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# LIFE, LIBERTY, AND THE PURSUIT OF HUNTING & FISHING: THE IMPLICATIONS OF KENTUCKY'S "RIGHT TO HUNT" CONSTITUTIONAL AMENDMENT

*Young-Eun Park\**

## I. INTRODUCTION

In 2012, the Commonwealth of Kentucky passed an amendment to its state constitution that ensured its citizens a constitutional right to hunt and fish. Section 255A of the Kentucky Constitution now reads:

The citizens of Kentucky have the personal right to hunt, fish, and harvest wildlife, using traditional methods, subject only to statutes enacted by the Legislature, and to administrative regulations adopted by the designated state agency to promote wildlife conservation and management and to preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. This section shall not be construed to modify any provision of law relating to trespass, property rights, or the regulation of commercial activities.<sup>1</sup>

With the passage of this amendment, Kentucky became one of four states that recognize a constitutional right to hunt and fish in 2012, joining Idaho, Nebraska, and Wyoming.<sup>2</sup> Despite this seemingly small number of states passing such an amendment, many others have passed similar constitutional amendments.<sup>3</sup> In fact, the oldest constitutional amendment regarding the right to hunt and fish can be found in Vermont's 1777 constitution.<sup>4</sup> Vermont's constitution in 1777 ensured its citizens the right

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<sup>1</sup> KY. CONST. § 255A.

<sup>2</sup> Douglas Shinkle, *State Constitutional Right to Hunt and Fish*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 12, 2014), <http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

“to have the liberty in seasonable times, to hunt fowl on the lands they hold and on other lands not inclosed [sic].”<sup>5</sup> Since then, many states have followed Vermont’s example. Alabama, for example, amended its constitution, using broad and overarching language: “The people have a right to hunt, fish, and harvest wildlife, including by the use of traditional methods, subject to reasonable regulations . . . .”<sup>6</sup> Though the text varies, the message remains the same—citizens within the state’s borders have a constitutionally protected right to hunt and fish.

Fervor for the recent amendments stems from “worries that hunting will one day be banned or restricted” since animal rights groups have been relatively successful in efforts to curtail some hunting practices over the past few decades.<sup>7</sup> For instance, California had a 1990 ballot initiative that resulted in both a ban on planned mountain lion trophy hunting and the creation of a fund for habitat preservation.<sup>8</sup> From 1994 to 2001, animal rights groups successfully used ballot initiatives to ban trapping in Arizona, California, Colorado, Massachusetts, and Washington.<sup>9</sup> Similarly, Michigan voters in 2006 banned the shooting of mourning doves, the state’s songbird—an activity reinstated in 2004.<sup>10</sup> The “intense campaign [was] fueled on either side by millions of dollars from pro-gun and antihunting groups.”<sup>11</sup> In addition to animal rights groups, “elected officials have also acted to limit hunting, such as prohibiting dove hunting in Iowa, bear hunting in New Jersey, and the use of leg-hold traps in Rhode Island.”<sup>12</sup>

Many states, including Kentucky, passed amendments in response to these events that made hunting and fishing a constitutional right because

<sup>5</sup> Suzi Parker, *Constitutional Right to Hunt? Voters in Three States to Decide*, CHRISTIAN SCIENCE MONITOR (Feb. 26, 2010), <http://www.csmonitor.com/USA/Politics/2010/0226/A-constitutional-right-to-hunt-Voters-in-three-states-to-decide> (quoting VT. Const. Ch. II, § 67).

<sup>6</sup> *State “Right to Hunt and Fish” Protections*, NATIONAL SHOOTING SPORTS FOUND., <http://nssf.org/factsheets/PDF/StateRighttoHunFish.pdf> (last visited Mar. 6, 2015).

<sup>7</sup> Parker, *supra* note 5.

<sup>8</sup> 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).

<sup>9</sup> *Id.*

<sup>10</sup> Parker, *supra* note 5.

<sup>11</sup> *Id.*

<sup>12</sup> Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 82 (2009), available at <http://www.animallaw.info/articles/arus77tennrev57.htm#FNFa1351142630>.

“state constitutionalization” would make any attempts at banning hunting more difficult, as it would require a constitutional amendment.<sup>13</sup> In other words, a ban on hunting and fishing “couldn’t be done without a vote of the people.”<sup>14</sup>

While these amendments were instituted with good intentions, a right to hunt and fish has no place in Kentucky’s Constitution, a document of the Commonwealth’s most fundamental rights. Instead, hunting and fishing rights should be left to legislative regulation. Section II of this Note will provide background on federal and state precedents and general history regarding the constitutional right, or lack thereof, to hunt and fish. Section III describes the original purpose of the constitutional provision and argues that its original purpose no longer comports with modern society’s view of wildlife. Section IV argues that “right to hunt” amendments actually cannot change already existing laws. Section V then looks specifically at Kentucky’s constitutional amendment and contends that it was passed in response to a nonexistent problem and is unnecessary. Section VI argues that hunting and fishing are recreational rights that do not belong in the Kentucky Constitution. Section VII proposes a solution that allows the right to hunt and fish to be included either in statutes or in a broader constitutional amendment. Section VIII concludes by urging for the repeal of Kentucky’s hunting and fishing amendment and the cease of future related amendments in other states.

## II. BACKGROUND

### *A. No Constitutional Right To Hunt And Fish Exists In The Federal Constitution*

The federal Constitution does not recognize the right to hunt and fish, although the idea that such a right should exist under our federal Constitution dates back to the founding: “At its convention in December 1787, Pennsylvania became the first state to debate amending the

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<sup>13</sup> *Id.* at 83.

