PRIVATE PROPERTY RIGHTS IN CAPTIVE BREEDER DEER: HOW WILD ARE THEY?

Comment

J.D. Kirby[*]

I. INTRODUCTION 344
II. CAPTIVE BREEDER DEER: POSSESSION, THE INDUSTRY, AND CHRONIC WASTING DISEASE 347
 A. *Possession of Captive Breeder Deer in Texas* 347
 B. *The Challenges of Chronic Wasting Disease* 348
  1. *Symptoms of Chronic Wasting Disease* 349
  2. *Transmission of Chronic Wasting Disease* 351
  3. *A History of Chronic Wasting Disease in Texas* 351
 C. *The Captive Breeder Deer Industry* 354
III. FROM ROME TO TEXAS: THE DEVELOPMENT OF WILDLIFE OWNERSHIP 356
 A. *Roman Beginnings* 357
 B. *Common Law England: Kingly Adaptations* 358
 C. *The United States: Uniquely American* 359
 D. *Gone to Texas* 360
  1. State v. Bartee 361
  2. Hollywood Park Humane Society v. Town of Hollywood Park 362
  3. Bailey v. Smith 363
IV. THE TEXAS LEGISLATURE SHOULD TAKE STEPS TO SOLIDIFY COMMON LAW PRIVATE PROPERTY RIGHTS IN CAPTIVE BREEDER DEER 364
 A. *Texas Law Supports Private Property Rights Arising in Captive Breeder Deer* 365
 B. *Captive Breeder Deer Are Not That Wild* 370
 C. *Weak Property Rights Risk Destroying a Vital Part of Texas's Economy* 372
 D. *Classifying Captive Breeder Deer as Public Property Will Destroy Deer Breeders' Ability to Protect Their Interest Against Third Parties* 374

* Comment Editor, *Texas Tech Law Review*; J.D. Candidate, May 2021, Texas Tech School of Law; B.S., 2014, Texas A&M University. I would like to thank Dean Jack Wade Nowlin, Professor Jamie Baker, Associate Dean Alyson Outenreath, Robert Montgomery, and Brooke Bohlen for their editorial contributions and feedback throughout the writing process of this Comment.

V. CONCLUSION 374

I. INTRODUCTION

Mrs. Moss is a retired schoolteacher who decided to enter Texas's deer breeding industry after inheriting 200 acres of land from her parents.[1] She and her husband spent thousands of dollars and two years of hard work clearing the 200 acres of mesquite thickets and cacti, erecting the necessary fencing, and making the land into a suitable captive deer breeding facility.[2] After this, they sold their home, moved onto the 200 acres, got the necessary permits, and sunk everything they had left into this high-overhead venture.[3] They currently have a thriving enterprise where they tend 600 head of deer.[4]

However, upon the discovery of chronic wasting disease (CWD) in a captive deer that had died at a different facility—the Texas Mountain Ranch—the Moss's captive breeder deer business and their livelihood threatened to fall down around them.[5] After the infected deer was discovered, the Texas Parks and Wildlife Department (TPWD) tested forty-two more deer at the Texas Mountain Ranch that were considered high risk.[6] Unfortunately, the government has failed to approve a method for live-animal testing; therefore, all forty-two deer had to be euthanized, have their heads cut off, and have their brain stems pulled out in order to be tested.[7] Thirty-nine were subsequently found to be healthy.[8]

Texas Mountain Ranch was a very large operation and had sold many breeder deer.[9] Unfortunately for the Mosses, they had purchased one of those deer.[10] The TPWD contacted the Mosses and informed them that the deer purchased from the Texas Mountain Ranch, who the Mosses called Alice, had to be euthanized and its brain stem sent in for testing; they were not allowed to buy or sell any more deer until this was completed.[11] Further, "[i]f the test came back positive, the Mosses would have to exterminate every deer they owned, which would mean the end of their livelihood."[12]

---

1. Brantley Hargrove, *Chronic Wasting Unease: The Emergence of a Deadly Disease Has Wildlife Officials and Deer Breeders Eyeing Each Other Suspiciously*, TEX. MONTHLY (Dec. 23, 2015), https://www.texasmonthly.com/articles/chronic-wasting-unease/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* The Texas Mountain Ranch is in Medina County, and is one of the largest deer breeder ranches in Texas and is a completely separate ranch from the Moss's. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Fortunately for the Mosses, the test came back negative, and they were able to continue their operations while incurring only one "senseless death"; others have not been so lucky.[13] Texas Mountain Ranch's entire herd, which "numbered 238 when the state response to CWD began[,] [was] euthanized."[14] With some of these deer being worth upwards of $50,000 each, the Texas Mountain Ranch's inventory losses alone totaled over three million dollars.[15] Circumstances much like this are leading to clashes between deer breeders and state governments across the nation, as the former fight to protect their property rights and livelihoods.[16] However, this fight will be all but lost if a recent decision by the Austin Court of Appeals on these property rights—or lack thereof as the court sees it—is not addressed.[17]

CWD is a deadly disease that infects and kills deer, and is spreading across the nation.[18] To combat this, states have implemented plans to prevent its spread.[19] Often these plans include euthanizing and testing suspected infected deer and deer deemed to be high risk.[20] In the instance of captive deer breeder facilities, this can also include the state putting a freeze on a facility with infected or suspected infected deer and not allowing any deer in or out of the facility for years.[21] This has resulted in effects on deer breeders ranging from decreased sales to having businesses effectively closed and losing millions of dollars as entire deer herds, infected or not, are euthanized.[22] Consequently, deer breeders have brought takings and due process claims before courts in objection to these regulations and to seek

---

13. *Id.*
14. Zeke MacCormack, *Remaining 177 Deer in Medina County Ranch Euthanized as Lawsuit Blasts Texas Disease Policy*, MY SAN ANTONIO (Oct. 2, 2015, 7:09 PM) [hereinafter *Deer in Medina*], https://www.mysanantonio.com/news/local/article/Remaining-177-deer-in-Medina-County-ranch-6546781.php.
15. Hargrove, *supra* note 1.
16. *See generally* Zeke MacCormack, *Disease Response Highlights Texas' Claim to Own Deer, Even Captive Ones*, SAN ANTONIO EXPRESS-NEWS (Aug. 21, 2015, 08:43 PM) [hereinafter *Disease Response*], https://www.expressnews.com/news/local/article/Disease-response-highlights-Texas-claim-to-own-6458654.php# (discussing the dispute between deer breeders and the government over what property rights deer breeders have in captive breeder deer).
17. *See* Bailey v. Smith, 581 S.W.3d 374, 393 (Tex. App.—Austin 2019, pet. denied) (holding that captive breeder deer were public property as opposed to private property).
18. Jason Bittel, *A Deadly Deer Disease Is Spreading. Could It Strike People, Too?*, WASH. POST (June 14, 2019, 6:00 AM), https://www.washingtonpost.com/science/2019/06/14/deadly-deer-disease-is-spreading-could-it-strike-people-too/.
19. *See Chronic Wasting Disease Management Plan*, TEX. PARKS & WILD. DEP'T & TEX. ANIMAL HEALTH COMM'N (Mar. 2015), https://tpwd.texas.gov/huntwild/wild/diseases/cwd/media/CWD_ManagementPlan_02March2015.pdf (discussing Texas's plan for "addressing risks, developing management strategies, and protecting big game resources from CWD in captive or free-ranging cervid populations"); *infra* Part II.B (discussing the CWD, its effects, how it spreads, and how Texas specifically has responded to the disease).
20. *See* Hargrove, *supra* note 1.
21. *See id.*
22. *See id.*

compensation.[23] However, because due process and takings jurisprudence requires plaintiffs to have a property interest in order to have standing for these causes of action, courts considering these claims have been faced with the need to determine the very subject of this Comment: Do deer breeders have private property rights in their captive breeder deer or are they public property?[24]

This Comment argues that Texas courts and legislators should take steps to uphold and strengthen private property rights in captive breeder deer because that is the classification a reasonable interpretation of Texas case law and statutes call for, and because anything less will have grave, negative effects on part of an industry that makes up $14.4 billion of Texas's economy annually.[25] There are many articles discussing ownership of wild animals as this subject is thousands of years old. However, this Comment is the first to consider the ownership of captive breeder deer through the lens of Texas's statutory and common-law scheme concerning ownership of wildlife, and in light of the recent decision by the Austin Court of Appeals in *Bailey v. Smith*, which held captive breeder deer were public property.[26] This topic will only become more pertinent as CWD continues to spread through Texas.[27] As the disease and TPWD's regulations effect more and more landowners, the Texas Legislature or the Texas Supreme Court will have to address this issue. Further, this is likely to happen sooner rather than later as the decision in *Bailey v. Smith* is currently under petition for review by the Texas Supreme Court.[28]

This Comment, in Part II, provides an overview of the ownership of breeder deer in Texas and the challenges faced in the control of chronic wasting disease.[29] Part II first discusses statutory law governing the possession of captive breeder deer in Texas. Then it gives an overview of the problems of chronic wasting disease in deer and the Texas response to the disease. Finally, it provides information about the importance of the captive breeder deer industry to Texas's economy. Part III then analyzes the historical development of Texas common law governing the ownership of

---

23. *See generally* Bailey v. Smith, 581 S.W.3d 374 (Tex. App.—Austin 2019, pet. denied) (considering a due process claim brought by a Texas deer breeder against the TPWD's CWD regulations).

24. *Id.* at 393; TCI W. End, Inc. v. City of Dallas, 274 S.W.3d 913, 916 (Tex. App.—Dallas 2008, no pet.) ("A takings cause of action consists of three elements: (1) an intentional act by the government under its lawful authority[,] (2) resulting in a taking of the plaintiff's property[,] (3) for public use."). If deer breeders do not have private property rights in their captive breeder deer then their takings claims seeking compensation for the government euthanizing millions of dollars worth of their deer automatically fails the second element. *Id.*

25. *See infra* Part IV (discussing the possible effects of classifying captive breeder deer as public property).

26. *Bailey*, 581 S.W.3d at 393.

27. *See infra* Part II.B (discussing the spread of chronic wasting disease).

28. *Bailey*, 581 S.W.3d at 374.

29. *See infra* Part II (giving an overview of Texas's history with captive breeder deer and the problems associated with CWD).

wild animals, tracking it from its Roman beginnings, through its transformations in England, to its adoption by the United States and eventually Texas.[30] Next, Part IV argues that private property rights in captive breeder deer should be granted to deer breeders.[31] It starts with suggested legislation to address this problem. Then it provides an analysis that concludes that Texas's case law and statues governing captive breeder deer support deer breeders having private property rights in them. Next, Part IV analyzes the nature of captive breeder deer with respect to other wild animals and livestock, suggesting the deer are not truly wild animals. This is followed by analysis showing the effect that classifying captive breeder deer as private property will have on Texas's economy and the ability of deer breeders to protect their interests.

