


A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments

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Stacey L. Gordon*

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INTRODUCTION

“In the Fall of 2001, [Rep. Joe Balyeat] crouched in a hunting blind just south of the Canadian border between the towns of Whitlash and Galata, MT. [He] was bowhunting for antelope in a blind [he] built himself” and reflecting on Montana’s hunting traditions and values.¹ Earlier that year, Rep. Balyeat had co-sponsored a bill in the Montana legislature to place on the ballot a constitutional amendment that would preserve Montana’s hunting heritage.² Although the bill was tabled in committee, the hearing testimony clearly established the purpose of the hunting heritage amendment that would pass two years later.

Rep. Dave Lewis . . . explained that HB264 is to preserve the heritage of Montana citizens to harvest wild game and wild fish. This Bill is similar to one passed in North Dakota declaring that hunting, fishing and trapping are part of their heritage that must forever be preserved for the people. The purpose of HB 264 is to avoid possible future Animal Rights Activist issues. The Legislatures of Minnesota, Virginia and Alabama have passed similar bills.³

Seventeen states have “right to hunt” provisions in their constitutions,⁴ and the citizens of three more will vote on such amendments in

1. Mont. H. Fish, Wildlife & Parks Comm., *Hearing on H. 306*, 58th Legis., Reg. Sess. ex. 1 (Jan. 28, 2003) (written testimony of Rep. Joe Balyeat) [hereinafter *Balyeat Testimony*].

2. Mont. H. 264, 57th Legis., Reg. Sess. (Jan. 11, 2001). The proposed amendment was: “(1) The harvest of wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state. The heritage does not create a right of trespass and is subject to regulation by law. (2) The state shall manage fish and wildlife to preserve opportunities for the harvest of wild fish and wild game animals by the citizens of the state.”

3. Mont. H. Fish, Wildlife & Parks Comm., *Hearing on H. 264*, 57th Legis., Reg. Sess. 15 (Jan. 16, 2001) (sponsor’s opening statement).

4. Ala. Const. art. I, § 36.02; Ark. Const. amend. 88, § 1; Ga. Const. art. I, § 1, ¶ XXVIII; Idaho Const. art. I, § 23; Ky. Const. § 255A; La. Const. art. I, § 27; Minn. Const. art. XIII, § 12; Mont. Const. art. IX, § 7; Neb. Const. XV, § 25; N.D. Const. art. XI, § 27; Okla. Const. art. II, § 36; S.C. Const. art I, § 25; Tenn. Const. XI, § 13; Vt. Const. ch II, § 67; Va. Const. art. XI, § 4; Wis. Const. art. I, § 26; Wyo.

2014.⁵ Analysis of these provisions reveals telling similarities that are rooted in their provenance, with notable variations that point to states trying to work through potential implications. All are a product of special interest fears and, as often the case when both special interests and fear control, most are problematic. All amend state constitutions unnecessarily.

Americans have been hunting since before the drafting of the Constitution—thousands of years before in fact—but there is no right to hunt in the United States Constitution. The Second Amendment guarantees the right to bear arms, but only cites the need for a “well ordered militia,” not the need for people to keep guns to hunt, even though hunting was crucial to survival. Vermont citizens have enjoyed a constitutional right to hunt since 1777 when the state’s original constitution was adopted,⁶ but it was over two hundred years before any other state professed a need to protect hunting by constitutional amendment. The sixteen modern constitutional hunting amendments have all been adopted since the mid-1990s. Their history reflects a fear that an activity that was once ubiquitous is now under a significant enough threat to need constitutional protection.

Const. art I, § 39. Although they are commonly described as “right to hunt” amendments, in this article, they will be referred to as “hunting amendments” because they do not all confer rights.

5. Ind. Sen. Jt. Res. 7, 118th Gen. Assembly, 1st Reg. Sess. (Jan. 7, 2013); Miss. H. Con. Res. 30, 127th Legis. Sess. (Feb. 7, 2012); Ala. H. 322, 2014 Reg. Sess. (Jan. 21, 2014). The Alabama amendment amends the already existing hunting amendment adopted in 1996 so that it will conform to the NRA model discussed in this article. In addition, the legislatures in Missouri, New York, Pennsylvania and West Virginia area all considering bills to add hunting amendments to future ballots. Mo. H. Jt. Res. 55, 97th Gen. Assembly, 2d Reg. Sess. (Jan. 9, 2014); N.Y. Sen. Con. Res. 3049, 236th Legis. Sess. (Jan. 29, 2013); Pa. H. Jt. Res. 410, 197th Gen. Assembly (Jan. 29, 2013); W. Va. Sen. Jt. Res. 10, 81st Legis., 1st Sess. (Feb. 4, 2010). Since these bills may die in process, they will not be discussed in this article except to note that except Pennsylvania’s, they appear to be based on the NRA model.

6. Vt. Const. ch. II, § 39 (1777) (“That the inhabitants of this State shall have liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed); and in like manner, to fish in all boatable and other waters, not private property, under proper regulations, to be hereafter made and provided by the General Assembly.”)

Depending on how you read the statistics, numbers of hunters may be decreasing, or at least were decreasing for a while. However, even if evidence is only anecdotal, hunters perceive that numbers are decreasing. That perception, combined with modern social pressures and evolving attitudes toward animals, alarms hunters. The purpose of hunting amendments is to ensure the American hunting tradition is protected from major threats against it, namely anti-hunting activity from animal rights advocates.⁷ However, even considering that animal welfare advocates have had some successes in fighting specific hunting practices, pressure from new social attitudes is an overly simplistic explanation for statistics that are more nuanced than a simple decline. Even if the debate does reflect a shift in American values, elevating it to the level of constitutional discourse, and especially portraying it as an emergency, is at best premature. Hunting amendments are reactionary and therefore may not be as well-considered as constitutional amendments should be.

This article explores the facets of hunting amendments. Part I traces the legal history of protections for hunting, from early laws to preserve hunting for the people to modern hunter harassment statutes. Part II analyzes the forms of hunting amendments—some guarantee a right, others only recognize a heritage; some are fundamental rights, others are less strong; some are limited by private property rights, others are absolute. Nonetheless, they have a common source. Part III considers the impacts—possibly unintended consequences—of hunting amendments. Finally, Part IV suggests that while there are unrecognized common values between hunters and animal welfare groups that provide a solution for much of the debate, there are irreconcilable value clashes that will—and should—play out in the legal system but not in the constitutional arena.

7. See e.g. *Balyeat Testimony*, *supra* n. 1; Darren LaSorte, *Right to Hunt: Oklahoma Sportsmen Have Opportunity to Establish National Model*, <http://www.nraila.org/news-issues/articles/2008/right-to-hunt.aspx?s=right+to+hunt+oklahoma&st=&ps=> (Sept. 16, 2008).

I. A BRIEF HISTORY OF HUNTING IN THE U.S.

The American right to hunt, historically a common law right,⁸ was originally a rejection of Britain's reservation of hunting for the elite, or more specifically, for the Crown.⁹ In America, hunting was reserved for the people. It was not sport so much as necessity and its utility went beyond food and clothing—developing good hunting skills ensured that colonists were excellent marksmen, a necessity for both a revolutionary army and a strong militia.¹⁰

Unfortunately, pervasive and unregulated hunting led to the depletion—and in some cases, near-extinction—of wildlife.¹¹ Surprisingly, this was the expected result. “Hunting was thought of and written about as *something which must eventually disappear . . .*”¹² The purpose of early hunting regulation was not to create or preserve hunting opportunity for future generations or to protect game, but to manage game just to delay the eventual demise of hunting.¹³ Aldo Leopold criticized early game management for its almost exclusive focus on regulating hunting.¹⁴ He defined game management as “the art of making land produce sustained annual crops of wild game *for recreational use.*”¹⁵

8. See e.g. *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dept. of Nat. Resources*, 677 N.W.2d 612, 629 (2004).

9. Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 Wm. & Mary Bill Rts. J. 197, 198 (2010); Jeffrey Omar Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 Tenn. L. Rev. 57, 67-68 (2009).

10. Halbrook, *supra* n. 9, at 202-203 (quoting *McConico v. Singleton*, 9 S.C.L. 244 (S.C. Const. App. 1818)); *D.C. v. Heller*, 554 U.S. 570, 597-98 (2008).

11. S.P. Mahoney et al., *The North American Model of Wildlife Conservation: Enduring Achievement and Legacy* in Sporting Conservation Council, *Strengthening America's Hunting Heritage and Wildlife Conservation in the 21st Century: Challenges and Opportunities* 7 (Joanne Nobile & Mark Damian Duda, eds., Sporting Conservation Council 2009) (available at http://www.fws.gov/whhcc/doc/2009-29110-16517_Report_2009-10-13-17-19-00.pdf).

12. Aldo Leopold, *Game Management* 17 (Charles Scribner's Sons 1933, U. Wis. Press 1986) (emphasis original).

13. *Id.* at 16-17.

14. *Id.* at xxxi.

15. *Id.* at 3 (emphasis added).

Leopold's definition of game management signaled an important shift in the American idea of hunting. Although hunting almost certainly had a recreational component for the British elite, in America it was initially a means of survival. As the foundations of hunting shifted, hunting in America remained a protected common law right, but it acquired a recreational purpose.¹⁶ This is significant: hunting grew into a protected recreational activity. Modern hunting is almost entirely recreational so hunting amendments heighten a protection of recreation.

Under the intellectual and political leadership of Theodore Roosevelt, Gifford Pinchot, and Aldo Leopold, among others, in the late 19th and early 20th centuries, the conservation movement took on the responsibility of reestablishing and strengthening wildlife populations,¹⁷ relying largely on the voluntary, but legislated, financial support of hunters. The 1937 Pittman-Robertson Act¹⁸ was enacted with not just the support of hunters but at their insistence.¹⁹ The act created the federal aid to wildlife conservation fund, funded through excise taxes on hunting weapons and ammunition.²⁰ Under the Pittman-Robertson Act, funds are still distributed to states for wildlife conservation and hunter education programs.²¹ State hunting license fees directly fund state fish and wildlife agencies. Even though modern game management is mostly in the hands of state-employed, professional biologists and game managers, it is still largely, though not exclusively, funded by hunters. This relationship between

16. See Usman, *supra* n. 9, at 58, 68 (quoting Tenn. H. Jt. Res. 108, 105th Gen. Assembly (Feb. 8, 2008); *McConico*, 9 S.C.L. at 244-246).

17. John F. Reiger, *American Sportsmen and the Origins of Conservation* ch. 2 (3d ed., Or. St. U. Press 2001).

18. Federal Aid in Wildlife Restoration Act, Pub. L. No. 415, 50 Stat. 917 (1937).

19. Whitehouse Conference on North American Wildlife Policy, *Facilitation of Hunting Heritage and Wildlife Conservation* 5 (2008) (available at http://www.fs.fed.us/biology/resources/pubs/wildlife/rec_hunting_action_plan_2008.pdf); see also Katie Spidallieri, Student Author, *Looking beyond the Bang for More Bucks: A Legislative Gift to Fund Wildlife Conservation on Its 75th Anniversary*, 60 Cleveland St. L. Rev. 769, 775 (2012).

20. 50 Stat. at 917.