<sup>14</sup> *Id.*

Constitution to protect rights not expressly safeguarded in the proposed constitution."<sup>15</sup> Pennsylvania believed that hunting and fishing rights were so important that it drafted a number of proposed amendments that included the right to hunt and fish in conjunction with what is now the Free Exercise Clause and the Free Speech Clause of the First Amendment, and the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Amendments.<sup>16</sup>

Though the amendment did not pass, former Chief Justice Warren Burger has suggested that a constitutional right to hunt and fish exists under the Constitution, stating: "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."<sup>17</sup> Unlike Justice Burger's belief, however, the U.S. Supreme Court has never found that the right to hunt and fish is a constitutionally protected right.<sup>18</sup> Circuit and district courts have also held that hunting and fishing constitute recreational activities that are privileges, not constitutional rights.<sup>19</sup>

Hunting and fishing rights are also not protected through other rights under the U.S. Constitution. In *Baldwin v. Fish and Game Commission of Montana*, out-of-state hunters and fishers are not protected under the Equal Protection or the Privileges and Immunities Clauses of the Fourteenth Amendment because hunting and fishing are considered recreational activities and not essential to an individual's livelihood.<sup>20</sup> In another case, regarding different license fees for in-state and out-of-state elk hunters, the Supreme Court held that elk hunting by nonresidents in Montana is recreation and sport, which does not offend the Privileges and Immunities Clause.<sup>21</sup>

<sup>15</sup> *Id.* at 69.

<sup>16</sup> Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 276 (2008).

<sup>17</sup> Usman, *supra* note 12, at 70 (quoting Warren E. Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990, at 4).

<sup>18</sup> 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).

<sup>19</sup> See *Landsen v. Hart*, 168 F.2d 409, 412 (7th Cir. 1948); *Terk v. Ruch*, 655 F. Supp. 205, 209-10 (D. Colo. 1987); *DeMasters v. Mont.*, 656 F. Supp. 21, 24 (D. Mont. 1986); *see generally* *Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942).

<sup>20</sup> *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978).

<sup>21</sup> *Id.*

Additionally, the Pennsylvania Supreme Court, in an ironic decision governing constitutional protections of hunting licenses, held that not even minimal procedural due process requirements attach when one is deprived of the right to hunt or fish.<sup>22</sup> The court, through its interpretation of the Fourteenth Amendment of the United States Constitution, determined that "the right to hunt game is but a privilege given by the Legislature, and is not an inherent right in the residents of the State" and as such, "hunting is not a property or liberty interest to which the full panoply of due process protections attach."<sup>23</sup> As the right to hunt fails to qualify as a Due Process right, the court found that hunting licenses are revocable without being subject to procedural due process requirements.

These cases demonstrate that courts are unwilling to consider the right to hunt and fish as protected within the confines of the U.S. Constitution. Further, they seem hesitant to accord constitutional rights upon these traditionally recreational activities.

### *B. State Constitutions Can Create Substantive Rights In Hunting And Fishing*

State constitutions are dissimilar to the federal Constitution because state constitutions "are rich sources of substantive provisions" that reflect public policy.<sup>24</sup> State constitutions are free to borrow provisions from their federal counterpart or include provisions that are non-existent in the federal document. These constitutions can be "laboratories of democracy."<sup>25</sup> This ability, known as "substantive divergence,"<sup>26</sup> emerges from the capability of state constitutional drafters to include provisions absent from the US

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<sup>22</sup> Pa. Game Comm'n v. Marich, 666 A.2d 253, 257 (Pa. 1995).

<sup>23</sup> *Id.*

<sup>24</sup> Paul Lernack, *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 (2007).

<sup>25</sup> Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 302 (2011).

<sup>26</sup> Scott R. Bauries, *Florida's Past and Future Roles in Education Finance Reform Litigation*, 32 J. EDUC. FIN. 89 (2006).

Constitution. Examples of such provisions are education clauses,<sup>27</sup> disabled care,<sup>28</sup> and collective bargaining.<sup>29</sup>

States may, according to their own procedural processes, pass any amendment that fits the policy needs of its citizens. The states are capable of passing such amendments because “state courts’ jurisprudence stands independent of the shadow of federal court analysis.”<sup>30</sup> Between 1776 and 1991, more than 5,800 amendments to state constitutions were adopted, with states like South Carolina and California passing over 200 amendments.<sup>31</sup> The populist and political nature of the time of these amendments, combined with the massive number of amendments, resulted in making state constitutions into “super-legislative” documents.<sup>32</sup>

The advantages from the “super-legislative” nature of state constitutions have allowed states to define hunting and fishing rights since the founding of the United States. Indeed, the hunting and fishing amendments arose from the desire to establish those rights for all people instead of the older English system that extended such activities only to noble elites and the Crown.<sup>33</sup> Concerned that the legislature might “sometime be induced to convey this hunting on public lands to individuals, or might forbid it altogether . . . [the Vermont Framers] made it part of the constitution that these rights of the citizen should never be alienated.”<sup>34</sup> With that thought in mind, “at least three of the first state constitutions included references to hunting and fishing rights,” while “the other two state constitutions adopted a constitutional right to hunt, fowl, and fish as a state constitutional right.”<sup>35</sup> Whereas Vermont’s constitutional right to hunt and fish survives to the present day, Pennsylvania, the original supporter of

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<sup>27</sup> See generally Josh Kagan, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003).

<sup>28</sup> Alan Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7, 9 (1982).