II. CAPTIVE BREEDER DEER: POSSESSION, THE INDUSTRY, AND CHRONIC WASTING DISEASE

The captive breeder deer industry is a large and complex industry in Texas, and it has been made even more complex with the rise of CWD. This Section gives background on the workings, regulations, and complexities of the industry and CWD, and how they have combined to cause the issue of property rights in captive breeder deer to become an important question that must be answered by Texas's courts and legislature. Part A of this Section briefly introduces Texas's laws on the possession of captive breeder deer.[32] Next, Part B delves into the specific challenges that CWD presents to wildlife agencies and the necessary regulations that the TPWD has implemented to combat the disease.[33] Finally, Part C provides an overview of captive breeder deer industry and its huge impact and importance to Texas's economy.[34]

A. Possession of Captive Breeder Deer in Texas

In Texas, the TPWD is charged with "protecting the state's fish and wildlife resources" and "administer[ing] the laws relating to game."[35] Consequently, the TPWD has authority over white-tailed deer and mule deer (native cervid species).[36] White-tailed deer and mule deer (referred to

---

30. *See infra* Part III (providing historical information on private versus public wildlife ownership).

31. *See infra* Part IV (proposing legislative options and solutions for courts to follow in providing private property rights to captive breeder deer (and other wildlife) in Texas).

32. *See infra* Part II.A (discussing Texas's laws on possession of captive breeder deer).

33. *See infra* Part II.B (discussing the fight against chronic wasting disease).

34. *See infra* Part II.C (discussing the captive breeder deer industry and its impact on Texas's economy).

35. TEX. PARKS & WILD. CODE ANN. §§ 12.001(a), 12.0011(a).

36. *Id.* ("The department is the state agency with primary responsibility for protecting the state's fish and wildlife resources."); *see also* HOUSE COMM. ON NAT. RES., SUBCOMMITTEE ON OVERSIGHT &

collectively as deer for the purposes of this Comment), along with all the other many wild animals of Texas, are considered "the property of the people" of Texas by statute.[37] Therefore, with few exceptions, it is illegal to possess wild animals in Texas.[38]

One of these exceptions, and the primary focus of this Comment, is the captive breeder deer permit.[39] Under the Texas Parks & Wildlife Code, a deer breeder—"a person holding a valid deer breeder's permit"—is issued a permit that allows them to legally hold the deer in captivity.[40] Here, "'[c]aptivity' means the keeping of a breeder deer in an enclosure suitable for and capable of retaining the breeder deer . . . and to prevent entry by another deer."[41] In particular, deer breeders holding a permit are allowed to "engage in the business of breeding breeder deer in the immediate locality for which the permit was issued" and to "sell, transfer to another person, or hold in captivity live breeder deer for the purposes of propagation or sale."[42] A deer breeder's permit "is a complete defense" to "prosecution for the unlawful possession or transportation of white-tailed deer or mule deer."[43]

However, as with most rights, these rights are not absolute; they are limited by, and subject to, the TPWD's authority to "make regulations governing[,]" among other things, "the possession of breeder deer" and the "procedures and requirements for the purchase, transfer, sale, or shipment of breeder deer."[44] The Texas Parks & Wildlife Code also dictates that only healthy breeder deer can be transferred and the deer breeder must obtain a transfer permit first.[45] TPWD, in carrying out its obligation to protect the state's wildlife, has exercised this authority by making regulations to combat disease in breeder deer, namely, CWD.[46]

B. The Challenges of Chronic Wasting Disease

To understand the relevancy of the captive breeder deer property debate, it is important to have an understanding of CWD and the state's response to

---

INVESTIGATIONS: TESTIMONY BY CARTER SMITH TEX. PARKS & WILD. DEP'T, at 3 (June 25, 2019) [hereinafter TESTIMONY BY CARTER SMITH], https://naturalresources.house.gov/imo/media/doc/Carter%20Smith%20-%20Testimony%20-%20O&I%20Ov%20Hrg%2006.25.19%20CWD.pdf.

37. PARKS & WILD. § 1.011(a) ("All wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.").

38. *See generally id.* at §§ 43.021–.955 ("Special Licenses and Permits").

39. *See generally id.* at §§ 43.351–.369 ("Deer Breeder's Permit").

40. *Id.* § 43.351(2).

41. *Id.* § 43.351(3).

42. *Id.* §§ 43.357(a)(1)–(2).

43. *Id.* § 43.353.

44. *Id.* § 43.357(b).

45. *Id.* § 43.362.

46. *See generally* TEX. ADMIN. CODE §§ 65.80–.99, 65.601–.613 (setting out laws on "Disease Detection and Response" and "Deer Breeder Permits").

it.[47] CWD, and the particular difficulties the nature of the disease presents to states trying to combat the disease, is what has led to the current discourse between states and deer breeders; it is the reason that property rights in captive breeder deer are a relevant discussion today and worth pondering.[48] Without CWD, there would be no regulations; without the regulations, there would be no takings and due process claims by deer breeders; and without takings and due process claims by deer breeders, there would be no need for courts to consider what property rights deer breeders have in their captive breeder deer.[49]

CWD is not only a serious and growing concern for Texas's wildlife, but also for wildlife across the nation and the world.[50] It is a type of neurological disease that affects "cervids" (e.g., moose, elk, and deer).[51] Specifically, it is a form of "transmissible spongiform encephalopathies (TSEs)."[52] Probably the most well-known example of a TSE is bovine spongiform encephalopathy, which most people know by its colloquial name, mad cow disease.[53] CWD was initially discovered in 1967 in Colorado.[54] Over half a century later, the disease is spreading rapidly; as of last year, twenty-four states have had confirmed cases of CWD, with Tennessee becoming the most recent to succumb to the spread.[55] The disease is primarily located in the United States' Midwest, but it has also found its way out of the U.S., with confirmed cases in Canada, Norway, South Korea, and Finland.[56] It is also prevalent and spreading in the United States' Southwest and some areas of the East Coast.[57]

1. Symptoms of Chronic Wasting Disease

In order to understand why CWD necessitates the strict regulations imposed by states to combat the disease, it is important to understand the

---

47. To be sure, property rights in captive breeder deer, and not CWD, are the subject of this Comment. Nor is the subject of this Comment the stringent regulations that have been imposed by TPWD to manage CWD, which this Comment recognizes as necessary and vital to curbing CWD and preserving Texas's wildlife and strong hunting traditions.

48. *See supra* Part I (laying out how TPWD's regulating CWD has resulted in discord between deer breeders and the TPWD).

49. *See generally* Bailey v. Smith, 581 S.W.3d 374 (Tex. App.—Austin 2019, pet. denied) (considering litigation arising from TPWD's regulations and the property status of captive breeder deer).

50. TESTIMONY BY CARTER SMITH, *supra* note 36, at 10.

51. *Chronic Wasting Disease FAQ*, CWD-INFO [hereinafter *FAQ*], http://cwd-info.org/faq/ (last visited Jan. 18, 2021).

52. *Id.*

53. *Id.*

54. David Murray, *Montana FWP Seeks Hunter Help to Halt Spread of Deadly Chronic Wasting Disease*, GREAT FALLS TRIB. (Oct. 28, 2019, 5:32 AM), https://www.greatfallstribune.com/story/news/2019/10/28/montana-biologists-seek-hunter-help-halt-chronic-wasting-disease/4075525002/.

55. Bittel, *supra* note 18.

56. *Id.*

57. *See id.*

symptoms. CWD is always fatal and the symptoms are well-known.[58] However, the disease has a long incubation period—eighteen months to two years—so many infected deer do not exhibit any symptoms until the very end of the disease's cycle.[59] Therefore, "the majority of infected animals are virtually impossible to distinguish from healthy, non-infected animals."[60] Further, CWD attacks the neurological systems of infected deer first.[61] Consequently, things such as predators, vehicle collisions, and other diseases generally "remove the animals from the population far before outward signs of the disease become apparent."[62] This makes it very hard to identify infected deer and take a targeted approach when trying to combat the disease.[63]

However, deer that survive past the initial stage will exhibit noticeable symptoms both in changes in appearance and behavior.[64] These symptoms include the following: reduced feeding leading to emaciation and weight loss (wasting), excessive drinking, excessive urination, listlessness, repetitive pacing, stumbling, lack of coordination, drooling, drooping ears, lack of fear of people, lowering the head, blank expression, and eventual, inevitable death.[65] Given the eerie effects CWD has on deer, some have given it a more colorful—if not slightly creepier—name: zombie deer disease.[66]

As established by the lengthy list above, the symptoms of CWD are abundant and apparent.[67] Unfortunately, these symptoms "alone are not sufficient to definitively diagnose" the disease because there are other diseases and maladies in deer that present similar symptoms.[68] As a result, the only conclusive and USDA-approved way to diagnose CWD is to examine the brain stem of the infected deer after death or euthanasia.[69] Therefore, when CWD is discovered in a captive herd through routine testing of harvested deer, the state's response options are limited to quarantining and waiting to see if other deer present symptoms, which poses a high risk of the disease spreading, or euthanizing more, if not all, of the herd to test for CWD

---

58. CTRS. FOR DISEASE CONTROL & PREVENTION, *Chronic Wasting Disease (CWD)*, https://www.cdc.gov/prions/cwd/transmission.html (last visited Jan. 18, 2021).
59. *FAQ*, *supra* note 51.
60. *Id.*
61. *Id.*
62. *Id.*
63. *See supra* Part I (discussing how the TPWD euthanized the entire Texas Mountain Ranch herd).
64. *Chronic Wasting Disease (CWD)*, *supra* note 58.
65. *Id.*
66. Bittel, *supra* note 18.
67. *See supra* text accompanying note 65 (listing the symptoms of CWD).
68. *FAQ*, *supra* note 51 (noting that "brain abscesses, trauma-related injuries, or other diseases such as epizootic hemorrhagic disease" have similar symptoms).
69. *Chronic Wasting Disease Management Plan*, *supra* note 19.

and stop the spread.[70] This, in turn, has helped precipitate much of the current dispute regarding the property status of captive breeder deer.[71]