21. Hunter education was added in 1970, Pub. L. No. 91-503, § 102, 84 Stat. 1097, 1100 (1970), to "cultivate competent, ethical hunters across the country." Spidallieri, *supra* n. 19, at 776.

hunters and conservation became known as the North American Model of Wildlife Conservation and is recognized as being highly successful,²² but it also begs the criticism that wildlife is managed to maximize game available to hunters, not necessarily to maximize the interests of wildlife.²³

Hunting is now a highly regulated activity, though not all regulation is restrictive. Some hunting regulations, like hunting seasons and bag limits, have been adopted to fulfill game management purposes. However, now that wildlife populations may have recovered from the decimation of the 19th century and hunting itself is perceived to be endangered, modern hunting legislation is designed to increase flagging numbers of hunters by preserving and creating opportunities to hunt,²⁴ even allowing hunting methods that have previously been outlawed.²⁵

But modern hunting faces a challenge in the form of strongly held animal welfare values. As anti-hunting values emerged in American society, a new type of hunting legislation developed to protect hunters: hunter harassment statutes. Every state has enacted hunter harassment legislation.²⁶ In general, these statutes prohibit harassing hunters in order to keep them from the field or interfering with a legal hunt. Hunter harassment statutes may be effective to protect a specific hunt from a sabotage attempt, but as hunters worry that anti-hunting sympathies are growing

22. Sporting Conservation Council, *supra* n. 11.

23. Daniel J. Decker & Tommy L. Brown, *How Animal Rightists View the "Wildlife Management: Hunting System,"* 15 *Wildlife Socy. Bull.* 599, 600 (1987).

24. *See e.g.* Recreational Fishing and Hunting Heritage and Opportunities Act, Sen. 170, 113th Cong. (Jan. 29, 2013); Recreational Fishing and Hunting Heritage and Opportunities Act, H. 1825, 113th Cong. (May 3, 2013); Sportsmen's Heritage and Recreational Enhancement Act, H. 1350, 113th Cong. (Nov. 21, 2013); Bipartisan Sportsman's Act of 2014, Sen. 1996 (Feb. 4, 2014).

25. *See e.g.* Allow Lighted Nocks on Arrows while Big Game Hunting, Mont. H. 26, 63d Legis., Reg. Sess. (Nov. 21, 2012) (died in process); Authorize Use of Sound Suppressors while Hunting Certain Large Predators, Mont. H. 27 63d Legis., Reg. Sess. (Nov. 21, 2012) (vetoed); Allow Hound Hunting for Black Bears, Mont. H. 144, 63d Legis., Reg. Sess. (Jan. 7, 2013) (died in committee). Interestingly, bills that expand hunting methods or hunted species can be more controversial among hunters than regulations restricting hunting. H. 26, H. 27 and H. 144 were all both supported and opposed by hunting and wildlife organizations and individual hunters.

26. *See* Animal Legal & Historical Center, *Hunter Harassment Interference Laws*, <http://www.animallaw.info/articles/arpushunterharassment.htm> (accessed Aug. 30, 2013).

and numbers of hunters are declining, they have turned not just to legislation, but to constitutional amendment to protect hunting culture.

II. THE FORMS AND EFFECTS OF STATE HUNTING AMENDMENTS

A. State Constitutions

Constitutions are declarations of how groups of people choose to govern themselves; they are expressions of the fundamental values of how society should be organized and governed and what rights the people have. They are the fundamental law that society has determined no other law can derogate. In the United States, where the most fundamental value is liberty, the federal Constitution defines the rights of the people and the limits of government. State constitutions similarly limit state government action, either expressly or by implication.²⁷ In addition, state constitutions define positive rights.²⁸

State constitutions, however, have been criticized for being trivial and enshrining lower-level policy choices and administrative details.²⁹ Critics point to provisions like one in the New York Constitution establishing the width of ski trails that leave

the impression that these documents are too detailed to serve as repositories of national political commitments, or even any kind of principled commitment. As a result of their details, state constitutions appear to reflect idiosyncratic anxieties rather than national concerns, to be pluralistic competition rather than deliberate judgment, and to

27. G. Alan Tarr, *Introduction* in *State Constitutions for the Twenty-First Century* vol. 3, 2 (Frank P. Grad & Robert F. Williams, eds., St. U. of N.Y. Press 2006); Robert F. Williams, *The Law of American State Constitutions* 27 (Oxford U. Press 2009).

28. Emily Zackin, *Looking for Rights in All the Wrong Places* ch. 3 (Princeton U. Press 2013).

29. *Id.* at 18-19 (citing James Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992)).

enshrine trivial policies rather than fundamental promises.³⁰

State constitutional amendments often reflect partisan politics and concerns instead of the broader, weightier issues important to the whole of state populations.³¹ Some state constitutional provisions even limit future legislative action to preserve current majority values.³² Indeed, Rep. Joe Balyeat, the sponsor of Montana's hunting amendment said in his testimony:

The purpose of enumerated rights in state and federal constitutions is to ensure that the rights of various minorities are not infringed by the political whims of the majority. Without those constitutional guarantees, democracy can quickly deteriorate into the tyranny of the majority—a story of sterilized version of mob rule. While today hunting and fishing have the protection afforded by large percentage participation by Montanans; tomorrow we may find that these traditions are practiced only by a minority—especially if current trends continue. That's why today, when we have the political power to do so, we need to do what's right to protect that right for those future generations. We need to place in our constitution a Right to Hunt Amendment.³³

Changing value systems are a legitimate reason to amend state constitutions,³⁴ but Rep. Balyeat's logic reversed that assumption. Instead

30. *Id.* at 15, 18-19. Although Zackin defines these criticisms, the thesis of her book is to refute this characterization of state constitutions.

31. *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* xvii, xx (G. Alan Tarr, ed., Greenwood Press 1996) [hereinafter *Constitutional Politics*].

32. *Id.* at xx; see Williams, *supra* n. 27, at 29.

33. *Balyeat Testimony*, *supra* n. 1; Mont. Sen. Fish & Game Comm., *Hearing on HB 306*, 58th Legis., Reg. Sess. ex. 5 (Mar. 20, 2003) (written testimony).

34. Donald S. Lutz, *Patterns in the Amending of American State Constitutions in Constitutional Politics*, *supra* n. 31, at 28.

of amending the constitution because it no longer reflects the values of the citizens of the state, he sought to provide constitutional protection for a value because he feared citizens of the state would no longer value it. This is a dubious base for state hunting amendments, but is nevertheless the common incentive behind hunting amendments.

To counter the assertion that state constitutions are trivial, some state constitutional scholars posit that state constitutions reflect “not distinctive state political cultures but rather the political forces prevailing nationally at the time they were adopted.”³⁵ Constitutional provisions are similar from state to state because states look to each other to see how common issues are resolved.³⁶ Likely, this is often true; modern information flow, communications, and ease of travel ensure that most issues are discussed on a national level. However, this article argues that the history of hunting amendments reveals a common special-interest driven campaign: both the problem requiring constitutional amendment and the amendment language solving that problem were crafted by special interests.

B. Hunting Amendments³⁷

State voters have been adopting constitutional hunting amendments steadily since 1996, but no two states have exactly the same hunting amendment. Although they likely supported all the amendment campaigns, the National Rifle Association (NRA) eventually determined the early amendments were insufficient³⁸ and since at least 2003, they have led the campaign to adopt constitutional hunting amendments.³⁹ They drafted a model amendment that since 2003 most states have used to some degree. Interestingly, both the outliers—those amendments that predate

35. G. Alan Tarr, *State Constitutional Politics: An Historical Perspective* in *Constitutional Politics*, *supra* n. 32, at 3 (quoted in Williams, *supra* n. 27, at 29); see also Zackin, *supra* n. 28, at 20-22.

36. Zackin, *supra* n. 28, at 20; *Constitutional Politics*, *supra* n. 31, at xv.

37. See *infra* App. for a summary of state hunting amendments.

38. LaSorte, *supra* n. 7.

39. See *Id.* Idahoans Against Trapping places the NRA’s lobbying for hunting amendments much earlier, beginning in 1996 with Alabama’s hunting amendments. Idahoans Against Trapping, *The Problem Is Trapping, not Hunting or Fishing*, http://iatvoteno.org/?page_id=44 (accessed Aug. 25, 2013).

the model—and the amendments that follow the model are flawed. It is the NRA that found the outliers to be problematic because their protections are weak. Amendments based on the NRA model, however, are problematic because of the consequences that follow from their provisions.

1. *The Outliers*

Of the seven hunting amendments that predate the NRA model, four do not expressly guarantee a right to hunt. Instead, they recognize the state's hunting tradition or heritage as a value to preserve. For example, the Montana hunting amendment provides only that “the opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state.”⁴⁰ Similarly, the Minnesota amendment says, “Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people.”⁴¹ The North Dakota amendment varies only by the express addition of trapping.⁴² The Louisiana amendment states, “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.”⁴³

The language of these amendments is reminiscent of Vermont's hunting provision that guarantees the “*liberty*, in seasonable time, to hunt and fowl,”⁴⁴ but, while this language affirms public policy, it is unclear that the amendments have any other power to protect hunting. When tested, the North Dakota and Minnesota amendments both failed to provide a strong defense of hunting. In response to defendants' argument that the amendment protects a right to hunt, the North Dakota Supreme Court implicitly recognized it as a statement of public policy. However, the Court did not comment at all on the argument that the amendment protects a right, nor did it allow defendants to use the public policy as an affirmative

40. Mont. Const. art. IX, § 7.

41. Minn. Const. art. XIII, § 12.

42. N.D. Const. art XI, § 27.

43. *Id.*

44. Vt. Const., ch. II, § 67 (emphasis added).

defense to hunting in a closed area.⁴⁵ The Minnesota appeals court recognized only that “Minnesota has constitutionally recognized the *importance* of fishing and hunting to the people of this state.”⁴⁶

The legislative history of the Montana hunting amendment illustrates why states would adopt seemingly weak hunting amendments that do nothing more than recognize a heritage. When the hunting amendment was first introduced in the 2001 legislative session it did not create an express right and it was placed in Article IX (Environment and Natural Resources) of the constitution. An attempt in committee to move it from Article IX to Article II (Declaration of Rights) was withdrawn after a lengthy discussion⁴⁷ and the issue was not revisited in the 2003 session. Certainly, constitutional rights are guaranteed outside declarations of rights provisions and in fact it is fairly common to find environmental rights in environmental provisions in state constitutions.⁴⁸ Indeed, the committee seemed to take for granted that the amendment would create a right, but a problematic one.⁴⁹ The bill failed and the hunting amendment died in committee for that legislative session. Rep. Thomas had the final word, saying, “Every time we give a group a constitutional right, we are on the other hand saying if you don’t have a constitutional right then your activity is in jeopardy. . . . This is basically a bad situation we are getting ourselves into.”⁵⁰

Proponents tried again in 2003. They approached the creation of a right more directly, but again, failed in that regard even though the bill passed. The original version of H. 306, before it was amended in committee, contained the language “. . . and for state residents may be abridged only by general regulation necessary to further a compelling state inter-

45. *N.D. v. Mittleider*, 809 N.W.2d 303 (N.D. 2011).

46. *Mertins v. Commr. of Nat. Resources*, 755 N.W.2d 329, 336 (Minn. App. 2008) (citing Minn. Const. art. XIII, § 12) (emphasis added).