<sup>29</sup> *Collective Bargaining*, FLA. DEPT’ OF MGMT. SERVS., [http://www.dms.myflorida.com/workforce\\_operations/human\\_resource\\_management/collective\\_bargaining](http://www.dms.myflorida.com/workforce_operations/human_resource_management/collective_bargaining) (last visited Jan. 22, 2015).

<sup>30</sup> Usman, *supra* note 12, at 100.

<sup>31</sup> RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN & JEFFREY SUTTON, *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE*, 893 (2010).

<sup>32</sup> *Id.* at 894.

<sup>33</sup> *New England Trout & Salmon Club v. Mather*, 35 A. 323, 328 (Vt. 1896).

<sup>34</sup> Usman, *supra* note 12, at 76.

<sup>35</sup> *Id.* at 74-75.

its inclusion in the U.S. Constitution, has removed the right from its constitution as "unnecessary constitutional clutter."<sup>36</sup>

In contrast with Pennsylvania's reasoning, many states in the last several years have decided to include the provision in their state constitutions. Currently, eighteen states have some form of a right to hunt and fish in their constitutions, while seven states in the last year rejected proposed amendments.<sup>37</sup> Although no longer tied to the former British rule over the US, such provisions reflect the states' ongoing abilities to write into their constitutions any provision they see fit for their citizens, independent of federal constitutional analysis. Reflecting the changing times and policies of the state, the constitutional amendments demonstrate the states' ability to include anything into their constitutions. Kentucky's inclusion of a right to hunt and fish in the state constitution is therefore allowable.

### III. THE CONSTITUTIONAL RIGHT TO HUNT AND FISH NO LONGER NEEDS STATE CONSTITUTIONAL PROTECTION

Pennsylvania believed that the right to hunt and fish should be a constitutional right.<sup>38</sup> The passage of Magna Carta and the Charter of the Forest first recognized hunting rights to private landowners but, over time, increasingly restricted the classes, who were allowed to hunt even on their own property.<sup>39</sup> Such laws sharply differentiated the noble elites of Britain from other classes by reinforcing upper-class power over an important facet of British society and severely punishing those who violated the laws.<sup>40</sup> In contrast, the colonies were established by those still "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."<sup>41</sup> In light of the hunting restrictions under British rule, the "equal right of all to hunt game was viewed as an incredibly profound sign

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<sup>36</sup> *Id.* at 77.

<sup>37</sup> Shinkle, *supra* note 2.

<sup>38</sup> Usman, *supra* note 12, at 69.

<sup>39</sup> Shinkle, *supra* note 2, at 62.

<sup>40</sup> *Id.* at 65.

<sup>41</sup> *Id.* at 75.



of the heightened liberty available in the colonies.”<sup>42</sup> This belief is reflected in Vermont’s “right to hunt” amendment, which exists in its state constitution to the present day.<sup>43</sup>

Despite the strong history of the amendment’s importance, the original purpose of the constitutional amendment protecting the right to hunt and fish no longer comports with modern America. Wildlife in the United States is no longer seen as “bountiful and seemingly never-ending wilderness,”<sup>44</sup> but is comprehensively regulated and restricted by local ordinances, state statutes, and federal laws.<sup>45</sup> With the passage of laws such as the National Wildlife Refuge System Administration Act and the Endangered Species Act, the Congress has shown that wildlife is no longer something to be taken freely, but must be conserved and regulated.<sup>46</sup> These aforementioned laws, in conjunction with many regulations and rules, are now managed by the U.S. Fish and Wildlife Service, and oversee various aspects of wildlife management, including hunting and fishing.<sup>47</sup>

Current federal laws and regulations demonstrate that wildlife in the United States is no longer bountiful and many species are in danger of becoming extinct.<sup>48</sup> Wilderness resources are no longer property that everyone has a right to without limitations. Recognizing a constitutionally protected right to resources that are now limited and strictly regulated is not logical in the current era, as the purpose behind the protection has been eroded by the improper use of resources. While governmental protection of the right to hunt and fish certainly amounted to fundamental human activity at the time of its first proposal, the motive behind the amendment no longer exists. Because the original purpose of the constitutional provision no longer comports with the state of wildlife in the United States,

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<sup>42</sup> *Id.* at 67–68.

<sup>43</sup> Parker, *supra* note 5.

<sup>44</sup> Usman, *supra* note 12, at 67.

<sup>45</sup> Greg Yarrow, *Rules, Regulations and Laws Affecting Wildlife Management*, CLEMSON UNIV. EXTENSION FORESTRY & NATURAL RES., [http://www.clemson.edu/extension/natural\\_resources/wildlife/publications/fs26\\_rules\\_regulations\\_laws.html](http://www.clemson.edu/extension/natural_resources/wildlife/publications/fs26_rules_regulations_laws.html) (last updated May 2009).

<sup>46</sup> National Wildlife Refuge System Act of 1966, 16 U.S.C. § 668dd (1998); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1988).

<sup>47</sup> *About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., [http://www.fws.gov/help/about\\_us.html](http://www.fws.gov/help/about_us.html) (last visited Feb. 2, 2015).

<sup>48</sup> *ESA Basics: 40 Years of Conserving Endangered Species*, U.S. FISH AND WILDLIFE SERVS., (Jan. 2013), [http://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf).

a right to hunt and fish is not a fundamental right and has no place in state constitutions.

