THE GAME IS AFOOT: CONSTITUTIONALIZING THE RIGHT TO HUNT AND FISH IN THE TENNESSEE CONSTITUTION

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Introduction

With the adoption of House Joint Resolution 108 on March 17, 2008, the Tennessee General Assembly formally began the process of amending the Tennessee constitution so as to create a new state constitutional right. With a diverse array of bill sponsors standing behind the amendment, including an astonishing ninety-one of the ninety-nine members of the Tennessee house [FN1] and nine members of the Tennessee senate, [FN2] an overwhelming majority of the Tennessee state house and state senate approved the following measure:

> *58 A RESOLUTION to propose an amendment to Article XI, Section 13, of the Constitution of Tennessee, relative to the right to hunt, fish, and harvest game.
>
> WHEREAS, the Legislature finds that hunting and fishing are honored traditions in the state of Tennessee; and
>
> WHEREAS, from the time prior to statehood, citizens have enjoyed the bounty of Tennessee s natural resources, including hunting and fishing for subsistence and recreation. Indeed, hunting and fishing are a vital part of this state s heritage and economy and should be preserved and protected; and
>
> WHEREAS, the legislative intent of this amendment is declared to be the following:
>
> (1) Hunting and fishing for the taking of game and fish are a valued part of this state s heritage and should be preserved for the people;

(2) Citizens of this state should have the opportunity to take game and fish by traditional manner and means; however, game and fish management, including hunting and fishing, shall be consistent with the state s duty to honor this heritage and its duty to conserve and protect game and fish; and

(3) The right of the people to hunt and fish shall be subject to reasonable regulations and restrictions as the Legislature may prescribe: now, therefore,

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDRED FIFTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE SENATE CONCURRING, that a majority of all the members of each house concurring, as shown by the yeas and nays entered on their journals, that it is proposed that Article XI, Section 13 of the Constitution of the State of Tennessee be amended by adding the following sentences at the end of the section:

The citizens of this state shall have the personal right to hunt and fish, subject to reasonable regulations and restrictions prescribed by law. The recognition of this right does not abrogate any private or public property rights, nor does it limit the state s power to regulate commercial activity. Traditional manners and means may be used to take non-threatened species. [FN3]

*59 The proposed constitutional amendment has surmounted the first of three primary hurdles required to amend the Tennessee constitution. The first step requires both houses to approve the proposed constitutional amendment by a majority vote. [FN4] Second, the proposed amendment must be published more than six months prior to the next election and then presented for the consideration of the next general assembly. [FN5] In order for the amendment process to proceed past the second step, the house and senate must approve the amendment by a two-thirds majority vote. [FN6] Third, the amendment is submitted to the electorate on a ballot during the next gubernatorial election. [FN7] If a majority of the voters approve the amendment and the number of affirmative votes exceeds half of the number of voters that voted in the gubernatorial election, the amendment is adopted. [FN8]

By November 2, 2010, the process of amending the Tennessee constitution to constitutionalize the right to hunt, fish, and harvest game could be complete. [FN9] This article explores the constitutionalization of hunting and fishing rights and, considered within that context, the role of state constitutions. It begins by tracing hunting and fishing rights through western legal history with a special emphasis on ancient Rome, England, and the American colonies. [FN10] Next, it directs attention to the existing status of hunting and fishing rights under the federal and state constitutions, [FN11] including the dramatic surge in the constitutionalization of hunting and fishing rights since the mid-1990s [FN12] and the reason for this surge. [FN13] The article then explores the legal effect of these state constitutional hunting and fishing rights provisions [FN14] and addresses the likely legal impact of Tennessee's proposed hunting and fishing rights amendment. [FN15] The article concludes by considering whether this type of right is appropriate for enshrinement in a state constitution. [FN16] In doing so, it explores the role of a state constitution in the modern federal system. [FN17]

*60 I. Hunting and Fishing Rights in Western Legal History [FN18]

The concept of a right to hunt or fish is not entirely novel in western history; quite to the contrary, this issue has been of formal legal concern since at least the Roman Empire. [FN19] Ancient Romans possessed a right to hunt wild animals and, by capturing them, to gain ownership thereof. [FN20] “[W]ild animals were labeled as res nullius-things capable of individual appropriation, but which belonged to no one until a human took possession by occupatio (the natural method of occupation).” [FN21] This concept was not considered to be a

privilege conferred by the state but instead a right divined as a matter of natural law. [FN22] However, this natural law right to hunt was not absolute; rather, it was subject to limitation both by the state's power to place restrictions on the harvesting of animals and by certain private property protections that limited the rights of a trespassing hunter. [FN23] While Roman law generally tended towards broadly allowing people to hunt, the restrictions that were imposed were non-egalitarian, setting aside the right to hunt certain species as the exclusive province of the ruling elite or as a reward to military leaders for expanding the empire. [FN24]

Prior to the Norman Conquest of England in 1066, [FN25] the right to hunt was freely available in England to commoners and elites. [FN26] Under their ancient, *61 unwritten constitution, Englishmen possessed a right to hunt wild animals that was akin to the rights of ancient Romans. [FN27] In Anglo-Saxon England, prior to the Conquest, occupying "tenants, no matter how humble, had been permitted to trap and snare any wild animals on their land, and neither king nor landowner had the authority to interfere with this." [FN28] However, the Norman view, which became ascendant with the 1066 Conquest, broke from both the Roman model and the existing, unwritten English constitution. [FN29] Instead of wild animals belonging to no one until being captured, "the rights to all wild animals vested in the king, and he decided who could hunt." [FN30] Lord Edward Coke stated that "when no man can . . . claim property in any goods, the King shall have them by his prerogative." [FN31] William Blackstone added that "the sole right of taking and destroying game belongs exclusively to the king." [FN32]

William the Conqueror set aside vast tracts of English land for his own use under the Forest Laws, which provided that no person could hunt in such locations without his permission. [FN33] His successors liberally expanded the areas falling within these "forests" and used royal officials to enforce the "harsh and unpopular" restrictions on hunting. [FN34] For example, William provided that "'[w]hoever shall kill a stag, a wild boar, or even a hare, shall have his eyes torn out."' [FN35] Castration and banishment were also sanctioned as punishments. [FN36] *62 Hunting was limited exclusively to the King on more than one-third of all the land in England, regardless of who owned it. [FN37] These restrictions impacted English citizens from commoners to barons. [FN38] Henry II's 1184 Assize of the Forest, which created an extensive administrative apparatus for controlling hunting on restricted lands, only exacerbated the situation. [FN39] The King now employed "forest justices, game wardens, master woodsmen, and others" for the sole purpose of preserving his control over the hunting of wild animals. [FN40] In punishing transgressions, Henry II showed little discrimination between the sanction for a killer of a stag in his forests and the sanction for a killer of a person. [FN41]

The Crown's prohibitions on hunting were so severe and of such import that they constituted a significant factor leading to the signing of Magna Carta. [FN42] Magna Carta in 1215 and the Charter of the Forest in 1217 exacted hunting rights from the Crown. [FN43] The Charter of the Forest, along with the disafforestation of some but certainly not all of the King's forests, restored hunting rights to private landowners [FN44] and reinstated "the right of all to hunt wild animals" on the landowner's own lands. [FN45] However, these hunting rights narrowed according to class in 1389. [FN46] Although common law lawyers and the public resisted such measures as contrary to the ancient, unwritten English constitution, the Crown increasingly limited the class of those who were *63 allowed to hunt, even on their own property. [FN47] As a result, "[w]hen deer destroyed his woodland, or when hares or rabbits nibbled his crops, the smaller farmer could do nothing but stand by and watch the destruction." [FN48]

Since the King owned all wild animals, the right of others to hunt was deemed a franchise conferred by the Crown. [FN49] While the initial impact of royal franchises on hunting practices, notably rights of chase and free warren, had been modest, [FN50] the royal franchise's theoretical scope was quite "audacious," claiming authority to control the hunting of animals throughout the kingdom. [FN51] These franchises functioned as exclusive rights to hunt in a particular area, regardless of ownership or control of the property. [FN52] British monarchs exercised strict control in dispensing the right to hunt and fish, limiting grants only to a favored few

and at a cost rather than conferring them upon the landowner regardless of rank. [FN53] Over the centuries, an elaborate, complex, and often contradictory system of law was enacted and implemented to regulate the taking of wild animals. [FN54]

Following the restoration of the British Crown in 1660 under King Charles II, [FN55] an important theoretical shift occurred that further instilled American colonials' negative view of the actions of the Crown and Parliament with regard to hunting and fishing rights. [FN56] Because wild animals were his, the King remained responsible for the costs associated with the preservation of game, which included appointing royal game wardens and others to prevent unauthorized takings. [FN57] As early as 1667, Charles II wrote to his Master of Hawks that, to save money, salaried gamekeepers should only be retained for his five largest estates with the responsibility at other locations being shared with "gentlemen of quality." [FN58]

*64 With passage of the Game Act in 1671, "gentlemen of quality," the noble elites of Britain, gained significant formalized rights. [FN59] While in 1389 the ability to hunt had been limited by class, [FN60] the qualification bar was significantly raised in 1671, thereby dramatically reducing the number of persons qualifying for the right to hunt. [FN61] The Game Act extended to the landed gentry the King's previously exclusive right to hunt wherever he pleased and take whatever measures were necessary to preserve game. [FN62] Charles II's own hunting rights had not been limited, and he had been relieved of an expense. The King minded little sharing his authority and its costs with the landed gentry. [FN63] Even laws of trespass were relaxed to allow the nobility to enter upon another's property for hunting purposes. [FN64] One scholar described the effect of the game laws as follows:

> The law[s] . . . allowed a qualified person to kill game on anyone's land unless specifically warned off, thereby making their right to hunt universal. . . . [A]ll the nation's small wild animals, not only those hopping over private estates, but also those found in the country's woods and commons, became the exclusive property of one social class: the landed gentry. [FN65]

Reflecting upon the shift from exclusive royal control of hunting of wild animals to a concurrent authority among the Crown and noble elites, Blackstone summarized the impact as follows: "[T]he forest laws established only one mighty hunter throughout the land[;] the game laws have raised a little Nimrod [[FN66]] in every manor." [FN67]

*65 The noble elites of Britain increasingly came to view the game laws as a critical way of differentiating themselves from the urban bourgeoisie, especially the economically powerful members of the urban bourgeoisie whom the landed noble elites deeply resented. [FN68] Such laws helped to reinforce the hierarchal nature of society and the landed gentry's standing at the apex thereof. [FN69] The landed gentry also reaped a financial benefit from the rising cost and value of meat, a market which they effectively controlled, thus providing a motivating influence behind the draconian enforcement of restrictive measures. [FN70] Furthermore, since the Norman Conquest in 1066, the elites had also appreciated the advantages of banning hunting as a means of keeping weapons out of the hands of commoners who could otherwise pose a greater danger of revolting against the elites' rule. [FN71]

Not surprisingly, given the benefits that the aristocracy derived from the game laws, they promulgated and enforced strict punishments that resulted in heavy fines and imprisonment for unauthorized hunting. [FN72] Even harsher punishments were theoretically available including death, banishment, and castration. [FN73] The game laws were complicated and confusing. Blackstone noted that "[t]he statutes for preserving the game are many and various, and not a little obscure and intricate." [FN74] These laws are viewed by historians and were viewed by many contemporaries as harsh and repressive. [FN75] It has been *66 suggested that at one point as many as one in four persons imprisoned in Britain were in jail for a violation of

the game laws. [FN76]

Exclusive ownership of wildlife by the monarch and restrictions upon the rights of commoners were not confined to England; to the contrary, such limitations were historically widespread throughout continental Europe. [FN77] Switzerland stood as a rare counterexample where all citizens were permitted to hunt. [FN78] Elsewhere, European commoners repeatedly endeavored to secure a right to hunt, as did advocates on their behalf. Father Francisco de Vitoria, a leading theologian and political philosopher of the Second Scholasticism Renaissance in Spain, placed emphasis on the right to hunt as a critical human liberty. [FN79] While conceding that a king certainly had the authority to place restrictions upon hunting, Father Vitoria suggested that "'it is tyrannical that they make laws concerning the appropriation of wild animals and against the people's liberty to hunt because wild animals are common to all. On the contrary, princes should rather defend this liberty."' [FN80] The public's passion for the liberty to hunt and fish was also demonstrated in France after the overthrow of the King and the aristocracy when the French people rushed to fish countryside streams that had been previously assiduously guarded by and reserved for elite families. [FN81] In fact, following the storming of the Bastille in *67 1789, the abolition of restrictions on certain hunting rights were among the first liberties addressed in the Fourth of August Decrees of the National Constituent Assembly. [FN82] Similarly, German progressives, who dominated the Frankfurt Parliament in 1848, drafted a proposed constitution for a unified Germany that expressly embraced the right to hunt. [FN83] Although The Fundamental Rights of the German People was a short-lived constitution, the right of Germans to hunt upon their own land, subject to the legislature's regulation for safety and general welfare, was formally guaranteed during its tenure. [FN84] The aforementioned are representative samples of the intellectual and popular ire that historically existed in Europe against aristocratic limitations on the right to hunt and fish.

II. Hunting and Fishing Rights in the United States

While the right to hunt was a right of kingship and limited to noble elites in Europe, the demographic, geographic, and environmental conditions of the American colonies and the bountiful and seemingly never-ending wilderness that existed there created a dramatically different understanding of nature than existed in Britain and continental Europe. [FN85] The equal right of all to hunt game was viewed as an incredibly profound sign of the heightened liberty available in the colonies. [FN86] Immigrants from Europe "brought with them a cultivated resentment against fish and game laws. . . . [H]unters regarded attempts to *68 regulate their harvest as an odious intercession." [FN87] Given the environmental conditions and demographics, "[t]he logical policy for America was a policy of 'free taking,' recognizing everyone's right to take game." [FN88] Accordingly, active takings policies were encouraged throughout the colonies and later the states, with even property rights often deferred to the pursuit of wildlife. [FN89]

Despite demarcating hunting as a privilege, early American judicial decisions attest to the strength of the attachment to the concept of a right to freely hunt and fish. For example, in 1818, the South Carolina Constitutional Court of Appeals, then the high court of the state, stated the following:

> Until the bringing of this action, the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that it has been universally exercised from the first settlement of the country up to the present time; and the time has been, when, in all probability, obedient as our ancestors were to the laws of the country, a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege. It was the source from whence a great portion of them derived their food and raiment, and was, to the devoted huntsman . . . a source of considerable profit. The forest was regarded as a common, in which they entered at pleasure, and exercised the privilege; and it will not be denied that animals, ferae naturae, are common property, and belong to the first taker. If, therefore, usage can make law, none was ever better established. . . . Now if the right to hunt beyond that, did not before exist,

> this act was nugatory; and it, cannot be believed that it was only intended to apply to such as owned a tract of land, the diameter of which would be fourteen miles. . . . The right to hunt on unenclosed lands, I think, therefore, clearly established; but if it were doubtful, I should be strongly inclined to support it. Large standing armies are, perhaps, wisely considered as dangerous to our free institutions; the militia, therefore, necessarily constitutes our greatest security against aggression; our forest is the great field in which, in the pursuit of game, they learn the dexterous use and consequent certainty of firearms, the great and decided advantages of which have been seen and felt on too many occasions to be forgotten, or to require a recurrence to. [FN90]

Additionally, the Georgia Supreme Court, in rejecting the enduring applicability of an English game law and quashing an indictment in the process, found the game law "not only penal to a feudal degree, but . . . productive of tyranny." [FN91] Popular resistance to early attempts to even regulate, much less prohibit, hunting or fishing was, as predicted by the South Carolina Constitutional Court of Appeals, vociferous. [FN92]

*69 A. Hunting and Fishing Rights Under the Federal Constitution

Among Pennsylvanians, the commitment to safeguarding hunting and fishing rights was so strong that the Anti-Federalists of that state argued that those rights should be included in the federal Constitution. [FN93] Concern that the Constitution did not contain a Bill of Rights had spilled over into state ratification conventions. [FN94] At its convention in December 1787, Pennsylvania became the first state to debate amending the Constitution to protect rights not expressly safeguarded in the proposed constitution. [FN95] Although the Anti-Federalist minority's proposed amendments were not endorsed by the convention, the Anti-Federalists drafted a minority report in which they set forth their proposed amendments. [FN96] In drafting the proposed Bill of Rights amendments, Madison reviewed approximately two hundred suggested amendments that emerged from the ratification debates in the various states; [FN97] ultimately, he borrowed heavily from the Pennsylvania minority report. [FN98] Included among Pennsylvania's fourteen proposed amendments was a constitutional safeguard of the right to hunt, fish, and fowl. [FN99] The proposed amendment provided that:

> The inhabitants of the several States shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands in the United States not inclosed, and in like manner to fish in all navigable waters, and *70 others not private property, without being restrained therein by any laws to be passed by the legislature of the United States. [FN100]

While this hunting and fishing rights provision was not included in the federal Constitution, many of the Pennsylvania minority report suggestions were adopted, [FN101] helping form a basis for the Free Exercise Clause, the Free Speech Clause, the Free Press Clause, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Amendments. [FN102]

Despite the founders' failure to adopt the proposed hunting and fishing rights amendment, former Chief Justice Warren Burger suggested following his retirement from the U.S. Supreme Court that a constitutional right to hunt and fish exists under the U.S. Constitution. [FN103] Chief Justice Burger stated: "Nor does anyone seriously question that the Constitution protects the right of hunters to own and keep sporting guns for hunting game any more than anyone would challenge the right to own and keep fishing rods and other equipment for fishing-or to own automobiles." [FN104] Thus, "[i]n a single sentence, the former Chief Justice asserts that three 'Constitutional rights'-hunting, fishing, and buying cars-are so firmly guaranteed as to be

beyond question." [FN105] However, the U.S. Supreme Court has never found any of the aforementioned rights to be constitutionally protected. [FN106] In fact, where the issue of hunting rights has been implicated, the Court's analysis has suggested a contrary determination. [FN107] Circuit and district courts have similarly concluded that hunting and fishing constitute recreational activities that are a privilege but not a constitutional right. [FN108] Discrimination against out-of-state residents does not raise constitutional concerns under the Equal Protection [FN109] or Privileges and Immunities [FN110] Clauses of the Fourteenth Amendment or even the Commerce *71 Clause. [FN111] Moreover, at least one court has held that not even minimal procedural due process requirements attach where one is deprived of the right to hunt or fish. [FN112] Simply stated, under the federal Constitution, "[n]o citizen has a right to hunt wild game except as permitted by the State." [FN113]

B. The Status of Hunting and Fishing Rights Under Colonial Law and State Constitutions

While there is no federal constitutional right to hunt or fish, state constitutions offer a more varied approach to such rights. Historically, state courts have viewed the right to hunt or fish as a privilege that exists at the will of the state legislature rather than as a constitutional right. [FN114] An 1881 Illinois Supreme Court decision is emblematic of the prevailing view in state courts:

> The ownership [of wild animals] being in the people of the State-the repository of the sovereign authority-and no individual having any property rights to be affected, it necessarily results, that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare.
>
> Stated in other language, to hunt and kill game, is a boon or privilege granted, either expressly or impliedly, by the sovereign authority-not a right *72 inhering in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege . . . of hunting and killing game. [FN115]

In other words, if a state legislature wished to prohibit hunting or fishing, the legislature was within its discretion to do so.