2. Transmission of Chronic Wasting Disease

How CWD is transmitted is another factor that has necessitated stringent regulations.[72] While much about CWD is not yet completely understood, it is generally believed that CWD spreads laterally from animal to animal through bodily fluids and feces by "direct contact or indirectly through environmental contamination of soil, food or water."[73] Further, most believe, despite the captive deer breeder industry's adamant disagreement, CWD is more likely to spread where deer are more densely concentrated, such as in captivity.[74]

The ability of CWD to contaminate an environment and subsequently be contracted by a deer is one of the most concerning aspects of CWD, and it is one of the main reasons the disease is particularly challenging to combat.[75] CWD prions, once shed from the deer, can survive for up to sixteen years in the environment.[76] Moreover, once the disease is in an environment there are no known methods to remove it or to prevent other deer from contracting the disease indirectly.[77] This makes the eradication of CWD nearly impossible once it has become established in an area, and it is why states have been forced to implement what some see as draconian regulations to prevent the disease from becoming established.[78]

3. A History of Chronic Wasting Disease in Texas

Texas's first response to the relentless spread of CWD was in 1999 (thirty-two years after CWD was discovered in the United States and thirteen years before the first confirmed case in Texas).[79] This involved a voluntary program where participating herd owners submitted samples for testing of all

---

70. *See* Hargrove, *supra* note 1.
71. *See id.* ("Chronic wasting disease might as well have been purpose-built to ignite old animosities between TPWD and deer breeders.").
72. *Chronic Wasting Disease Management Plan*, *supra* note 19.
73. *Chronic Wasting Disease (CWD)*, *supra* note 58.
74. *FAQ*, *supra* note 51.
75. *Chronic Wasting Disease Management Plan*, *supra* note 19.
76. Melanie Greaver Cordova, *Cornell's Dr. Krysten Schuler Warns Federal Government Committee of Dangers of Chronic Wasting Disease, Advocates for Preventative Measures*, CORNELL UNIV. (June 27, 2019, 3:22 PM), https://www.vet.cornell.edu/news/20190627/cornell-s-dr-krysten-schuler-warns-federal-government-committee-dangers-chronic-wasting-disease.
77. *Chronic Wasting Disease Management Plan*, *supra* note 19.
78. Cordova, *supra* note 76 ("Once CWD becomes established in a population, it is nearly impossible to eradicate. Therefore, it's critical that we . . . take preventative action . . . . ").
79. TEX. LEGIS. BUDGET BD., OVERVIEW OF STATE RESPONSE TO CHRONIC WASTING DISEASE, at 6 (Apr. 2019) [hereinafter BUDGET BOARD], http://www.lbb.state.tx.us/Documents/Publications/Staff_Report/2019/4754_WildlifeDiseaseManagement.pdf.

deer seventeen months or older that died.[80] Starting in 2002, as CWD continued to spread, TPWD implemented rules for CWD testing in hunter-harvested deer and roadkill in high-risk areas, as well as rules to help prevent the importation of deer suspected to be infected from other states.[81] This continued until 2005, when TPWD outright prohibited the importation of any out-of-state captive deer and imposed heightened record keeping and monitoring standards concerning the disease.[82] Then, in 2006, the CWD Task Force was created to help monitor, manage, and develop rules for issues related to CWD.[83]

However, these precautions failed to prevent the seemingly inexorable spread of CWD from breaching Texas's borders, and the disease was discovered in Texas for the first time in free-ranging mule deer in 2012 in Hudspeth County (east of El Paso, bordering New Mexico and Mexico).[84] Consequently, TPWD established movement restriction zones in the area to prevent further spread of the disease.[85] These measures were successful at containing the disease from spreading further until 2015 when the disease was discovered in the Texas Mountain Ranch in Medina County (located about thirty miles west of San Antonio).[86]

The discovery of CWD on the Texas Mountain Ranch was the first discovery of the disease in Texas in a captive breeder facility.[87] The disease was discovered through tissue samples "submitted by the breeder facility as part of routine deer mortality surveillance."[88] In response, TPWD temporarily disabled the database which deer breeders used to obtain transfer permits for their deer, placed "movement restrictions on the breeder facilities that had received deer from the Medina County facility or shipped deer to the facility during the previous two years, and disallow[ed] release of captive deer from all breeder facilities into the wild."[89] The response to the discovery of CWD culminated in the TPWD eradicating the ranch's entire herd.[90]

---

80. *Id.*
81. *Id.* at 6–7.
82. *Id.* at 7.
83. *Id.* at 4. The CWD Task Force is co-chaired by the Texas Parks & Wildlife Department and the Texas Animal Health Commission. *Id.*
84. *Id.* at 7.
85. *Id.*

> [C]ontainment zones . . . are geographic areas within which CWD has been detected or detection is probable, and surveillance zones are geographic areas within which the presence of CWD could reasonably be expected. The artificial movement of deer is restricted in both types of zones, and hunters who harvest CWD-susceptible species in either are required to bring their animals to a TPWD check station within 48 hours for testing.

Id. at 4.

86. *Id.* at 7.
87. *Id.*
88. *Id.*
89. *Id.*
90. *See supra* Part I (detailing the discovery of CWD at the Texas Mountain Ranch and the TPWD response).

This also resulted in the TPWD adopting emergency rules that required:

> (1) specific testing requirements for deer breeders to move deer to other deer breeders or for purposes of release; (2) similar testing requirements on release sites; and (3) restriction of the release of breeder deer to enclosures surrounded by a fence of at least seven feet in height capable of retaining deer at all times.[91]

Then in 2016, after much negotiation between the various stakeholders in the industry, comprehensive rules for the regulation of CWD were adopted.[92] These aggressive steps have hopefully helped stem the tide of CWD in Texas.[93] As of June 20, 2019, there have been 144 confirmed cases of CWD in Texas; the majority of these cases have come from five deer-breeding facilities.[94] This is compared with Wisconsin, which has had over 4,200 positive cases.[95] However, while these aggressive steps have been successful in ebbing the spread of CWD, and this Comment does not argue they should be stopped given the gravity of the problem, there are many—namely the captive breeder deer industry—who oppose them.[96]

While there is not a "single standardized approach to responding to a CWD positive in a free-ranging deer population[,]"[97] the approach for positive cases in captive breeder deer seems to be fairly clear: eradication.[98] Of the five captive deer breeding facilities in Texas in which the disease has been discovered, so far three have been closed and had their entire herds euthanized, or "depopulated" as the TPWD puts it.[99] Additionally, the TPWD tracks down any deer sold by the facility and euthanizes them as well, as highlighted in the Texas Mountain Ranch incident where TPWD euthanized at least 174 deer at other facilities that did business with the Texas Mountain

---

91. BUDGET BOARD, *supra* note 79, at 7. These emergency rules were replaced with interim rules later in 2015. *Id.* at 7–8.

92. *Id.* at 8. These stakeholders included: Breeder User Group, Chronic Wasting Disease Task Force, Deer Breeder Corporation, Exotic Wildlife Association, North America Deer and Elk Farmers Association, Private Lands Advisory Committee, Texas Deer Association, Texas Parks and Wildlife Department, Texas Wildlife Association, White-tailed Deer Advisory Committee. *Id.*

93. *Id.*

94. TESTIMONY BY CARTER SMITH, *supra* note 36, at 6. These are the only captive deer breeding facilities the disease has been discovered on in Texas and are all located in central and south-central Texas. *Id.*

95. BUDGET BOARD, *supra* note 79, at 8. Granted, Wisconsin has had the disease within its border since 2002 compared to 2012 for Texas. *Id.* at 6, 8.

96. *Id.* at 6–10.

97. TEX. PARKS & WILDLIFE DEP'T, FREQUENTLY ASK QUESTIONS: LANDOWNER'S INQUIRY INTO CWD IMPLICATIONS ON PRIVATE LANDS AND CWD TESTING (Sept. 23, 2016), https://tpwd.texas.gov/huntwild/wild/diseases/cwd/docs/CWD_landowner_FAQ_2016.pdf.

98. *See* TESTIMONY BY CARTER SMITH, *supra* note 36, at 5.

99. *Id.* at 6.

Ranch, none which tested positive.[100] All of this underscores Texas's primary approach to the disease in general: aggressive, mandatory testing, strict management and control of the movement of captive breeder deer through containment zones, minimum testing requirements to be able to sell or transfer deer, outright prohibition of the importation of out of state deer, and, if needed, quarantining of facilities.[101]

C. The Captive Breeder Deer Industry

The deer breeding industry has a much greater economic influence than many may think.[102] Texas boasts a native cervid population of over a million deer.[103] A small percentage of this population is contained within the approximately 1,000 captive deer breeding facilities in Texas.[104] These deer make up part of Texas's "multi-billion-dollar ranching, hunting, real estate, and wildlife management affiliated economies."[105] In Texas, all told hunting and fishing is a 14.4-billion-dollar industry.[106] Many of the state's rural economies and communities are dependent upon the seasonal influx of approximately 840,000 "deer hunters who infuse in excess of $2 billion in direct expenditures on travel, goods, supplies, equipment, and other purchases that support their hunting-related activities."[107]

Deer breeding itself, not including any hunting that results from it, has an estimated $786.9 million economic impact in Texas.[108] When this is combined with the hunting that results from it, the total impact on Texas's economy reaches an estimated $1.6 billion annually.[109] This type of impact is easier to imagine when the substantial value of these deer are realized: a straw of semen from a quality breeder buck can bring over $10,000, a doe

---

100. Zeke MacCormack, *New Texas Deer Rules Pending over Chronic Wasting Disease*, KSL NEWS (Aug. 22, 2015, 10:40 AM) [hereinafter *New Texas*], https://www.ksl.com/article/36104455/new-texas-deer-rules-pending-over-chronic-wasting-disease.

101. *See Chronic Wasting Disease Management Plan*, *supra* note 19; Claire Kowalick, *Texas Parks and Wildlife: Cases of Brain-Eating Disease in Deer Confirmed in State*, TIMES RECORD NEWS (Jan. 4, 2019, 2:39 PM), https://www.timesrecordnews.com/story/news/local/2019/01/04/tpwd-confirms-cases-chronic-wasting-disease-texas-deer/2483065002/.

102. *See generally* Brian J. Frosch et al., *Economic Impact of Deer Breeding Operations in Texas*, TEX. A&M UNIV. (2008), https://core.ac.uk/download/pdf/7083040.pdf (noting the need for continued research into the economic impact of this predominately rural industry).

103. TESTIMONY BY CARTER SMITH, *supra* note 36, at 2.

104. *Id.* at 3.

105. *Id.* at 1.