#### IV. CURRENT PROTECTIONS EXIST, MAKING THE RIGHT TO HUNT AND FISH A MOOT AMENDMENT

Any additional protection of a right to hunt and fish in state constitutions is duplicious of current protections that exist in the federal Constitution. Recognizing this fact, even the Humane Society of the United States does not oppose the amendments.<sup>49</sup> Accordingly, Michael Markarian of the Humane Society of the United States has stated: "We haven't opposed these measures . . . We don't really view them as having much of an impact. These proposals are a solution in search of a problem. Every state allows hunting."<sup>50</sup>

The lack of protest speaks to the fact that many states, including Kentucky, draft the right to hunt and fish subject to legislative statutes and administrative regulations already in place. This means any existent statutes and regulations still have precedent over the amendment's purported protections.<sup>51</sup> Additionally, proponents claim that such an amendment might be used as a basis for challenging both existing and new laws.<sup>52</sup> While Kentucky has not spoken directly on this issue, other courts review hunting and fishing statutes under a rational basis standard, meaning the regulation must only be reasonable to be upheld.<sup>53</sup> Under rational basis review, "the 'standard formulation of the test for minimum rationality' is whether the classification is 'rationally related to a legitimate governmental purpose.'"<sup>54</sup> Since this is a fairly easy standard to meet, any challenges made under the amendment will most likely fail, as long as the regulation is reasonable.

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<sup>49</sup> Parker, *supra* note 5.

<sup>50</sup> *Id.*

<sup>51</sup> State "Right to Hunt and Fish" Protections, *supra* note 6; KY. CONST. §255A.

<sup>52</sup> WIS. S. JOURNAL, 95th Regular Sess., at 107 (2001), available at <http://docs.legis.wisconsin.gov/2001/related/journals/senate/20010306.pdf>.

<sup>53</sup> See, e.g., Ala. Dog Hunters Ass'n v. State, 893 So. 2d 1224, 1227 (Ala. Civ. App. 2004).

<sup>54</sup> Cal. Gillnetters Ass'n v. Dep't of Fish & Game, 46 Cal. Rptr. 2d 338, 342 (Cal. Ct. App. 1995).

State courts have already spoken on this issue. In 1995, a California Appeals Court concluded that the constitutional right to fish is a “qualified right that is subject to rational basis review.”<sup>55</sup> In another case, the Vermont Supreme Court determined that every presumption is to be made in favor of the constitutionality of the legislature, and therefore found that the fishing statute at issue was constitutional despite Vermont’s hunting and fishing amendment.<sup>56</sup> Since rational basis review is incredibly deferential to the legislature, hunting and fishing regulations will continue to operate in full force, even if challenged. Thus, having an amendment will not do anything sizeable to change current laws, and will allow the legislature to easily continue passing new hunting and fishing laws.

Further, a right to hunt and fish amendment has absolute limits that it can never overcome. For instance, courts have found that despite the existence of a constitutional right to hunt and fish, the right does not extend to the hunting or fishing of endangered or threatened species if such regulations are in place.<sup>57</sup> For example, in 2003, Wisconsin passed a constitutional “right to hunt” amendment.<sup>58</sup> In a subsequent challenge over the hunting of mourning doves, the Wisconsin Supreme Court noted, “the fact that citizens of this state enjoy the right to hunt in the absence of reasonable regulations does not necessarily mean that it is ‘open season’ on any species of birds not regulated by the [Department of Natural Resources . . . [the Wisconsin Administrative Code] currently provides that certain enumerated species are protected and may not be taken without authorization by the DNR.”<sup>59</sup>

As seen by the Wisconsin case, an amendment does not suddenly erase the legislative or administrative authority in instituting bans on endangered or threatened species. Thus, even if a constitutional amendment to hunt and fish existed, such a right is not absolute, and certain animals, such as endangered species, will be exempt. While other groups of animals have not been litigated as needing an exception, the future is open as to whether

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<sup>55</sup> *Id.*

<sup>56</sup> *Elliott v. State Fish & Game Comm'n*, 117 Vt. 61, 69 (Vt. 1951).

<sup>57</sup> *Usman*, *supra* note 12, at 85.

<sup>58</sup> WIS. CONST. art. I, § 26.

<sup>59</sup> *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Natural Res.*, 270 Wis. 2d 318, 354 (Wis. 2004).

other animals might be given exemptions based on similar reasoning. If such is the case, the amendment will have done nothing to protect hunting and fishing rights not already protected by statute.

The right to hunt and fish is an unnecessary amendment to a state constitution. Despite this, all current laws and endangered species bans remain in effect. Additionally, the constitutional right to hunt and fish does not grant individuals additional protections, as new laws and regulations are subject to rational basis review.

#### V. KENTUCKY'S AMENDMENT WAS AN UNNECESSARY INCLUSION, PASSED IN RESPONSE TO A PROBLEM THAT DID NOT EXIST

In 2011, Kentucky's constitutional amendment, known as HB1, passed with ease, receiving 94 votes in favor and only one vote in opposition.<sup>60</sup> Yet, precedent set by other state courts demonstrates that Kentucky's amendment will not do much for the state. The amendment does not change routine regulations, those of which range from determining hunting seasons, which individuals must obtain a sporting permit, and how much the permits should cost.<sup>61</sup> The Department of Fish and Wildlife Resources will also continue to regulate both hunting and fishing.<sup>62</sup>

Additionally, while a Legislative Research Commission publication points to wildlife protection and conservation laws as reasons why the amendment is needed,<sup>63</sup> it is clear that wildlife protection and conservation laws were not the reason behind the current amendment. While no groups are currently lobbying against hunting and fishing rights,<sup>64</sup> supporters of the

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<sup>60</sup> Craig Fehrman, *It's Not Just the Second Amendment Anymore*, SLATE (Dec. 20, 2012, 1:26 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/12/right\\_to\\_hunt\\_how\\_the\\_nra\\_is\\_larding\\_state\\_constitutions\\_with\\_frivolous.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/12/right_to_hunt_how_the_nra_is_larding_state_constitutions_with_frivolous.html).