Although hunting and fishing are privileges subject to the normal political process in most states, this is not invariably so. In fact, a constitutional right to hunt and fish in the American colonies predates the Declaration of Independence, and such rights in state constitutions predate the U.S. Constitution.

1. Colonial Hunting and Fishing Rights

A number of colonial charters and compacts expressly provided for the right to hunt and fish. The 1641 Massachusetts Body of Liberties was a "detailed charter of liberties [that] served as the model for other colonies" [FN116] and arguably stands as "the most important . . . forerunner of the federal Bill of Rights." [FN117] It guaranteed colonial Massachusetts house holders a right to fish and fowl, subject to certain limitations that could be imposed by a town or general court and the rights of private property. [FN118] Specifically, the Massachusetts Body of Liberties provided:

> Every Inhabitant that is an howse holder shall have free fishing and fowling in any great ponds and Bayes, Coves and Rivers, so farre as the sea *73 ebbes and flowes within the presincts of the towne where they dwell, unlesse the free men of the same Towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to

> come upon others proprietie without there leave. [FN119]

Similarly, the 1662 Connecticut Royal Charter guaranteed:

> [T]hese Presents shall not in any Manner hinder any of Our loving Subjects whatsoever to use and exercise the Trade of Fishing upon the Coast of New-England, in America, but they and every or any of them shall have full and free Power and Liberty, to continue, and use the said Trade of Fishing upon the said Coast, in any of the Seas thereunto adjoining, or any Arms of the Seas, or Salt Water Rivers where they have been accustomed to fish, and to build and set up on the waste Land belonging to the said Colony of Connecticut, such Wharves, Stages, and Work-Houses as shall be necessary for the salting, drying, and keeping of their Fish to be taken, or gotten upon that Coast, any Thing in these Presents contained to the contrary notwithstanding. [FN120]

The 1663 Royal Charter of Rhode Island and Providence Plantations provided the same guarantee as the Connecticut Charter [FN121] and added an additional protection:

> And further, for the encouragement of the inhabitants of our said Colony of Providence Plantations to set upon the business of taking whales, it shall be lawful for them, or any of them, having struck whale, dubertus, or other great fish, it or them to pursue unto any part of that coast, and into any bay, river, cove, creek, or shore, belonging thereto, and it or them, upon the said coast, or in the said bay, river, cove, creek, or shore, belonging thereto, to kill and order for the best advantage, without molestation, they making no willful waste or spoil anything in these presents contained, or any other matter or thing, to the contrary, notwithstanding. [FN122]

Two decades later, in receiving a royal charter for Pennsylvania, the Crown implicitly conferred upon William Penn hunting and fishing rights over the entire expanse of the land grant. [FN123] Penn, in turn, referenced rights to hunt and *74 fish in the literature that he used to promote settlement in Pennsylvania. [FN124] Newcomers to Pennsylvania promptly demanded that their rights to hunt and fish be given effect in a formalized guarantee. [FN125] Acceding to these demands, the 1683 Frame of the Government of the Province of Pennsylvania and, Territories Thereunto Annexed, in America, also known as the Second Frame of Government, provided as follows:

> And that the inhabitants of this province and territories thereof may be accommodated with such food and sustenance, as God, in His providence, hath freely afforded, I do also further grant to the inhabitants of this province and territories thereof, liberty to fowl and hunt upon the lands they hold, and all other lands therein not inclosed; and to fish, in all waters in the said lands, and in all rivers and rivulets in, and belonging to, this province and territories thereof, with liberty to draw his or their fish on shore on any man s lands, so as it be not to the detriment, or annoyance of the owner thereof, except such lands as do lie upon inland rivulets that are not boatable, or which are, or may be hereafter erected into manors. [FN126]

The 1696 Frame of Government of the Province of Pennsylvania, and the Territories Thereunto Belonging, also known as the Third Frame of Government, retained this guarantee. [FN127]

2. Hunting and Fishing Rights Under Early State Constitutions

During the American Revolutionary War, twelve former colonies adopted state constitutions. [FN128] In addition to operating under their own initiative, [FN129] the states were also responding to advice from the Continental Congress, which encouraged them to establish a government that "will best produce the happiness of the people, and most effectually secure peace and good order in the province, during continuance of the present dispute between Great Britain and the colonies." [FN130] These initial attempts at state constitution formation had multiple objectives including securing the rights of the state's inhabitants. [FN131] At least three of the first state constitutions included references to hunting and fishing rights, one state constitution listed the denial thereof in a litany of *75 complaints against the Crown as part of justifying resistance thereto. [FN132] The other two state constitutions adopted a constitutional right to hunt, fowl, and fish as a state constitutional right. [FN133]

Although the South Carolina constitution of 1776, which was drafted prior to the Declaration of Independence, expressed a hope for reconciliation with Great Britain, it nevertheless began with a justification for establishing a new government in resistance to the authority of the Crown. [FN134] Included among the litany of deprivation of rights charges, South Carolina vigorously protested Parliament s actions in "depriving many thousands of people of the means of subsistence, by restraining them from fishing on the American coast." [FN135]

The framers of the Vermont and Pennsylvania constitutions went further than South Carolina by adopting hunting and fishing rights provisions in their respective state constitutions. The Vermont constitution provides:

> The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly. [FN136]

Likewise, the Pennsylvania constitution of 1776 guaranteed that "[t]he inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable waters, and others not private property." [FN137]

i. Why Did Vermonters Adopt a Constitutional Right to Hunt?

When drafting the Vermont constitution, the framers thereof "were then smarting under the oppression and inequalities of the English system, under which individual development among the common people was impeded and often prevented, and the rights and enjoyments of the many were subjected to the pleasure of a favored few." [FN138] In their view, among the worst offenses committed by the noble elites and Crown was the creation of fish and game laws. [FN139] "The framers of [the Vermont] constitution knew that the English system of fish and game laws had been a most fruitful source of crime and *76 misery, and . . . it was their purpose to so provide that this state should never be cursed by a like system." [FN140] Vermonters would not tolerate the reservation of hunting, fowling, and fishing rights to those born of a certain class or those achieving a certain economic status. [FN141] They sought to ensure that public lands would be available for hunting, fowling, and fishing to the people of the State. [FN142] The framers were concerned that "the legislature might sometime be induced to convey this hunting on public lands to individuals, or might forbid it altogether-and so they made it a part of the constitution that these rights of the citizen should never be alienated." [FN143] The Vermont constitution also sought to balance an active takings regime against the rights of private property by empowering hunting and fishing trespassers to engage in these activities, subject to certain limitations imposed to protect private property. [FN144]

Reflecting on the perceived success of the measure approximately one hundred twenty years after its constitutionalization, Justice Thompson of the Vermont Supreme Court wrote:

> When we consider the crime and misery in England during the last century resulting from its private fish and game preserves, protected by its system of fish and game laws, and then consider how free from such crime and misery this state has been during the same time, it is apparent that this provision of the constitution, as construed by the people, was one of the wisest that could have been made. This decision is most far reaching in its consequences. Hitherto in our history as a state, our people, young and old, rich and poor, have fished, as a matter of right, in all the waters of the state. . . . This freedom to associate with and enjoy nature has borne fruit in the independent, liberty-loving character of our people, and has had its influence in forming a type of manhood that has had a potent influence in making Vermont to-day, in many respects, the ideal republic of the world. [FN145]

In Justice Thompson's view, the constitutionalization of the right to hunt and fish under the Vermont constitution was a smashing success.

ii. Why Did Pennsylvanians Adopt a Constitutional Right to Hunt and Fish and Then Promptly Remove It?

The right to hunt, fish, and fowl had been of long-standing importance in defining the broad scope of liberty available in Pennsylvania to attract settlers. [FN146] These rights enjoyed a constitutional status in Pennsylvania since the *77 1683 Second Frame Government. [FN147] Pennsylvania's founders, who were well acquainted with the unwritten English constitutional rights to hunt and fish and the abuses thereof by various rulers, had no intention of sacrificing the gains that had been made. [FN148]

Pennsylvania's 1776 constitution was the most democratic of the state constitutions created during the Revolutionary War period. [FN149] Thomas Paine, the most radical of the founders, [FN150] described the resulting document, which was drafted under the control and influence of a number of political outsiders, as a governing instrument that “considers mankind as they came from their maker s hands-a mere man, before it can be known what shall be his fortune or his state.” [FN151] However, the 1776 Pennsylvania constitution generated conservative opposition that led to its replacement in 1790. [FN152] “At a meeting of a large and respectable number of the citizens of Philadelphia, in the State-House yard last night and this morning,” a group, standing in opposition to the 1776 constitution, declared “[t]hat the several regulations improper to be taken notice of therein, are mentioned in the said Constitution.” [FN153] The constitutional protection of hunting, fishing, and fowling was identified as precisely such a provision. [FN154] The 1790 Pennsylvania constitution eliminated the hunting, fishing, and fowling guarantee, which existed in the 1776 constitution and traced its origins in the state to William Penn's 1683 Second Frame of Government, as unnecessary constitutional clutter. [FN155]

3. Subsequent State Constitutionalization of the Right to Hunt and Fish

Following the period of initial constitutional formation, eleven additional states have added constitutional protections that expressly constitutionalize the right to hunt, fish, or both: Rhode Island (1844), [FN156] California (1910), [FN157] *78 Alabama (1996), [FN158] Minnesota (1998), [FN159] North Dakota (2000), [FN160] Virginia (2000), [FN161] Wisconsin (2003), [FN162] Louisiana (2004), [FN163] Montana (2004), [FN164] Georgia (2006), [FN165] and Oklahoma (2008). [FN166]

The Alabama and Virginia constitutions provide a right to hunt in accordance with or subject to such laws or

regulations that may be enacted or promulgated. [FN167] The Alabama constitution, in an amendment entitled the "Sportsperson's Bill of Rights," [FN168] states that "[a]ll persons shall have the right to hunt and fish in this state in accordance with law and regulations." [FN169] The Virginia constitution similarly provides that "[t]he people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law." [FN170]

The Georgia, Minnesota, and North Dakota constitutions, in strikingly similar language, guarantee the right to hunt and fish and impose a duty upon the state legislature and administrative agencies to preserve and manage wildlife to safeguard these activities. [FN171] The Georgia constitution declares that "[t]he tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good." [FN172] The Minnesota constitution provides that "[h]unting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good." [FN173] The North Dakota constitution states that "[h]unting, trapping, and fishing and the taking of game and fish are a valued *79 part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good." [FN174]

The Wisconsin and Oklahoma constitutions both expressly provide that any regulation of the right to take game must be reasonable. [FN175] Oklahoma adds to this requirement a guarantee that traditional methods of taking game shall be preserved. [FN176] The Wisconsin constitution states that "[t]he people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law." [FN177] The Oklahoma constitution guarantees the following:

> All citizens of this state shall have a right to hunt, fish, trap, and harvest game and fish, subject only to reasonable regulation as prescribed by the Legislature and the Wildlife Conservation Commission. The Wildlife Conservation Commission shall have the power and authority to approve methods, practices and procedures for hunting, trapping, fishing and the taking of game and fish. Traditional methods, practices and procedures shall be allowed for taking game and fish that are not identified as threatened by law or by the Commission. Hunting, fishing, and trapping shall be the preferred means of managing game and fish that are not identified as threatened by law or by the Commission. Nothing in this section shall be construed to modify any provision of common law or statutes relating to trespass, eminent domain, or any other property rights. [FN178]

Like Oklahoma, as part of guaranteeing the right to hunt and fish, the Louisiana and Montana constitutions expressly protect the rights of private property owners against trespass by hunters or fisherman. [FN179] The Louisiana constitution provides:

> The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. Hunting, fishing and trapping shall be managed by law and regulation consistent with Article IX, Section I of the Constitution of Louisiana to protect, conserve and replenish the natural resources of the state. The provisions of this Section shall not alter the burden of proof requirements otherwise established by law for any challenge to a law or regulation pertaining to hunting, fishing or trapping the wildlife of the state, including all aquatic life. Nothing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property. [FN180]

*80 The Montana constitution declares that "[t]he opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right to trespass on private property or diminution of other private rights." [FN181]

The California and Rhode Island constitutions do not address hunting but do safeguard fishing rights. [FN182] The California constitution provides:

> The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken. [FN183]

Harkening back to the 1663 Royal Charter of Rhode Island and Providence Plantations, the Rhode Island constitution guarantees "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore." [FN184]

There is an additional category of distinct provisions that appear to confer a right to hunt. Nevertheless, they are not the focus of this article because they are addressed primarily to guaranteeing a state constitutional right to keep and bear arms rather than a constitutional right to hunt or fish. Seven state constitutions expressly reference that a right to keep and bear arms exists for the purpose, among others, of being able to hunt. [FN185] Two of those states, North *81 Dakota and Wisconsin, have expressly constitutionalized the right to hunt elsewhere in their state constitution. [FN186] Five of those states, Delaware, Nebraska, Nevada, New Mexico, and West Virginia, have not. The North Dakota constitution guarantees that "[a]ll individuals . . . have certain inalienable rights, among which are . . . [the right] to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." [FN187] The Wisconsin constitution declares that "[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." [FN188] The Delaware constitution states that "[a] person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." [FN189] The Nebraska constitution provides that "[a]ll persons . . . have certain inherent and inalienable rights; among these are . . . the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes." [FN190] The Nevada constitution indicates that "[e]very citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." [FN191] The New Mexico constitution declares:

> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." [FN192]

Finally, the West Virginia constitution states that "[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." [FN193]

*82 III. What is Spurring States to Constitutionalize Hunting and Fishing Rights?

The recent surge in state constitutional amendments protecting hunting and fishing rights appears to be a reaction to the growing effectiveness of the animal rights movement. Animal rights advocates achieved success in the 1930s with a Massachusetts ballot initiative process in which the voters approved a measure outlawing the use of trapping devices that caused severe suffering. [FN194] While a similar anti-trapping initiative proved unsuccessful in 1977 in Ohio, the animal rights movement, nevertheless, demonstrated its financial clout by spending more than one million dollars on the initiative. [FN195] With a professional campaign management staff in place, a 1990 ballot initiative in California proved more successful, resulting not only in a ban on mountain lion hunting but also the creation of funding for habitat preservation. [FN196] From 1994 to 2001, animal rights groups were able to use the ballot initiative process to achieve bans on trapping in Arizona, California, Colorado, Massachusetts, and Washington. [FN197] Not all of the animal rights successes have been gained through the initiative process; elected officials have also acted to limit hunting, such as prohibiting dove hunting in Iowa, [FN198] bear hunting in New Jersey, [FN199] and the use of leg-hold traps in Rhode Island. [FN200]

In reaction to the successes of the animal rights movement, hunting and fishing rights activists have mobilized nationally. [FN201] Because the animal rights *83 movement appears to be well-funded and has undeniably achieved success in some states, pro-hunting and fishing rights state legislators have turned their attention to these issues. [FN202] Beyond the actual results, the perception that animal rights activists are on the advance has been sufficient to spur movement for the constitutionalization of hunting and fishing rights. Colorfully summarized by one prominent supporter of Oklahoma's constitutional amendment:

> [State constitutionalization] is a pre-emptive strike . . . making it more difficult for any nutty animal rights activist or anti-hunting organization to target Oklahoma. . . . [A]ny attempt to ban . . . hunting . . . would require amending the constitution. So if state lawmakers were to go insane and wanted to eliminate deer hunting, for example, it couldn't be done without a vote of the people. [FN203]

The impetus for the constitutionalization of hunting and fishing rights in Tennessee is similar to that in other states. The successes of animal rights groups in other states [FN204] and the activity of such groups in Tennessee has not gone unnoticed by Tennessee hunting and fishing rights advocates. [FN205] Tennessee hunting and fishing rights advocates are concerned that animal rights groups will seek to outlaw or sharply limit hunting and fishing. [FN206] Their concern is heightened by the perception that animal rights groups are a well-funded political adversary. [FN207]

*84 Many supporters of hunting and fishing rights, as well as their opponents, candidly concede that the political climate in Tennessee is not such that hunting and fishing rights are under immediate threat. [FN208] State Senator Doug Jackson, a senate sponsor of the hunting and fishing amendment, indicated that the effort to constitutionalize these rights was to safeguard against a political "'environment that doesn't exist today, but that could exist tomorrow."' [FN209] Mike Butler, the executive director of the Tennessee Wildlife Federation, a group who has been actively advocating for passage of the proposed constitutional amendment, conceded that there is "'[p]robably not' . . . 'a clear and present danger (in Tennessee) [,] . . . [b]ut [noted that] if we wait until there is, it will be too late."' [FN210] Their efforts are aimed at securing the right to hunt and fish for future generations of Tennesseans by preventing future legislatures from seeking to eliminate Tennesseans' right to hunt, fish, and harvest game. [FN211]

Tennessee hunting and fishing rights advocates are particularly concerned about demographic trends. [FN212] The Tennessee Wildlife Resources Agency estimates that the number of hunters in the state is holding relatively steady at approximately one million; [FN213] however, other measures suggest that the

number of hunters in Tennessee is declining. [FN214] Regardless, the number of hunters is not keeping pace with the state's population increases, and hunters are declining as a relative percentage of the Tennessee electorate. [FN215] The demographics are also shifting as the state of Tennessee becomes more urbanized, suburban, and less rural. [FN216] Fear of decreasing electoral influence and a demographic population shift that is perceived to have fewer cultural ties to hunting and fishing is also creating urgency to constitutionalize these rights. [FN217] In seeking to safeguard against a future political climate less favorable to hunting and fishing rights, the proposed amendment to the Tennessee constitution is designed to give "'hunters and fishermen . . . the ability to take their concerns all the way to the state supreme court"' by safeguarding such rights in the state constitution. [FN218]

*85 IV. What Is the Impact of These Constitutional Provisions?