47. Mont. H. Fish, Wildlife & Parks Comm., *Executive Action on H. 264*, 57th Legis., Reg. Sess. (Jan. 30, 2001).

48. See Bret Adams et al., Student Authors, *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. Land Resources & Envtl. L. 73 (2002) (cited in Barton H. Thompson, Jr., *The Environment and Natural Resources in State Constitutions for the Twenty-First Century*, *supra* n. 27, at 307 n. 1).

49. See Mont. H. Fish, Wildlife & Parks Comm., *supra* n. 1.

50. *Id.*

est.”⁵¹ The state Fish, Wildlife & Parks Department (FWP) opposed the language because it created a fundamental right and would restrict FWP’s ability to manage wildlife.⁵² Legal counsel for FWP commented that

[t]he difference between the “right to hunt” and the “opportunity to harvest” was monumental to many involved. . . . “Fish, Wildlife and Parks has always been in favor of the preservation of hunting rights. But in theory, the right to hunt implies that we would not have any management control.” . . . [He said] the right to hunt might be construed by some individuals as absolute and available at any time, an attitude that would run counter to species management and federal mandates such as the Endangered Species Act.⁵³

One legislator criticized the final version’s failure to include express rights language. “I know they’re sincere, but if they were serious they’d have said “right.” It gives a false impression of protecting harvesting in the state, but it’s a feel good thing.”⁵⁴ However, even Rep. Balyeat approved of the removal of the rights language because of the potential that voters would misinterpret it as guaranteeing the right to a *successful* hunt: “We didn’t want to constitutionally guarantee that every hunter will bag a deer.”⁵⁵ He added, however, that “[y]ou don’t have to have the word right to grant a right.”⁵⁶ His reasoning ignored the purpose of removing the express rights language.

Perhaps the strongest indicator of the weakness of Montana’s hunting amendment is the lack of case law applying it. In a state boasting

51. Mont. H. 306, 58th Legis., Reg. Sess. (Jan. 13, 2003) (as introduced) (available at http://leg.mt.gov/bills/2003/hb0399/HB0306_1.wpd).

52. Mont. H. Fish, Wildlife & Parks Comm., *supra* n. 1, at ex. 4 (written testimony of Bob Lane, Chief Legal Counsel Montana Fish, Wildlife & Parks Dept.) [hereinafter Lane Testimony].

53. Whitefish Pilot, Christine Hensleigh, *Ballot Measure Ensures Right to Hunt*, http://www.whitefishpilot.com/news/article_8a791e86-763d-5a5c-9377-a0c9a281f7d6.html (Oct. 6, 2004).

54. *Id.* (quoting Sen. John Cobb).

55. *Id.* (quoting Rep. Joe Balyeat) (emphasis added).

56. *Id.*

a highly active hunting population, the Court has had no opportunity to apply the amendment in the decade since Montana voters approved it. Also indicative is that although there were several hunting bills presented to the 2013 Montana House, in legislative hearings almost nobody even mentioned the hunting amendment in support of pro-hunting bills. It was raised in support of only a bill that would have allowed students to keep guns in locked vehicles at school.⁵⁷

Montana voters passed the hunting amendment in 2003 with neither language creating an express right nor placement in the Constitution suggesting a right. In contrast, the constitutional hunting amendments are stronger in Wyoming and Georgia because they are contained in the declaration of rights. The Wyoming amendment says,

The opportunity to fish, hunt and trap wildlife is a heritage that shall forever be preserved to the individual citizens of the state, subject to regulation as prescribed by law, and does not create a right to trespass on private property, diminish other private rights or alter the duty of the state to manage wildlife.⁵⁸

Under the Georgia Constitution, “[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.”⁵⁹ The Georgia legislature specifically rejected express rights language and relied on the amendment’s placement. This allowed Georgia to avoid the problems created by Virginia’s hunting amendment which uses the word “right.”

Virginia realized the problems that arise from using the word “right,” as opposed to “tradition,” when a local hunting preserve sued its respective county for violating its constitutional right to hunt because the county denied it a special-use permit for a shotgun shooting range. . . .

57. Mont. H. Jud. Comm., *Hearing on H. 384*, 63d Legis., Reg. Sess. (Feb. 8, 2013).

58. Wyo. Const. art. I, § 39.

59. Ga. Const. art. I, § 1, ¶ XXVIII.

Despite pressure from the National Rifle Association to create a “right,” Senator Eric Johnson of the 1st district, who is the resolution’s sponsor, and other individuals who drafted the legislation were careful to use the word “tradition,” as opposed to “right,” so individuals could not use the amendment to challenge otherwise permissible hunting and fishing regulations.⁶⁰

Virginia’s express right to hunt⁶¹ is one of the strongest of the pre-NRA model amendments. Alabama also has a hunting amendment that creates an express right.⁶² The Alabama hunting amendment, which is placed in the declaration of rights, declares simply, “All persons shall have the right to hunt and fish in this state in accordance with law and regulations.”⁶³

Arguably, these do provide the protections hunting amendment proponents sought, but in the estimation of the NRA, all the early hunting amendments were flawed. According to Darren LaSorte of the NRA’s Institute for Legislative Action, “[T]hese amendments provide HSUS [Humane Society of the United States] and the other radical animal “rights” groups with far too much latitude to ban much of what hunters do today.”⁶⁴ In 2003 the NRA began promoting a model amendment and all state hunting amendments adopted since then conform in some degree to the model, with the single exception of Georgia’s.⁶⁵

60. Clay S. O’Daniel, *A Resolution: Amend the Constitution so as to Provide that the 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*, 22 Ga. St. U. L. Rev. 11, 13 (2005).

61. Va. Const. art. XI, § 4.

62. Ala. Const. art. I, § 36.02.

63. *Id.* Despite the strength of Alabama’s hunting amendment, a bill in the 2014 Alabama Legislature would amend Alabama’s hunting amendment to conform to the NRA model discussed below. Ala. H. 322, 2014 Reg. Sess. (Jan. 21, 2014).

64. LaSorte, *supra* n. 7.

65. Wisconsin, Montana and Louisiana voters adopted hunting amendments in 2003 and 2004, after the introduction of the NRA model, but all were products of deliberations that pre-date the model.

2. *The NRA Model and a Critique of Its Elements*

The NRA lauds the 2008 Oklahoma amendment for incorporating the important elements of an NRA-drafted model, elements that would “provide specific protections against the foreseeable attacks that will come from the Humane Society of the United States.”⁶⁶ The NRA model includes three elements: 1) a reasonableness standard for hunting legislation; 2) protection for “traditional methods” for taking non-threatened species; and 3) establishment of hunting and fishing as the “preferred means of managing wildlife.”⁶⁷

The NRA’s influence is powerful but neither state legislatures nor voters have been convinced to adopt the NRA model in its entirety. The NRA has been successful in getting hunting amendments before legislatures—between 2009 and 2012, legislatures in eighteen states considered hunting amendments.⁶⁸ They have had less success getting hunting amendments before voters, and in nine states the bills failed to make it out of the legislature.⁶⁹ Arizona’s Proposition 109 did make it onto the ballot,

66. LaSorte, *supra* n. 7.

67. *Id.*

68. Ark. Sen. Jt. Res. 3, 87th Gen. Assembly, 2009 Reg. Sess. (Jan. 12, 2009); Haw. Sen. 2107, 26th Legis. (Jan. 19, 2012); Idaho Sen. Jt. Res. 103, 61st Legis., 2d Reg. Sess. (Jan. 24, 2012); Idaho Sen. Jt. Res. 104, 61st Legis., 2d Reg. Sess. (Jan. 30, 2012); Idaho Sen. Jt. Res. 105, 61st Legis., 2d Reg. Sess. (Feb. 15, 2012); Idaho Sen. Jt. Res. 106, 61st Legis., 2d Reg. Sess. (Feb. 20, 2012); Idaho H. Jt. Res. 2, 61st Legis. 2d Reg. Sess. (Mar. 15, 2012); Ind. Sen. Jt. Res. 7, 118th Gen. Assembly, 1st Reg. Sess.; Ky. H. 1, 2011 Reg. Sess. (Jan. 4, 2011); Md. Sen. 33, 427th Sess. (Jan. 13, 2010); Mich. H. Jt. Res. T, 95th Legis., 2010 Reg. Sess. (Apr. 23, 2009); Miss. H. Con. Res. 30, 127th Legis. Sess.; Mo. H. Jt. Res. 55, 96th Gen. Assembly, 1st Reg. Sess. (Jan. 12, 2011); Neb. Legis. Res. 40CA, 102d Legis., 1st Reg. Sess. (Jan. 19, 2011); N.J. Sen. Con. Res. 30, 114th Legis., 1st Annual Sess. (Jan. 12, 2010); N.J. Sen. Con. Res. 32, 114th Legis., 1st Annual Sess. (Jan. 12, 2010); N.J. Sen. Con. Res. 42, 114th Legis., 1st Annual Sess. (Jan. 12, 2010); N.M. Sen. Jt. Res. 11, 50th Legis. (Jan. 24, 2012); N.C. Sen. 329, 2009 Reg. Sess. (Feb. 25, 2009); Pa. H. Jt. Res. 419, 193d Gen. Assembly (Feb. 13, 2009); S.C. H. Jt. Res. 3483, 118th Sess. (Feb. 10, 2009); Tenn. Sen. Jt. Res. 30, 106th Gen. Assembly, 2d Reg. Sess. (Feb. 2, 2009); Wyo. Sen. Jt. Res. 1, 161st Legis. (Dec. 14, 2010).

69. The following bills all failed: Haw. Sen. 207, 26th Legis.; Md. Sen. 33, 427th Sess.; Mich. H. Jt. Res. T, 95th Legis., 2010 Reg. Sess.; Mo. H. Jt. Res. 5, 96th Gen. Assembly, 1st Reg. Sess.; N.J. Sen. Con. Res. 30, 114th Legis., 1st Annual Sess.; N.J. Sen. Con. Res. 32, 114th Legis., 1st Annual Sess.; N.J. Sen. Con. Res. 42, 114th

but was not approved by voters.⁷⁰ Two proposed amendments will be considered by voters in 2014.⁷¹ The majority of all these appear to be based on the NRA model,⁷² but only two, Oklahoma's and New Mexico's, contain all three of the NRA's elements.

Idaho's experience illustrates the tensions created by the NRA model. In 2012, the Idaho legislature considered five resolutions to place a constitutional hunting amendment on the ballot.⁷³ The Senate hearing for Sen. Jt. Res. 104 reveals a great deal of concern about how a right would affect the state's regulation of hunting.⁷⁴ Sen. Jt. Res. 106 appears to have addressed those concerns.⁷⁵ Nevertheless, the Senate effort was abandoned in favor of the House resolution, which was drafted by the NRA.⁷⁶

Senator Heider [testifying in favor of H.J.R. 2] said HJR 002a is the House version of SJR 106 that was sent to them, which is the right to hunt, fish, and trap. He explained the changes that were made. The National Rifle

Legis., 1st Annual Sess.; N.M. Sen. Jt. Res. 11, 50th Legis.; N.Y. Sen. 6759, 233d Legis. Sess.; N.C. Sen. 329, 2009 Reg. Sess.; and Pa. H. Jt. Res. 419, 193d Gen. Assembly.