<sup>61</sup> Leslie Combs, *Representative Leslie Combs: The Case for the Hunting Constitutional Amendment*, LEXINGTON HERALD-LEADER (Oct. 28, 2012), <http://www.kentucky.com/2012/10/28/2387280/rep-leslie-combs-the-case-for.html>.

<sup>62</sup> *Democracy 2012: Kentucky fish and game issue*, WCPO CINCINNATI, (Nov. 5, 2012, 4:06 PM), <http://www.wcpo.com/news/political/kentucky-fish-and-game-issue>.

<sup>63</sup> *Proposed Amendment to the Kentucky Constitution*, LEGISLATIVE RESEARCH COMM'N, (Nov. 6, 2012), [http://www.lrc.ky.gov/ConstAmend\\_PR\\_2012.pdf](http://www.lrc.ky.gov/ConstAmend_PR_2012.pdf).

<sup>64</sup> John Cheves, *Constitutional Amendment to Protect Hunting and Fishing Passes Easily*, LEXINGTON HERALD-LEADER, (Nov. 6, 2012), <http://www.kentucky.com/2012/11/06/2398379/constitutional-amendment-to-protect.html>.

amendment consider the amendment a “preemptive action” against those who might threaten hunting and fishing rights in the future.<sup>65</sup> In other words, the amendment was passed in response to a problem that does not exist, meaning this “super-legislative” document added a provision that is useless and unnecessary.<sup>66</sup>

Further, though state constitutional amendments are supposed to pass by “vote of the people,”<sup>67</sup> much of the talk about preemptive action was actually fueled by the National Rifle Association (NRA), and not the people of the state. Undoubtedly, the NRA has tremendous sway in Kentucky.<sup>68</sup> The endorsement of the National Rifle Association is critical to seventy-five to eighty percent of the district legislators; when the NRA supports a bill, it usually gets attention.<sup>69</sup>

In 2011, the NRA worked with the Kentucky Legislature to sponsor the constitutional amendment.<sup>70</sup> The reason for the bill was articulated by NRA spokeswoman Stephanie Samford, who stated that the NRA has “seen that lot of well-funded animal rights extremist groups are working to erode our sporting heritage in countless states. To assume that attacks like that would never happen in Kentucky is naïve.”<sup>71</sup> Insisting that the state needs protection from “attacks initiated by well-funded anti-hunting extremists who have assailed sportsmen throughout the country in recent years . . . the NRA doesn’t wait for problems to arise to address them” and instead wants to be “proactive on our Second Amendment rights.”<sup>72</sup> As seen by the NRA’s comments, the amendment was fueled not by wildlife protection and conservation laws as the Legislative Commission Report stated, but by the more tangential issue of gun rights and preemptive action. In other words, the amendment was passed to combat a problem that does not exist: mainly, the potential future threat to hunting and fishing rights

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<sup>65</sup> *Id.*

<sup>66</sup> HOLLAND, ET AL., *supra* note 31, at 894.

<sup>67</sup> Usman, *supra* note 12.

<sup>68</sup> Fehrman, *supra* note 60.

<sup>69</sup> *Id.*

<sup>70</sup> *Kentucky: Important Right to Hunt and Fish Amendment Needs Your Vote on November 6*, NRA-ILA, (Oct. 12, 2012), <http://www.nraila.org/legislation/state-legislation/2012/10/kentucky-important-right-to-hunt-and-fish-amendment-needs-your-vote-on-november-6.aspx>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

by animal activist groups who have created no "tangible threats to Kentuckians' ability to hunt."<sup>73</sup>

Even when voting on the amendment, representatives expressed doubt about its usefulness. The lone dissenter in the House, Representative Jim Wayne, opposed the passage of the amendment, viewing it as a "precedent for constitutional amendments that's bad for the state."<sup>74</sup> During the legislative session, Wayne stated that he "never in [his] 62 years felt a threat to [his] ability to either hunt or fish."<sup>75</sup> He asked the sponsor of the bill if there was "any documentation that says currently there is a threat to these liberties in our commonwealth?"<sup>76</sup> Not only was there no documentation but the sponsor also refused to answer further questions.<sup>77</sup> Representative Darryl Owens, who voted for the amendment, later criticized it: "[the amendment] didn't make sense. Hunting doesn't seem to be in any jeopardy."<sup>78</sup>

As these representatives have expressed, no threat currently exists in Kentucky that this amendment would remedy.<sup>79</sup> If state constitutions are "rich sources of substantive provisions" that reflect public policy," then amendments should similarly reflect the actual public policy of the state instead used as a front for another, unrelated reason for the amendment's enactment.<sup>80</sup> While the Legislative Research Commission touts the public policy behind the amendment as "wildlife protection and conservation," the amendment's true purpose instead attempts "to get some tenuous protection against gun control, if anyone were ever to attempt that [in Kentucky]."<sup>81</sup> Kentucky already has a "right to bear arms" provision in its constitution,<sup>82</sup> any desire to strengthen gun rights should arise from that provision rather than an amendment defending hunting and fishing rights under the guise of wildlife protection and conservation. Since the amendment does not

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<sup>73</sup> Fehrman, *supra* note 60.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Greta McClain, *Constitutional Amendment Protecting 'Right to Hunt' Proposed*, DIGITAL JOURNAL (Nov. 5, 2012), <http://digitaljournal.com/article/336200>.

<sup>80</sup> Lermack, *supra* note 24, at 1431-32.

<sup>81</sup> McClain, *supra* note 79.