None of the state hunting or fishing rights constitutional provisions have been interpreted as preventing a state from regulating hunting or fishing. [FN219] Nor have these provisions been interpreted as reaching beyond the domain of hunting, fishing, or harvesting animals. Thus, for example, shotgun sports such as clay pigeon shooting have received no additional protection. [FN220] Courts interpreting these constitutional provisions have concluded that a regulation need only be reasonable to be upheld. [FN221] Accordingly, state laws or administrative regulations that impose licensing fees, [FN222] limit hunting to particular seasons, [FN223] or place limits on the number of animals that may be taken [FN224] have been upheld as constitutional. Even long-term bans have been utilized by state legislatures; for example, because the Vermont deer population had been "so decimated that a deer sighting could merit a newspaper story," the state authorized a deer hunting ban from 1865 to 1896, which, along with the reforestation of abandoned farmland, led to a recovery of the deer population and a return to regulated deer hunting. [FN225] In fact, some courts have suggested that these amendments impose upon states an affirmative constitutional obligation to enact laws that preserve hunting and fishing. [FN226] Courts have found the making of such laws to be delegable to appropriate administrative bodies in a manner consistent with other delegations of legislative authority. [FN227] Additionally, courts have found the constitutional right to hunt or fish to be curtailed by federal and state laws prohibiting the taking of endangered or threatened species. [FN228] In other words, these amendments do not create a *86 constitutional right to hunt, fish, or harvest endangered or threatened species. Despite the aforementioned limitations, state constitutional hunting and fishing rights provisions appear to guarantee that the political branches may not ban hunting and fishing by statute or regulation. [FN229] Those are not the only impacts of these measures, however.

The impact of the constitutionalization of hunting and fishing rights has also impacted procedural due process rights, gun rights, search and seizure issues, property and riparian rights, and administrative agency decision making. For example, the Minnesota Court of Appeals considered the constitutionalization of the right to hunt and fish as one factor in determining that a commercial fisherman had a sufficient interest in his commercial fishing license to characterize the interest as a property right, the elimination of which was entitled to procedural due process protections. [FN230] The same Minnesota state constitutional provision also may have created a right to keep and bear arms for the purpose of hunting in Minnesota. [FN231] Six states, one of which is Minnesota, have no constitutional right to bear arms provision in their state constitutions. [FN232] It has been suggested that the Minnesota hunting rights provision confers an indirect state constitutional right to bear arms for the purposes of hunting. [FN233]

Constitutional provisions imposing duties to preserve hunting and fishing may have decreased constitutional protections for hunters or fishermen with regard to searches and seizures while engaged in these endeavors. More likely, these provisions have simply confirmed that a lesser expectation of privacy applies with regard to the enforcement of highly regulated fishing and gaming activities. [FN234] For example, a fisherman was convicted for refusing to allow an inspection of his boat by a conservation officer who lacked probable cause to believe that any violation of fish and wildlife preservation laws had occurred. [FN235] *87 In determining that a lesser expectation of privacy applied to fishermen and their boats, the court noted that the state

constitution “recognizes the link between enforcement of fishing regulations and the preservation of . . . game and fish resources.” [FN236] The court reasoned that requiring probable cause to enforce gaming laws “would prevent the state from meeting its constitutional mandate that it manage and regulate fishing to preserve our natural resources.” [FN237] Accordingly, the court held that the fisherman had “no reasonable expectation of privacy [in] the areas of his open boat or other conveyance used to typically store or transport fish.” [FN238]

With regard to riparian or private property rights, the impact of constitutionalizing the right to fish or hunt has dramatically diverged among the states. These differences are largely tied to the states' common law tradition [FN239] and the precise language of the constitutional provision itself. For example, the Louisiana constitution expressly provides that “[n]othing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property.” [FN240] Accordingly, the Fifth Circuit Court of Appeals concluded that “[w]hen the article is read in full, it is plain that the right to fish is circumscribed and does not extend to waters on private property.” [FN241] In contrast, Wisconsin s constitutional amendment enshrines the state s common law, and riparian rights holders cannot prevent fishing in navigable waterways. [FN242] Similarly, in Vermont, pursuant to a state constitutional provision that has been in effect since 1777, Vermonters have a state constitutional right to enter a piece of land to “hunt and fowl.” [FN243] However, the Vermont constitutional fishing and hunting rights guarantee expressly grants private property owners protections against would-be trespassing hunters or fishermen where the private property is enclosed or the waterway is not boatable. [FN244]

*88 Where property rights do bow to hunting and fishing rights, both private and public property is affected. The Vermont Supreme Court invalidated as being unconstitutional an injunction that prevented fishermen from going into a lake slough which had been marked with posted private property signs and which had a small area that was nonboatable. [FN245] Similarly, the Rhode Island Supreme Court interpreted the state's constitution, which ensures a right to fish from the shore, as barring the state from authorizing the City of Newport to exclude the general public from the shore by erecting fences and operating the shore area for profit. [FN246]

In terms of practical impact in the courts, the import of these state constitutional provisions ultimately hinges upon the degree to which they are enforced. For example, the Vermont Supreme Court permitted the Winooski Valley Park District, a municipal district containing portions of the municipalities of Burlington, Colchester, Essex, Jericho, South Burlington, Williston, and Winooski which owned 1,730 acres of land and leased another 134 acres, to impose an absolute ban on hunting and trapping on these lands. [FN247] Although the Hunters, Anglers and Trappers Association of Vermont, Inc. offered evidence that hunting and trapping could be safely conducted within the district's lands, whether this is true was left untested. [FN248] The District offered only an assertion that it was pursuing, through the creation of this park district, recreational and conservation objectives solely, essentially conceding that it was not considering the right to hunt in any fashion. [FN249] Despite the fact that Vermont's constitutionalization of the right to hunt and fish was directed, in part, to enabling hunting on public lands, the Vermont Supreme Court upheld the absolute ban on hunting without seriously addressing the question of whether the restrictions were reasonable. [FN250]

*89 Alternatively, the California Supreme Court adopted a radically different approach to an argument that a constitutional right to fish upon the Whale Rock Reservoir, a public land, was being violated. [FN251] The California Constitution provides for fishing rights on public lands. [FN252] The court interpreted public lands “as meaning state-owned land the use of which by the state is also compatible with use by the public for purposes of fishing.” [FN253] The Court stated that “[o]nly property which is being used for a special purpose that is incompatible with its use by the public-for example, lands used for prisons or mental institutions-does not fall within the scope of this constitutional provision.” [FN254]

The significance of this framework was demonstrated in the Whale Rock Reservoir case. The reservoir was being used for domestic water supply purposes, a use that the State asserted was inconsistent with the exercise of fishing rights. [FN255] The court, however, concluded:

> Use of a domestic water supply reservoir for public recreational fishing is not necessarily incompatible with its primary purpose since many domestic water supply reservoirs throughout the state provide public fishing programs without any health hazard to the users of the water. Although there may be *90 domestic water supply reservoirs at which such use is incompatible with public fishing, ample evidence supports the trial court's finding in this case that a properly implemented public recreational fishing program at Whale Rock Reservoir would not interfere with its function as a domestic water supply reservoir. [FN256]

The San Luis Obispo Sportsman's Association conceded that in “appropriate factual situations” its members right to fish on public lands would necessarily have to yield to the state s power to protect public safety and welfare [FN257] and that “regulation of fishing at the reservoir [would be necessary] in order to insure against contamination of the water supplied from the reservoir for domestic consumption.” [FN258] In agreement, the court noted that “although the public has a constitutional right to fish at Whale Rock Reservoir, this right is subject to reasonable regulation and could in fact be extinguished if public recreational fishing were to become incompatible with the reservoir s function as a domestic water supply source.” [FN259] However, fishing at the reservoir could be conducted in accordance with local and state regulations without creating any health risk. [FN260] Thus, although certain portions of the reservoir needed to be closed to the public [FN261] and regulations needed to be imposed and enforced in order to protect against contamination, [FN262] the state could not impose an outright ban on fishing in the entire reservoir. [FN263] In fact, the court imposed an affirmative obligation upon the state to institute a fishing program and provide sanitary facilities and surveillance, despite the fact that the fees collected from such a fishing program might not cover the costs. [FN264]

The impact of constitutionalizing hunting and fishing rights has also extended beyond the courts. These constitutional provisions also directly affect the decision making of state legislatures, governors, and administrative agencies. For example, in issuing an opinion as to the impact of the state's constitutionalization of hunting and fishing rights on water appropriation permits, the North Dakota Attorney General advised that “[t]he State Engineer, in managing the state's waters, cannot ignore a constitutional provision that seeks to protect interests so closely related to water. The State Engineer must consider the provision when deciding whether to grant water permits and when carrying out planning responsibilities.” [FN265] Thus, with constitutionalization of hunting and fishing rights, legislators, governors, and state agencies must consider their actions or inaction in light of these constitutional protections.

*91 V. Anticipated Impact of Tennessee's Proposed Amendment

After several years of internecine struggle among the Tennessee Wildlife Federation, other hunting and fishing rights groups, the Tennessee Wildlife Resources Agency (“TWRA”) and the National Rifle Association (“NRA”), the Tennessee General Assembly has settled on a hunting and fishing rights amendment. Although the amendment is not intended to go as far as advocated by the NRA due to concerns that the TWRA would not be able to adequately regulate hunting and fishing activities, it reaches beyond being superfluous. [FN266] The Tennessee constitution, in its current form, authorizes the general assembly “to enact laws for the protection and preservation of Game and Fish, within the State” and allows such laws to be “applied and enforced in particular Counties or geographical districts, designated by the General Assembly.” [FN267] Under the proposed amendment, the Tennessee General Assembly will retain the authority to regulate hunting and fishing, but its regulations must be reasonable. [FN268] The framers of this

amendment are quite consciously directing courts toward applying a rational basis standard of review, but a rational basis standard that is assessed against the specific goal of preserving hunting and fishing. [FN269] Under the amendment, the right to hunt, fish, and harvest game is a personal right that is limited to subsistence and recreation and does not extend to commercial hunting or fishing activities, which have been exempted from the constitutional protections of the provision and placed firmly under the state's absolute regulatory authority. [FN270] The amendment does not alter existing property rights on either public or private lands. [FN271] Although the amendment subjects hunting and fishing rights to reasonable regulations, those regulations cannot include the prohibition of traditional manners and means of taking game except insofar as necessary to preserve or conserve game for the purposes of hunting or *92 fishing. [FN272] The amendment does not extend the constitutional right to hunt, fish, or harvest game to threatened species. [FN273] The provision also imposes an affirmative duty upon the general assembly, the governor, and the various state departments and agencies to act to preserve and protect hunting and fishing. [FN274] It is the duty of the State to conserve and protect game and fish for purposes of maintaining the ability of Tennesseans, present and future, to continue to engage in hunting and fishing. [FN275]

While the aforementioned is a general outline of the proposed amendment's impact, there are a number of additional effects that attorneys and interested parties should consider. One effect that attorneys should consider when litigating cases is the impact the constitutionalization of this provision will have on statutory interpretation. Like many other courts, [FN276] Tennessee state courts have long employed the constitutional conflict avoidance principle as a canon of statutory construction. [FN277] If a statute can legitimately be construed in more than one manner and one of the constructions presents a constitutional conflict, it is the duty of a Tennessee state court to adopt an interpretation that will avoid the conflict. [FN278] Thus, in every case in which a statute has more than a de minimis adverse impact on the right to hunt or fish, an attorney is empowered under the constitutional avoidance canon of construction to impress upon the courts the need to narrowly construe the statute where necessary to avoid a serious constitutional conflict. [FN279] Although Tennessee courts are *93 unlikely to allow this to run too far afield, the array of statutes and circumstances potentially implicated is enormous, ranging from rural development projects to wildlife programs.

The implementation of this canon of construction could have a potentially significant impact on the passage of laws that affect hunting and fishing rights. The constitutional avoidance canon functions in a manner similar to the clear statement rule applied by federal courts in cases implicating federalism concerns, [FN280] which effectively requires the legislature to offer a clearer statutory statement when legislating on matters that threaten to create constitutional conflicts. [FN281] Use of the avoidance canon “can produce an immediate result favorable to the party seeking the shelter of the Constitution without causing the Court to adjudicate issues it should not.” [FN282] It also encourages “legislators to *94 reflect and deliberate before plunging into constitutionally sensitive issues.” [FN283] By utilizing this approach, a court “keeps the political process in play” [FN284] without necessarily barring a legislature from determining that it wishes to test those constitutional waters. Part of that interplay is clear notice to the pubic and removal of any uncertainty among legislators that a particular constitutional interest is being addressed through a statute, which affords an opportunity for opponents to “mobilize their forces.” [FN285] A clearer statement also fosters political accountability. [FN286] In effect, if the Tennessee General Assembly wishes to pass legislation that raises serious constitutional concerns, it must precisely define what it is doing, which certainly provides an opportunity for participation of the electorate and advocacy groups.

While the constitutionalization of hunting and fishing rights measures will certainly impact cases before state courts, the political branches' adherence to the restrictions and pursuit of the affirmative goals of the hunting and fishing rights amendment has the potential to have an even more significant practical impact on the fulfillment of these rights. “Even under a robust judicial supremac[y model], the executive admittedly has significant space and responsibility to interpret and apply the Constitution.” [FN287] Nor may it be seriously doubted that legislators play an extremely important role in upholding both their oath [FN288] and the state constitution by considering the constitutionality of measures during the lawmaking process. [FN289]

*95 With regard to regulations, policies, contracts, or legislative drafting assistance, state attorneys, working in both the executive and legislative branches, can bring a rich understanding of the state constitutional law to assist their departments or agencies in operating within the strictures of these constitutional provisions. [FN290] State attorneys have a particularly important role in advising state officials as to rights under state constitutions. [FN291] For example, it is beyond doubt that "[t]he Tennessee attorney general . . . play[s] an important role in construing the Tennessee Constitution . . . [through] hundreds of opinions on pending legislation." [FN292] Deferential aspects of judicial under-*96 enforcement of constitutional rights, structural limits on the courts' jurisdiction, and greater effectiveness of legislative or executive intervention render constitutional actualization by the political branches a critical component for vindication of constitutional rights, even in a system possessing a strong judicial supremacy commitment. [FN293]

VI. Are These Types of Constitutional Provisions Appropriate for State Constitutions?

Since the Civil War, the federal government's power vis-a-vis the states has steadily, though not invariably, [FN294] increased. [FN295] The Civil War Amendments, as well as the Sixteenth and Seventeenth Amendments, have contributed *97 significantly to this strengthened position of the federal government. [FN296] Additionally, the New Deal and Great Society programs and the emergence of the modern regulatory state have further expanded federal power. [FN297] Moreover, the incorporation of the majority of the Bill of Rights provisions against the states and the expansive interpretation assigned to the Commerce Clause, the Taxing and Spending Clause, and the Necessary and Proper Clause have instituted a profound structural change in the federal-state relationship. [FN298] In this existent system of federalism, "[s]tate constitutions have a chameleon-like quality. They are at once supreme, constitutional documents, taking precedence over all other forms of state law, and at the same time subservient, lesser forms of law, giving way to any kind of valid federal law, authorized by the federal constitution, including . . . administrative regulations." [FN299] Not surprisingly, the normative role of state constitutions is a matter of some uncertainty.