70. Ariz. Proposition 109 (2012).

71. Ind. Sen. Jt. Res. 7, 118th Gen. Assembly, 1st Reg. Sess.; Miss. H. Con. Res. 30, 127th Legis. Sess..

72. Ark. Sen. Jt. Res. 3, 87th Gen. Assembly, 2009 Reg. Sess.; Idaho H. Jt. Res. 2, 61st Legis. 2d Reg. Sess.; Ky. H. 1, 2011 Reg. Sess.; Mo. H. Jt. Res. 5, 96th Gen. Assembly, 1st Reg. Sess.; Neb. Legis. Res. 40CA, 102d Legis., 1st Reg. Sess.; N.M. Sen. Jt. Res. 11, 50th Legis.; N.J. Sen. Con. Res. 30, 114th Legis., 1st Annual Sess.; N.J. Sen. Con. Res. 42, 114th Legis., 1st Annual Sess.; N.Y. Sen. 6759, 233d Legis. Sess.; N.C. Sen. 329, 2009 Reg. Sess.; S.C. H. Jt. Res. 3483, 118th Sess.; Tenn. Sen. Jt. Res. 30, 106th Gen. Assembly, 2d Reg. Sess.

73. Idaho Sen. Jt. Res. 103, 61st Legis., 2d Reg. Sess.; Idaho Sen. Jt. Res. 104, 61st Legis., 2d Reg. Sess.; Idaho Sen. Jt. Res. 105, 61st Legis., 2d Reg. Sess.; Idaho Sen. Jt. Res. 106, 61st Legis., 2d Reg. Sess.; Idaho H. Jt. Res. 2, 61st Legis., 2d Reg. Sess. .

74. Idaho Sen. Resources & Env. Comm., *Hearing on Sen. Jt. Res. 104*, 61st Legis., 2d Reg. Sess. (Feb. 8, 2012).

75. Idaho Sen. Resources & Env. Comm., *Hearing on Sen. Jt. Res. 106*, 61st Legis., 2d Reg. Sess. (Feb. 22, 2012).

76. See Idaho Sen. Resources & Env. Comm., *Hearing on H. Jt. Res. 2*, 61st Legis., 2d Reg. Sess. (Mar. 26, 2012).

Association (NRA) wanted the words “including by the use of traditional methods” and “managed through the laws, rules and proclamations that preserve the future of hunting, fishing and trapping” added, which was done. The NRA originally had “managing and controlling wildlife,” but the Idaho Department of Fish and Game (IDFG) had the NRA attorney in Washington remove the words “and controlling” and just leave “managing wildlife.” . . . Senator Heider said that he feels like he started out with a good resolution and it has been worked through several times; however, when the NRA came to town, it had to be changed. . . .⁷⁷

The resulting amendment adopted by Idaho voters includes two of the three NRA elements. The fact that it does not contain the NRA’s reasonableness standard likely reflects the legislature’s concerns that the model amendment could constrain the state’s ability to regulate hunting. In fact, most states that used the NRA model eliminated the reasonableness standard. All three elements, however, are problematic.

a. A Reasonableness Standard for Hunting Legislation

“A ‘reasonableness’ standard ensures that science, not politics and emotion, is the driving force behind regulations.”⁷⁸ However, this reflects a fundamental misunderstanding of the legal definition of “reasonable” and the “reasonable review” in constitutional law. With the exception of Montana’s, every state’s hunting amendment contains language allowing the state to manage hunting through legislation and regulation. Even Vermont’s 1777 provision contains this language.⁷⁹ But the NRA feared that without a qualifier, this language gave legislatures enough discretion to ban hunting.⁸⁰ Overtly tying the “right to hunt” with efforts to curb gun-control, Darren LaSorte of the NRA-ILA likened weak hunting amendments to a Second Amendment that declares “. . . The right of the

77. *Id.* (emphasis added).

78. *Id.*

79. Vt. Const. ch. II, § 67.

80. LaSorte, *supra* n. 7.

people to keep and bear arms shall not be infringed . . . unless Barack Obama and Hillary Clinton think it's a good idea to ban firearms.”⁸¹ The NRA feared that legislatures are subject to politics (true) and emotion but believed that a reasonableness standard would ensure these non-scientific considerations would not be a part of lawmaking surrounding hunting.

A cursory analysis of the term “reasonable” as it is used in law elicits the opposite conclusion: a reasonable standard would not ensure that decisions are based entirely on science but would instead take factors like politics, emotion, demographics, and economics—and science—into account. A legal definition of “reasonable” is “fair, proper, or moderate under the circumstances” or “according to reason.”⁸² The first definition—“fair, proper and moderate”—should include all relevant inquiries, including political, emotional and scientific. There is no requirement that the scientific considerations prevail. The second definition—“according to reason”—begs the question of what “reason” is, but the examples provided in *Black's Law Dictionary* seem to equate it with logic.⁸³ Although logic seems to be closer to science than politics and emotions are, logic does not necessarily demand lawmakers apply scientific principles to drafting laws and regulations, nor does it require that they consider scientific data. In defining reasonableness, one court stated, “The determination of its meaning, in any case, is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use.”⁸⁴

In constitutional law, reasonableness is considered in reviewing statutes under the rational basis test, the least stringent test for determining the constitutionality of a statute. The rational basis test is applied when fundamental rights are not implicated. When the Supreme Court held that recreational hunting was not a fundamental right,⁸⁵ only Vermont had a

81. *Id.*

82. *Black's Law Dictionary* 1379 (Bryan A. Garner ed., 9th ed., West 2009).

83. *See id.*

84. *Meridian Township v. City of E. Lansing*, 71 N.W.2d 234, 237 (Mich. 1955).

85. *Baldwin v. Fish & Game Commn. of Mont.*, 436 U.S. 371, 388 (1971) (cited in John Schreiner, *The Irony of the Ninth Circuit's (Ab)Use of the Commerce*

constitutional right to hunt. The rational basis test was therefore the appropriate test to apply to hunting regulation challenges.⁸⁶ Under that test, the question is whether “the statute bears a reasonable relationship to a proper governmental purpose.”⁸⁷ Both wildlife management and public safety⁸⁸ are proper governmental purposes in the context of hunting regulation.

In response to a challenge to South Carolina’s ban on Sunday hunting, the state Supreme Court found that easier enforcement of hunting laws, “creation of more opportunities for non-hunters to enjoy the outdoors,” and preserving “finite wildlife resources and quality hunting experiences” were all proper legislative purposes.⁸⁹ In order for the ban to be constitutional, the court only had to find that the ban bore a reasonable relationship to one of these purposes; it found the ban bore a reasonable relationship to all three.⁹⁰ Similarly, the West Virginia Supreme Court also upheld a ban on Sunday hunting, saying, “Prohibiting Sunday hunting allows one day of the week during hunting season when citizens can enjoy private and public property without being startled or threatened by gunshots, or fear being hit by stray bullets or arrows.”⁹¹

If the right to hunt were a fundamental right, this burden would be much higher and courts would have to apply the strict scrutiny test. In placing hunting amendments in the constitutional declarations of rights, establishing hunting as a fundamental right may have been exactly what many state legislatures were trying to do. The NRA’s reasonableness burden confounds this purpose since it requires only application of a test akin to the rational basis test to any laws that would regulate hunting.

The reasonableness language neither requires scientific scrutiny nor protects the right at a fundamental rights level. The NRA’s explanation for including the reasonableness standard likely does not put legisla-

Clause, 33 W. St. U. L. Rev. 13, 20-21 (2005-2006)); *Lee v. S.C. Dept. of Nat. Resources*, 530 S.E.2d 112, 113 (S.C. 2000).

86. *See Lee*, 530 S.E.2d at 113.

87. *Hartly Hill Hunt Club v. Co. Commn. of Ritchie Co.*, 647 S.E.2d 818, 828 (W. Va. 2007); *see also Lee*, 530 S.E.2d at 114.

88. *See Hartley Hill Hunt Club*, 647 S.E.2d at 825.

89. *Lee*, 530 S.E.2d at 114-115.

90. *Id.*

91. *Hartley Hill Hunt Club*, 647 S.E.2d at 825.

tures at ease. Several state legislatures were apparently concerned that hunting amendments might constrain state wildlife management.⁹² This concern was strong enough to contribute to the initial defeat of hunting amendments in some legislatures, so it is surprising that the NRA would add language constraining state hunting regulation. The question remains whether courts in states that did not include the reasonableness review language will hold hunting amendments to be fundamental rights which would implicate a strict scrutiny review.

b. Protection for Traditional Methods of Hunting

The NRA model incorporates language that would preserve “traditional methods” of hunting and fishing of non-threatened species in order to “protect[] against emotion-inspired bans of certain hunting methods” like hunting birds and game with dogs and use of certain types of equipment.⁹³ Specifically, the language is aimed at preventing bans on bow hunting.⁹⁴ More than just preserving a right to hunt, this language preserves a right to hunt with certain weapons. Conversely, it does not preserve a right to utilize newer hunting technologies, which calls into question whether proponents seek to preserve an actual right to hunt or simply to preserve a tradition.

The model language protecting “traditional methods” for taking non-threatened species inaccurately presumes that hunters are a homogeneous group to the extent that it constitutionalizes hunting methods that not even all hunters support. For example, in the 2013 Montana legislative session, a bill to allow hunting black bears with dogs drew both support and opposition from hunters.⁹⁵ In fact, some hunters, including members of the House Fish, Wildlife & Parks Committee, feared this bill would endanger their chances of eventually being able to hunt grizzly

92. See e.g., Mont. H. Fish, Wildlife & Parks Comm., *supra* n. 3 (testimony of Jeff Barber).

93. LaSorte, *supra* n. 7.

94. *Id.*

95. See Mont. H. Fish, Wildlife & Parks Comm., *Hearing on H. 144*, 63d Legis., Reg. Sess. (Jan. 22, 2013) (audio available at http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=1202&meta_id=12558).

bear.⁹⁶ Nevertheless, the model language could allow a minority of hunters to prevail in advocating for one specific hunting method to the detriment of other hunters because one method is constitutionally protected while another is not.

The inclusion of the non-threatened species language in this element, reveals how reactive the NRA model is. As it is, only non-threatened species can be hunted anyway so this language seems unnecessary. However, while the language protecting traditional methods is meant to combat one line of success animal rights groups have had in raising awareness about some hunting practices, the non-threatened species language directly combats the other line of success—banning or limiting the hunting of certain species, mostly mourning doves, bears, and cougars.⁹⁷ Taken together, the two parts of this element (protecting traditional methods for the hunting of non-threatened species) seem to give credence to the view that hunting amendments are just a part of a philosophical debate between the NRA and the Humane Society of the United States. This element reveals hunting amendments not as deliberative statements of rights but as a defensive salvo. With this element, more so than the rest of the model amendment, the NRA is likely to put hunters more in conflict with each other than with animal rightists.

c. Hunting as the Preferred Means of Managing Wildlife

The NRA model includes language designating hunting as the preferred means of managing wildlife in order to preserve public hunting as a wildlife management tool and ensure that wildlife managers do not use alternative wildlife management methods such as wildlife contraception or government sharpshooters.⁹⁸ Limiting methods of wildlife management directly contradicts the NRA's argument for including the reasonableness language in order to insure that "[t]he experts should continue to be the ones establishing reasonable hunting and fishing regulations."⁹⁹ Limiting

96. *Id.*; Mont. H. Fish, Wildlife & Parks Comm., *Executive Action on H. 144*, 63d Legis., Reg. Sess. (Jan. 24, 2013) (audio available at http://montanalegislature.granicus.com/MediaPlayer.php?view_id=17&clip_id=1271).