<sup>82</sup> KY. CONST. § 1.

actually solve any current tangible problem in Kentucky, it should not be in Kentucky's constitution.

## VI. CONSTITUTIONS SHOULD BE A PLACE FOR FUNDAMENTAL RIGHTS, NOT RECREATIONAL PRIVILEGES.

### *A. Establishing A Constitutional Right To Hunt And Fish Destroys The Public Trust Doctrine*

While it is true that state constitutions may contain substantive provisions, such as education or welfare, state courts have often interpreted hunting and fishing to be under the control of the legislature.<sup>83</sup> Known as the Public Trust Doctrine, the idea stems from the belief that natural resources are “universally important in the lives of people, and that the public should have an opportunity to access these resources for purposes that traditionally include fishing, hunting, trapping, and travel routes.”<sup>84</sup> The doctrine essentially establishes the government as trustee to hold and manage wildlife, fish, and waterways for the benefit of the public.<sup>85</sup> The government does not own the resources within the trust, but instead safeguards the trust owned by the public, for the public's long-term benefit.<sup>86</sup> By viewing the government as trustee, the government becomes “accountable for its actions in managing publicly owned assets, [and] [t]he public, as beneficiary of the trust, has legal rights to enforce accountability upon its government.”<sup>87</sup>

State courts have interpreted and affirmed the Public Trust Doctrine for many years. As early as 1842, the U.S. Supreme Court found that the public held a common right to fish in the navigable and tidal waters of New Jersey because the waters and underlying lands were owned by the state for

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<sup>83</sup> Usman, *supra* note 12, at 71.

<sup>84</sup> GORDON R. BATCHELLER ET AL., THE WILDLIFE SOC'Y, THE PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR WILDLIFE MANAGEMENT AND CONSERVATION IN THE UNITED STATES AND CANADA, TECHNICAL REVIEW 10-01, 9 (Sept. 2010), available at [http://wildlife.org/wp-content/uploads/2014/05/ptd\\_10-1.pdf](http://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 10.

<sup>87</sup> *Id.* at 14.

the "common use" of the people.<sup>88</sup> More recently, in 1881, the Illinois Supreme Court held in *Magner v. Illinois* that to "hunt and kill game, or qualify and restrict it" was in the public welfare and held in trust of "all the people of the State and . . . by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use."<sup>89</sup> Similarly, the California Supreme Court stated that 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."<sup>90</sup> In the same vein, Michigan declared that "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."<sup>91</sup>

Many states believe that the public owns wildlife, but only when maintained by the government. Thus, many states have given hunting and fishing protection through statutes, the main legal vehicle for giving public trust status to wildlife.<sup>92</sup> For example, New Hampshire's statute states, "it shall be the policy of the state to maintain and manage [wildlife] resources for future generations."<sup>93</sup> Similarly, Georgia's statutory provision provides, "wildlife is held in trust by the state for the benefit of its citizens and shall not be reduced to private ownership except as specifically provided for in this title."<sup>94</sup> Many other states have similar statutes, including Kentucky's own statute explaining, "the policy of the Commonwealth of Kentucky, is to protect and conserve the wildlife of this Commonwealth so as to insure a permanent and continued supply of the wildlife resources of this state for

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<sup>88</sup> *Martin v. Waddell*, 41 U.S. 367, 410-11, 419 (1842).

<sup>89</sup> *Magner v. People*, 97 Ill. 320, 333-34 (Ill. 1881).

<sup>90</sup> *Ex parte Maier*, 37 P. 402, 404 (Cal. 1894). *See also*, e.g., *Collopy v. Wildlife Comm'n, Dept of Natural Res.*, 625 P.2d 994, 999-1000 (Colo. 1981); *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).

<sup>91</sup> *People v. Zimberg*, 33 N.W.2d 104, 106 (Mich. 1948).

<sup>92</sup> GORDON R. BATCHELLER ET AL., *supra* note 84, at 22.

<sup>93</sup> N.H. REV. STAT. ANN. § 212-B:2 (1988).

<sup>94</sup> GA. CODE ANN. § 27-1-3 (2005).



the purpose of furnishing sport and recreation for the present and for the future residents of this state . . . .”<sup>95</sup>

Such statutes demonstrate wildlife as the domain of the people and the legislature. Contrarily, a constitutional right to hunt and fish violates the idea of the public trust by attempting to take away the ability to regulate. If there were ever a need to ban or severely restrict hunting specific animals for public purposes, unnecessary litigation and questions might arise concerning the constitutionality of the restriction in light of this current amendment. Instead of the amendment, the government should rely on Kentucky’s public trust statute and manage wildlife as a trustee for the benefit of the public. Doing so will allow the legislature to freely manage its responsibilities to Kentuckians through statutes without the hindrance of a constitutional provision that does little to change the status quo and might create additional and unnecessary litigation that would bar effective and desired enactment of future hunting and fishing laws supported by the public. Since the constitutional amendment violates the Public Trust Doctrine, by taking over an area traditionally left to legislation, Kentucky should leave hunting and fishing rights to the legislature instead of embodying such a right within its constitution.

### *B. The Constitution Is A Source Of Basic, Substantive Rights Not Recreational Activities*

As constitutions are places of basic, substantive rights, a recreational activity such as the right to hunt and fish should not be considered a constitutional right. While “some state constitutions . . . attempt to cover subject and policy areas best reserved for a document other than the fundamental law of the state,”<sup>96</sup> constitutions should actually be places of basic democratic rights, following common themes such as structure of government, separation of powers, individual rights, and responsibilities or limitations on the state in specific subject areas.<sup>97</sup> Historically, state

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<sup>95</sup> KY. REV. STAT. ANN. § 150.015 (West 2006).