Although the Bill of Rights grew out of a number of corresponding provisions in state constitutions, [FN300] it did not apply to the states prior to the enactment of the Civil War amendments. [FN301] Thus, to pursue fundamental rights such as the right to a jury trial or free speech, parties looked solely to state courts and the corresponding provisions under their state constitutions to *98 vindicate those rights when violated by state or local governments. [FN302] However, with incorporation, state constitutions became secondary to the federal Constitution in vindicating these rights, especially with the rapid changes instituted under the Warren Court. [FN303] The practical impact of the Warren Court on state constitutions was to increase the federalization of individual rights; consequently, state constitutional claims became distinctly secondary, if considered at all. [FN304] Reflecting upon this time period, Justice Brennan wrote, "I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions." [FN305] Simply stated, "it was easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law." [FN306] Litigants pressed federal rather than state claims, even before state courts. It has been suggested that "[a] generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of the Warren Court decisions left state constitutional law in a condition of near atrophy in most states." [FN307]

State constitutionalism reemerged, however, as the Burger and Rehnquist Courts began to reverse course from the pathway of the Warren Court. [FN308] Some state courts began to find that their state constitutions imposed more stringent limitations than the federal Constitution. [FN309] In an article published in the Harvard Law Review in 1977, Justice Brennan encouraged state courts to continue to do precisely that and, in fact, to expand their efforts thereupon. [FN310] Justice Brennan's appeal became immersed in politics, largely because it appeared to constitute a naked political end-run around the U.S. Supreme Court's conservative course change in criminal cases. [FN311] The "new judicial *99 federalism" that was sparked

from Brennan's appeal has been praised and championed, [FN312] or alternatively, condemned and ridiculed. [FN313] Regardless of his motivations, Brennan was undoubtedly correct that state courts are the supreme arbiter of the meaning of the rights guaranteed under their state constitutions; [FN314] furthermore, he helped breathe new energy into the debate of state constitutional rights. [FN315] The continuing maturation and intellectual growth stemming from the seeds of Brennan's new judicial federalism is evident in both state court decisions and the correlated choices of activists selecting that forum for pursuing legal, political, and social change via the courts. [FN316] Outside the realm of criminal law, the expanding impact of this new wave of judicial federalism has perhaps most prominently manifested in judicial decisions relating to civil unions and marriage for gay couples, [FN317] de facto economic segregation in school districts, [FN318] and exclusionary residential zoning policies. [FN319]

Although attorneys, judges, and scholars primarily focus on state constitutional provisions that correspond with a federal constitutional right, an equally important, yet less explored, area is the role of state constitutional rights that have no federal counterpart. [FN320] State constitutions "confer rights with *100 respect to agendas that federal constitutional law does not address . . . [and] authorize remedies that federal constitutional law does not contemplate." [FN321]

As an essential element of federalism, "state constitutions have long been understood as potential sources for more substantial rights than the federal Constitution." [FN322] State constitutions, unlike their federal counterpart, "are rich sources of substantive provisions" that "reflect public policy." [FN323] The right to an education [FN324] provides the primary manifestation of such a state constitutional measure, but social welfare, [FN325] environmental, [FN326] victims' rights, [FN327] and open courts [FN328] provisions also exemplify significant protections that appear in state constitutions but not the federal Constitution. "The full potential of state constitutionalism . . . lies not merely in the reinterpretation under the state constitution of similar rights conferred by the Federal Constitution, but in giving effect to distinct rights embodied in the state constitutions." [FN329] With regard to the non-corresponding constitutional rights provisions, state courts' jurisprudence stands independent of the shadow of federal court analysis. [FN330]

Nevertheless, some critics suggest that state constitutions err by deviating from the federal model and should instead adhere closely thereto. [FN331] This advice *101 is "highly questionable." [FN332] Although scholars reflexively view deviations from the federal model as rendering state constitutions essentially "non-constitutional," [FN333] this reflex reflects an errant understanding. [FN334] It is important for one to remember that:

> [a]ll state constitutions contain . . . provisions that address policy concerns and other more mundane matters. Instead of lamenting the inclusion of these "non-constitutional" provisions in state constitutions, one needs to recognize that state constitutions differ from the Federal Constitution in their underlying character, and that this difference-not an ineptitude in constitutional design-explains much of what is included in state constitutions. [FN335]

States have developed as distinct political communities with qualities formed in part by their "history, geography, economy, [demographics,] and relationship to the rest of the country," and it is that identity which finds some expression in a state constitution. [FN336] State constitutions provide a forum for protecting and promoting [FN337] the values of a state. [FN338] Whether ruling in the context of a constitutional provision that corresponds with a federal constitutional right or one that exists solely under the state constitution, state constitutionalism enables a state's judiciary to respond to local practices, concerns and values, the state s history, and the specific text of the state constitutional provision. [FN339] States are also empowered to recognize their distinct political responsibilities and status vis-a-vis the federal government, which suggests a certain shared commonality among states with regard to state constitutionalism standing in contrast to federal

constitutionalism. [FN340]

In terms of constitutionalizing rights that have no corresponding federal counterpart, the use of state constitutions to address controversial social policies is a flourishing practice. [FN341] While the merits of this practice can certainly be *102 questioned, [FN342] it is not a new phenomenon. [FN343] Since Aristotle outlined his version of constitutionalism more than two millennia ago, there has been an understanding that one of the three primary dimensions of constitutionalism is a constitution's establishment of "the moral dimensions of the body politic." [FN344] As an illustration, Vermont became the first state to abolish slavery in its 1777 state constitution, [FN345] and Pennsylvania soon followed in 1780. [FN346] While of lesser import than banning slavery, historically, states have addressed other social issues through their state constitutions, including prohibition of (1) gambling, [FN347] with a special focus on lotteries, [FN348] (2) dueling, [FN349] (3) alcohol production, consumption, and distribution, [FN350] and (4) polygamy. [FN351]

Contemporary attempts to turn existing majority consensuses on certain social issues into constitutional provisions have been part of what noted state constitutional law scholar G. Alan Tarr identifies as "constitutional populism." [FN352] While the federal Constitution "has always been suspicious of the perils of populism," [FN353] state constitutions are, in comparison, vastly more populist in nature. [FN354] They are relatively easy to amend, and citizens have *103 tremendous control and influence over the amendment process in many states. [FN355]

The latter half of the twentieth century witnessed the emergence of a second wave of populism in state constitutional reform. [FN356] These constitutional populists had "largely a negative [agenda], concerned with preventing or combating impositions by government." [FN357] Over the last two decades, "constitutional populists have shifted their attention from questions of governmental structure, responsiveness, and expense to questions of substantive policy." [FN358] These constitutional populists believe that government is "unaccountable and beholden to special interests." [FN359] Accordingly, in their view it is "important to limit [the government s] power by constitutionalizing policy choices and circumscribing officials' freedom of action." [FN360] That policy limitation also applies to the judiciary. The electorate appears to have grown increasingly suspicious that judges are asserting their own policymaking preferences into judicial decisions, and accordingly, have taken action on a state level to limit the decisional capacities and policy pursuits available to courts. [FN361]

The constitutionalization of issues of public concern provides a forum for settlement of "major societal conflicts." [FN362] Entrenchment of the then prevailing majority view results, and "entrenchment is one of the primary purposes of constitutionalism." [FN363] The raison d'etre of a constitution "is to prevent change-to embed certain rights in such a manner that future generations cannot readily take them away." [FN364] Although state constitutional provisions certainly qualify as entrenched, they do not have anywhere near the degree of obduracy to change of federal constitutional provisions. "The measure of how difficult it is under the formal legal process to change a constitutional rule or norm is an assessment of the obduracy of the rule or norm; the existence of a formal heightened legal procedure to change the rule or norm is its entrenchment." [FN365] Accordingly, because the relative ease of amendment on *104 contentious issues, state constitutions, in comparison with the federal Constitution, arguably "resemble relational contracts of medium-term duration." [FN366]

Understandably, there is concern that "[h]ighly contentious economic and social issues avoided by legislatures have come to dominate the agenda, exacerbating splits among the populace." [FN367] Contentious issues, including gay rights and affirmative action, have figured prominently in recent state constitutional battles. [FN368] Additionally, state constitutions have been derided as being "haphazardly and improvidently" amended to include trivial provisions. [FN369] The embedding of narrow social or economic issues in a state constitution threatens to convert a state constitution into an ineffectual symbolic document that is little more than a "junkyard." [FN370] Furthermore, such excessive constitutionalization poses the

danger of creating unwarranted governmental rigidity. [FN371] Limitations on the government s ability to act, that is to be *105 responsive to public concerns, and obsolescence should be of concern when constitutionalizing an issue. [FN372]

One of the best critiques of the constitutionalization of hunting and fishing rights as a specific enactment was offered by the invariably bitingly-witty and often provocative Tennessean columnist Larry Daughtrey, who both mocked the idea of hunting and fishing rights being threatened in Tennessee and ridiculed the general assembly=s priorities. [FN373] In responding to the Tennessee General Assembly's completion of the first step of the process to constitutionalize hunting and fishing rights, Daughtrey stated, in part:

> That's why I'm glad the legislature is still hanging around Nashville looking after our interests, although its work product seems rather slim in most tallies. Our schools are still bad, our tax system is a shambles, the economy has tanked, the governor is about to lay off state employees, and bridges are about to fall in rivers.
>
> Still, the legislature is taking care of the important things.
>
> Here's one you may not have heard about: They re about to guarantee our right to hunt and fish. And they're about to do it in the state constitution.
> . . . .
>
> If all goes well, we ll all be able to vote for that sucker by about a 95 percent margin in November 2010, and write it into the constitution.
>
> You didn t know there was any question about being able to hunt and fish? That s because you're not as clued in as the legislature. They have heard reports of thousands of PETA parties, right on the square in the light of day in Columbia, Springfield, Sparta, Winchester, Carthage, Pulaski and as near as Eighth and Broadway in Nashville.
> . . . .
>
> Maybe it will all turn out OK. After all, the legislature has protected us before from things we didn t know were sneaking up on us.
> . . . .
>
> They have . . . rushed into our constitution a prohibition against gay marriage, stopping in their tracks the half-dozen couples who were on the verge of making Tennessee into a sinful marriage mill.
>
> Maybe next year they will expand our constitutional rights some more, like guaranteeing our heritage of making moonshine and having rooster fights without the sheriff butting in. That rarely happens, but you can t be too careful about our way of life. [FN374]

While some recent state constitutional endeavors have warranted derision, it must be understood that states are working within a circumscribed field. The federal Constitution and the federal courts, as well as federal statutes and administrative regulations, limit the states within a sphere that they may not *106 exceed. [FN375] In other words, the states are operating within a limited field; [FN376] the federal Constitution and federal law generally have already provided the floor below which rights cannot fall. [FN377] Nevertheless, significant operational space remains. [FN378] Within this open area, states are able to reflect the diversity of their political culture and to serve as the laboratories of democracy. In constitutionalizing issues of public

concern, it is the electorate that provides the energy behind these efforts-state constitutions "are far more readily transformed through the political activity of citizens than is possible under the U.S. Constitution." [FN379] Empowering the electorate to participate in directing the course of the state s constitution, rather than simply leaving this task to judiciary, "has made state constitutional politics an increasingly dynamic and energetic form of political contestation in recent times." [FN380] An element of identity politics is certainly at work in these movements to alter and amend state constitutions, including serving a "normative need to have one s values and identity reproduced and validated." [FN381] However, the danger of such constitutionalization is that:

> [o]ver-constitutionalization forces some in the polity to become subordinate to the values and conceptions of the good of others and thus threatens to de-legitimize the Verfassungsstaat [state rule through the constitution]. . . . In the final analysis, over-constitutionalization gives rise to a very similar problem to that produced by strict Kantian autonomy. In the latter case, legitimate law is bound to alienate one from one's own interests as the right must remain above all interest; in the former, one always risks alienation from one's own interests to the extent that the constitution enshrines conflicting interests. In a pluralist polity, this means a sizeable portion of the citizenry will remain significantly alienated from the dictates emanating from the prevailing substantively grounded legal-constitutional regime. [FN382]

Given the aforementioned considerations, the appropriateness of constitutionalizing a right to hunt and fish is certainly a matter of legitimate debate. When "evaluating any proposal to include a particular . . . provision in a state constitution[, the basic inquiry] should be whether the value of embodying this proposal in higher law, beyond change by normal lawmaking processes, is *107 greater than the cost of so doing." [FN383] In the case of the proposed Tennessee amendment, the rigidity and divisiveness concerns are not so significant as to warrant its exclusion. The proposed Tennessee amendment does not eliminate the ability of the general assembly to regulate hunting and fishing; rather, it requires the preservation of hunting and fishing, imposes a limitation on laws relating to hunting insofar as they must be reasonable, and prohibits restricting traditional means of hunting and fishing. [FN384] The amendment internally allows for flexibility, except for accommodation of a competing moral paradigm that hunting and fishing should be restricted as a violation of animal rights. While there are principled and vocal opponents of hunting and fishing within Tennessee who can and would advocate such a view, the legislative history of this provision makes it readily apparent that a pro-hunting and fishing rights stance is not particularly divisive within the state of Tennessee. [FN385]

Instead the critical inclusion/exclusion questions with regard to the constitutionalization of the proposed Tennessee hunting and fishing rights amendment are the ones underlying Larry Daughtrey's critique. [FN386] Tennesseans must ask whether hunting and fishing rights are of "such enduring importance that we are willing to bind ourselves to it more firmly than by ordinary legislation," and whether any true, long-term danger to hunting and fishing rights exists in Tennessee. [FN387] That hunting and fishing are of enduring and intense cultural significance in Tennessee is beyond reasonable dispute, [FN388] but cultural importance alone is insufficient to justify constitutionalization. Otherwise, a college football preservation amendment should shortly follow. [FN389] Rather, the proposal gains legitimacy because the question of animal rights versus hunting and fishing rights has emerged as a national issue of debate in which animal rights activists have attained a certain measure of progress. Furthermore, the historical pedigree of the right to hunt also cannot be ignored. *108 While changing conditions, notably the evolution of hunting and fishing into more of a recreational activity less tied to obtaining food and clothing for survival, undermine the full force of this lineage, it does not eliminate it entirely. This lineage provides a broad historical sweep from ancient Rome to Runnymede to Tennessee, where the general assembly found that "hunting and fishing are honored traditions in the state of Tennessee," that "from the time prior to statehood, citizens have enjoyed the bounty of Tennessee's natural resources, including hunting and fishing for subsistence and recreation," and that "hunting

and fishing are a vital part of this state s heritage." [FN390] As for the danger posed to such rights, even a cursory review of the legislative history surrounding the passage of House Joint Resolution 108 reveals that Tennessee=s hunters and fishermen are well represented in the general assembly to protect against a complete abridgement of hunting and fishing rights. Advocates for hunting and fishing rights, however, are concerned that their numbers are dwindling as the demographics of the state of Tennessee change. On November 2, 2010, the voters of Tennessee will most likely have the opportunity to determine whether they believe that the right to hunt, fish, and harvest game is of such enduring importance-and the aforementioned challenge to those rights sufficiently real-so as to warrant inclusion of such provisions in the constitution. Regardless of whether the voters adopt or reject the amendment, dynamism among the electorate in reaching that conclusion will produce a further constitutional populism bent to the formation of the Tennessee constitution.

Conclusion

In ancient Rome, the right to hunt and fish was divined as a matter of natural law. The capture of a wild animal established the hunter's ownership thereof. Although such an understanding existed in England prior to the Norman Conquest, generations of kings and later the British nobility eliminated hunting and fishing rights, instead converting them into privileges of kingship and nobility. Such restrictions were firmly rejected in the colonies and later the United States. Early in the history of the United States, both Pennsylvania and Vermont constitutionalized the right to hunt and fish, firmly opposing the European-style restrictions of such rights to elites, and the right to hunt and fish was even proposed for inclusion in the federal Constitution. However, the constitutionalization of hunting and fishing rights did not advance in other states in the early years of the republic. Frankly, there appeared to be no serious threat posed to such rights so as to warrant their inclusion in a state constitution.

It was not until hunters and fishermen perceived that the animal rights movement was making progress in curtailing their rights that a dramatic movement towards constitutionalization was spurred. Seeking to entrench *109 hunting and fishing rights for future generations, hunters, fishermen, their advocates, and legislative supporters have succeeded in constitutionalizing such rights in an increasing number of states. Although these provisions offer hunters and fishermen additional protections, these provisions do not prohibit states from regulating such activities.

The movement to constitutionalize hunting and fishing rights is emblematic of constitutional populism's emergence as a form of constitutional policymaking by the citizens on the state level. During the last three decades, constitutional populists have expressed their profound distrust of government and courts by seeking to narrow the potential range of policy choices of state executives, agencies, legislatures, and courts. By enshrining hunting and fishing rights provisions in state constitutions, the electorates of various states are expressing the importance of preserving and protecting these activities as a significant part of their state's heritage and culture. They are seeking to hold courts and the political branches of government to these principles. In the final analysis, "[t]hough constitutional amendment in the states might not always take place with the type of measured reflection that many deem desirable, it does help to ensure that state constitutions are charters more truly reflective of the ever-developing values of a democratic body politic . . . ." [FN391] Tennessee s voters likely will have to decide on November 2, 2010, whether hunting and fishing rights are reflective of their body politic.

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opinions expressed herein and any mistakes are exclusively the author's.

[FN1]. H.R.J. Res. 108, 105th Gen. Assem., 2d Sess. (Tenn. 2008). Of the ninety-nine members of the Tennessee House of Representatives, ninety-one members sponsored the resolution, including forty-nine Democrats and forty-two Republicans. Id. The house Democrat sponsors include Representatives Eddie Yokley, John Litz, Michael McDonald, Joe Armstrong, Eddie Bass, Bob Bibb, Stratton Bone, Willie Borchert, Tommie Brown, Frank Buck, Curt Cobb, Kent Coleman, Barbara Cooper, Charles Curtiss, John DeBerry, Lois DeBerry, Joanne Favors, Dennis Ferguson, Henry Fincher, Craig Fitzhugh, George Fraley, Brenda Gilmore, Jim Hackworth, G.A. Hardaway, Bill Harmon, John Hood, Sherry Jones, Ulysses Jones, Mike Kernell, Mark Maddox, Larry Miller, Gary Moore, Gary Odom, Phillip Pinion, Joe Pitts, Mary Pruitt, Randy Rinks, Johnny Shaw, David Shepard, Janis Baird Sontany, John Tidwell, Harry Tindell, Joe Towns Jr., Mike Turner, Nathan Vaughn, Ben West Jr., John Windle, Les Winningham, and then-Speaker Jimmy Naifeh. Id. The house Republican sponsors include Representatives Joe McCord, Curry Todd, Joey Hensley, Dolores R. Gresham (now Senator Gresham), Tom DuBois, Frank Niceley, Curtis Johnson, William Baird, Mike Bell, Harry Brooks, Kevin Brooks, Stacey Campfield, Glen Casada, Jim Cobb, Jim Coley, Chris Crider, Vince Dean, Bill Dunn, Jimmy Eldridge, Richard Floyd, Dale Ford, Michael Harrison, Beth Harwell, David Hawk, Matthew Hill, Phillip Johnson, Ron Lollar, Jon Lundberg, Debra Maggart, Judd Matheny, Jimmy Matlock, Gerald McCormick, Steve McDaniel, Richard Montgomery, Jason Mumpower, Doug Overbey (now Senator Overbey), Dennis Roach, Donna Rowland, Charles Sargent, Eric Swafford, Eric Watson, and Kent Williams (now Speaker Williams). Id.