97. LaSorte, *supra* n 7.

98. *Id.*

99. *Id.*

into perpetuity what wildlife managers can do takes decision-making power out of the hands of professionals with scientific knowledge. This, in turn, violates a well-established tenet of the North American Model supported by hunters, that wildlife professionals should make wildlife management decisions.¹⁰⁰

This element is also reactive. In explaining the NRA model, LaSorte points specifically to contraception as a means of managing wildlife populations. Again, he implicates HSUS: “One of the most aggressive HSUS campaigns today is to argue, often at the city and county level, that hunting should be stopped as a means of controlling wildlife populations and replaced by “humane” contraception practices.”¹⁰¹ But wildlife contraceptive techniques are expensive and are ineffective,¹⁰² and are generally unpopular,¹⁰³ making it unlikely that they will be widely used. Such tenuous motivation casts suspicions on hunting amendments and makes them seem frivolous. The consequences of constitutionalizing hunting as the preferred management method, however, are not frivolous.

In general people trust state fish and wildlife agencies to manage wildlife.¹⁰⁴ Even more than the “reasonableness” requirement discussed above, mandating hunting as the preferred means of management inhibits the statutorily delegated duties of these agencies to manage wildlife. State wildlife managers balance management concerns of all species in the ecosystem. Elevating hunting to the preferred means of management simultaneously elevates the management concerns of hunted species over the management concerns of non-game species, creating an inherent conflict in state game management. It also creates an internal conflict in the

100. Mahoney et al., *supra* n. 11, at 9.

101. *Id.*

102. Terry A. Messmer et al., *Stakeholder Acceptance of Urban Deer Management Techniques*, 25 *Wildlife Socy. Bull.* 360, 364 (1997) [hereinafter Messmer et al., *Stakeholder Acceptance*]. However, two of the authors of this report also recognized in another report published at the same time that immunocontraception may be more viable in the future. Terry A. Messmer et al., *Legal Considerations Regarding Lethal and Nonlethal Approaches to Managing Urban Deer*, 25 *Wildlife Socy. Bull.* 424, 427 (1997) [hereinafter Messmer et al., *Legal Considerations*].

103. Tara Teel et al., *Wildlife Values in the West* iii (W. Assn. Fish & Wildlife Agencies 2005) (available at http://warnercnr.colostate.edu/docs/hdnr/hdnru/Wildlife_Values_in_the_West_Final_Regional_Report_9-05.pdf).

104. *Id.*

amendment itself. Preferring hunting over other methods of game management is not based on scientific principles; it is based on emotion and fear.

Furthermore, hunting as a mandated management tool may create conflict with other land uses. In many states, public lands are already constitutionally managed for both support of the public schools and use by the citizens of the state. State trust lands comprise 46,000,000 acres of land in 24 states.¹⁰⁵ In these states, the state manages these lands as trustee, for the support of public schools or other public purposes.¹⁰⁶ Commonly, revenue from state trust lands has come from natural resource development, timber production, and grazing leases, but increasingly values regarding land management are shifting toward less extractive and more protective uses like watershed, open space and wildlife habitat protection.¹⁰⁷ The Colorado Constitution recognizes the multiple values attached to public land in requiring “that the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations.”¹⁰⁸ Additionally, state legislatures often require that public lands are managed for multiple use.¹⁰⁹ For example, Nevada law provides:

The public lands of Nevada must be administered in such a manner as to conserve and preserve natural resources, wildlife habitat, wilderness areas, historical sites and artifacts, prehistoric sites and artifacts, paleontological resources and to permit the development of compatible public uses for recreation, agriculture, ranching, mining and timber production and the development, production and

105. Erin Pounds, *State Trust Land: Static Management and Shifting Value Perspectives*, 41 *Envtl. L.* 1333, 1334 (2011).

106. *Id.* at 1341.

107. *Id.* at 1336.

108. Colo. Const. art. IX, § 10.

109. *E.g.*, Alaska Stat. § 38.05.285 (Lexis 2013); Ariz. Rev. Stat. Ann. § 37-902 (West, WL current through 1st Reg. Sess. 51st Legis.); Fla. Stat. Ann. § 253.034 (West, WL current through 2013 1st Reg. Sess. of the 23rd Legis.); Mont. Code Ann. § 77-1-203 (2013).

transmission of energy and other public utility services under principles of multiple use which provide the greatest benefit to the people of Nevada.¹¹⁰

Multiple-use is a foundational land use value in many states, and although hunting is one of those uses for which land is managed, hunting is not always consistent with other uses.¹¹¹ Donna Minnis noted in her study of anti-hunting ballot measures that the at least two measures arose from concerns for multi-use lands.¹¹² Constitutionalizing hunting as the preferred means of wildlife management could create inherent conflicts between wildlife managers and land managers and endanger the application of multi-use statutes. In states with constitutional multi-use provisions, hunting amendments may create an internal constitutional conflict.

Finally, while the NRA model proscribes hunting as the preferred method of wildlife management, in real-world application, hunting is not always preferred or even possible. Management of urban deer provides a perfect example. There is no question that urban deer are a wildlife management challenge, but while wildlife managers agree that controlled hunting is their preferred method of managing urban deer populations,¹¹³ they also recognize that, especially in urban environments, hunting might be unfeasible, unsafe or socially unacceptable.¹¹⁴ Given all the factors, in-

110. Nev. Rev. Stat. Ann. § 321.5977 (West, WL current through 2011). See also e.g., Alaska Stat. § 38.05.285 (Lexis 2013); Ariz. Rev. Stat. Ann. § 37-902 (West, WL current through 1st Reg. Sess. 51st Legis.); Fla. Stat. Ann. § 253.034 (West, WL current through 2013 1st Reg. Sess. of the 23d Legis.); Mont. Code Ann. § 77-1-203 (2013).

111. See e.g. Mont. H. Fish, Wildlife & Parks Comm., *Hearing on H. 27*, 63d Legis., Reg. Sess. (Jan. 29, 2013) (audio available at http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=1364&meta_id=14648). H. 27 would have legalized the use of suppressors to hunt wolves and mountain lions. Opponents raised concerns that silencers would endanger hikers, berry-pickers and even other hunters. *Id.*

112. Donna Minnis, *Wildlife Policy-Making by the Electorate: An Overview of Citizen-Sponsored Ballot Measures on Hunting and Trapping*, 26 *Wildlife Socy. Bull.* 75, 79 (1998).

113. Messmer et al., *Stakeholder Acceptance*, *supra* n. 102, at 362.

114. Messmer et al., *Legal Considerations*, *supra* n. 102, at 425 (noting that hunting-based management requires access to private property that may not be possible in urban areas); Michelle L. Doerr et al., *Comparison of 4 Methods to Reduce*

cluding the human element, involved in management of urban deer, several states have implemented multi-method, flexible approaches that do not mandate lethal management methods but instead allow communities to determine appropriate methods for themselves.¹¹⁵ Organizers of a symposium dedicated to methods of managing urban deer¹¹⁶ acknowledged that hunters “resist setting a precedent for nonhunting solutions to deer population control, and perhaps eventually management of other hunted species, because they are concerned about diminishing the importance of hunting.”¹¹⁷ But they were also clear that

[r]egardless of one’s advocacy for hunting, public safety must take precedence and no right-minded individual would lobby for the traditional hunter harvest approach if public safety is unreasonably compromised. Moreover, the wide range of urbanites’ intent and attitudes, and highly developed aesthetic appreciation for wildlife, when coupled with the complexity of land ownership in a thickly settled, highly politicized land area, all argue that a new and different approach is needed.¹¹⁸

Urban deer may be a special case, but the challenges of managing them highlight the multiple concerns wildlife managers actually consider in making decisions. The NRA model, with its hunting mandate, fails to

White-Tailed Deer Abundance in an Urban Community, 29 *Wildlife Socy. Bull.* 1105, 1105 (2001) (recognizing that “traditional hunting approaches may not be practical or the option of choice in some urban landscapes due to the high density of residential dwellings and a citizenry concerned about neighborhood safety”); Daniel J. Decker & Milo E. Richmond, *Managing People in an Urban Deer Environment: The Human Dimensions Challenge for Managers*, in *Urban Deer: A Manageable Resource?* 3 (Jay B. McAninch, ed., N.C. Sec. Wildlife Socy. 1995) (proceedings of the 55th Midwest Fish & Wildlife Conference) (“The cause of our dilemma is twofold: (1) hunting-based deer management approaches that we have used traditionally in rural areas cannot be applied in most urban/suburban situations and (2) the stakeholders in urban deer management are diverse in their values, beliefs, attitudes, and desires for deer, and seem to doubt whether professional deer managers understand their views.”).

115. Messmer et al, *Stakeholder Acceptance*, *supra* n. 102, at 364.

116. *Urban Deer: A Manageable Resource?* *supra* n. 114.

117. Decker & Richmond, *supra* n. 114, at 3.

118. *Id.* at 4.

recognize the reality that management decisions are complex and require balancing of interests.

III. REBUTTING THE ARGUMENTS FOR HUNTING AMENDMENTS

Although it is tempting to attribute hunting amendments to a bitter philosophical argument between the NRA and the HSUS,¹¹⁹ the underlying social forces are more nuanced than a hunting/anti-hunting argument. Hunting amendments protect hunting, but probably for a more complicated set of reasons than even many proponents recognize. Taken together, the factors discussed here—endangered gun rights, expanding public animal welfare sentiments, declining numbers of hunters, and alternative methods of wildlife management—could point to a doomsday scenario for hunters. Nevertheless, a deeper look at each of these reveals that hunting amendments are an unnecessary reaction.

A. Hunting Amendments Are Not Necessary to Ensure Gun Rights

Hunting amendments are not just gun rights amendments in disguise, but neither can the two be completely separated. If nothing else, there is a sort of “guilt by association.” Nonetheless, the link between guns and hunting does not mean that hunting must be protected to ensure guns are not restricted. Indeed, given that restrictions on guns usually target weapons not used by hunters and the rights created by hunting amendments are not absolute, hunting amendments would not be effective defenses for gun control legislation.

Clearly, there is a link between the mission of the NRA and hunting. The NRA, which was formed to promote marksmanship after the Civil War, has been involved in hunter education since 1949.¹²⁰ But the link between gun rights and hunting is actually much older than the

119. Although the NRA does implicate other animal rights and welfare organizations as being anti-hunting, the bulk of its criticism falls on HSUS. *See e.g.*, LaSorte, *supra* n. 7.