<sup>96</sup> Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J. L. & EDUC. 1, 6 (2011).

<sup>97</sup> HOLLAND ET AL., *supra* note 31, at 894.

constitutions have always been considered documents of high repute, with the earliest documents providing guidance for the current United States Constitution, and have subsequently provided laudable examples for each other and the nation.<sup>98</sup> Most notably, state constitutions were the first in providing some of our most enduring and significant rights, such as popular election of judges, women's suffrage, equal rights for women, and black suffrage.<sup>99</sup> Adding a recreational activity like hunting and fishing in a document of great social, political, and economic import is an improper use of one of the most fundamental and basic documents of the state. In other words, "the purpose of a constitution is to establish a basic framework for the government to operate in and to be flexible in."<sup>100</sup> It is not a place for recreational rights such as hunting and fishing.

The view that the constitution remains a basic, yet flexible, framework was most likely shared by those who formulated the Kentucky Constitution in 1890. During the debates of the Kentucky Convention, a discussion arose regarding what form of government the Commonwealth should have.<sup>101</sup> One of the delegates, answered:

[The delegates] have no right to dictate now just what form of government we shall have for one hundred years to come. There is nothing so sacred about any of this Constitution but what the people can alter, modify or change, and adapt it to the wants of the people when the emergency arises.<sup>102</sup>

The writers of the Kentucky Constitution desired that the people change the constitution whenever the need or emergency arose. Hunting and fishing rights are surely not an emergency, and the writers of the Kentucky Constitution most likely did not intend for such rights to exist. In addition to the intentions of the writers of our constitution, when

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Fehrman, *supra* note 60.

<sup>101</sup> See generally E. POLK JOHNSON, OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER 1890: TO ADOPT, AMEND, OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 1754, at 2 (1890).

<sup>102</sup> *Id.*

determining whether to include an amendment in our constitution, lawmakers should ask “whether the value of embodying this proposal in higher law, beyond change by normal lawmaking processes is greater than the cost of doing so,” and 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.”<sup>103</sup> In the case of Kentucky’s amendment, the answer to each of these questions is a resounding no. Proponents of the amendment point to hunting and fishing as a rich tradition in Kentucky that must be protected,<sup>104</sup> and hunting and fishing are “integral to Kentucky life,”<sup>105</sup> While the cultural importance of hunting and fishing is undeniable in Kentucky, cultural importance alone is insufficient to justify constitutional protection.<sup>106</sup> The insufficiency of giving cultural activities constitutional protections is stated aptly by a Tennessean columnist in opposition to Tennessee’s similar amendment: “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.”<sup>107</sup> Similarly, People for the Ethical Treatment of Animals spokeswoman Ashley Byrne told the Louisville Courier-Journal: “Why not a right to shop or a right to golf? Amendments like this threaten to open the door to a flood of other amendments whose sole purpose is to make political statements for political interest groups. It’s a solution in search of a problem.”<sup>108</sup>

As seen by these concerns, constitutionalizing cultural activities is improper, in spite of their great and undoubtedly important social significance. Recreational activities have no place in a constitution.

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<sup>103</sup> Usman, *supra* note 12, at 106.

<sup>104</sup> See *Kentucky! Vote Yes on the Constitutional Right to Hunt and Fish*, NAT’L RIFLE ASS’N-INST. LEGISLATIVE ACTION, <https://www.nraila.org/campaigns/hunting/right-to-hunt-ky/> (last visited Dec. 23, 2013).

<sup>105</sup> Matthew Rand, *Kentucky voters to consider hunting and fishing amendment*, WYMT-TV MOUNTAIN NEWS (Oct. 10, 2012, 1:46 AM), <http://www.wkyt.com/wymt/home/headlines/Kentucky-voters-to-consider-hunting-and-fishing-amendment-173384861.html>.

<sup>106</sup> Usman, *supra* note 12, at 107.

<sup>107</sup> *Id.* at 106.

<sup>108</sup> Elizabeth Dias, *Ballot Initiative of the Day: Will Kentucky Make Hunting a Constitutional Right?*, TIME (Nov. 2, 2012), <http://swampland.time.com/2012/11/02/ballot-initiative-of-the-day-will-kentucky-make-hunting-a-constitutional-right/>.

Amendments to state constitutions should occur when an emergency rises, as the original writers intended, or when a right is of "such enduring importance" that the permanent embodiment of the right into our document of government and individual rights is worth much greater than the problems it might create.

## VII. A PROPOSED SOLUTION

Since hunting and fishing are important traditions in Kentucky, some recognition and protection should exist. Instead of a narrow constitutional right to hunt and fish, the state can protect the rich tradition of Kentucky's hunting heritage through two alternative ways: statute or a broader constitutional amendment directed towards wildlife in general.

First, the state can establish protections for hunting and fish via statute. This makes the most sense because state courts have historically viewed the right to hunt or fish as a privilege that "exists at the will of the state legislatures [and] if a state legislature wished to prohibit hunting or fishing, the legislature [is] within its discretion to do so."<sup>109</sup> In the same vein, if Kentucky's legislature desired to affirm hunting and fishing rights, then it could easily do so.

There is nothing to stop Kentucky from having such a statute. In fact, Kentucky already has one that reflects similar principles. As discussed before, Kentucky has a statute that proclaims that the state policy is "to protect and conserve the wildlife of the Commonwealth to insure a permanent and continued supply of the wildlife resources of this state for the purpose of furnishing sport and recreation for the present and future residents of the state."<sup>110</sup> This statute has the dual purpose of protecting wildlife while guaranteeing that the public will still enjoy the right to engage in activities such as hunting and fishing.<sup>111</sup> Having a statute that guarantees a supply of wildlife for the purpose of hunting and fishing provides legislative assurance that hunting and fishing are not activities that should or will be banned. The statute is more than sufficient to affirm

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<sup>109</sup> Usman, *supra* note 12, at 72.