[FN2]. Id. Of the thirty-three members of the Tennessee Senate, nine senators sponsored the resolution, including six Democrats and three Republicans. Id. The senate Democrat sponsors include Senators Doug Jackson, Joe Haynes, Roy Herron, Tommy Kilby, Steve Roller, and Andy Berke. Id. The senate Republican sponsors include Raymond Finney Jr., Mark Norris, and Mae Beavers. Id.

[FN3]. Id.

[FN4]. Tenn. Const. art. XI, § 3.

[FN5]. Id.

[FN6]. Id.

[FN7]. Id.

[FN8]. Id.

[FN9]. See, e.g., Bob Hodge, Butler Advocating Right to Hunt, Fish, Knoxville News Sentinel, Oct. 19, 2008, at D8.

[FN10]. See infra Parts I, II.A.

[FN11]. See infra Part II.B.1-2.

[FN12]. See infra Part II.B.3.

[FN13]. See infra Part III.

[FN14]. See infra Part IV.

[FN15]. See infra Part V.

[FN16]. See infra Part VI.

[FN17]. See infra Part VI.

[FN18]. For an informative discussion of modern and historic hunting beyond western legal history, see generally Thomas T. Allsen, The Royal Hunt in Eurasian History (2006); Christian Le Noel, On Target: History and Hunting in Central Africa (1999); Wildlife Resources: A Global Account of Economic Use (Harald H. Roth & G nter Merz eds., 1997).

[FN19]. Michael C. Blumm & Lucus Ritchie, The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife, 35 Envtl. L. 673, 677 (2005).

[FN20]. Id.

[FN21]. Id. at 677-78; see also The Institutes of Justian 37 (J.B. Moyle trans., Oxford at the Clarendon Press 5th ed. 1913) (Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for this natural reason admits the title of the first occupant to that which previously had no owner.

[FN22]. See Richard A. Pacia & Raymond A. Pacia, Roman Contributions to American Civil Jurisprudence, R.I. B.J., May 2001, at 5, 32.

[FN23]. Blumm & Ritchie, supra note 19, at 678.

[FN24]. James B. Whisker, The Right to Hunt 51 (2d ed. 1999); Michael E. Field, The Evolution of the Wildlife Taking Concept from Its Beginning to Its Culmination in the Endangered Species Act, 21 Hous. L. Rev. 457, 460 (1984). Dividing species of animals into categories of those available for elites to hunt and those available for peasants is a practice that has existed in societies since the shift from hunting and gathering to the cultivation of land. Emma Griffin, Blood Sport: Hunting in Britain Since 1066, at 6 (2007). In the Old Kingdom of Ancient Egypt, Pharaohs and other “dignitaries hunted large animals for recreation: the peasants hunted smaller animals - geese, ducks and quail - to supplement their meagre diets.” Id.

[FN25]. See generally Hugh M. Thomas, The Norman Conquest: England After William the Conqueror (2008); Andrew Simmonds, Amah and Eved and the Origin of Legal Rights, 46 S.D. L. Rev. 516, 577-81 (2001).

[FN26]. 2 William Blackstone, Commentaries *415; Griffin, supra note 24, at 16; Andrea McDowell, Legal Fictions in Pierson v. Post, 105 Mich. L. Rev. 735, 745 (2006) (citing Charles Donahue, Jr., Animalia Ferae Naturae: Rome, Bologna, Leyden, Oxford and Queen's County, N.Y., in Studies in Roman Law in Memory of A. Arthur Schiller 39, 61 (Roger S. Bagnall & William V. Harris eds., 1986)).

[FN27]. McDowell, supra note 26, at 745-46; see also Field, supra note 24, at 461; James L. Huffman, Speaking of Inconvenient Truths-A History of the Public Trust Doctrine, 18 Duke Envtl. L. & Pol'y F. 1, 81 (2007) (quoting Bracton, 2 De Legibus et Consuetudinibus Angliae 41 (1256)).

[FN28]. Griffin, supra note 24, at 19.

[FN29]. See generally Griffin, supra note 24, at 15-24.

[FN30]. McDowell, supra note 26, at 745; see also 1 Halsbury's Laws of England, Animals 529-616 (2d ed. 1931)) (“English law transformed to allow game hunting only upon the crown's permission, ratione privlegi.”); Dale D. Goble, Three Cases / Four Tales: Commons, Capture, the Public Trust, and Property in Land, 35 Envtl. L. 807, 822-30 (2005); J. M. Kelley, Implications of a Montana Voter Initiative that Reduces Chronic Wasting Disease Risk, Bans Canned Shooting, and Protects a Public Trust, 6 Great Plains Nat. Resources J. 89, 91-92 n.21 (2001) (citing 15 Halsbury's Laws of England, Game 406-65 (2d ed. 1931)).

[FN31]. Constable's Case, (1601) 77 Eng. Rep. 218, 223 (K.B.).

[FN32]. 2 William Blackstone, Commentaries *417. See generally Huffman, supra note 28, at 81-82.

[FN33]. P. B. Munsche, Gentlemen and Poachers: The English Game Laws 1671-1831, at 9 (1981).

[FN34]. Id.

[FN35]. Whisker, supra note 24, at 44.

[FN36]. Field, supra note 24, at 461.

[FN37]. Roger B. Manning, Forest Laws, in Historical Dictionary of Stuart England, 1603-1689, at 200 (Ronald H. Fritze et al. eds., 1996).

[FN38]. Whisker, supra note 24, at 55.

[FN39]. Id.

[FN40]. Id.

[FN41]. Griffin, supra note 24, at 20 (quoting William of Newburgh, The History of William of Newburgh 408 (Joseph Stevenson trans, 1996)).

[FN42]. Field, supra note 24, at 461. See generally J. C. Holt, Magna Carta (1992); William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John (1914).

[FN43]. Manning, supra note 37, at 200; see also Griffin, supra note 24, at 34-48, 62; Munsche, supra note 33, at 9. At least two provisions of Magna Carta are directly related to the barons' concerns regarding their hunting rights. Chapter 47 provides that

“[a]ll forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river-banks that have been placed ‘in defence’ by us in our time.” Magna Carta ch. 47, reprinted in McKechnie, supra note 42, at 435. Chapter 48 states that: [a]ll evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river-banks and their wardens, shall immediately be inquired into in each county by twelve sworn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, be utterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

Magna Carta ch. 48, reprinted in McKechnie, supra note 42, at 438-39.

[FN44]. Manning, supra note 37, at 200.

[FN45]. Griffin, supra note 24, at 62.

[FN46]. Id.; McDowell, supra note 26, at 745-46.

[FN47]. McDowell, supra note 26, at 745-46.

[FN48]. Griffin, supra note 24, at 62.

[FN49]. Munsche, supra note 33, at 9-10.

[FN50]. Griffin, supra note 24, at 19.

[FN51]. Munsche, supra note 33, at 10.

[FN52]. Griffin, supra note 24, at 19-20, 46, 62.

[FN53]. Hope M. Babcock, Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things that Go Bump in the Night, 85 Iowa L. Rev. 849, 881 n.133 (2000); Manning, supra note 37, at 200.

[FN54]. See Munsche, supra note 33, at 8; Nicholas A. Robinson, The 'Ascent of Man': Legal Systems and the Discovery of an Environmental Ethic, 15 Pace Envtl. L. Rev. 497, 500 (1998).

[FN55]. An English Civil War that began during the reign of Charles I resulted in the execution of the King and the empowerment of Oliver Cromwell, which caused further societal distress and upheaval that finally calmed when Charles II ascended to the throne in the Restoration of 1660. Scott D. Gerber, The Court, the Constitution, and the History of Ideas, 61 Vand. L. Rev. 1067, 1106-09 (2008); A.E. Dick Howard, The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World, 42 U. Rich. L. Rev. 9, 19-21 (2007).

[FN56]. Munsche, supra note 33, at 23-24.

[FN57]. Id. at 9-10.

[FN58]. Id. at 16.

[FN59]. Id. at 12-19.

[FN60]. Griffin, supra note 24, at 62; McDowell, supra note 26, at 745-46.

[FN61]. Griffin, supra note 24, at 110-11.

[FN62]. Munsche, supra note 33, at 13; see also 1 Halsbury's Laws of England, Animals 529-616 (2d ed. 1931)); Kelley, supra note 30, at 92 n.21 (citing 15 Halsbury's Laws of England, Game 406-65 (2d ed. 1931).

[FN63]. Munsche, supra note 33, at 16.

[FN64]. Id. at 13 ("The qualified sportsman . . . was, of course, still subject to the law of trespass, but by another law passed in 1671 plaintiffs in trespass cases could not be awarded full costs unless the damages were found to exceed 40s. Since the latter was unlikely to occur in a case of simple trespass by a sportsman, suits against qualified gentlemen were effectively discouraged.").

[FN65]. Griffin, supra note 24, at 111.

[FN66]. The term “nimrod” has not always had the negative connotation that it has today:
Nimrod was an Old Testament king whom the Bible calls a mighty hunter before the Lord.@ A grandson of the ark-builder Noah, the mighty hunter Nimrod was also a founder of nations. He established the cities of Babylon, Akkad, and Nineveh, the capital of the Assyrian empire.

English speakers have used the name of this Assyrian king as a moniker for a skillful and daring hunter or sportsman. Recently, however, the word nimrod has suffered from disrespect. It s no longer a compliment to be considered a nimrod; it is, in fact, undesirable in most instances, because a 21st century nimrod is an obnoxious person, a jerk.

How has the mighty hunter and the founder of empires fallen so far from grace?

Evidence is meager, but this uncomplimentary sense of the word probably owes its currency to a 1940's Warner Brothers cartoon in which Bugs Bunny refers sarcastically to the hunter Elmer Fudd as a “poor little nimrod.” Stripped of all dignity in this lampoonish context, the word has since become increasingly abusive.

Popular media have used the word to designate dim-witted dweebs since at least the 1960s. Chrysti M. Smith, Verbivore s Feast: A Banquet of Word & Phrase Origins 243 (2004).

[FN67]. 2 William Blackstone, Commentaries *416.

[FN68]. Munsche, supra note 33, at 16-19.

[FN69]. Id.

[FN70]. Adrian Harvey, The Beginnings of a Commercial Sporting Culture in Britain, 1793-1850, at 67 (2004); Munsche, supra note 33, at 22-23.

[FN71]. Robert F. Kennedy, Jr., Falconry: Legal Ownership and Sale of Captive-Bred Raptors, 4 Pace Envtl. L. Rev. 349, 363 (1987).

[FN72]. Munsche, supra note 33, at 20-27.

[FN73]. Field, supra note 24, at 461.

[FN74]. 4 William Blackstone, Commentaries *175.

[FN75]. Harvey, supra note 70, at 67; Lynn Hunt et al., The Making of the West: Peoples and Cultures a Concise History 622 (2006); The Jurist, Apr. 10, 1847, at 1-2; The Game Laws, Westminster Review, reprinted in The Spirit of the Times 426-27 (Thomas Dolby 1825). See generally Edward Christian, A Treatise on the Game Laws (1817). One American court described the view of English game laws as follows:

[The game laws] have long been considered, by many of their soundest jurists, as an anomaly in their admirable system of municipal jurisprudence. Mr. Justice Willes says, “nothing can be more oppressive than the present system of the game laws;” and Blackstone, speaking of the same subject, says, “yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge, that, in their present shape, they owe their immediate origin to slavery.”

Johnson v. Patterson, 14 Conn. 1, 4 (1840) (citation omitted) (tracing the English rule making lawful the use of a spring-gun to defend one's property to England's historical system of game laws).

[FN76]. F. David Roberts, The Social Conscience of the Early Victorians 52 (2002).

[FN77]. See Peter L. Atkinson, Making Game: An Essay on Hunting, Familiar Things, and the Strangeness of Being Who One Is 61-62 (2009); Stuart Carroll, Blood and Violence in Early Modern France 62-65 (2006); J. P. Cooper, Land, Men and Beliefs: Studies in Early-Modern History 126 (1983); John P. McKay et al., A History of Western Society Since 1300, at 664 (9th ed. 2007).

[FN78]. Cooper, supra note 77, at 126.

[FN79]. David B. Kopel, The Catholic Second Amendment, 29 Hamline L. Rev. 520, 562-63 (2006).

[FN80]. Annabel S. Brett, Liberty, Right and Nature: Individual Rights in Later Scholastic Thought 132 (2003) (quoting Francisco de Vitoria, Commentarios a la Secundae de Santo Tomas 64.1.5 (V. Beltran de Heredia ed., 1934)). Such a position was consistent with the Catholic Church's by then longstanding view that "by divine providence [animals] are intended for man's use according to the order of nature. Hence it is not wrong for man to make use of them . . . ." 3 Saint Thomas Aquinas, Summa Contra Gentiles, reprinted in 2 Basic Writings of Saint Thomas Aquinas 222 (Anton C. Pegis ed., 1945). But while the killing of game by commoners to provide for their own meager diet did not raise moral concerns, leading lights of the Catholic Church were not so invariably fond of the sporting aspects of hunting. Sir Thomas More, Utopia 89-90 (trans. Ralph Robinson 1997).

[FN81]. Atkinson, supra note 77, at 62; see also Jean-Beno t Nadeau & Julie Barlow, Sixty Million Frenchmen Can't be Wrong: Why We Love France But Not the French 27 (2003).

[FN82]. Frank Maloy Anderson, The Constitutions and Other Select Documents Illustrative of the History of France: 1789-1901, at 11 (1904); see also George Rude, Revolutionary Europe 1783-1815, at 85 (2d ed., Blackwell Publishers 2000) (1964) (noting that in 1789 the National Assembly viewed hunting and fishing rights as among the inherent rights of the people that had been wrongfully usurped by the aristocracy).

[FN83]. See Contemporary Civilization Staff of Columbia Coll., Columbia Univ., Introduction to Contemporary Civilization in the West 544 (3d ed. 1961).

[FN84]. The Fundamental Rights of the German People art. IX, § 39 (repealed 1851).

[FN85]. See Kelley, supra note 30, at 91-92; see also Thomas A. Campbell, The Public Trust, What s it Worth?, 34 Nat. Resources J. 73, 74 (1994); Joseph L. Sax, Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1442 (1993); Anna R. C. Caspersen, Comment, The Public Trust Doctrine and the Impossibility of Takings by Wildlife, 23 B.C. Envtl. Aff. L. Rev. 357, 364-65 (1996). Historically, an abundance of wildlife has profoundly impacted the law on ownership and seizure of wildlife. See, e.g., Hugo Grotius, Mare Liberum 57 (Ralph Van Deman trans., 1916).

[I]n the case of the sea the same primitive right of nations regarding fishing and navigation which existed in the earliest times, still today exists undiminished and always will. . . . [E]very one admits that if a great many persons hunt on the land or fish in a river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea.

Id.

[FN86]. Goble, supra note 30, at 830 n.110.

[FN87]. Kennedy, supra note 71, at 363.

[FN88]. Thomas A. Lund, Early American Wildlife Law, 51 N.Y.U. L. Rev. 703, 705 (1976).

[FN89]. Atkinson, supra note 77, at 62; Blumm & Ritchie, supra note 19, at 686-90.

[FN90]. McConico v. Singleton, 9 S.C.L. (2 Mill) 244, 244-46 (1818).

[FN91]. State v. Campbell, T.U.P.C. 166, 168 (Ga. 1808).

[FN92]. Kennedy, supra note 71, at 363-64.

[FN93]. Pennslyania and the Federal Constitution 1787-1788, at 422, 462 (John Bach McMaster & Frederick D. Stone eds., 1888); Blumm & Ritchie, supra note 19, at 689 n.101.

[FN94]. See, e.g., Thomas Y. Davies, Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of Due Process of Law, 77 Miss. L.J. 1, 127-36 (2007); John F. Stinneford, The Original Meaning of Unusual : The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739, 1807 (2008); see also Paul Finkelman, A Well Regulated Militia : The Second Amendment in Historical Perspective, 76 Chi.-Kent L. Rev. 195, 198 (2000).

As they met with defeat in one state after another, the Antifederalists fell back to their secondary position of demanding amendments to alter the nature of the government. Thus, in a number of the states, the defeated Antifederalists proposed amendments that they hoped would be added after ratification. . . . The Antifederalists wanted the state ratifying conventions to endorse their proposed amendments.

Id. (footnote omitted).

[FN95]. Davies, supra note 94, at 131-32.

[FN96]. Id.

[FN97]. Paul Finkelman, It Really Was About a Well Regulated Militia, 59 Syracuse L. Rev. 267, 274 (2008).

[FN98]. See Finkelman, supra note 94, at 206-07.

[FN99]. Pennsylvania and the Federal Constitution 1787-1788, supra note 93, at 422, 462; Finkelman, supra note 94, at 207.

[FN100]. Pennsylvania and the Federal Constitution 1787-1788, supra note 93, at 422, 462.

[FN101]. Finkelman, supra note 94, at 206-07.

[FN102]. Id.

[FN103]. Warren E. Burger, The Right to Bear Arms, Parade Magazine, Jan. 14, 1990, at 4.

[FN104]. Id.

[FN105]. David B. Kopel, The Supreme Court s Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment, 18 St. Louis U. Pub. L. Rev. 99, 129 n.88 (1999).