120. National Rifle Association, *About Us*, <http://home.nra.org/history/document/about> (accessed July 29, 2013).

NRA's first hunter education course; hunting maintained the firearms skills necessary for a strong militia,¹²¹ the underlying purpose of the Second Amendment right to bear arms.¹²² The NRA is a legitimately interested party in hunting legislation just as specialty hunting groups are legitimately interested in gun control efforts.¹²³

While the NRA does not overtly claim hunting amendments are necessary to counteract gun control, they and other gun-enthusiast groups use the specter that hunting will be endangered by gun control measures as a fear tactic in the gun control debate,¹²⁴ rhetoric that likely reaches the average voter. An article about the right to bear arms amendment in Wisconsin begins with the interview of a truck driver who, "will be carrying treasured memories of hunting deer and pheasant with his two sons in Wisconsin's North Woods, of sitting stock-still for hours in tree stands and of the animal trophies that hang in his den in his suburban home." He planned to vote for the amendment despite his opposition to handguns.¹²⁵ "'I'm an avid hunter,' [he] said, 'and my kids are.'"¹²⁶

121. Halbrook, *supra* n. 9, at 202-203 (quoting *Singleton*, 9 S.C.L. at 244); *Heller*, 554 U.S. at 597-598.

122. U.S. Const. amend. II.

123. See, e.g. Boone and Crockett Club, *Position Statement on Second Amendment Rights*, http://www.boone-crockett.org/about/positions_Second_Ammendment.asp?area=about&ID=6B455080&se=1&te=1 (updated Dec. 1, 2012) ("The success of North American Model of Wildlife Conservation relies upon an armed citizenry able to participate in the regulated harvest of game species. The best guarantor of well-managed, well-funded and sustainable wildlife conservation programs is therefore the right to keep and bear arms as guaranteed by the Second Amendment of the Constitution of the United States.")

124. See, e.g. Wisconsin Gun Owners, Corey Graff, *Why the NRA Is Nuts to Expand Background Checks*, <http://wisconsingunowners.org/2010/07/13/why-nra-is-nuts-to-expand-background-checks/> (July 13, 2010); Peterson's Hunting, Mike Schooby, *Why Gun Bans Affect Hunters*, <http://www.petersenshunting.com/2013/05/01/why-gun-bans-affect-hunters/> (May 1, 2013); High Country News, Ali Macalady, *A Hunter for Gun Control*, <http://www.hcn.org/issues/190/10099> (Nov. 6, 2000) (quoting NRA-ILA Federal Affairs director, James Jay Baker as saying that gun control legislation is "just the beginning, not of a battle but of a war, to eliminate the entire culture of hunting, shooting, and wildlife conservation?")

125. Andy Hall, *Gun Vote Brings out Emotions*, Wis. St. J. 1B (June 14, 1998).

126. *Id.*

Gun control legislation has been focused not on banning the types of guns used for hunting but on regulating assault weapons, waiting periods and background checks,¹²⁷ but gun control opponents rely on the slippery slope argument that leads from background checks to banning hunting entirely.¹²⁸ Although this seems unlikely since hunting still garners strong popular support¹²⁹ even while many types of guns do not,¹³⁰ it is a powerful emotional argument that resonates with gun enthusiasts and hunters.

Hunting amendments are not absolute even when they create fundamental rights.¹³¹ When the scope of Virginia's amendment was tested, the trial court held that operating a sporting clay facility was not a right provided by the amendment.¹³² The court found that hunting could not be defined to include sporting clays because a necessary element of hunting is the chase.¹³³ Neither do sporting clays fall under activities incident to hunting, which would be properly covered by the right, because again, those incident activities fail to meet the definition of hunting.¹³⁴ Wisconsin's hunting amendment is contained in the declaration of rights, but subjects the right to hunt and fish to only "reasonable restrictions as prescribed by law."¹³⁵ Applying this language, the Wisconsin Supreme Court held that "[t]he 2003 amendment does not impose any limitation upon the power of the state or DNR to regulate hunting, other than that

127. See National Rifle Association, *Compendium of State Firearms Laws*, <http://www.nraila.org/gun-laws/articles/2010/compendium-of-state-firearms-laws.aspx> (July 9, 2010).

128. James Jay Baker's quotation, *supra* n. 124, is a perfect example of this line of reasoning.

129. See *infra* nn.193-196 and accompanying text.

130. See e.g. Washington Post, *Most Support Background Checks, Assault Weapons Ban*, http://www.washingtonpost.com/politics/most-support-background-checks-assault-weapons-ban/2013/03/11/e57f8330-8ab9-11e2-98d9-3012c1cd8d1e_graphic.html (accessed Dec. 9, 2013).

131. *Orion Sporting Group, LLC v. Bd. of Supervisors of Nelson Co.*, 2005 WL 3579067 at *2 (Va. Cir. June 29, 2005).

132. *Id.* at *1. An appeal to the Virginia Supreme Court was denied. Halbhook, *supra* n. 9, at 210.

133. *Orion Sporting Group*, 2005 WL 3579067 at **3-4.

134. *Id.* at *4.

135. Wis. Const. art. I, § 26.

any restrictions on hunting must be reasonable.”¹³⁶ Reasonable—the language touted by the NRA in its model hunting amendment—is not a very high level of scrutiny.

Most states declined to include this language in their hunting amendments so the applicable level of scrutiny would be determined by how strong the right created is, but even under the intermediate scrutiny standard employed by the Seventh Circuit to determine whether someone with a misdemeanor conviction for domestic violence could be deprived of a shotgun used for hunting under the Second Amendment, the court upheld the decision that the statute was constitutional,¹³⁷ although it should be noted that the case was not about an outright gun ban or even a ban on certain types of guns. If a strong federal Second Amendment cannot always protect guns used for hunting, the relatively weaker state hunting amendments likely cannot either, except possibly where amendments guarantee strong fundamental rights. That possibility has yet to be tested and since absolute gun bans are unlikely, it is unlikely to be tested in that context.

It seems more likely that in the face of either an absolute gun ban or ban on certain types of guns, hunting amendments would be called in to defend gun rights only as a back-up to state rights to bear arms and the Second Amendment. At most, hunting amendments may help defend gun rights because the argument resonates with the public. Despite emotional rhetoric and perceived relevance, they are unnecessary for this purpose.

*B. Hunting Amendments Are Not Necessary to
Counteract Threats from Animal Rights Activists*

“A new elite with the agenda of ‘animal rights’ who abhor hunting has replaced the Crown as the political force seeking to repress hunting by the average person.”¹³⁸

In state after state, proponents warn that hunting amendments are necessary to counteract threats from animal rights activists to ban hunt-

136. *Wis. Citizens Concerned for Cranes & Doves*, 677 N.W.2d at 629.

137. *U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

138. Halbrook, *supra* n. 9, at 203.

ing.¹³⁹ The NRA's testimony at the hearing on the 2001 Montana hunting amendment bill is indicative of the group's posture.

Virtually every western state in the United States has seen out-of-state anti-hunting extremists push an initiative restricting hunting, trapping or some other human use of wildlife resources. By amending the state constitution to protect the right to harvest wild fish and wild game animals, HB 264 will send an unmistakable message to animal extremists that Montana's conservationists and hunters are not going to tolerate attacks on their hunting and wildlife heritages.¹⁴⁰

Undoubtedly, many, maybe even most, animal welfare groups espouse values that are anti-hunting. That does not, however, necessarily translate into actively promoting a total ban on hunting. To be more precise, what some animal welfare groups promote is regulation of, including in some cases a ban of, specific hunting practices.¹⁴¹ A study of ballot measures on hunting revealed that the most successful anti-hunting ballot campaigns focus on protecting appealing species like bears or mourning doves from hunting practices that are perceived to be cruel or unsporting.¹⁴² These ballot measures are most successful when they benefit from experienced national leadership.¹⁴³ Undoubtedly, this leadership comes from animal welfare groups.

The NRA has identified several groups as "virulent anti-hunting groups."¹⁴⁴ Of these, the NRA most often focuses on HSUS. LaSorte

139. See, e.g. LaSorte, *supra* n. 7; David Hendee, *On Target or Overkill, Voters Decide Nov. 6: Is the Right to Hunt and Fish Threatened, or too Trivial for the State Constitution?* Omaha World-Herald 1A (Sept. 26, 2012).

140. Mont. H. Fish, Wildlife & Parks Comm., *supra* n. 3, at ex. 35 (written testimony of Brian Judy, NRA-ILA Montana State Liaison).

141. Minnis, *supra* n. 112.

142. *Id.* at 79.

143. *Id.* at 80.

144. National Rifle Association-Institute for Legislative Action, *Hunting Fact Card*, <http://www.nraila.org/hunting/fact-sheets/nra-ila-hunting-fact-card.aspx?s=&st=&ps=> (Mar. 2, 2004). The groups listed are American Humane Association, American Society for the Prevention of Cruelty to Animals, Animal Protec-

quotes HSUS Director, Wayne Pacelle, as having said, “Our goal is to get sport hunting in the same category as cock fighting and dog fighting. Our opponents say hunting is a tradition. We say traditions can change.”¹⁴⁵ This is the type of language that rightly would alarm hunters, but what LaSorte failed to note is that Pacelle’s extreme stance on hunting was when he was with Fund for Animals¹⁴⁶ and should not be attributed to HSUS. HSUS is now partnered with Fund for Animals and they have a joint Animal Protection Litigation Section,¹⁴⁷ but HSUS’s actual position on hunting is more moderate; HSUS does not advocate a total ban on hunting, but they do call “for a ban on particularly inhumane, unsporting and biologically reckless practices.”¹⁴⁸ “The HSUS works to end the worst abuses in hunting and to maintain longstanding protections for ani-

tion Institute, Animal Welfare Institute, Earthjustice, Friends of Animals, Fund for Animals, Humane Society of the United States, In Defense of Animals, International Fund for Animal Welfare, Last Chance for Animals, PETA. All of these groups oppose hunting to some degree though not all actively do so and none (with the possible exception of PETA) actively advocate for a total ban on hunting. See American Society for the Prevention of Cruelty to Animals, *Hunting*, <http://www.aspca.org/about-us/aspca-policy-and-position-statements/hunting> (accessed Aug. 2, 2013); American Humane Association, *Animal Protection Position Statements*, <http://www.americanhumane.org/assets/pdfs/animals/au-animal-welfare-position-statements.pdf> (2009); International Fund for Animal Welfare, *Glossary and Statements of Principle*, <http://www.ifaw.org/united-states/our-work/glossary-and-statements-principle> (Apr. 4, 2013); Friends of Animals, *Who We Are, What We Do, How to Join*, <http://friendsofanimals.org/sites/default/files/kcfinder/files/Who%20We%20Are%20207-2013.pdf> (accessed Apr. 26, 2014).

145. LaSorte, *supra* n. 7 (quoting Wayne Pacelle). LaSorte gives no citation for the quotation, but Pacelle was quoted in 1991 as saying, “But if we could shut down all sport hunting in a moment, we would . . . Just like we would shut down all dog fighting, all cock fighting or all bull fighting.” *Anti-Hunting Activist Targets West*, Kingman Daily Miner 2 (Dec. 30, 1991).

146. Pacelle was Executive Director of Fund for Animals from 1988-1994. He joined HSUS as its chief lobbyist in 1994, and became President and CEO in 2004. Fund for Animals and HSUS formed a partnership in 2005. Fund for Animals, *About Us*, <http://www.fundforanimals.org/about/> (accessed Aug. 1, 2013). Mr. Pacelle’s comments cited here predate that partnership.

147. Humane Society of the United States, *Litigation*, <http://www.humanesociety.org/about/departments/litigation/> (accessed Aug. 2, 2013).