106. Steve Lightfoot, *Hunting and Fishing a $14.4 Billion Industry in Texas*, TEX. PARKS & WILD. DEP'T: NEWS & MEDIA (Feb. 26, 2008), https://tpwd.texas.gov/newsmedia/releases/?req=2008 0226g.

107. TESTIMONY BY CARTER SMITH, *supra* note 36, at 2.

108. Joe L. Outlaw et al., *Economic Impact of the Texas Deer Breeding and Hunting Operations*, TEX. DEER ASS'N 5 (Apr. 2017), https://texasdeerassociation.com/wp-content/uploads/2017/06/ Economic-Impact-Texas-Deer-Breeding-and-Hunting-Operations.pdf.

109. *Id.*

that is well bred can sell for $20,000, and quality breeder bucks can fetch more than $50,000 apiece.[110] The industry supports around 17,000 jobs in Texas, the majority of which are in the rural communities of Texas.[111] "If this industry did not exist, those jobs would have to be supported by some other economic activity."[112]

While deer breeding often conjures images of herds of monster white-tail bucks with impressive tangles of 300+ inch antlers adorning their heads, the sale of these bucks is not the only source of revenue for deer breeders, which also includes the sale of urine, venison, and antlers.[113] Further, deer breeding facilities are often accompanied with hunting operations as another source of revenue.[114] Many deer farmers operate breeding facilities inside their high-fenced ranches.[115] The high-fenced ranch will contain mostly native deer, and then, the deer farmer will release deer from the breeding facility onto the high fenced ranch to help supplement the genetics of the native deer on the ranch.[116]

While "[d]eveloping genetics for high-quality antler growth [is] most likely . . . the main goal of a whitetail deer farmer and the driving force of a farmer's day-to-day decisions[,]"[117] there are a variety of reasons deer breeders enter the industry:

> [T]he consumption side is represented by other breeders, trophy hunting preserves, or game ranches, and ultimately, hunters. Producers market breeding stock to other breeders and stocker deer to game ranches. With hunting as the end market the industry serves, producers selectively breed deer in an attempt to attain consistent genetics to produce trophy whitetail. The Texas deer breeding industry represents a portion of the national cervid farming industry. . . . At the national level, the industry includes commercial venison producers, commercial urine collection operations, and antler and other products operations, in addition to breeding operations.[118]

There are a number of groups that oppose the captive deer breeding industry and strive for more stringent regulations within the industry, such as the Texas Chapter of the Wildlife Society and the Texas Wildlife

---

110. Craig Dougherty, *Freak Show Bucks: A Hard Look at Breeding for Antlers*, OUTDOORLIFE (Sept. 19, 2011), https://www.outdoorlife.com/photos/gallery/hunting/2011/09/freak-show-bucks-look-genetically-altered-deer/.

111. Outlaw, *supra* note 108, at 5.

112. *Id.*

113. Kirby L. Crow, *Oh Deer: The Public Trust Doctrine and Issues Regarding Estate Planning for the Cervid Breeding Industry*, 6 EST. PLAN. & CMTY. PROP. L.J. 375, 377 (2014).

114. *Id.* at 378.

115. *Id.*

116. *Id.*

117. *Id.* at 379.

118. Frosch, *supra* note 102.

Association.[119] Some of this opposition comes from groups such as the Quality Deer Management Association (QDMA) that have "concerns with several aspects of the captive deer breeding industry, including artificially retaining and manipulating white-tailed deer and the threats these activities place on animal welfare, human health/safety, disease, compliance with game laws and our overall hunting heritage."[120]

However, much of the opposition to the captive deer breeding industry boils down to a lack of understanding.[121] For example, many believe the whole purpose of the industry is to pen-raise deer and then release them for canned hunts, which they view as unethical.[122] When in fact, this is the exact opposite of the industry's goals.[123] It requires a significant amount of money and time to raise and cultivate deer with quality genetics.[124] Therefore, contrary to much of the opposition's belief, "it is financially impractical and adverse to the ultimate goal of most deer farmers to release and immediately negotiate paid hunts for deer that are still capable of breeding and have high-quality genetic dispositions."[125]

III. From Rome to Texas: The Development of Wildlife Ownership

The jurisprudence governing the possession of wild animals in the United States has a long history stretching back to the nation's very beginnings as illustrated by the famous 1805 case taught in every first year property class: *Pierson v. Post*.[126] However, the principals influencing America's jurisprudence on the possession of wild animals is much older than even the nation itself.[127]

There are two generally accepted classifications of animals: "wild, or ferae naturae, and domestic, or domitae naturae."[128] While the ownership of wild animals has developed and morphed considerably over the years, the right to reduce wild animals to possession has long been subject to governmental regulation.[129] Even as far back as 500 BC, the government of

---

119. Crow, *supra* note 113, at 380.

120. *QDMA's Whitetail Report 2018*, Quality Deer Mgmt. Ass'n 26 [hereinafter *Whitetail Report*], https://www.qdma.com/wp-content/uploads/2018/02/Whitetail_Report_2018.pdf (last visited Jan. 18, 2021).

121. Crow, *supra* note 113, at 380.

122. *Id.*

123. *Id.*

124. *Id.* at 379–80.

125. *Id.*

126. *See* Pierson v. Post, 3 Cai. R. 175, 178–80 (N.Y. Sup. Ct. 1805) (holding that, in a case about who had ownership of a hunted fox, the rule of capture was the law for wild animals, and therefore, whoever physically reduced it to possession gained ownership).

127. *See* Geer v. Connecticut, 161 U.S. 519 (1896), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322 (1979) (discussing the history of the laws governing wild animals all the way back to ancient Athens that led to the then current United States' jurisprudence).

128. 3 Tex. Jur. 3d *Animals* § 2 (2019).

129. *Geer*, 161 U.S. at 522.

ancient Athens forbade the killing of wild animals.[130]

A. Roman Beginnings

Like many other modern Western concepts of property, to understand how these principles of ownership in wild animals and governmental regulation developed, it is intuitive to start with ancient Roman law.[131] In Rome, property was broadly categorized as either being owned by someone (*res in patrimonium*) or being "owned by no individual in particular" (*res extra patrimonium*).[132] With regard to the property considered being owned by no individual in particular, there were three subcategories: (1) property owned by no one (*res nullius*); (2) property owned in common (*res communes*); and (3) property owned by the state (*res publicae*).[133] Wild animals were generally considered *res nullius*.[134] Things classified as "*res nullius* referred to those things that were capable by their very natures of individual appropriation, but that belonged to no one until a human being took possession of" it.[135] Therefore, if an individual captured and took possession of a wild animal in Rome, the animal became their private property.[136]

This concept, referred to as *occupatio* in ancient Rome, of intentionally gaining title to something no one owns by seizing possession of it (capturing it) is one the oldest justifications for property rights, and it is the precursor for the modern day rule of capture laid out in *Pierson v. Post*.[137] However, while this right had few restrictions in ancient Rome, this rule of capture was not absolute.[138] Though rarely used, the Roman state retained sovereign control over the exploitation and harvesting of wild animals.[139] Land ownership was recognized as a further restriction.[140] While trespassers could legally take wild animals from another's land, the landowners could exclude the trespassers from their land if they wished.[141] A final restriction of the

---

130. *Id.*

131. *Id.* at 522–23.

132. Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENV'T L. 673, 677 (2005).

133. *Id.*

134. Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENV'T AFFS. L. REV. 471, 503 (1996).

135. *Id.* These included items such as precious stones, abandoned property, and unoccupied lands. *Id.*

136. *Geer*, 161 U.S. at 522–23.

137. Wise, *supra* note 134, at 503. *See generally* Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (discussing the rule of capture).

138. Blumm & Ritchie, *supra* note 132, at 678.

139. Wise, *supra* note 134, at 503.

140. Blumm & Ritchie, *supra* note 132, at 678.

141. *Id.* "This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the state of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all." *Geer*, 161 U.S. at 523.

Roman rule of capture was that, like in America today, private property rights could be lost if the animal escaped and regained its natural liberty.[142]

B. Common Law England: Kingly Adaptations

Moving forward through history, common law England adopted and implemented a form of the Roman rule of capture.[143] England recognized that an individual could obtain a qualified property interest in a wild animal by capturing it and taking it out of its natural liberty.[144] However, the rule of capture that developed in England, like much of Europe, was vastly more restrictive than the Roman version.[145] This is because, unlike in ancient Rome where wild animals belonged to no one, the King was considered to own wild animals in England.[146] Consequently, the King was able to exercise exclusive and absolute control over wild animals and what property rights the King's subjects could obtain in them.[147] While an individual could, in theory, gain property rights in a wild animal through capture, the rule was subject to vast limitations by the crown and the laws of England.[148]

The King of England exercised both sovereign and proprietary powers, which was used to restrict and limit individual rights to acquire ownership in wild animals through capture by implementing an elaborate land-classification system.[149] For example, after the Norman Conquest of England in 1066, King William declared large portions of the English country-side as the royal forest.[150] These lands were to be used for the benefit of the Crown and favored subjects.[151] The use of this forest was highly regulated, and it was often illegal to harvest timber or to hunt certain species, namely deer.[152] Violators were often punished severely.[153] The King also restricted the rule of capture by granting hunting rights (hunting franchises).[154] These rights gave the select few the exclusive right to take certain wild animals in designated areas, and they therefore had superior

142. Wise, *supra* note 134, at 503–04.

143. *Id.* at 516–29 (detailing the development of the rule of capture through English history).

144. *Id.* at 520–21. This property right was qualified because animals were considered fugitive in nature, so the property right only lasted so long as the animal remained captured. *Geer*, 161 U.S. at 526–27.

145. Blumm & Ritchie, *supra* note 132, at 679.

146. *Id.* at 681.

147. Alyssa Falk, *As Easy as Shooting Fish in a Barrel? Why Private Game Reserves Offer a Chance to Save the Sport of Hunting and Conservation Practices*, 2015 U. ILL. L. REV. 1329, 1334 (2015).