[FN106]. Id.

[FN107]. See Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371, 388 (1978); Patsone v. Penn., 232 U.S. 138, 143 (1914).

[FN108]. See Landsen v. Hart, 168 F.2d 409, 412 (7th Cir. 1948); Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942); Terk v. Ruch, 655 F. Supp. 205, 209-10 (D. Colo. 1987); DeMasters v. Mont., 656 F. Supp. 21, 24 (D. Mont. 1986).

[FN109]. See Baldwin, 436 U.S. at 388-91; Schutz v. Thorne, 415 F.3d 1128, 1137 (10th Cir. 2005).

[FN110]. See Baldwin, 436 U.S. at 388; McCready v. Virginia, 94 U.S. 391, 395-96 (1876); 16B Am. Jur. 2d Constitutional Law § 775 (1998); 35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 8 (2001).

[FN111]. Commerce Clause challenges sometimes have proven successful. See generally Jay M. Zitter, Annotation, Validity, Construction, and Application of State Statutes Prohibiting, Limiting, or Regulating Fishing or Hunting in State by Nonresidents, 31 A.L.R. 6th 523 (2008). At present, however, Congress appears to have statutorily foreclosed the possibility of bringing suit under the Commerce Clause based upon discrimination against out-of-state residents. As part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Congress approved the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005. In this Act, Congress declared the following:

(1) IN GENERAL.-It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with issuance of licenses or permits for hunting or fishing.

(2) CONSTRUCTION OF CONGRESSIONAL SILENCE.-Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of Section 8 of Article I of the Constitution (commonly referred to as the "commerce clause") to the regulation of hunting or fishing by a State or Indian tribe. Pub. Law No. 109-13, § 6036(b), 119 Stat. 231, 289-90 (2005); see also Schutz, 415 F.3d at 1138; Eder v. Cal. Dep't of Fish and Game, 87 Cal. Rptr. 3d 788, 795 (Cal. Ct. App. 2009).

[FN112]. See Pa. Game Comm'n v. Marich, 666 A.2d 253, 257 (Pa. 1995).

[FN113]. Bishop v. United States, 126 F. Supp. 449, 451 (Ct. Cl. 1954).

[FN114]. See 2 Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States § 151 (1900).

[FN115]. Magner v. People, 97 Ill. 320, 333-34 (1881). This view is and has been extremely widespread among state courts. For example, the California Supreme Court has also stated:

Nor do we think that in giving the act this effect it contravenes the constitution of this state as being in excess of the police power of the state. The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.

Ex parte Maier, 37 P. 402, 404 (Cal. 1894); see also, e.g., Collopy v. Wildlife Comm'n, Dep t of Natural Res., 625 P.2d 994, 999-1000 (Colo. 1981); People v. Zimberg, 33 N.W.2d 104, 106 (Mich. 1948) ("It is universally held in this country that wild game and fish belong to the state and are subject to its power to regulate and control; that an individual may acquire only such limited or qualified property interest therein as the state chooses to permit."); Haggerty v. St. Louis Ice Mfg. & Storage Co., 44 S.W. 1114, 1114-15 (Mo. 1898); Fields v. Wilson, 207 P.2d 153, 156-57 (Or. 1949); Marich, 666 A.2d at 256; Ex parte Blardone, 115 S.W. 838, 840 (Tex. Crim. App. 1909).

[FN116]. David S. Rudstein, A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy, 14 Wm. & Mary Bill Rts. J. 193, 222 (2005).

[FN117]. 1 Bernard Schwartz, The Bill of Rights: A Documentary History 69 (1971).

[FN118]. The Massachusetts Body of Liberties § 16 (1641), reprinted in American Historical Documents 1000-1904, at 73 (Charles W. Eliot ed., 1910).

[FN119]. Id.

[FN120]. Charter of Connecticut (1662), available at http:// avalon.law.yale.edu/17th_century/ct03.asp.

[FN121]. Charter of Rhode Island and Providence Plantations (1663), available at http://www.sec.state.ri.us /pubinfo/rigomstatic/richarter.html.

[FN122]. Id.

[FN123]. Cultures and Identities in Colonial British America 107 (Robert Olwell & Alan Tully eds., 2006).

[FN124]. Id. at 107-08.

[FN125]. Id. at 108.

[FN126]. The Frame of the Government of the Province of Pennsylvania and, Territories Thereunto Annexed, in America § 22 (1683), available at http:// avalon.law.yale.edu/17th_century/pa05.asp.

[FN127]. The Frame of Government of the Province of Pennsylvania, and the Territories Thereunto Belonging (1696), available at http:// avalon.law.yale.edu/17th_century/pa06.asp.

[FN128]. See Thomas Y. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington, 71 Brook. L. Rev. 105, 154 n.157 (2005).

[FN129]. See G. Alan Tarr, Understanding State Constitutions 60 (1998) [hereinafter Tarr, Understanding].

[FN130]. 8 George Bancroft, History of the United States, From the Discovery of the American Continent 137 (6th ed. 1868) (noting that this specific language was addressed to encourage the formation of state

constitutions in New Hampshire and South Carolina).

[FN131]. See generally Tarr, Understanding, supra note 129, at 60-93.

[FN132]. See S.C. Const. of 1776 pmbl.

[FN133]. See Pa. Const. of 1776, § 43; Vt. Const. of 1777 ch. II, § 39.

[FN134]. S.C. Const. of 1776 pmbl; see also Tarr, Understanding, supra note 129, at 67.

[FN135]. S.C. Const. of 1776 pmbl.

[FN136]. Vt. Const. ch. II, § 67. The above quoted language is the current form of Vermont s state constitutional protection of hunting and fishing rights. The current language is almost identical to the original language of chapter II, section XXXIX of the Vermont Constitution of 1777.

[FN137]. Pa. Const. of 1776, § 43.

[FN138]. New England Trout & Salmon Club v. Mather, 35 A. 323, 328 (Vt. 1896) (Thompson, J., dissenting); see also Cabot v. Thomas, 514 A.2d 1034, 1037 (Vt. 1986).

[FN139]. New England Trout & Salmon Club, 35 A. at 328 (Thompson, J., dissenting).

[FN140]. Id.

[FN141]. M. Goldsmith & Charles Barrett, Biennial Report of the Commissioners of Fisheries, in J. H.R., Biennial Sess., 1878, app. C at 460-61 (Vt. 1879).

[FN142]. Id. at 461.

[FN143]. Id.

[FN144]. See Elliott v. State Fish & Game Comm'n, 84 A.2d 588, 592-93 (Vt. 1951).

[FN145]. New England Trout & Salmon Club, 35 A. at 330 (Thompson, J., dissenting).

[FN146]. See Cultures and Identities in Colonial British America, supra note 123, at 107-08.

[FN147]. Id. at 108.

[FN148]. See generally Edward Dumbauld, An Unusual Constitutional Claim, 1 Am. J. Legal Hist. 229 (1957).

[FN149]. Robert F. Williams, Old Constitutions and New Issues: National Lessons from Vermont s State Constitutional Case on Marriage of Same-Sex Couples, 43 B.C. L. Rev. 73, 81 (2001).

[FN150]. See generally John Koritansky, Thomas Paine: The American Radical, in History of American Political Thought 63-79 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003).

[FN151]. 2 The Complete Writings of Thomas Paine 285 (Philip S. Foner ed., 1945) (emphasis in original).

[FN152]. See Cultures and Identities in Colonial British America, supra note 123, at 110-11.

[FN153]. Resolutions Passed at a Meeting in the State-House Yard (Oct. 22, 1776), available at http://www.stanklos.net/? act=para&pid=14956&psname=CORRESPONDENCE.%20PROCEEDINGS%2C%C20%C26C.%201776.

[FN154]. Id.

[FN155]. Cultures and Identities in Colonial British America, supra note 123, at 110-11.

[FN156]. R.I. Const. art. 1, § 17.

[FN157]. Cal. Const. art. 1, § 25.

[FN158]. Ala. Const. art. I, § 36.02.

[FN159]. Minn. Const. art. XIII, § 12.

[FN160]. N.D. Const. art. XI, § 27.

[FN161]. Va. Const. art. XI, § 4.

[FN162]. Wis. Const. art. I, § 26.

[FN163]. La. Const. art. I, § 27.

[FN164]. Mont. Const. art. IX, § 7.

[FN165]. Ga. Const. art. I, § I, XXVIII.

[FN166]. Okla. Const. art. II, § 36. Additionally, while not constitutionalizing the right to hunt or fish, the courts of several other states have concluded that the right to hunt wild animals on one's own land constitutes a property right under certain circumstances, the deprivation of which is permitted but which requires compensation. See Shellnut v. Ark. State Game & Fish Comm'n, 258 S.W.2d 570, 573-74 (Ark. 1953); Alford v. Finch, 155 So.2d 790, 793 (Fla. 1963); Allen v. McClellan, 405 P.2d 405, 407-08 (N.M. 1965).

[FN167]. See Ala. Const. art. I, § 36.02(a); Va. Const. art. XI, § 4.

[FN168]. Ala. Const. art. I, § 36.02(b).

[FN169]. Ala. Const. art. I, § 36.02(a).

[FN170]. Va. Const. art. XI, § 4.

[FN171]. Ga. Const. art. I, § I, XXVIII; Minn. Const. art. XIII, § 12; N.D. Const. art. XI, § 27.

[FN172]. Ga. Const. art. I, § I, XXVIII.

[FN173]. Minn. Const. art. XIII, § 12.

[FN174]. N.D. Const. art. XI, § 27.

[FN175]. See Okla. Const. art. II, § 36; Wis. Const. art. I, § 26.

[FN176]. See Okla. Const. art. II, § 36.

[FN177]. Wis. Const. art. I, § 26.

[FN178]. Okla. Const. art. II, § 36.

[FN179]. See La. Const. art. I, § 27; Mont. Const. art. IX, § 7.

[FN180]. La. Const. art. I, § 27. Article IX, section 1 of the Louisiana Constitution, which is referenced by article I, section 27, states that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." La. Const. art. IX, § 1.

[FN181]. Mont. Const. art. IX, § 7.

[FN182]. See Cal. Const. art. 1, § 25; R.I. Const. art. 1,§ 17.

[FN183]. Cal. Const. art. 1, § 25.

[FN184]. R.I. Const. art. 1, § 17.

[FN185]. See Del. Const. art. I, § 20; Neb. Const. art. I, § 1; Nev. Const. art. 1, § 11, cl. 1; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1; W.V. Const. art. III, § 22; Wis. Const. art. I, § 25. An eighth state could be added in 2010. In November 2010, the voters of Kansas will have before them a proposed state constitutional amendment that would expressly guarantee gun rights as an individual personal right. In addition, the proposed language would specifically reference "lawful hunting" as one of the purposes of this right. Posting of Eugene Volokh to The Volokh Conspiracy, http://www.volokh.com/posts/1238042014.shtml (Mar. 26, 2009 12:33). For a listing of the various past and present gun rights provisions under state constitutions, see Eugene Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Pol. 191 (2006).

[FN186]. See N.D. Const. art. XI, § 27; Wis. Const. art. I, § 26.

[FN187]. N.D. Const. art. I, § 1.

[FN188]. Wis. Const. art. I, § 25.

[FN189]. Del. Const. art. I, § 20.

[FN190]. Neb. Const. art. I, § 1.

[FN191]. Nev. Const. art. 1, § 11, cl. 1.

[FN192]. N.M. Const. art. II,§ 6.

[FN193]. W.V. Const. art. III, § 22. The West Virginia Supreme Court has indicated that this provision protects a person's right to keep and bear arms for lawful hunting but does not appear to view the legislature as being limited, under this provision, as to what it may render unlawful with regard to hunting. See Hartley

Hill Hunt Club v. County Comm n of Ritchie County, 647 S.E.2d 818, 824-25 (W. Va. 2007).

[FN194]. Dena M. Jones & Sheila Hughes Rodriguez, Restricting the Use of Animal Traps in the United States: An Overview of Laws and Strategy, 9 Animal L. 135, 145 (2003).

[FN195]. Id.

[FN196]. Id.

[FN197]. Id.

[FN198]. People for the Ethical Treatment of Animals, Iowa Governor Vetoes Dove-Hunting Bill, http://www.peta.org/about/victories_date.asp? page=1&selected_year=2001 (last visited Jan. 15, 2010).

[FN199]. Bruce A. Scruton, Gov. Corzine: Black Bear Population Not a Problem, New Jersey Herald, Sept. 27, 2008, at 154.

[FN200]. Humane Society of the United States, City and State Trapping Bans, http://www.hsus.org/furfree /cruel_reality/trapping/city_and_state_trapping_ bans.html (last visited Jan. 15, 2010).

[FN201]. See, e.g., Jones & Rodriguez, supra note 194, at 146 ("Groups interested in preserving trapping have responded to the success of citizen initiatives by sponsoring legislation that will guarantee the right to trap and will limit the use of the initiative process for wildlife management issues."); Aaron Lake, 1998 Legislative Review, 5 Animal L. 89, 101 (1999) ("The Minnesota Outdoor Heritage Foundation, an umbrella group made up of most of the state's hunting and fishing organizations, was the driving force behind the amendment. The group claims the amendment was necessary to fend off attacks on hunting, fishing, and trapping made by animal rights groups."); Lisa Weisberg, Legislative Proposals Protecting Animals in Entertainment: At The Crossroads, 16 Pace Envtl. L. Rev. 125, 129 (1998) ("[M]any state legislatures, perhaps feeling threatened by the recent string of successful state ballot initiatives that outlaw certain methods of hunting and trapping, have proposed amendments to their state constitutions in order to guarantee its citizens the right to hunt.").

[FN202]. See, e.g., Emilie Clermont, 2003 Legislative Review, 10 Animal L. 363, 381 (2004).

[FN203]. Ed Godfrey, Protecting a Proud Tradition, The Oklahoman, Oct. 19, 2008, at 18B. Inclusion of this derisive reference is meant to reflect the underlying feelings and beliefs that are giving rise to the move to constitutionalize the right to hunt and fish and is not intended to reflect the views of the author. There certainly are effective advocates writing in opposition to hunting and fishing whose arguments warrant consideration and discussion. See, e.g., Tom Regan, The Case for Animal Rights (2004); Matthew Scully, Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy (2002); Peter Singer, Animal Liberation: A New Ethics for our Treatment of Animals (1975).

[FN204]. Bob Hodge, Some States Are Making It Tough on Outdoorsmen, Knoxville News Sentinel, Nov. 19, 2006, at D8 [hereinafter Hodge, Some States]; Bob Hodge, Watch Step on Outdoors Measure, Knoxville News Sentinel, Apr. 23, 2006, at D12 [hereinafter Hodge, Watch Step]; Larry Woody, Amendment Splits Wildlife Groups, The Tennessean, Jan. 14, 2007, at 2C.

[FN205]. Bob Hodge, Butler Advocating Right to Hunt, Fish, Knoxville News Sentinel, Oct. 19, 2008, at D8 [hereinafter Hodge, Butler Advocating]; Bob Hodge, State Legislature to Consider Right to Hunt, Knoxville News Sentinel, Dec. 2, 2007, at D8 [hereinafter Hodge, State Legislature].

[FN206]. Hodge, Butler Advocating, supra note 205, at D8; Michael A. Weber, Sportsmen Feel Like Targets, The Tennessean, Jan. 17, 2007, at 1B.

[FN207]. Matt Gouras, Hunters Fight to Protect Rights-Propose Amendment to Counter Activists, The Commercial Appeal, Feb. 20, 2005, at B6; Hodge, Some States, supra note 204, at D8; Richard Simms, Looking Out for the Laws: TWRA Monitors Legislature's Hunting, Fishing Proposals, Chattanooga Times Free Press, May 1, 2005, at C9.

[FN208]. See Sean McCombs, Right-to-Hunt Crusade Begins, Chattanooga Times Free Press, Mar. 3, 2005, at B2.

[FN209]. Id. (quoting Sen. Doug Jackson, Tenn. S.)

[FN210]. Simms, supra note 207, at C9 (quoting Mike Butler, Executive Director, Tennessee Wildlife Foundation).

[FN211]. Hodge, State Legislature, supra note 205, at D8; Simms, supra note 207, at C9.

[FN212]. See McCombs, supra note 208, at B2.

[FN213]. Gouras, supra note 207, at B6.

[FN214]. McCombs, supra note 208, at B2; Mike O Neal, Hunting Decline Hits Revenue, Chattanooga Times Free Press, Jan. 2, 2009, at A1.

[FN215]. Gouras, supra note 207, at B6.

[FN216]. O'Neal, supra note 214, at A9.

[FN217]. Gouras, supra note 207, at B6; Weber, supra note 206, at 3B.

[FN218]. Bob Hodge, State Favors Hunter-Fisherman Rights, Knoxville News Sentinel, May 13, 2007, at D12 (quoting Mike Butler, Executive Director, Tennessee Wildlife Foundation).

[FN219]. However, some analysts suggest that the various constitutional hunting rights provisions secure the right to trap from contrary regulatory efforts. See Jones & Rodriguez, supra note 194, at 146; see also Clermont, supra note 202, at 381; Lake, supra note 201, at 101.

[FN220]. Orion Sporting Group, LLC v. Bd. of Supervisors of Nelson County, Nos. 04-0019, 04-0020, 2005 WL 3579067, at *1, *4 (Va. Cir. Ct. June 29, 2005).

[FN221]. See, e.g., Ala. Dog Hunters Ass'n v. State, 893 So.2d 1224, 1227 (Ala. Civ. App. 2004); Cal. Gillnetters Ass'n. v. Dep't of Fish & Game, 46 Cal. Rptr. 2d 338, 343 (Cal. Ct. App. 1995) (concluding that the constitutional right to fish is a qualified right that is subject to rational basis review); Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't of Natural Res., 667 N.W.2d 612, 629-30 (Wis. 2004); Jason J. Czarnezki, Environmentalism and the Wisconsin Constitution, 90 Marq. L. Rev. 465, 471 (2007).