148. Discovery.com, *Is the Humane Society of the United States against All Hunting?* <http://curiosity.discovery.com/question/humane-society-us-against-hunting> (accessed July 31, 2013) (quoting Wayne Pacelle).

mals where they already exist.”¹⁴⁹ Terms like “inhumane,” “unsporting,” and “abuses” are subjective and animal welfare activists and hunters would attach them differently,¹⁵⁰ but despite this unspecific rhetoric, HSUS’s anti-hunting activities are specifically directed and limited in scope, including campaigns against poaching, fox pens, bear baiting, captive hunts,¹⁵¹ internet hunting,¹⁵² dove shooting,¹⁵³ hound hunting,¹⁵⁴ and trophy hunting for bears.¹⁵⁵

Before joining with HSUS, the Fund for Animals successfully campaigned in both courts and legislatures to stop certain hunting practices,¹⁵⁶ but again, many of their wins were against specific hunting practices. In 1983, Fund for Animals joined with other groups and successfully challenged US Fish & Wildlife Service regulations that would have allowed trapping of the threatened Minnesota grey wolf.¹⁵⁷ In 1991 Fund for Animals won an injunction to stop the hunting of Grizzly bears in Montana.¹⁵⁸ In 1994, Fund for Animals won a temporary ban on bear

149. Humane Society of the United States, *Protect Wildlife*, http://www.humanesociety.org/issues/campaigns/wildlife_abuse/ (accessed July 31, 2013).

150. The disagreement is not limited to hunter vs. non-hunter. Hunters themselves disagree about what is “unsporting.” For example a 2013 Montana bill to allow hound hunting for black bear drew testimony from hunters both in support and in opposition, including testimony from Montana Sportsmen’s Alliance in opposition. Mont. H. Fish Wildlife & Parks Comm., *supra* n. 95. A bill to allow hound hunting for mountain lion and black bear also drew both support and opposition from hunters. Mont. Sen. Fish & Game Comm., *Hearing on Sen. 397*, 63d Legis., Reg. Sess. (Jan. 22, 2013) available at http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=1202&meta_id=12558.

151. Humane Society of the United States, *supra* n. 149.

152. Humane Society of the United States, *Internet Hunting*, http://www.humanesociety.org/issues/internet_hunting/ (accessed July 31, 2013).

153. Humane Society of the United States, *Dove Shooting*, http://www.humanesociety.org/issues/dove_shoot/ (accessed July 31, 2013).

154. Humane Society of the United States, *Hound Hunting*, http://www.humanesociety.org/issues/hound_hunting/ (accessed July 31, 2013).

155. Humane Society of the United States, *Bear Trophy Hunting*, http://www.humanesociety.org/issues/bear_hunting/ (accessed July 31, 2013).

156. See Fund for Animals, *History of Fund for Animals: Timeline of Victories*, <http://www.fundforanimals.org/about/history.html> (accessed Aug. 1, 2013).

157. *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985) (reversing in part and affirming in part, *Sierra v. Clark*, 577 F. Supp. 783 (D. Minn. 1984).

158. *Fund for Animals v. Turner*, 1991 WL 206232 (D.D.C. Sept. 27, 1991).

baiting in national forest lands in Wyoming.¹⁵⁹ Fund for Animals was a proponent of the successful 1999 Washington initiative to ban certain traps.¹⁶⁰ In 2003 they won a temporary injunction against the hunting of stocked non-native pheasants on the Cape Cod National Seashore.¹⁶¹

Despite these wins and claims by NRA that the HSUS/Fund for Animals Animal Protection Litigation section was formed “for the purpose of bringing lawsuits to interfere with hunting and hunter’s rights around the nation,”¹⁶² much of its work does not even deal with hunting or even wildlife issues and the cases that do fall within the more moderate stance of protecting against controversial hunting activities.¹⁶³ Although not exhaustive, a search of federal and state dockets revealed that hunting-related cases filed by HSUS in the past five years are focused on the delisting of wolves and protection of marine mammals.¹⁶⁴

It is undeniable that anti-hunting sentiments and even activity exist. Ballot measures are increasingly used by animal welfare activists.¹⁶⁵ It is the nature of democratic society that people and groups disagree with each other. However, although it is a level of activity that is higher than

159. *Fund for Animals v. Thomas*, 1994 WL 151192 (D.D.C. Apr. 14, 1994).

160. SeattleTimes.com, *November Primer: Statewide, King County and Seattle Initiatives*, <http://seattletimes.com/politics/election2000/measures/#1> (accessed Aug. 2, 2013); see *Citizens for Responsible Wildlife Mgt. v. Wash.*, 71 P.3d 644, 649 (Wash. 2003).

161. *Fund for Animals v. Maillella*, 283 F. Supp. 2d 418 (D. Mass. 2003).

162. National Rifle Association-Institute for Legislative Action, *Animal “Rights” Extremists Look to New Strategies*, <http://www.nraila.org/hunting/factsheets/animal-rights-extremists-look-to-new.aspx?s=&st=&ps=> (Jan. 6, 2005).

163. See Humane Society of the United States, *supra* n. 149.

164. Although the issue has not reached the court system yet, the Humane Society of the United States is active in an attempt in Maine to stop bear baiting and hounding. See Humane Society of the United States, *The HSUS Urges Maine Legislators to Pass Bill Protecting Bears from Inhumane and Unsporting Practices*, http://www.humanesociety.org/news/press_releases/2013/01/maine-bear-protection-bill-012213.html (Jan. 22, 2013). The bill failed in May, 2013, but sportsmen fear the outcome of a possible 2014 ballot initiative. Bangor Daily News, George Smith, *Will Supporting the Humane Society Save Maine’s Bear Hunt?* <http://bangordailynews.com/2013/05/10/outdoors/will-supporting-the-humane-society-save-maines-bear-hunt/> (May 10, 2013). The bill would not have banned all bear hunting, only specific controversial practices.

165. See Minnis, *supra* n. 112.

many hunters would be comfortable with, it is not the widespread call for an all-out ban on hunting that hunting amendments often characterize it as. Statements like Rep. Balyeat's testimony in support of Montana's hunting amendment, like much political rhetoric, are emotional arguments that play on fears more than they represent facts:

The purpose of enumerated rights in state and federal constitutional is to ensure that the rights of various minorities are not infringed by the political whims of the majority. Without those constitutional guarantees, democracy can quickly deteriorate into the tyranny of the majority—a sort of sterilized version of mob rule. While today hunting & fishing have the protection afforded by large percentage participation by Montanans; tomorrow we may find that these traditions are practiced only by a minority—especially if current trends continue. That's why today, when we have the political power to do so, we need to do what's right to protect that right for those future generations. We need to place in our constitution a Right to Hunt Amendment.¹⁶⁶

This type of rhetoric often sets up a “slippery slope” argument: regulation/banning of one practice, even a controversial one, will lead to more regulation and an eventual ban. This argument is raised often in opposition animal welfare regulation and it is powerful, even though it often becomes absurd.¹⁶⁷ Given the popular support for hunting, even among non-hunters¹⁶⁸ and the limited scope of much anti-hunting activity, there is little evidence supporting such dire conclusions.

166. *Balyeat Testimony, supra* n. 1.

167. During executive action on a bill to make it illegal to spectate at animal fights, a committee member argued that if the bill passed, animal rights activists would next try to ban rodeos. Mont. H. Agric. Comm., *Executive Action on H. 279* (Feb. 14, 2013) (available at http://montanalegislature.granicus.com/MediaPlayer.php?view_id=11&clip_id=1873) (comment of Rep. Krayton Kerns).

168. In most states, hunting amendments have passed with overwhelming majorities that could only be garnered with votes from non-hunters, suggesting that there is a great deal of support for hunting. This also suggests that the influence of

It should also be noted that animal welfare organizations lose at least as many hunting cases and legislative initiatives as they win, particularly in state courts. One notable loss was a case challenging the constitutionality of Virginia's hunting amendment.¹⁶⁹ It appears that judges, far from being the "activist judges" feared by the NRA¹⁷⁰ deliberately apply the law.

More than once, hunting amendments have been called a "solution in search of a problem."¹⁷¹ Even hunting amendment proponents admit that in their states there is no threat to hunting.¹⁷² There is, however, a great deal of currently unfounded fear that attempts to curb controversial hunting practices will translate into future widespread bans on all hunting.

C. Hunting Amendments Are Not Necessary to Increase Declining Numbers of Hunters

While support for some hunting practices may be decreasing, support for hunting itself is not. American approval of hunting is still quite high; it remained high even while numbers of hunters were declining. But it is this decline that hunting amendment proponents cite as the reason the amendments are necessary.¹⁷³ There was a time period when hunting numbers declined significantly and hunters were justified in their concern. More recent surveys, however, indicate that decline has turned around; continued reliance on statistics indicating decline would be misleading.

animal welfare groups may not be as strong as hunting amendment proponents suggest.

169. *Fund for Animals v. Virginia St. Bd. of Elections*, 53 Va. Cir. 405 (Va. Cir. 2000).

170. See National Rifle Association-Institute for Legislative Action, *supra* n. 162.

171. E.g. Kristen Borns & CJ Eisenbarth Hager, *Understanding Arizona's Propositions: Prop 109*, at 2 (Ariz. St. U. Morrison Inst. for Pub. Policy 2010) (available at http://sod208.fulton.asu.edu/publications-reports/2010-proposition-109-constitutional-right-to-hunt-and-fish/at_download/file); SERC, *Issue: "Right to Hunt and Fish" Laws*, <http://www.serconline.org/huntandfish.html> (updated Mar. 16, 2004).

172. See e.g., Lane Testimony, *supra* n. 52; Usman, *supra* n. 9 at 84.

173. See e.g., Balyeat Testimony, *supra* n. 1.

The National Survey of Fishing, Hunting and Wildlife-Associated Recreation showed a 10% decline in hunters from 1996 to 2006.¹⁷⁴ The significant part of that decline took place between 1996 and 2001 when numbers decreased 7%.¹⁷⁵ There was also a slight decline from 1991 to 1996 of 1%.¹⁷⁶ Considered together, these surveys show a significant decline in hunting nationally in the 1990s. Constitutional amendment takes time, so this decline corresponds to the first hunting amendment in 1996.

The most recent hunting amendments, adopted in 2012, were adopted before the results of the 2011 survey were published in December 2012. That survey shows a 9% increase in hunting since 2006.¹⁷⁷ Numbers of hunters have virtually recovered from the losses suffered in the 1990s; the decline from 1991 to 2011 is only 2.8%¹⁷⁸ with the trend increasing. Future proponents of hunting amendments, including the 2014 ballot initiatives in Mississippi and Indiana can no longer legitimately cite declining statistics in support. Mississippi, in fact, has seen a 65% increase in the Mississippi residents hunting in Mississippi from 2001 to 2011,¹⁷⁹ though they too experienced a decline in the 1990s mirroring the national trend.¹⁸⁰

174. 2006 *National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 32-33 (U.S. Fish & Wildlife Service 2007) (available at <http://www.census.gov/prod/2008pubs/fhw06-nat.pdf>).

175. *Id.*

176. 1996 *National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 32 (U.S. Fish & Wildlife Serv. 1997) (available at <http://www.census.gov/prod/3/97pubs/fhw96nat.pdf>). Although the survey has been conducted since 1955, a different methodology was used in the 1985 survey and the statistics are not comparable before 1991.

177. 2011 *National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 32-33 (U.S. Fish & Wildlife Serv. 2012) (available at <http://www.census.gov/prod/2012pubs/fhw11-nat.pdf>).

178. The 1991 survey reported 14.1 million hunters. 1991 *National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 4 (U.S. Fish & Wildlife Serv. 1993) (available at <http://www.census.gov/prod/1/gen/interior/fhw91-us.pdf>). The 2011 survey reported 13.7 million hunters. 2011 *National Survey of Fishing, Hunting and Wildlife-Associated Recreations*, *supra* n. 177, at 4.