148. Blumm & Ritchie, *supra* note 132, at 679.

149. *Id.*

150. *Id.* at 680.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 681.

rights to the game over landowners.[155] Pressure on Parliament by landowners led to the decline of the hunting franchise and an increase in rights of property owners.[156] However, these new-found rights did not last; Parliament began passing statutes that made it illegal for most anyone who did not possess money to take wild animals.[157]

C. The United States: Uniquely American

As shown above, the power of the government to control the taking of wild animals in England was well established; consequently, these same powers were vested in the American colonial governments.[158] When the colonies won their independence from England, all powers that the colonies possessed were transferred to the states.[159] With this transfer of power came the common law right for individuals to obtain qualified property rights in wild animals via rule of capture, as well as the ability of government to regulate this right.[160] While based on English common law, the United States' use of the power to regulate the rule of capture differed vastly from England's.[161] America did away with its old monarch's attempts to restrict the right to take wild animals to only those of wealth or high birth.[162] Instead they implement "a new policy concerning personal appropriation of wildlife—the "free take" imperative."[163]

The United States' adaptation of the rule of capture "was a rule of free taking, recognizing everyone's right to hunt and take game."[164] This policy disdained "[a]ny policy that restricted hunting to a specified group or for a limited term."[165] This adaptation is best demonstrated by American courts gradually overturning—to varying degrees—the English common law right of landowners to exclude hunters.[166] By the nineteenth century, the general rule in the United States was that if land was unenclosed, hunters were free to trespass on the land to take game.[167] Aside from throwing off England's oppressive rules, the United States' free-take rule of capture arose out of the

---

155. *Id.*
156. *Id.* at 682–83.
157. *Id.*
158. Geer v. Connecticut, 161 U.S. 519, 528–29 (1896), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322 (1979).
159. *Id.* at 528–29.
160. Bailey v. Smith, 581 S.W.3d 374, 390 (Tex. App.—Austin 2019, pet. denied). "The American states inherited this power with the understanding that it was 'to be exercised, like all other powers of government, as a trust for the benefit of the people.'" *Id.* (citing *Geer*, 161 U.S. at 529).
161. Blumm & Ritchie, *supra* note 132, at 685.
162. *Id.*
163. *Id.* at 686.
164. *Id.* at 687.
165. *Id.* at 686–87.
166. *Id.* at 688–89.
167. *Id.* at 687–89.

nation's needs to promote settlement, land development, and for its people to be able to feed themselves.[168] These needs were some of the driving factors behind the *Pierson v. Post* decision that, in the spirit of the free-take policy, "laid down the rule that ownership of wild animals required physical capture or mortal wounding."[169]

However, this rule of capture led to many animals being hunted to extinction.[170] Consequently, states began trying to regulate the taking of wild animals; for this, the states looked to the common-law power to regulate the rule of capture they retained from England.[171] This resulted in the creation of "the state 'ownership' doctrine, also known as the wildlife trust."[172] The state ownership doctrine relies on the ideas of public trust found in navigable waterways in the United States where the property is considered common property, but is vested in the government to hold and care for the benefit of all citizens' use.[173]

The state ownership doctrine was upheld by the Supreme Court in *Geer v. Connecticut* in 1896.[174] There, the Supreme Court upheld the rule of capture, but reasserted that this right had always been subject to regulation by the government.[175] The Court stated that wild animals were common property that states had the power to regulate, but that the power had "to be exercised . . . as a trust for the benefit of the people, and not as a prerogative for the advantage of the government."[176] While *Geer v. Connecticut* was eventually overturned on other grounds, the state ownership doctrine has been implemented by every state through statutes and constitutional provisions.[177]

D. Gone to Texas

Texas adopted the English common law in 1840, and its "courts have consistently treated the public trust doctrine as forming part of the common law since that time."[178] Consequently, wild animals inside the borders of

---

168. *Id*. at 684–87.
169. *Id.* at 686.
170. *Id.* at 693.
171. *Id.*
172. *Id.*
173. *Id.* at 693–94.
174. *See generally* Geer v. Connecticut, 161 U.S. 519 (1896) (discussing the state ownership doctrine), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322 (1979).
175. *See id.* at 522.
176. *Id.* at 529.
177. Blumm & Ritchie, *supra* note 132, at 706.
178. Bailey v. Smith, 581 S.W.3d 374, 390–91 (Tex. App.—Austin 2019, pet. denied). *See, e.g.*, Coastal Habitat All. v. Pub. Util. Comm'n, 294 S.W.3d 276, 287 (Tex. App.—Austin 2009, no pet.) ("[W]ild animals [ ] belong to the State, and no individual property rights exist in them as long as they remain wild, unconfined, and undomesticated."); Hollywood Park Humane Soc'y v. Town of Hollywood Park, 261 S.W.3d 135, 140 (Tex. App.—San Antonio 2008, no pet.) (explaining property rights do not

Texas belong to the people of Texas in common for all their benefit.[179] However, no individual property rights exist in wild animals in Texas "as long as the animal remains wild, unconfined, and undomesticated."[180] Further, possessing land in Texas does not vest the owner with property rights in the wild animals that are found on the land.[181]

Notwithstanding these, Texas courts have recognized the rule of capture, and consistently held that legally removing a wild animal from its natural liberty and subjecting it to man's dominion can cause property rights to arise in the wild animal.[182] Whether an individual in Texas has acquired property rights in a wild animal through the common law "is determined by whether the [wild] animal in question has been reduced to possession;" it is not determined by the animal's habits.[183] These property rights in wild animals are qualified though; much like in ancient Rome, property rights are lost if the animal escapes possession and regains its natural liberty.[184]

While there are many cases spanning Texas's history that discuss the myriad of issues surrounding property rights in wild animals, this Comment will focus on three of them: *State v. Bartee*,[185] *Hollywood Park Humane Society v. Town of Hollywood Park*,[186] and *Bailey v. Smith*.[187]

1. State v. Bartee

In *State v. Bartee*, a 1994 case, the San Antonio Court of Appeals grappled with a novel legal question as to if a white-tailed deer could be the subject of theft or criminal mischief under Texas's statutory scheme.[188] There, the defendant, Jimmy Bartee, allegedly stole, shot, and killed a deer that the state claimed to own.[189] Thereafter, he "was charged with theft of a white-tailed deer, theft of deer antlers, and criminal mischief."[190] Bartee argued that there are no property rights in wild animals such as deer, and

---

exist in wild animals "as long as the animal remains wild, unconfined, and undomesticated," but property rights "can arise when an animal is legally removed from its 'natural liberty' and subjected to 'man's dominion'") (first quoting State v. Bartee, 894 S.W.2d 34, 41 (Tex. App.—San Antonio 1994, no pet.); then quoting Nicholson v. Smith, 986 S.W.2d 54, 60 (Tex. App.—San Antonio 1999, no pet.)).

179. TEX. PARKS & WILD. CODE ANN. § 1.011(a).

180. *See Bartee*, 894 S.W.2d at 41.

181. *See Hollywood Park*, 261 S.W.3d at 140.

182. *See, e.g.*, *Coastal Habitat All.*, 294 S.W.3d at 287; *Nicholson*, 986 S.W.2d at 60.

183. *Hollywood Park*, 261 S.W.3d at 140.

184. *Bartee*, 894 S.W.2d at 41.

185. *Id.*

186. *Hollywood Park*, 261 S.W.3d at 135.

187. Bailey v. Smith, 581 S.W.3d 374 (Tex. App.—Austin 2019, pet. denied).

188. *Bartee*, 894 S.W.2d at 37. The court also addressed "whether the State of Texas may be alleged as an owner in such situations[,]" but this topic is not addressed in this Comment. *Id.*

189. *Id.* at 37–38.

190. *Id.* at 37.

therefore, cannot be the subject of theft or criminal mischief—both of which require property rights.[191]

In its analysis, the court first recognized that there is a common law right in Texas whereby property rights can be obtained in wild animals "when they are legally removed from their natural liberty and made the subjects of man's dominion."[192] The court then looked to a Texas Court of Criminal Appeals case from fifty years earlier, *Runnels v. State*, where the court, in addressing a similar issue, wrote: "Wild animals are not subject to theft until they become the property of an owner."[193] Finally, the court considered the enactment of the Texas Parks & Wildlife Code.[194] The court concluded that, while statutorily all wild animals belonged to the state, provisions in the Code such as breeder permits provide for legal possession of deer.[195] Therefore, "while acting under permits from the State, the scientific breeder and the transporter would legally have qualified rights of ownership or possession of the white-tailed deer."[196] Consequently, the court held that because property rights can arise in these deer held under permits, they can be the subject of theft.[197]

2. Hollywood Park Humane Society v. Town of Hollywood Park

In *Hollywood Park Humane Society v. Town of Hollywood Park*, a town was dealing with overpopulation by deer.[198] In order to deal with the problem, the town acquired a trap, transport, and transplant permit from the TPWD so they could relocate the deer.[199] However, to receive this permit a certain percentage of the deer had to be euthanized and tested to ensure the deer did not have CWD before transporting.[200] This resulted in the plaintiff bringing a claim of an inverse condemnation, due process, and a takings claim against the town when five deer the defendant claimed to own as pets were euthanized or relocated.[201] These claims required the plaintiff to have a

---

191. *Id.* at 38, 40.
192. *Id*. at 41 (citing Jones v. State, 45 S.W.2d 612, 613–14 (Tex. Crim. App. 1931)).
193. *Id.* at 41–42 (citing Runnels v. State, 213 S.W.2d 545, 547 (Tex. Crim. App. 1948)). "White-tailed deer in their natural state of liberty are not the proper subject of the criminal offenses of theft and criminal mischief." *Id.* at 46.
194. *Id.* at 42–43.
195. *Id.*
196. *Id.* at 43.
197. *Id.*
198. Hollywood Park Humane Soc'y v. Town of Hollywood Park, 261 S.W.3d 135, 137 (Tex. App.—San Antonio 2008, no pet.).
199. *Id.* at 138.
200. *Id.*
201. *Id.*

property interest in the property that was allegedly taken.[202] Therefore, the court had to decide if the defendant had any property rights in these deer.[203]

In attempting to answer this question, the court noted that statutorily and under Texas's common law all wild animals in Texas belong to the state but, despite this, Texas's common law provides that "property rights in wild animals can arise when an animal is legally removed from its 'natural liberty' and subjected to 'man's dominion.'"[204] However, the court pointed out that "the Texas Legislature has enacted a statute that precludes an individual from capturing, transporting, or transplanting any game animal from the wild unless the individual has obtained a permit from TPW[D]."[205] Therefore, in order to legally remove the deer, the plaintiff had to have obtained a permit.[206] Evidence showed that the plaintiff had never obtained a permit or even confined the deer because they were free to come and go from his land.[207] Because the plaintiff never legally removed the deer, he never obtained a property interest in the deer, and therefore, he had no standing to bring his claims.[208]