[FN222]. See, e.g., Ex parte Parra, 141 P. 393, 395 (Cal. Dist. Ct. App. 1914).

[FN223]. See, e.g., Zanotti v. Bolles, 67 A. 818, 818 (Vt. 1907); State v. Niles, 62 A. 795, 796 (Vt. 1906).

[FN224]. See, e.g., Niles, 62 A. at 796.

[FN225]. Southview Assocs. v. Bongartz, 980 F.2d 84, 91 n.2 (2d Cir. 1992) (citing Vt. Dep't of Fish and Wildlife, Deer Management Plan for the State of Vermont, 1990-95, at 2-3 (1990)).

[FN226]. See State v. San Luis Obispo Sportsman's Ass'n, 584 P.2d 1088, 1095-96 (Cal. 1978); State v. Cozzens, 2 R.I. 561, 563 (1850).

[FN227]. See, e.g., Elliott v. State Fish & Game Comm'n, 84 A.2d 588, 592-93 (Vt. 1951).

[FN228]. See, e.g., Wis. Citizens Concerned for Cranes and Doves, 677 N.W.2d at 630. Although the Supremacy Clause certainly imposes federal law limitations on state hunting and fishing rights, state law limitations appear to be linked to the state's constitutional duty to preserve wildlife so as to ensure the availability of hunting prospectively.

[FN229]. See, e.g., Czarnezki, supra note 221, at 471.

[FN230]. Mertins v. Comm'r of Natural Res., 755 N.W.2d 329, 336-37 (Minn. Ct. App. 2008).

[FN231]. Robert A. Creamer, Note, History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment, 45 B.C. L. Rev. 905, 920, 925 (2004).

[FN232]. Nicholas J. Johnson, A Second Amendment Moment: The Constitutional Politics of Gun Control, 71 Brook. L. Rev. 715, 746 (2005).

[FN233]. Creamer, supra note 231, at 925.

[FN234]. If the scope of permissible searches and seizures has changed as a result of the constitutionalized duty to preserve fishing and hunting for future generations-as opposed to the state's general interest in regulating fishing and hunting absent such a provision-the change would appear to be extremely minor given the existing expansive, though not unlimited, authority of the State to conduct searches related to such activities. See generally 5 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 10.8(e) (4th ed. 2004); Donald C. Douglas, Jr., Comment, A Comment on Louisiana Wildlife Agents and Probable Cause: Are Random Game Checks Constitutional?, 53 La. L. Rev. 525 (1992).

[FN235]. State v. Colosimo, 669 N.W.2d 1, 6 (Minn. 2003). See generally Scott Witty, Note, It's a Keeper: Preserving Minnesota's Recreational Fishing by Allowing Effective Regulatory Enforcement, 26 Hamline J. Pub. L. & Pol y 151 (2004).

[FN236]. Colosimo, 669 N.W.2d at 6.

[FN237]. Id. at 7.

[FN238]. Id. at 6.

[FN239]. But see Payne v. Sheets, 55 A. 656, 660 (Vt. 1903) (noting that Vermont's common law has been somewhat modified by Vermont's state constitutional hunting and fishing rights provision).

[FN240]. La. Const. art. I, § 27.

[FN241]. Parm v. Shumate, 513 F.3d 135, 145 (5th Cir. 2007).

[FN242]. Czarnezk, supra note 221, at 471 (citing Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't of Natural Res., 677 N.W.2d 612 (Wis. 2004); Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914); Willow River Club v. Wade, 76 N.W. 273 (Wis. 1898)).

[FN243]. Philip A. Talmadge, The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights, 75 Wash. L. Rev. 857, 867 n.26 (2000) (quoting Vt. Const. ch. II, § 67).

[FN244]. Vt. Const. ch. II, § 67; see also Cabot v. Thomas, 514 A.2d 1034, 1038 (Vt. 1986) ("By attaching 'boatable waters' and 'lands not enclosed' limitations on the respective rights of fishing and hunting, the Vermont Constitution has designated those points beyond which private property becomes inviolate for fishing and hunting purposes-nonboatability for the former and enclosure for the latter.").

[FN245]. Id. at 1039.

[FN246]. Jackvony v. Powel, 21 A.2d 554, 558 (R.I. 1941). See also State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 607 (R.I. 2005) ("The state's plenary authority over tidal lands is nevertheless restricted by article 1, section 17, which preserves 'all the rights of fishery . . .' to the state's inhabitants, 'to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore . . . .'"); Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259-60 (R.I. 1999) ("The state's authority over [tidal] land is limited by article 1, section 17, of the Rhode Island Constitution, which provides that the people shall continue to enjoy 'the privileges of the shore,' including the right to fish, to swim, and to pass along the shore.").

[FN247]. Hunters, Anglers and Trappers Ass'n of Vt. v. Winooski Valley Park Dist., 913 A.2d 391, 393-94, 398 (Vt. 2006).

[FN248]. Id. at 398.

[FN249]. See id. at 393-94, 398.

[FN250]. Similarly, although the Rhode Island courts have ultimately imposed limitations on the legislature pursuant to the state's constitutional fishing rights provision, a 1910 decision of the Rhode Island Supreme Court provides the nadir of effectualness of hunting and fishing rights provisions:

These are instances of the manner in which the Legislature exercised its powers over the rights of fishery, to which the people were entitled under the charter and usages of the state, and illustrate the fact that they were subject to the control of the General Assembly. The rights which the General Assembly had in 1822 and 1827 were not abridged by the foregoing provisions of article 1, § 17, of the Constitution, for it is expressly stated therein "no new right is intended to be granted, nor any existing right impaired, by this declaration." In other words, no change was made. No greater privileges were reserved to the people than they already had, and no powers or rights of the General Assembly were thereby abridged. Therefore the whole subject of fisheries, floating and shellfish, and all kinds of shellfish whether oysters, clams, quahaugs, mussels, scallops, lobsters, crabs, or fiddlers, or however they may be known and designated and wherever situate within the public domain of the state of Rhode Island, are under the fostering care of the General Assembly. It is for the Legislature to make such laws regulating and governing the subject of lobster culture, oyster culture, clam culture, or any other kind of pisciculture, as they may deem expedient. They may regulate the public or private fisheries. They may even prohibit free fishing for a time and for such times as in their judgment it is for the best interest of the state so to do. They may withhold from the public use such natural oyster beds, clam beds, scallop beds, or other fish beds as they may deem desirable. They may make a close time within which no person may take shellfish, or other fish, and generally they have complete dominion over fisheries

and fish as well as all kinds of game. We find no limitation, in the Constitution, of the power of the General Assembly to legislate in this regard, and they may delegate the administration of their regulations to such officers or boards as they may see fit.

Payne & Butler v. Providence Gas Co., 77 A. 145, 158 (R.I. 1910).

[FN251]. See State v. San Luis Obispo Sportsman's Ass'n, 584 P.2d 1088 (Cal. 1978).

[FN252]. Cal. Const. art. 1, § 25.

[FN253]. San Luis Obispo Sportsman's Ass'n, 584 P.2d at 1092.

[FN254]. Id.

[FN255]. Id. at 1091.

[FN256]. Id. at 1092.

[FN257]. Id.

[FN258]. Id.

[FN259]. Id.

[FN260]. Id. at 1093-94.

[FN261]. Id. at 1095.

[FN262]. Id.

[FN263]. Id.

[FN264]. Id. at 1095-96.

[FN265]. Op. N.D. Att'y Gen. 2006-L-23 (Aug. 16, 2006).

[FN266]. See John Commins, Hunting Resolution Draws Concern, Chattanooga Times Free Press, May 15, 2005, at B1; Dan Cook, Amendment Wording Has to be Precise, Chattanooga Times Free Press, May 7, 2006, at C10; Editorial, Misfiring on Hunting Bill, The Tennessean, May 20, 2005, at 12A; Gouras, supra note 207, at B6; Richard Simms, Same-Side Disagreement, Chattanooga Times Free Press, Feb. 4, 2007, at C13; Weber, supra note 206, at 3B; Larry Woody, Amendment Splits Wildlife Groups, The Tennessean, Jan. 14, 2007, at 2C.

[FN267]. Tenn. Const. art. XI, § 3. See generally Environmental and Natural Resources Provisions in State Constitutions, 22 J. Land Resources & Envtl. L. 73, 220-23 (2002).

[FN268]. See H.J. Res. 108, 105th Gen. Assem., 2d Sess. (Tenn. 2008) (“The citizens of this state shall have the personal right to hunt and fish, subject to reasonable regulations and restrictions prescribed by law.”).

[FN269]. See Commins, supra note 266, at B3 (noting that state Senator Doug Jackson “amended his resolution to give state courts a so-called ‘rational basis standard’ to review hunting and fishing laws”); Cook,

supra note 266, at C10 (quoting Mike Bulter, executive director of the Tennessee Wildlife Federation as stating that "[t]he important thing is that it calls for a rational-basis standard").

[FN270]. H.J. Res. 108., 105th Gen. Assem., 2d Sess. (Tenn. 2008).

[FN271]. Id.

[FN272]. Id.

[FN273]. Id.

[FN274]. Id.

[FN275]. This creates room for alliance between environmentalists and hunting and fishing rights advocates. However, this should not be surprising given that "[h]unters are usually the most diligent conservationists, managing the environment over which they hunt so as to conserve the animals' habitat, and restricting their hunting so as to preserve stocks." Griffin, supra note 24, at 3.

[FN276]. See e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804).

[FN277]. State v. Yardley, 32 S.W. 481, 484 (Tenn. 1895); see also Marion County Bd. of Comm'rs v. Marion County Election Comm'n, 594 S.W.2d 681, 684-85 (Tenn. 1980); Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand, 274 S.W. 544, 548 (Tenn. 1925); Minter v. State, 238 S.W. 89, 90 (Tenn. 1922); Heiskell v. City of Knoxville, 189 S.W. 857, 859 (Tenn. 1916). Some normative canons of statutory construction, including the constitutional avoidance principle, are grounded in constitutional values. Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1551 (2000) [hereinafter Young, Constitutional Avoidance]; see also William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 598 (1992) ("A good many of the substantive canons of statutory construction are directly inspired by the Constitution . . . .").

[FN278]. State v. Burkhart, 58 S.W.3d 694, 697-98 (Tenn. 2001); State v. Mallard, 40 S.W.3d 473, 480 (Tenn. 2001).

[FN279]. As was well explained by Justice Scalia:
[t]he doctrine of constitutional doubt does not require that the problem-avoiding construction be the preferable one-the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. "Adopt the interpretation that avoids the constitutional doubt if that is the right one" produces precisely the same result as "adopt the right interpretation." Rather, the doctrine of constitutional doubt comes into play when the statute is "susceptible of" the problem-avoiding interpretation-when that interpretation is reasonable, though not necessarily the best.
Almendarez-Torres v. United States, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) (citations omitted). The modern avoidance principle "extends the rule to cover those cases in which the statute at issue might be unconstitutional." Young, Constitutional Avoidance, supra note 277, at 1575-76. Accordingly, "[t]he most frequently-cited formula . . . provides that '[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature].'" Id. at 1576 (quoting Edward J. DeBartolo Corp., 485 U.S. at 575). If an interpretation threatens a constitutional conflict, the court should adopt the construction of the statute that avoids this conflict. Young, Constitutional Avoidance, supra note 277, at

1578-79.

[FN280]. See generally Thomas W. Merrill, Rescuing Federalism After Raich: The Case for Clear Statement Rules, 9 Lewis & Clark L. Rev. 823 (2005); Ernest A. Young, The Rehnquist Court s Two Federalisms, 83 Tex. L. Rev. 1 (2004) [hereinafter Young, Two Federalisms].

[FN281]. See, e.g., Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1213-16 (2006); Gilbert Lee, Comment, How Many Avoidance Canons Are There After Clark v. Martinez?, 10 U. Pa. J. Const. L. 193, 199-200 (2007); Note, Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation, 116 Harv. L. Rev. 1798, 1814 (2003); see also Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 327 (6th ed. 2006); William N. Eskridge, Jr., Dynamic Statutory Interpretation 286 (1994). Cf. Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't of Natural Res., 661 N.W.2d 858, 867-69 (Wis. Ct. App. 2003) (Dykman, J., dissenting) (noting that if Wisconsin voters pass the pending Wisconsin constitutional hunting rights amendment, the presumptions in the case would change to assuming that the legislature did not intend to restrict hunting).

[FN282]. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 173 (2d ed. 1986).

[FN283]. Eskridge, supra note 281, at 286.
Protecting underenforced constitutional norms through super-strong clear statement rules makes sense: it is not ultimately undemocratic, because Congress can override the norm through a statutory clear statement; such rules still provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.
Eskridge & Frickey, supra note 277, at 631.

[FN284]. Brian Galle & Mark Seidenfeld, Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power, 57 Duke L.J. 1933, 2018 (2008).

[FN285]. Ernest A. Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1359 (2001); see also Young, Two Federalisms, supra note 280, at 19.

[FN286]. James B. Staab, The Tenth Amendment and Justice Scalia's “Split Personality,” 16 J.L. & Pol. 231, 323 (2000).

[FN287]. Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 Mich. L. Rev. 676, 688 (2005).

[FN288]. The Tennessee constitution provides that:

[e]very person who shall be chosen or appointed to any office of trust or profit under this Constitution, or any law made in pursuance thereof, shall, before entering on the duties thereof, take an oath to support the Constitution of this State, and of the United States, and an oath of office.

Tenn. Const. art. X, § 1. The oath of office for members of the General Assembly is as follows:

I . . . do solemnly swear (or affirm) that as a member of this General Assembly, I will, in all appointments, vote without favor, affection, partiality, or prejudice; and that I will not propose or assent to any bill, vote or

resolution, which shall appear to me injurious to the people, or consent to any act or thing, whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared by the Constitution of this State.
Tenn. Const. art. X, § 2.

[FN289]. See Dawn E. Johnsen, Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?, 67 Law & Contemp. Probs. 105, 113 (2004).

[FN290]. Ronald K.L. Collins, Litigating State Constitutional Issues: The Government=s Case, 1 Emerging Issues in St. Constitutional L. 201, 201 (1988).

[FN291]. Id.

[FN292]. Lewis L. Laska, The Tennessee Constitution: An Unlikely Path Toward Conservatism, in The Constitutionalism of American States 363 (George E. Connor & Christopher W. Hammons eds., 2008). The Tennessee Attorney General's standing is rather unique in comparison with attorneys general in other states. Under the Tennessee constitution, the Tennessee Attorney General is formally part of the judicial department of government and is selected by the members of the Tennessee Supreme Court. Tenn. Const. art. VI, § 5; see also Penny J. White & Malia Reddick, A Response to Professor Fitzpatrick: The Rest of the Story, 75 Tenn. L. Rev. 501, 511 n.86 (2008). In forty-three states, the citizens directly elect their attorney general. Calvin Massey, State Standing After Massachusetts v. EPA, 61 Fla. L. Rev. 249, 274 n.103 (2009). In five states, Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming, the governor appoints the attorney general. Id. Maine joins Tennessee in providing a unique method, as its legislature chooses the attorney general by secret ballot. Id. In the District of Columbia, the attorney general is appointed by the mayor. Lawrence G. Wasden & Brian Kane, Massachusetts v. EPA: A Strategic and Jurisdictional Recipe for State Attorneys General in the Context of Emission Accelerated Global Warming Solutions, 44 Idaho L. Rev. 703, 721 n.168 (2008). The reason for the Tennessee provision “remains a puzzle.” Lewis L. Laska, A Legal and Constitutional History of Tennessee, 1772-1972, 6 Mem. St. U. L. Rev. 563, 644 (1976). Professor Lewis Laska has offered two nonmutually exclusive theories for the adoption of this method of selecting the Tennessee Attorney General and Reporter, the formal constitutional title of the position in Tennessee's constitution of 1870. One theory is that this method was chosen because of a personal friendship between A. O. P. Nicholson, the chairman of the convention's judiciary committee, and Joseph B. Heiskell, who had become close friends while imprisoned together during the Civil War. Id. Nicholson, an influential man who would shortly become Chief Justice of the Tennessee Supreme Court, provided for this methodology to obtain the attorney general position for Heiskell, who was not well-enough known statewide to win an election. Id. Laska's second theory is that this method was an “expedient adopted in 1870 to prevent a repeat of the practice under the Brownlow administration (1865-1869) whereby the Attorney General was selected by the Governor, who used his office to prevent ex-Confederates from gaining the franchise.” Lewis L. Laska, The 1977 Limited Constitutional Convention, 61 Tenn. L. Rev. 485, 546 (1994).

While not taking issue with either of Laska's theories, Judge Andy Bennett, former Chief Deputy of the Tennessee Attorney General's Office, has presented another possible explanation:

[This alternative theory] lies in the fact that the attorney general would be the reporter of the Supreme Court's decisions. One delegate to the convention proposed that the attorney general and reporter be elected by the qualified voters of the state. Delegate William Stephens opposed election because he did not think the people could judge the qualifications of a good reporter. James Thompson also urged that the court be allowed to select its own reporter because of the importance of law reports. Interestingly, Joseph Heiskell successfully moved that the proposal for popular election be tabled.

Andy D. Bennett, The History of the Tennessee Attorney General's Office, Tenn. B.J., Apr. 2000, at 12, 14.

[FN293]. Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585, 586 (1975); John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 Cardozo L. Rev. 375, 377, 383-84 (1993); Pillard, supra note 287, at 688, 692-98; David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113, 127-30 (1993). In fact, it has been argued that the application and meaning of the Constitution is determined mostly through ordinary politics for which elected officials are responsible. Stephen M. Griffin, American Constitutionalism: From Theory to Politics 45 (1996).