<sup>110</sup> KY. REV. STAT. ANN. § 150.15 (West 2006).

<sup>111</sup> GORDON R. BATCHELLER ET AL., *supra* note 84, at 22.

hunting and fishing rights in Kentucky, and if public sentiment regarding hunting and fishing remains the same, the statute will not be repealed.

If the current statute is insufficient, the legislature is free to pass additional provisions establishing a right to hunt and fish similar to the current amendment. The legislature can provide for a statute that explicitly gives citizens hunting and fishing rights in accordance with current laws and regulations. Enacting such statutes would be in line with the Public Trust Doctrine and the idea that hunting and fishing rights are within the domain of the legislature.

If the people believe that hunting and fishing rights absolutely must be embodied in the constitution then the amendment should address the issue in a broad way, addressing wildlife in general instead of enumerating specific rights. Similar to many education provisions that provide duties for the government to provide for the right of education,<sup>112</sup> the amendments regarding hunting and fishing should follow a similar pattern, by providing duties for the government to uphold in protecting hunting and fishing.

A few states already have such rights in their constitutions, demonstrating that more appropriate provisions exist than a narrow statement that gives citizens specific hunting and fishing rights. For instance, the Alaska Constitution states, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."<sup>113</sup> In interpreting this provision, the Alaska Supreme Court believed that the state "intended to engraft certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state."<sup>114</sup> Louisiana's provision is similar, declaring that the state is "to protect, conserve, and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people."<sup>115</sup>

The most appropriate way to embody a constitutional right to hunt and fish is through broader language that encompasses general and universal rights for all people, instead of a narrow provision that targets one

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<sup>112</sup> See generally Paul L. Tractenberg, *Education Provisions in State Constitutions: A Summary of a Chapter for the State Constitutions for the Twenty-First Century Project*, UNIV. RUTGERS-CAMDEN 8, <http://camlaw.rutgers.edu/statecon/subpapers/tractenberg.pdf> (last visited Dec. 22, 2013).

<sup>113</sup> AK. CONST. art. 8, § 3.

<sup>114</sup> *Owsichek v. State Guide Licensing & Control Bd.*, 763 P. 2d 488, 496 (Alaska 1988).

<sup>115</sup> GORDON R. BATCHELLER ET AL., *supra* note 84, at 23.

specific area of wildlife for a certain group of people. By amending the provision more like Alaska and Louisiana's, Kentucky could better serve the people's interests by giving universal rights to all people, instead of a certain group of individuals who would benefit from the current amendment. A broader statute would also comport with the idea that state constitutions should embody basic, fundamental rights, and the protection and future wellbeing of wildlife for use and enjoyment by the public, including the right to hunt and fish, is a more enduring and basic right of the people than one that specifically points to a recreational activity that affects one group of individuals.

### VIII. CONCLUSION

The recent wave of amendments affirming the constitutional right to hunt and fish came in response to the many successes of animal rights' groups and legislators in restricting certain hunting rights. As the successes of these groups grow, more states are becoming wary of the potential consequences and have passed constitutional amendments giving individuals a right to hunt and fish alongside provisions describing structures of government, free speech, right to trial by jury, and other interests traditionally considered some of our most fundamental and basic rights.

While well intentioned, a constitutional right to hunt and fish is an unnecessary and dangerous addition to the constitution. Kentucky's decision to amend sets a dangerous precedent for future amendments for the Commonwealth. Historically and currently, no federal constitutional right to hunt and fish exists and courts do not consider hunting and fishing laws as important fundamental rights. Although states have freedom in their own constitutions in passing whatever substantive provision they deem appropriate, amendments should be passed to create change or protect a threatened right, which this amendment does not do. Adding the right to hunt and fish in the constitution does not change current laws and regulations in existence, since most of them were written to comport with already existing statutes and ordinances. Some courts have even defined this

right as a qualified one, banning hunters from hunting endangered species and other specially protected animals.

Further, Kentucky's amendment is not a response to any current problem but a "pre-emptive strike" against the possibility of future litigation. No current litigation exists in Kentucky regarding hunting or fishing bans, however, and no future litigation appears to be on the horizon. Kentucky's amendment constitutionalizes a recreational activity where this protection is superfluous and unnecessary. Instead, the right to hunt and fish is best embodied in a statute, which is a better expression of the desires of the people. If wildlife belongs to the people collectively, then the state, through the legislature, can effectively pass laws in accordance with the desires of the people.

Given these reasons, the Commonwealth should repeal the amendment and leave it to the legislature to pass suitable statutes. Such an act would speak strongly to other states considering similar amendments. Other states considering such an amendment should do what Kentucky did not do: ask themselves whether hunting and fishing rights are of "such enduring importance that [they] are willing to bind [themselves] to it more firmly than by ordinary legislation."<sup>116</sup> Most states, while agreeing that hunting and fishing are enduring traditions, would most likely believe that such rights, however strong, do not warrant constitutional protection. The future impact of Kentucky's amendment is unclear. As further debate and litigation rise over the issue, states considering similar amendments should look to Kentucky and other states' "right to hunt" provisions with caution, and think profoundly before placing the right to hunt and fish alongside other basic, democratic rights embodied in its constitutions.

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<sup>116</sup> Usman, *supra* note 12, at 107.