3. Bailey v. Smith

One of the most recent courts to address ownership of wild animals in Texas was the Austin Court of Appeals in *Bailey v. Smith* in June 2019.[209] This court considered whether captive breeder deer held under permit were the private property of the deer breeders.[210] At its basis, this case was a due process claim.[211] Local deer breeders brought action against the TPWD and others challenging the validity of the regulations pertaining to CWD and captive breeder deer.[212] They claimed the regulations violated their due process.[213]

In considering the plaintiff's claim, the court had to determine if the captive breeder deer in question were in fact the property of the deer breeders.[214] After construing Texas's statutes regulating wildlife and captive breeder deer, the court determined the legislature had intended to abrogate the ability for Texas's common law property right in wild animals to vest in

---

202. *Id.* at 140.
203. *Id.*
204. *Id.* (citing Nicholson v. Smith, 986 S.W.2d 54, 60 (Tex. App.—San Antonio 1999, no pet.)).
205. *Id.* at 140–41 (citing TEX. PARKS & WILD. CODE ANN. § 43.061(a)).
206. *Id.*
207. *Id.* at 141.
208. *Id.*
209. *See* Bailey v. Smith, 581 S.W.3d 374 (Tex. App.—Austin 2019, pet. denied).
210. *Id.* at 393 (considering private property issues along with other issues that are beyond the scope of this Comment).
211. *Id.* at 382–84.
212. *Id.* at 383–84.
213. *Id.*
214. *Id.* at 393.

captive breeder deer.[215] The court stated that "[t]he statutory scheme simply leaves no room for common law property rights to arise in breeder deer."[216] Consequently, the court ruled that captive breeder deer were not the private property of the deer breeders they were possessed by, but instead that they were "public property held under a permit."[217] However, the concurring opinion, after analyzing the relevant parts of the Texas Parks & Wildlife Code, concluded that an individual can obtain property rights in captive breeder deer "because the Code does not 'clearly' express legislative intent to abrogate the common law[,]" which is required to abrogate an individual's common law rights in Texas.[218]

IV. THE TEXAS LEGISLATURE SHOULD TAKE STEPS TO SOLIDIFY COMMON LAW PRIVATE PROPERTY RIGHTS IN CAPTIVE BREEDER DEER

In the interest of protecting individual's private property rights, the Texas Legislature should take action to alleviate any possible ambiguities in the language of the breeder permit statute that might mistakenly be perceived to bar private property rights in captive breeder deer from vesting in deer breeders.[219] Without such action, other Texas courts may follow the Austin Court of Appeals in issuing decisions that "fail[] to preserve and protect the fundamental property rights of . . . deer breeders in their captive-bred white-tailed deer."[220] Allowing this to happen could lead to many untenable complications.[221]

A potential legislative solution to any confusion on this issue could be as simple as adding a provision that states:

> (a) Notwithstanding any provisions found inside this code, this statute does not preclude qualified private property rights in captive breeder deer legally held under permit from vesting in the permit holder through legal possession and captivity.
> (b) Regardless of what property rights in captive breeder deer vest in permit holders, all deer, including those currently or formerly held under permit, are still subject to all applicable provisions found herein and within Texas' law and remain subject to continued regulation by the Texas Parks & Wildlife Department within the confines of the law.

---

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 403 (Goodwin, J., concurring & dissenting).
219. *See id.* at 393.
220. *Id.* at 400 (Goodwin, J., concurring & dissenting). "[B]reeder deer are public property held under a permit issued by the [Texas Parks & Wildlife] Department and, consequently, deer breeders do not acquire common law property rights in them." *Id.* at 393.
221. *See infra* Parts IV.A–E (discussing the possible ramification of classifying captive breeder deer as public property).

The effect of this simple language would be two-fold. First, section (a) codifies the common law rule of capture for captive breeder deer, thereby helping protect the property rights of Texas citizens.[222] This will make it clear that the legislature did not intend to abrogate the common law, and that none of the provisions within the Texas Parks & Wildlife Code were meant to prevent qualified property rights in captive breeder deer legally held under permit from vesting in the deer breeder.[223] This will ensure the possibility of property rights arising in captive breeder deer, which will help alleviate the many problems laid out in this Comment that will arise if these property rights are not protected.[224]

Second, section (b) will ensure that the control of all deer, whether captive or free ranging, private property or public, will remain firmly within the control and regulation of the Texas Parks & Wildlife Department. Much of the push back from allowing qualified private property rights in captive breeder deer flow from fears that it will take regulatory control of captive breeder deer away from TPWD, who has "experience with wildlife species and . . . [a] stake . . . [in] wildlife disease issues."[225] Section (b) will alleviate these concerns. By statutorily qualifying any possible property rights that may arise in captive breeder deer, it allows Texas to thread the needle between private property rights and the public trust. This statutorily qualified property right, or quasi-private property right so to speak, will allow Texans to enjoy all the benefits that accompany private property rights, including avoiding the problems highlighted by this Comment that will arise if these property rights were not protected, all while still retaining the benefits, consistency, and peace of mind of having these animals remain under the experienced control of the TPWD.[226]

A. Texas Law Supports Private Property Rights Arising in Captive Breeder Deer

Both the current statutory and common law scheme of Texas pertaining to captive breeder deer support deer breeders being able to obtain qualified private property in their breeder deer.[227] Under Texas's common law, individual property rights in deer and other wild animals do not "exist as long

222. *See Bailey*, 581 S.W.3d at 403 (Goodwin, J., concurring & dissenting).
223. *See id.*
224. *See infra* Parts IV.A–E (discussing the possible ramification of classifying captive breeder deer as public property).
225. *Whitetail Report*, *supra* note 120, at 26.
226. *See infra* Parts IV.A–E (discussing the possible ramification of classifying captive breeder deer as public property).
227. *See Bailey*, 581 S.W.3d at 403–13 (Goodwin, J., concurring & dissenting) (analyzing Texas's common law and statutes pertaining to ownership of captive breeder deer).

as the animal remains wild, unconfined, and undomesticated."[228] Of course, this means the inverse must be true as well, and in fact, Texas's courts have long recognized that "property rights in wild animals can arise when an animal is legally removed from its 'natural liberty' and subjected to 'man's dominion.'"[229]

Captive breeder deer fit these elements to the letter. Texas's deer breeder permit statute provides a legal way for removing and possessing a deer.[230] Deer that are held captive their entire lives in captive breeder deer facilities are certainly removed from their natural liberty; they cannot leave a fenced in area and everything from their diet to their breeding partners are strictly controlled by the deer breeders.[231]

Granted, common law can be altered and overturned by the legislature, and Texas Parks & Wildlife regulates much on the possession of wild animals, including breeder deer.[232] However, "[j]ust because the state heavily regulates personalty such as handguns or automobiles, it does not follow that individuals may not own them."[233] If the mere fact that the government regulated something meant it could not be property, there would be very few things, if any, that individuals would own today. Consequently, for there to be abrogation of common law rights through a statute, there has to be clear, express legislative intent to take that right away.[234] Fortunately, the clear, express legislative intent to "abrogate the common law principle providing property rights to deer breeders who legally remove breeder deer from their natural liberty and subject them to man's dominion" is simply not there.[235] In fact, there are several parts of the statute that expressly recognize each of the three elements required for common law ownership of wild animals in Texas.[236]

---

228. Hollywood Park Humane Soc'y v. Town of Hollywood Park, 261 S.W.3d 135, 140 (Tex. App.—San Antonio 2008, no pet.) (quoting State v. Bartee, 894 S.W.2d 34, 41 (Tex. App.—San Antonio 1994, no pet.)).

229. *Id.* (quoting Nicholson v. Smith, 986 S.W.2d 54, 60 (Tex. App.—San Antonio 1999, no pet.)); *see* Jones v. State, 45 S.W.2d 612, 614 (Tex. Crim. App. 1931) ("As a general rule, there is no individual property in wild animals or fish so long as they remain wild, unconfined, and in a state of nature, but wild animals become property when removed from their natural liberty and made subjects of man's dominion."); *see also* Coastal Habitat All. v. Pub. Util. Comm'n, 294 S.W.3d 276, 287 (Tex. App.—Austin 2009, no pet.); *Bartee*, 894 S.W.2d at 41; Wiley v. Baker, 597 S.W.2d 3, 5 (Tex. App.—Tyler 1980, no writ); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870, 875–76 (Tex. App.—Dallas 1962, writ ref'd n.r.e.).

230. TEX. PARKS & WILD. CODE ANN. § 43.351(1).

231. *See supra* Part II.C (discussing the captive breeder deer industry).

232. *See Bailey*, 581 S.W.3d at 403–04 (Goodwin, J., concurring & dissenting).

233. *Bartee*, 894 S.W.2d at 48 (Rickhoff, J., concurring).

234. Dealers Elec. Supply Co. v. Scroggins Constr. Co., 292 S.W.3d 650, 660 (Tex. 2009). "But abrogation of common-law rights is disfavored, and absent clear legislative intent we have declined to construe statutes to deprive citizens of common-law rights." *Id.* (citing Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 16 (Tex. 2000)).

235. *Bailey*, 581 S.W.3d at 404 (Goodwin, J., concurring & dissenting) (citing *Dealers Elec. Supply*, 292 S.W.3d at 660).

236. *See infra* notes 238–67 and accompanying text (analyzing Texas's common law and statutes).

The Texas deer breeder permit statute recognizes that the common law still applies even if it does not expressly say it word for word.[237] The statute states that "[a]ll breeder deer and increase from breeder deer are under the full force of the *laws of this state* pertaining to deer," and that the "deer held under a deer breeder's permit are subject to *all laws and regulations of this state* pertaining to deer except as specifically provided in this subchapter."[238] "[T]he laws of this state include the common law . . . ."[239] The implication of this is that the Texas deer breeder permit statute recognizes that the common law still applies to it.[240]

The first element of common law ownership in wild animals is that they must be legally removed from the wild.[241] As it stands, the Texas Parks & Wildlife Code explicitly recognizes that captive breeder deer held under permit, through the operation of the statute, have been legally removed from the wild.[242] Section 43.351 of the statute states that: "'Breeder deer' means a white-tailed deer or mule deer *legally* held under a permit authorized by this subchapter."[243] The words of the statute itself evidences that captive breeder deer held under permit have been *legally* removed from the wild.[244] However, further evidence can be found in § 65.602 of the Texas Administrative Code, which states that a deer breeder's permit allows someone to "engage in the business of breeding *legally* possessed breeder deer[,] . . . *lawfully* take possession of a breeder deer[,] . . . sell or transfer breeder deer that are in [their] *legal* possession[,] . . . [and] recapture *lawfully* possessed breeder deer."[245] The continual use of "legal" and "lawful" is a further illustration that the legislature intended the statute to purport the legal removal of deer from the wild, and to be in line with the first element of the common law.[246]

Second, the statute explicitly recognizes that captive breeder deer have been removed from their natural liberty, which is the second common law element.[247] First, Texas Parks & Wildlife Code § 43.364 "expressly authorizes the removal of breeder deer from its natural liberty—'breeder deer may be held in captivity for propagation in this state'—when 'a deer

237. *Bailey*, 581 S.W.3d at 392–93.