[FN294]. See, e.g., Louis D. Bilionis, Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law, 52 UCLA L. Rev. 979, 1016-17 (2005); Dayna Bowen Matthew, The "New Federalism" Approach to Medicaid: Empirical Evidence that Ceding Inherently Federal Authority to the States Harms Public Health, 90 Ky. L.J. 973, 973-74 (2002).

[FN295]. See, e.g., Paul Brace & Martin Johnson, Does Familiarity Breed Contempt? Examining the Correlates of State-Level Confidence in the Federal Government, in Public Opinion in State Politics 19 (Jeffrey E. Cohen ed., 2006); Daniel N. Hoffman, Our Elusive Constitution: Silences, Paradoxes, Priorities 131 (1997); Laurance Lyon, Where Freedom Falters 22 (1927); David L. Shapiro, Federalism: A Dialogue 28 (1995); Edward L. Rubin, The Fundamentality and Irrelevance of Federalism, 13 Ga. St. U. L. Rev. 1009, 1049-50 (1997); Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 933 (1994).

[FN296]. See Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 206, 355-56 (2004); Donald L. Doernberg, Sovereign Immunity or the Rule of Law: The New Federalism's Choice 130 (2005); Lyon, surpra note 295, at 22; Shapiro, supra note 295, at 28-29; Robert J. Reinstein, Foreword: On the Judicial Safeguards of Federalism, 17 Temp. Pol. & Civ. Rts. L. Rev. 343, 349-50 (2008).

[FN297]. See Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State 191 (1998); Michael D. Tanner, Leviathan on the Right: How Big-Government Conservatism Brought Down the Republican Revolution 182-83 (2007); Randy E. Barnett, Three Federalisms, 39 Loy. U. Chi. L.J. 285, 285, 291 (2008); Michael Keenan, Is United States v. Morrison Antidemocratic?: Political Safeguards, Deference, and the Countermajoritarian Difficulty, 48 How. L.J. 267, 306 (2004); Saikrishna B. Prakash & John C. Yoo, The Puzzling Persistence of Process-Based Federalism Theories, 79 Tex. L. Rev. 1459, 1485 (2001).

[FN298]. See Randy Barnett, The Choice Between Madison and FDR, 31 Harv. J.L. & Pub. Pol'y 1005, 1005-07 (2008); Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harv. Int'l L.J. 121, 152 (2007); George Rutherglen, State Action, Private Action, and the Thirteenth Amendment, 94 Va. L. Rev. 1367, 1391 (2008); Roy W. Breitenbach, Comment, Perpich v. United States Department of Defense: Who Controls the Weekend Soldier?, 64 St. John's L. Rev. 133, 142, 147-49 (1989).

[FN299]. Robert F. Williams, Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments, 40 S. Tex. L. Rev. 625, 636 (1999) [hereinafter Williams, Comparative].

[FN300]. See Eve Cary & Mary R. Falk, People v. Scott & People v. Keta: "Democracy Begins in Conversation," 58 Brook. L. Rev. 1279, 1324 (1993); Melissa Sheridan & Bradford S. Delapena, Individual Liberties Claims: Promoting a Healthy Constitution for Minnesota, 19 Wm. Mitchell L. Rev. 683, 686 (1993); Jon Wesley Wise, Comment, State v. Reeves: Interpreting Louisiana's Constitutional Right to Privacy, 44 La. L. Rev. 183, 186-87 (1983).

[FN301]. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

[FN302]. See Cary & Falk, supra note 300, at 1323-24; Sheridan & Delapena, supra note 300, at 686; Wise, supra note 300, at 186-87.

[FN303]. See Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 61 St. John's L. Rev. 399, 404-05 (1987).

[FN304]. Cary & Falk, supra note 300, at 1325-27; Antony B. Klapper, Comment, Finding a Right in State Constitutions for Community Treatment of the Mentally Ill, 142 U. Pa. L. Rev. 739, 787-88 (1993).

[FN305]. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 495 (1977).

[FN306]. A. E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873, 878 (1976).

[FN307]. 1 Jennifer Friesen, State Constitutional Law: Litigating Individual Rights Claims and Defenses § 1.01 n.11 (4th ed. 2006).

[FN308]. 1 Wayne R. LaFave et al., Crim. Proc. § 2.12(a) (3d ed. 2008).

[FN309]. Id.; Louis Henkin, Economic Rights Under the United States Constitution, 32 Colum. J. Transnat'l L. 97, 124 (1994) ("[A]s the U.S. Supreme Court has become more restrictive in its constitutional interpretations, some state courts have tended to read state constitutional provisions to provide greater protection for civil and political rights than is provided by the federal Constitution.").

[FN310]. Brennan, supra note 305, at 502-03.

[FN311]. See Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 49 (2001); Paul W. Kahn, Two Communities: Professional and Political, 24 Rutgers L.J. 957, 968-69 (1993) (citing Earl M. Maltz, False Prophet-Justice Brennan and the Theory of State Constitutional Law, 15 Hastings Const. L.Q. 429 (1988)).

[FN312]. See generally, e.g., Clint Bolick, Brennan s Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom, 12 Tex. Rev. L. & Pol. 137 (2007); Cary & Falk, supra note 300; Alan Florendo, The Impact of Feminine Leadership on State Courts: A Panel of Women Chief Justices, 12 Cardozo J.L. & Gender 929 (2006).

[FN313]. See generally, e.g., George Deukmejian & Clifford K. Thompson, Jr., All Sail and No Anchor-Judicial Review Under the California Constitution, 6 Hastings Const. L.Q. 975 (1979); James W. Diehm, New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?, 55 Md. L. Rev. 223 (1996); James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761 (1992).

[FN314]. See Brennan, supra note 305, at 502.

[FN315]. Tarr, Understanding, supra note 129, at 166-67, 169; Robert F. Williams, Rights, in 3 State Constitutions for the Twenty-First Century: The Agenda of State constitutional Reform 8 (G. Alan Tarr & Robert F. Williams eds., 2006) [hereinafter Williams, Rights]; Daniel B. Rodriguez, State Constitutional Theory and Its Prospects, 28 N.M. L. Rev. 271, 299 (1998); Robert K. Fitzpatrick, Note, Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights, 79 N.Y.U. L. Rev. 1833, 1841-45

(2004).

[FN316]. Douglas S. Reed, Popular Constitutionalism: Toward a Theory of State Constitutional Meanings, 30 Rutgers L.J. 871, 873-74 (1999).

[FN317]. See Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Baker v. State, 744 A.2d 864 (Vt. 1999); Reed, supra note 316, at 873-74.

[FN318]. See Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Reed, supra note 316, at 873-74.

[FN319]. See S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975); Reed, supra note 316, at 873-74.

[FN320]. Michael D. Blanchard, The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance, 60 U. Pitt. L. Rev. 231, 239 (1998).

[FN321]. Ellen Ash Peters, The Role of State Constitutions in Our Federal System, 143 Proc. Am. Phil. Soc'y 418, 425 (1999).

[FN322]. Risa E. Kaufman, States ERAs in the New Era: Securing Poor Women s Equality by Eliminating Reproductive-Based Discrimination, 24 Harv. Women's L.J. 191, 193 (2001).

[FN323]. Paul Lermack, The Constitution Is the Social Contract so It Must be a Contract . . . Right? A Critique of Originalism as Interpretative Method, 33 Wm. Mitchell L. Rev. 1403, 1431-32 (2007).

[FN324]. Paul L. Tractenberg, Education, in 3 State Constitutions for the Twenty-First Century: The Agenda of State constitutional Reform 241 (G. Alan Tarr & Robert F. Williams eds., 2006); Michael Heise, State Constitutions, School Finance Litigation, and the Third Wave : From Equity to Adequacy, 68 Temp. L. Rev. 1151, 1157-66 (1995).

[FN325]. See, e.g., Daan Braveman, Children, Poverty and State Constitutions, 38 Emory L.J. 577, 595-608 (1989); Helen Hershkoff, Welfare Devolution and State Constitutions, 67 Fordham L. Rev. 1403, 1428-32 (1999); Burt Neuborne, Foreword: State Constitutions and the Evolution of Positive Rights, 20 Rutgers L.J. 881, 893-901 (1989); William C. Rava, State Constitutional Protections for the Poor, 71 Temp. L. Rev. 543 (1998).

[FN326]. See generally Bryan P. Wilson, Comment, State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?, 53 Emory L.J. 627 (2004) (discussing an environmental provision in Montana's constitution).

[FN327]. See generally Lynne Henderson, Revisiting Victim s Rights, 1999 Utah L. Rev. 383 (1999) (exploring victims' rights in the context of California's constitution).

[FN328]. See generally William C. Koch, Jr., Reopening Tennessee s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution, 27 U. Mem. L. Rev. 333 (1997) (reviewing the Tennessee constitution's open courts provision).

[FN329]. Blanchard, supra note 320, at 239.

[FN330]. Robert F. Williams, State Constitutional Law Processes 189 (1983) [hereinafter Williams, Law

Processes].

[FN331]. G. Alan Tarr & Robert F. Williams, Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform, 36 Rutgers L.J. 1075, 1112 (2005) [hereinafter Tarr & Williams, Getting From].

[FN332]. Id.

[FN333]. Marsha L. Baum & Christian G. Fritz, American Constitution-Making: The Neglected State Constitutional Sources, 27 Hastings Const. L.Q. 199, 200-01 (2000).

[FN334]. Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1194-96 (1999).

[FN335]. Tarr & Williams, Getting From, supra note 331, at 1112.

[FN336]. See Justin Long, Intermittent State Constitutionalism, 34 Pepp. L. Rev. 41, 52-56 (2006).

[FN337]. See generally Jeffrey Usman, Non-Justiciable Directive Principles: A Constitutional Design Defect, 15 Mich. St. J. Int l L. 643, 684-85 (2007) (discussing constitutional provisions as providing aspirational goals).

[FN338]. See Long, supra note 336, at 52-56.

[FN339]. Sean O. Hogan, An Introduction to State Courts and Law, in The Judicial Branch of State Government: People, Process, and Politics 18 (Sean O. Hogan ed., 2006).

[FN340]. Rodriguez, supra note 315, at 292-302.

[FN341]. Joseph A. Ranney, Wisconsin s Constitutional Amendment Habit: A Disease or a Cure?, 90 Marq. L. Rev. 667, 687 (2007).

[FN342]. Id. at 699.

[FN343]. See generally Lawrence M. Friedman, A History of American Law 116 (2d ed. 1985).

[FN344]. Daniel J. Elazar, Foreword: The Moral Compass of State Constitutionalism, 30 Rutgers L.J. 849, 849 (1999).

[FN345]. Peter R. Teachout, “Trustees and Servants”: Government Accountability in Early Vermont, 31 Vt. L. Rev. 857, 866 (2007).

[FN346]. Charles I. Lugosi, Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence, 22 Issues L. & Med. 119, 164 n.218 (2006-2007).

[FN347]. John Warren Kindt, Internationally, The 21st Century Is No Time for the United States to Be Gambling with the Economy: Taxpayers Subsidizing the Gambling Industry and the De Facto Elimination of All Casino Tax Revenues Via the 2002 Economic Stimulus Act, 29 Ohio N.U. L. Rev. 363, 380 (2003).

[FN348]. Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and

Tradition?, 87 Tex. L. Rev. 7, 101 (2008).

[FN349]. Id. at 101-02.

[FN350]. See generally Ann-Marie E. Szymanski, Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes (2003).

[FN351]. William M. Wilson III, Note, Romer v. Evans: "Terminal Silliness," or Enlightened Jurisprudence?, 75 N.C. L. Rev. 1891, 1910 (1997).

[FN352]. G. Alan Tarr, The State of State Constitutions, 62 La. L. Rev. 3, 7 n.17 (2001); G. Alan Tarr, Models and Fashions in State Constitutionalism, 1998 Wis. L. Rev. 729, 741-44 (1998) [hereinafter Tarr, Models].

[FN353]. Matthew S. R. Palmer, Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution, 54 Am. J. Comp. L. 587, 596 (2006).

[FN354]. Martha F. Davis, The Spirit of Our Times: State Constitutions and International Human Rights, 30 N.Y.U. Rev. L. & Soc. Change 359, 382 (2006).

[FN355]. See Lermanck, supra note 323, at 1433; Reed, supra note 316, at 875. See generally Christopher W. Hammons, State Constitutional Reform: Is It Necessary?, 64 Alb. L. Rev. 1327 (2001) (discussing the length of state constitutions and their frequency of amendment).

[FN356]. Tarr, Models, supra note 352, at 741-42.

[FN357]. Id. at 742.

[FN358]. Id. at 744.

[FN359]. Id. at 742.

[FN360]. Id.

[FN361]. See Tarr, Understanding, supra note 129, at 168; Williams, Rights, supra note 315, at 8-9; Patience Drake Roggensack, To Begin a Conversation on Judicial Independence, 91 Marq. L. Rev. 535, 541 (2007). See generally Reed, supra note 316.

[FN362]. Williams, Law Processes, supra note 330, at 176.

[FN363]. Michael C. Dorf, Courts, Reasons, and Rules, 19 Quinnipiac L. Rev. 483, 499 (2000).

[FN364]. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 40 (1997).

[FN365]. Usman, supra note 337, at 664.

[FN366]. Lermack, supra note 323, at 1433.

[FN367]. Tarr, Understanding, supra note 129, at 160; Tarr, Models, supra note 352, at 744.

[FN368]. See Tarr, Understanding, supra note 129, at 160-61.

[FN369]. Edward J. Erler, Californians and Their Constitution: Progressivism, Direct Democracy and the Administrative State, 6 Nexus 237, 237 (2001). Indeed, one cannot legitimately argue that state constitutions do not contain some rather frivolous provisions.

[S]tate constitutions differ from the federal Constitution in the level of detail in which they describe, and therefore the extent to which they constrain, governmental action with respect to subjects covered by the constitution. For example, as Judge Kaye of the New York Court of Appeals is fond of pointing out, the New York Constitution contains a provision specifying the width of ski trails in the Adirondack Park. The California Constitution specifies the way in which taxes are to be assessed on golf courses. The Texas Constitution provides for banks' use of "unmanned teller machines."

If a state constitution reflects the character of the people of a state, what can one say about the character of a people who enshrine these types of provisions in their constitutions - who evidently hold the values expressed in these provisions so dear that they see a need to place them beyond the reach of temporary majorities and transient passions, and to permit their alteration only by future direct action of the people themselves? Can one say of New Yorkers, for example, that they are a people who cherish their liberty to ski? If so, how does such a provision fit in with the other liberties contained in the New York Constitution, such as freedom of speech? Are New Yorkers a people who like to talk and schuss? To ski down a mountain and discuss politics over hot chocolate? If we are to take seriously the notion that the state constitution reveals the character of the people, we may be forced to the unappetizing conclusion that the people of New York, or California, or Texas are simply a frivolous people who are unable to distinguish between things that are truly important and things that are not.

Gardner, supra note 313, at 819-20 (footnotes omitted); see also Posting of Eugene Volokh to The Volokh Conspiracy, http:// volokh.com/posts/1156657358.shtml (Aug. 28, 2006, 13:46) (discussing article XI-C of the Maryland constitution, which addresses off-street parking).

[FN370]. Daniel R. Gordon, Protecting Against the State Constitutional Law Junkyard: Proposal to Limit Popular Constitutional Revision in Florida, 20 Nova L. Rev. 413 (1995).

[FN371]. Williams, Law Processes, supra note 330, at 177.

[FN372]. 2 Frank P. Grad & Robert F. Williams, State Constitutions for the Twenty-First Century: Drafting State Constitutions, Revisions, and Amendments 29 (2006).

[FN373]. Larry Daughtrey, Keep Important Things in Focus, Like Hunting, The Tennessean, May 11, 2008, at 19A.

[FN374]. Id.

[FN375]. See Williams, Comparative, supra note 299, at 636.

[FN376]. Elazar, supra note 344, at 859.

[FN377]. Stephen Gardbaum, The Myth and the Reality of American Constitutional Exceptionalism, 107 Mich. L. Rev. 391, 446 (2008). See 10A Fla. Jur. 2d Constitutional Law § 371 (2009) (discussing application of the Florida constitution's right to privacy in medical decision making cases).

[FN378]. See Elazar, supra note 344, at 859.

[FN379]. Reed, supra note 316, at 875.

[FN380]. Id. at 885.

[FN381]. Id. at 898.

[FN382]. Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. Cal. L. Rev. 1307, 1329-30 (2001).

[FN383]. Grad & Williams, supra note 372, at 29.

[FN384]. H.J. Res. 108, 105th Gen. Assem., 2d Sess. (Tenn. 2008) ("The citizens of this state shall have the personal right to hunt and fish, subject to reasonable regulations prescribed by law. The recognition of this right does not abrogate any private or public property rights, nor does it limit the state's power to regulate commercial activity. Traditional manners and means may be used to take non-threatened species.").

[FN385]. The Tennessee State Library and Archives has audio recordings of the general assembly's debate of this measure, a debate which evinces a strong desire to safeguard hunting and fishing rights.

[FN386]. Daughtrey, supra note 373.

[FN387]. Grad & Williams, supra note 372, at 23.

[FN388]. See generally Wayne Capooth, The Golden Age of Hunting: Arkansas, Mississippi, Tennessee (2004); Stuart A. Marks, Southern Hunting in Black and White (1991); Whisker, supra note 24, at 1-36, 85-102.

[FN389]. See, e.g., Tony Barnhart, Southern Fried Football: The History, Passion, and Glory of the Great Southern Game (2000); Ed McMinn, God Bless the Vols: Devotions for the Die-Hard Tennessee Fan (2007); Warren St. John, Rammer Jammer Yellow Hammer: A Journey into the Heart of Fan Mania (2004); Clay Travis, Dixieland Delight: A Football Season on the Road in the Southeastern Conference (2007).

[FN390]. H.J. Res. 108, 105th Gen. Assem., 2d Sess. (Tenn. 2008).

[FN391]. Fitzpatrick, supra note 315, at 1870 (footnotes omitted).

Top of Page