238. TEX. PARKS & WILD. CODE ANN. §§ 43.364, 43.366 (emphasis added).

239. *Bailey*, 581 S.W.3d at 393 (citing Fort Worth Transp. Auth. v. Rodriguez, 547 S.W.3d 830, 838 (Tex. 2018)).

240. *See id.*

241. Hollywood Park Humane Soc'y v. Town of Hollywood Park, 261 S.W.3d 135, 140 (Tex. App.—San Antonio 2008, no pet.).

242. *See id.*

243. PARKS & WILD. § 43.351(1) (emphasis added).

244. *See Hollywood Park*, 261 S.W.3d at 140.

245. 31 TEX. ADMIN. CODE §§ 65.602(b)(1)–(5) (emphasis added).

246. *See Hollywood Park*, 261 S.W.3d at 140.

247. *See id.* (quoting Nicholson v. Smith, 986 S.W.2d 54, 60 (Tex. App.—San Antonio 1999, no pet.)) ("[P]roperty rights in wild animals can arise when an animal is legally removed from its 'natural liberty' and subjected to 'man's dominion.'"); PARKS & WILD. § 43.361.

breeder's permit is issued by the department.'"[248] Section 43.361 of the Texas Parks & Wildlife Code provides for "[a] release site onto which breeder deer are *liberated*."[249] Black's Law Dictionary defines liberate as "[t]o free . . . from someone's control."[250] As the saying goes, you cannot give what you do not have. Consequently, the Texas Parks and Wildlife Code, by providing the means of freeing the breeder deer from the deer breeder's control, thereby giving the captive breeder deer its liberty back, implicitly recognizes that captive breeder deer have had their liberty taken away as required by the Texas common law for property rights to arise.[251]

The third element of common law ownership of wild animals in Texas is that they must be subjected to man's dominion.[252] Black's Law Dictionary defines dominion as "[c]ontrol; possession[.]"[253] Texas law governing deer held under breeder permits recognizes repeatedly that these deer are subjected to the permit holders' control and possession.[254] For example, Texas Parks & Wildlife Code states "'[c]aptivity' means the keeping of a breeder deer in an enclosure suitable for and capable of retaining the breeder deer . . . at all times."[255] What stronger show of control and possession is there than to keep an animal trapped in an enclosed spaced for its entire life? Another example is the Texas Parks and Wildlife Code allowing the holder of a breeder permit to "engage in the business of breeding" the deer and to "sell, transfer to another person, or hold [the deer] in captivity."[256] Having the ability to sell a living thing or force it to breed are clearly strong showings of control and possession. Further, Texas Administrative Code Title 31 refers to the deer breeder permit holder having possession of the deer in many places.[257] Taken all together, Texas law governing breeder deer clearly recognizes that captive breeder deer are subjected to the dominion of the deer breeders who hold them.[258]

As opposed to the Texas Parks & Wildlife Code that requires clear, "express legislative intent to abrogate the common law principle providing property rights to deer breeders[,]" the Code does the exact opposite, as it repeatedly recognizes each of the three elements required for common law

248. Bailey v. Smith, 581 S.W.3d 374, 403 (Tex. App.—Austin 2019, pet. denied) (Goodwin, J., concurring & dissenting) (citing PARKS & WILD. § 43.364).

249. PARKS & WILD. § 43.361 (emphasis added).

250. *Liberate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

251. *See Bailey*, 581 S.W.3d at 403 (Goodwin, J., concurring & dissenting).

252. *Id.*

253. *Dominion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

254. *See* PARKS & WILD. §§ 43.351–.369; *see also* 31 TEX. ADMIN. CODE §§ 65.601–.613.

255. PARKS & WILD. § 43.351(3).

256. *Id.* §§ 43.352(a)(1)–(2).

257. *See* 31 ADMIN. § 65.602.

258. Hollywood Park Humane Soc'y v. Town of Hollywood Park, 261 S.W.3d 135 (Tex. App.—San Antonio 2008, no pet.).

ownership of wild animals in Texas.[259] Despite this strong evidence that the legislature did not intend to abrogate common law, the *Bailey v. Smith* court still held that "[t]he statutory scheme simply leaves *no room* for common law property rights to arise in breeder deer."[260]

In reaching this decision, the court primarily relies on two statutory provisions in the Texas Parks & Wildlife Code.[261] First, the court relied on § 43.061(a) which provides that no one can legally capture or transport a wild animal without getting a permit from TPWD.[262] However, as discussed, to acquire common law property rights in a wild animal you are required to legally possess it.[263] As opposed to somehow preventing the property rights from arising, this section of the statue specifically provides how an individual can legally take possession.[264] Second, the court relied on § 1.013 which provides that "[t]he existence of a fence does not affect the status of wild animals as property of the people of this state."[265] However, this provision only refers to the ability of fences to affect a wild animal's property status; it makes no reference to captivity, which is statutorily defined and not the same as just putting up a fence, not being able to affect a wild animal's property status.[266] Captivity and fences are different under the Code; the Code "therefore does not prevent ownership through 'captivity' and possession of wildlife."[267]

Further, the *Bailey v. Smith* decision that the Code abrogates the common law ownership of wild animals is also incompatible with the decisions in *Bartee* and *Hollywood Park*.[268]

In *Bartee*, the court specifically stated that the Texas Parks & Wildlife Code provided for the legal possession of breeder deer, and therefore, "while acting under permits from the State, the scientific breeder . . . *would legally have qualified rights of ownership*" in their deer.[269] However, the court in *Bailey v. Smith* comes down on the opposite side of this holding.[270] While the majority in *Bailey* does not mention any distinctions between their holding and the *Bartee* holding, the only possible distinction that could be made in explanation would be the implementation of § 1.013 in 1997, which provided

---

259. *See* Bailey v. Smith, 581 S.W.3d 374, 404 (Tex. App.—Austin 2019, pet. denied) (Goodwin, J., concurring & dissenting); *supra* notes 254–57 and accompanying text (comparing the common law elements to the specific sections of the code).

260. *See Bailey*, 581 S.W.3d at 393.

261. *Id.* at 403 (Goodwin, J., concurring & dissenting).

262. *Id.*

263. *Id.* at 406.

264. *Id.*

265. *Id.* at 405–06 (citing TEX. PARKS & WILD. CODE ANN. § 1.013).

266. *Id.*

267. *Id.* at 406 (citing PARKS & WILD. § 1.013).

268. *See infra* notes 269–79 and accompanying text (comparing the *Bailey* decision to the *Hollywood* and *Bartee* decisions).

269. State v. Bartee, 894 S.W.2d 34, 43 (Tex. App.—San Antonio 1994, no writ) (emphasis added).

270. *Bailey*, 581 S.W.3d at 393.

that high fences do not affect the property status of wild animals.[271] *Bartee* was decided in 1994 before this provision was implemented.[272] However, as discussed above, this provision does not prevent deer breeders from acquiring property rights.[273] Further the *Bartee* court did not note any concern with the section of the Code that states you cannot legally possess wild animals without a permit somehow having the possibility of abrogating the common law.[274] This further shows that there has been no clear express intent by the legislature to abrogate the common law.[275]

Even if the *Bartee* decision did hinge on the distinction of § 1.013 having not been implemented yet, there is no such distinction in *Hollywood Park* as it was decided after the 1997 implementation of § 1.013.[276] There, the court even specifically considered the section prohibiting the capture of deer without a permit, which the *Bailey* court primarily relied on in reaching its decision.[277] The *Hollywood Park* court, much like the *Bartee* court, suggested that nothing in the statutory scheme prevented common law property rights from arising in deer that were taken legally.[278] The *Hollywood Park* court considered the same statutory scheme as the *Bailey* court and yet did not find that common law property rights could still arise.[279] This is even more evidence there was no clear intent by the legislature to abrogate the common law.[280]

B. Captive Breeder Deer Are Not That Wild

The very nature of captive breeder deer provides a simple and strong reason for why captive breeder deer are currently capable of acquiring private property status under Texas's law and for why the legislature should act to ensure they stay that way. Namely, captive breeder deer are *not* wild.

The Texas Parks & Wildlife Code provides, in part, that "[a]ll *wild* animals . . . [found] inside the borders of this state are the property of the people of this state."[281] The majority in *Bailey v. Smith*, in fact, relies on this

---

271. PARKS & WILD. § 1.013.

272. *Bartee*, 894 S.W.2d at 43.

273. *See supra* notes 261–67 and accompanying text (concluding that the language of the statute does not abrogate the common law).

274. *See Bartee*, 894 S.W.2d at 34.

275. *See id.* at 45–46.

276. *See* Hollywood Park Humane Soc'y v. Town of Hollywood Park, 261 S.W.3d 135 (Tex. App.—San Antonio 2008, no pet.).

277. *Id.* at 140–43.

278. *See id.*

279. *Id.*

280. *Id.*

281. TEX. PARKS & WILD. CODE § 1.011(a) (emphasis added).

provision in reaching its decision.[282] But, it can hardly be said that a white-tail deer that is bottle fed from birth and spends its entire life in captivity is wild.[283]

Many Texas courts have stated that "no individual property rights exist as long as the animal *remains wild*."[284] This suggests that Texas's courts recognize the simple fact that once a wild animal is not necessarily always a wild animal.[285] Animals are capable of becoming domesticated.[286] Just because deer in general are normally wild doesn't mean that all deer are always wild. Their status is capable of change.

Captive breeder deer in some respects are more akin to livestock than they are to their free-ranging brethren.[287] This is a fact that has been recognized in a growing number of states; it is why 56% of states surveyed by the Quality Deer Management Association reported that captive breeder deer are classified as a form of livestock in their state.[288] This is compared with only 33% of states surveyed that classified them as wildlife.[289] Further, it is a significant increase from the number that reported classifying them as a form of livestock in the 2013 White-tail Report.[290]

This shift is illustrative of the increasing recognition that captive breeder deer are not wild.[291] However, while it is of vital importance that Texas's legislature acts to safeguard the property rights of its citizen in the deer breeding industry, they must accomplish this with the severity and urgency of the CWD crisis in the forefront of their considerations.[292] Texas should not follow other states in taking steps to classify captive breeder deer as livestock.[293] Doing this would have the effect of taking these deer out of the

---

282. Bailey v. Smith, 581 S.W.3d 374, 393 (Tex. App.—Austin 2019, pet. denied) (concluding that when "[c]onstruing all these provisions together against the backdrop of Section 1.011 and the common law, . . . breeder deer are public property held under permit").

283. Outlaw, *supra* note 108, at 11.

284. *Hollywood Park*, 261 S.W.3d at 140 (emphasis added).

285. *See id.*

286. Lewis v. Great Sw. Corp., 473 S.W.2d 228, 231 (Tex. App.—Fort Worth 1971, writ ref'd n.r.e.) ("Animals[,] . . . by long continued association with man, have become thoroughly domesticated . . . .").

287. Colin Campbell, *Legislature Oks Expansion of Deer Farming*, NEWS & OBSERVER (Sept. 29, 2015, 04:53 PM), https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article36959700.html?fb_comment_id=741269896000967_741278939333396# (stating that the North Carolina legislator passed a bill to expand the state's deer farming industry "under the theory that deer farming is more akin to livestock").

288. *Whitetail Report*, *supra* note 120, at 26. These states include: Florida, Louisiana, Oklahoma, Kansas, Colorado, North Dakota, North Carolina, Virginia, Iowa, Maine, and many others. *Id.*

289. *Id.*

290. *Id.* (reporting that the 56% of states reporting as considering captive breeder deer as a form of livestock was "a major shift in classification since our 2013 Whitetail Report" where only 36% percent of states reporting classified them as a form of livestock).

291. *Id.*

292. *See* Bailey v. Smith, 581 S.W.3d 374, 400 (Tex. App.—Austin 2019, pet. denied) (Goodwin, J., concurring & dissenting) ("[C]hronic wasting disease . . . poses a significant threat to the deer population and for the people of the state.").

293. *Whitetail Report*, *supra* note 120, at 26.

purview of the Texas Parks & Wildlife Department and placing them under the purview of the agricultural department.[294] This risks disrupting efforts to stop the disease by a department that has far more experience at fighting CWD.[295] While protecting property rights should always be a priority, it can be accomplished without threatening the Texas Parks & Wildlife Department's efforts.[296] This is why the Texas Legislature should act to codify deer breeders' common law property rights in their captive breeder deer held under permit, but within the confines of the current regulatory scheme.[297]

C. Weak Property Rights Risk Destroying a Vital Part of Texas's Economy

If deer breeders' private property rights in their captive breeder deer are taken away by classifying them as public property held under permit, then deer breeders will be forced to internalize 100% of the cost of the loss when their deer are euthanized, while the majority of the benefit externalized to the public and environment as a whole.[298]

Classifying deer as public property "will destabilize the deer industry by removing any economic incentive to engage in deer breeding, a major component of Texas' hunting industry."[299] The deer breeding industry is a high overhead enterprise;[300] and unfortunately, the necessary implementation of increasingly more stringent regulations by the state to combat CWD has created sizable risk in entering the industry.[301] As the anecdote in the introduction portrays, the discovery of one unhealthy deer can lead to severe disruptions of deer breeding operations.[302] Even if a ranch merely purchased a deer from an operation with a subsequent confirmed case of CWD, this can result in the operation being quarantined until the necessary deer are euthanized and tested.[303] Aside from the monetary loss of the deer tested, this also means no money is being made, but plenty is being spent on the upkeep of the property and deer.[304] This is nothing compared to what happens to operations, such as the Texas Mountain Ranch, that ended up with confirmed cases of the disease: complete eradication of the herd resulting in millions of dollars worth of losses and the operation being shut down.[305] While these

---

294. *Id.*
295. *Id.*
296. *See supra* Part IV (discussing proposed legislation that would accomplish this).
297. *See supra* Part IV (discussing proposed legislation that would accomplish this).
298. *See* Bailey v. Smith, 581 S.W.3d 374, 394 (Tex. App.—Austin 2019, pet. denied).
299. *Id.*
300. Hargrove, *supra* note 1.
301. *See id.*
302. *See supra* Part I (discussing the regulatory ramification of discovery of CWD in the Texas Mountain Ranch).
303. *See supra* Part I (same).
304. *See supra* Part I (same).
305. *See supra* Part I (same).

steps by the state are likely necessary to overcome the difficulties in combating CWD, it has made entering into this business very risky.[306]

Classifying captive breeder deer as purely public property will only exacerbate these risks.[307] To have standing to bring a takings or due process claim, the plaintiff must have a property interest.[308] Consequently, classifying captive breeder deer as public property destroys deer breeders' ability to receive compensation for the millions in losses they incur from the state's regulations.[309] The results of this could be severe.

If individuals are forced to internalize 100% of the cost of combatting this disease, then there will be little incentive to enter the industry.[310] In a general sense, investors have many options available to them for where they invest their time and money.[311] When they exercise their option to invest in something, they give up the opportunity to invest elsewhere.[312] Therefore, investors must be able to justify their investments before they make them.[313] Consequently, factors such as riskiness and uncertainty can play large roles in individuals' decisions.[314]

If captive breeder deer are classified as public property, then all it takes is one CWD positive deer to be found at a facility and the entire business can be shut down, resulting in millions in losses with no ability to recover compensation due to lack of standing.[315] The huge risk and uncertainty this imposes on those in the industry, and to those contemplating entering it, will "remov[e] any economic incentive to engage in deer breeding."[316] Further risk and uncertainty will also be created because it will destroy the deer breeder's ability to bring theft and criminal mischief claims against third parties.[317] Given the size and importance of the economic impact of the hunting industry in Texas, these things cannot be allowed to happen.[318] Fortunately, this can easily be rectified by upholding deer breeders' conditional private property rights in their breeder deer.[319] Doing this will give deer breeders standing to recover compensation and will ensure their

---

306. *See supra* Part I (same).
307. *See* Bailey v. Smith, 581 S.W.3d 374, 394 (Tex. App.—Austin 2019, pet. denied).
308. *Id.* at 389.
309. *See supra* Part I (discussing the consequences of CWD being found in a herd).
310. *See Bailey*, 581 S.W.3d at 394.
311. *See* Avinash K. Dixit & Robert S. Pindyck, *The Options Approach to Capital Investment*, HARV. BUS. REV., https://hbr.org/1995/05/the-options-approach-to-capital-investment (last visited Jan. 18, 2021).
312. *See id.*
313. *See id.*
314. *See id.*
315. *See supra* Part I (discussing the regulatory ramification of discovery of CWD in the Texas Mountain Ranch).
316. Bailey v. Smith, 581 S.W.3d 374, 394 (Tex. App.—Austin 2019, pet. denied).
317. *See infra* Part IV.D (discussing how classifying deer as public property will destroy the ability of deer breeders to assert their rights in their deer against third parties).
318. *See supra* Part II.C.1 (discussing the economic importance to the captive deer breeding industry).
319. *See supra* Part IV (discussing proposed legislation to rectify this problem).

rights in the deer over third parties.[320] This would mitigate much of the risk and uncertainty.

D. Classifying Captive Breeder Deer as Public Property Will Destroy Deer Breeders' Ability to Protect Their Interest Against Third Parties

Ensuring that deer breeders' property rights in their captive breeder deer continue to be protected will help prevent unforeseen consequences unfurling.[321] Namely, suddenly overturning deer breeders' common law property rights will destroy their ability to bring claims such as theft or criminal mischief against third parties who trespass on their land and poach their deer, as these claims require an interest in property.[322]

The court, in *Bailey v. Smith*, dismisses this with one sentence: "Our holding does not affect the rights conferred by a deer breeder's permit or whether those rights are enforceable against third persons."[323] However, it is hard to see how this could be true. The only support given for revoking deer breeders' property rights in their deer somehow not affecting the deer breeders' ability to enforce its rights against third parties is *State v. Bartee*, which concluded "that deer held under a previous version of [the] breeder's permit were protected by theft and criminal mischief laws."[324] However, the *Bartee* court qualified this holding by stating "[w]ild animals are not subject to theft until they become the property of an owner."[325] Thus, if deer breeders are not able to acquire property rights in their deer, they will not be able to protect their interest against third parties.[326] This will result in the destabilization of the industry and an important part of Texas's economy.[327]

V. CONCLUSION

Property rights are an important and integral part of Texan and American society. As such, it is imperative on our courts and legislators to strive to protect and uphold these rights for every citizen. With the continued spread of CWD, states and state wildlife agencies are being forced to implement strict regulations and restrictions.[328] Unfortunately, these regulations have hit the captive breeder deer industry particularly hard as

---

320. *See supra* Part IV (same).
321. *See* Hargrove, *supra* note 1.
322. Bailey v. Smith, 581 S.W.3d 374, 393 (Tex. App.—Austin 2019, pet. denied).
323. *Id.* at 394.
324. *Id.* (citing State v. Bartee, 894 S.W.2d 34, 41 (Tex. App.—San Antonio 1994, no writ)).
325. *Bartee*, 894 S.W.2d at 41–42 (quoting Runnels v. State, 213 S.W.2d 545, 547 (1948)).
326. *See id.*; *Bailey*, 581 S.W.3d at 394.
327. *See Bailey*, 581 S.W.3d at 394.
328. *See supra* Part I (discussing the regulatory ramification of discovery of CWD in the Texas Mountain Ranch).

expensive deer are euthanized for testing, and movement of deer is restricted hampering business and threatening livelihoods.[329]

With the adverse effect these governmental regulations are having on deer breeders, their property, and their businesses, members of the deer breeder industry have been bringing takings and due process claims over their captive breeder deer.[330] Therefore, courts will increasingly have to consider what property status these animals have in our society.

Texas's courts and legislators must take steps to uphold and strengthen Texas's citizens' private property rights in their captive breeder deer held under permit. Classifying theses expensive animals as public property, aside from infringing on citizens' property rights, will likely have a myriad of negative effects.[331] Therefore, Texas's courts and legislators must uphold these rights because: there is strong and clear common law and statutory support for this in Texas; captive breeder deer are not wild; weak property rights risk destroying an important industry in Texas and undermining TPWD's efforts to prevent the spread of CWD; and classifying captive breeder deer as anything other than private property will cause unforeseen consequences.

---

329. *See supra* Part I (same).

330. *See Bailey*, 581 S.W.3d at 394.

331. *See supra* Part IV.D (discussing how classifying deer as public property will destroy the ability of deer breeders to assert their rights in their deer against third parties).