179. 2001 *National Survey of Fishing, Hunting and Wildlife-Associated Recreation: Mississippi* 3 (U.S. Fish & Wildlife Serv. 2003); 2011 *National Survey of Fishing, Hunting and Wildlife-Associated Recreation: Mississippi* (U.S. Fish & Wildlife Serv. 2012). Individual state surveys are available at U.S. Census Bureau, *Na-*

The National Survey of Fishing, Hunting and Wildlife-Related Recreation tracks sportsmen and animal watchers, but it does not survey non-participants who nevertheless support hunting. Thirty-eight percent of Americans participate in wildlife related recreation, which includes hunting, fishing and wildlife-watching, with wildlife watching accounting for nearly 80% of that participation.¹⁸¹ The percentage of Americans who hunt and fish is very low. However, in 1993, when only a small percentage of Americans hunted,¹⁸² around 73% supported hunting.¹⁸³ Statistics gathered over a decade during the 1990s show that “81% of Americans agreed that hunting should remain legal,” with 53% agreeing strongly.¹⁸⁴ These are the statistic that most affect adoption of hunting amendments.

These numbers do vary somewhat “based on the perceived ‘humaneness’ and ‘fair chase’ of the hunting activity.”¹⁸⁵ For example, while a person may generally approve of hunting, that same person may disapprove of baiting, which may be “seen as inhumane or not as fair chase.”¹⁸⁶ So while someone may actively oppose a law that allows bear baiting, that same person would not necessarily vote for a law to ban all hunting.

tional Survey of Fishing, Hunting and Wildlife-Associated Recreation, <http://www.census.gov/prod/www/fishing.html> (accessed Aug. 2, 2013).

180. See *2006 National Survey of Fishing, Hunting and Wildlife-Associated Recreation: Mississippi 5* (U.S. Fish & Wildlife Serv. 2003).

181. *2011 National Survey of Fishing, Hunting & Wildlife-Associated Recreation*, *supra* n. 177, at vi.

182. See *1991 National Survey of Fishing, Hunting and Wildlife-Associated Recreation*, *supra* n. 178, at 26.

183. Mark Damian Duda et al., *Wildlife and the American Mind: Public Opinion on and Attitudes toward Fish and Wildlife Management* 249 (Responsive Mgt. 1998). The statistics in this volume are not directly comparable with the *National Survey of Fishing, Hunting and Wildlife-Associated Recreation* so the comparison here is for illustration only and is not statistically valid. The statistics in this volume were gathered over a decade, notably, the 1990s from a variety of sources. *Id.* at forward. However, this compilation is extremely detailed and comprehensive and its findings about American attitudes toward hunting are relevant and illuminating here. American support for hunting is further documented in Tommy L. Brown et al., *Trends in Hunting Participation and Implications for Management of Game Species in Trends in Outdoor Recreation, Leisure and Tourism* ch. 13 (W.C. Gartner & D.W. Lime, eds., CABI Publishing 2000).

184. Duda et al., *supra* n. 183, at 249.

185. *Id.* at 248.

186. *Id.*

Again, these statistics suggest that although specific hunting practices may be in danger, hunting in general is likely not.

Still, hunting amendment proponents fear that someday this balance will change and a study of values regarding wildlife in the western states suggests that values are shifting.¹⁸⁷ Historically, animals have had a mostly utilitarian position in American society—animals were used for food, work, and protection. Animals had value as property. Even animals that lived with humans were livestock and working animals. Although there is evidence that humans have always kept animals as pets, until the late 18th and early 19th centuries, animals that lived with humans were still working animals. The modern concept of companion animals is considerably more recent,¹⁸⁸ and it is even more recently that the idea of animal rights has entered the conversation.¹⁸⁹

The *Wildlife Values in the West* study characterized values regarding wildlife as utilitarian (wildlife is meant for human use), mutualist (humans and wildlife should coexist without fear on either side), and pluralist (utilitarian and mutualist views are situational).¹⁹⁰ A fourth group, whom the authors referred to as distanced, seem to either not be interested in wildlife or not oriented toward wildlife issues.¹⁹¹ This is a helpful characterization because although hunting has been part of human history since the beginning, generalizing all hunting as one activity oversimplifies the debate. More precisely, we should look at three types of hunting activity: subsistence hunting, game management, and recreational hunting. These categories are not mutually exclusive, especially in the context of considering constitutional amendment, but there is a continuum of support that must be considered. Subsistence hunting and hunting in the context

187. Teel et al., *supra* n. 103.

188. Sabrina DeFabritiis, *Barking up the Wrong Tree: Companion Animals, Emotional Damages, and the Judiciary's Failure to Keep Pace*, 32 N. Ill. U. L. Rev. 237, 239-242 (2012).

189. Michael Hill, Student Author, *United States v. Fullmer and the Animal Enterprise Terrorism Act: "True Threats" to Advocacy*, 61 Case W. Res. L. Rev. 981, 982-983 (2011) (noting that the modern animal rights movement has only emerged in the past 30 years, although the antecedent ideas of animals possessing rights are ancient).

190. Teel et al., *supra* n. 103, at 9.

191. *Id.*

of game management still enjoy high levels of support.¹⁹² Popular support is weaker for recreational hunting.¹⁹³

It turns out, however, that, as often happens with statistics, the studies are not consistent. While one study shows that higher-income/more educated populations tend toward mutualist sympathies,¹⁹⁴ another study shows that there are more hunters in those groups.¹⁹⁵ A further anomaly not necessarily between studies but clearly expressed within studies are the numbers of “latent” hunters—those who do not currently participate in hunting activities but who still express interest in hunting or support hunting, at least for some purposes. These people, although not counted in numbers of hunters, are still unlikely to support the sorts of bans on hunting proponents of hunting amendments raise concerns about. These disparities suggest that support for hunting is more nuanced than numbers can portray and the argument that hunting amendments are necessary to counteract declining numbers of hunters is misleading.

*D. Hunting Amendments Are Not Necessary to
Protect Wildlife Conservation Efforts*

The strongest argument for protecting hunting is that hunters fund wildlife conservation. The 1937 Pittman-Robertson Act¹⁹⁶ tied state and federal conservation efforts to hunting. The act allocated a tax on firearms and ammunition to establishing the Federal Aid to Wildlife Restoration Fund.¹⁹⁷ Appropriations from the fund to states for wildlife restoration projects are based on acreage of the state and number of hunting licenses sold in the state.¹⁹⁸ Wildlife restoration projects are defined as the

selection, restoration, rehabilitation and improvement of
areas of land or water adaptable as feeding, resting, or

192. See e.g., Duda et al., *supra* n. 183, at 259-263.

193. *Id.* at 247.

194. *Id.* at 250.

195. 2011 National Survey of Fishing, Hunting and Wildlife-Associated Recreation, *supra* n. 177, at 63-64.

196. 50 Stat. 917.

197. *Id.*

198. *Id.* at 918.

breeding places for wildlife. . .and also including such research into problems of wildlife management as may be necessary to efficient administration affecting wildlife resources. . . .¹⁹⁹

Pittman-Robertson was enacted at a time when wildlife populations were suffering from over-hunting and a loss of habitat, and were disappearing. The purpose of the act was to go beyond conserving wildlife habitat and begin restoring both habitat and populations. The committee report accompanying Senator Pittman's bill eloquently stated the problem.

The wildlife resources of continental United States have shown a marked decrease in their populations due to a number of causes. The effects of drought, of floods, of soil erosion, the advance of civilization, the destruction of habitat, and the diminishing supply of foods for wildlife species have all played an important part in this depopulation. The increased number of men and women who enjoy the chase has been another factor.

The time has passed when conservation is the only remedy to apply to our dwindling wildlife species. Conservationists and technical research workers in wildlife problems have recommended for a number of years that restoration projects must be carried on if we are to bring back for the enjoyment of our people the wildlife species which once were so abundant in our forests, fields, and waters.

The problems of wildlife are inescapably and inherently linked with the land. We must restore the environment for wildlife if we are to have more of it. We must give it a better place in which to live and multiply. A high authority said recently: "Birds can't nest on the wing nor can animals reproduce on the run." Restoration of wildlife and its preservation for all time is essentially a problem of land and water management. Conservation of land areas

199. *Id.* at 917.

naturally includes the conservation of our lakes and streams which are the habitat of our fresh-water fishes.

...

The time has come when the Federal Government and the States must cooperatively engage in a broad program which “will not only conserve our present day limited supply of wildlife, but restore it to some semblance of its former-day abundance.

“The fight to conserve our big out-of-doors and its wildlife is a patriotic duty; increasing its area is an achievement for health and better citizenship”, were true words spoken recently by former Senator Harry B. Hawes, one of the great leaders of the conservation movement in America, in a speech delivered before the annual convention of the Izaak Walton League.

To that end this bill was introduced in the Senate.²⁰⁰

The act prohibits states from diverting revenue derived from hunting licenses to purposes other than supporting wildlife agencies.²⁰¹ The funding provided to states under the act allows states to establish wildlife agencies staffed with trained experts and develop restoration and management programs.

Thus began America’s system of funding the North American Model of Wildlife Conservation that links the hunter, angler, and the industry they support with educated and trained natural resource management professionals. This user-pay benefit funding system has been a primary engine for implementing the North American model of fish and wildlife conservation in the United States for the last 75 years.²⁰²

200. Sen. Rpt. 868 at 1-2 (July 6, 1937).

201. 50 Stat. at 917.

202. White House Conference on North American Wildlife Policy, *Facilitation of Hunting Heritage and Wildlife Conservation: The Recreational Hunting and*

Essentially, hunters taxed themselves in order to conserve wildlife. Today, the benefits of restored habitats and healthy wildlife populations accrue to all citizens and especially outdoor recreationists, even though conservation is still largely paid for by hunters and anglers.²⁰³ If numbers of hunters decrease or hunting is no longer allowed, funding for conservation efforts will suffer.

But as already shown, hunting is not endangered so although it is true that hunters support conservation, it does not follow that hunting amendments are necessary to maintaining conservation efforts. Funding under the Pittman-Robertson Act is dependent on the purchase of firearms, ammunition and hunting licenses. Numbers of hunters are not declining significantly, so revenue from taxes on firearms and ammunition and from hunting licenses is still a viable source of funding for conservation. In addition, revenue is generated from the sale of firearms and ammunition that are used for non-hunting purposes such as target shooting and self-defense. Furthermore, both the numbers of non-hunters who support hunting and the fact that animal welfare groups have not demonstrated the will to ban all hunting indicate that monies derived from hunting activities are not endangered.

Nevertheless, this discussion does raise a related question: should we be relying mostly on hunters to fund wildlife conservation when they are not the only ones who benefit from restored habitat? A report by an advisory council studying Montana's hunting fee structure recommends developing alternate funding sources to supplement hunting fees.²⁰⁴

All Montanans and visitors benefit from the management activities of Montana Fish, Wildlife, and Parks. FWP's management is currently paid for largely by people who purchase hunting and fishing licenses. Of those who do not purchase a license, some benefit in ways that have a physical presence creating impacts that FWP must manage. Others benefit without a physical presence and do

Wildlife Conservation Plan as Directed by Executive Order 13443, at 6, <http://www.fws.gov/whhcc/doc/RecHuntingActionPlanFINAL11009.pdf> (Dec. 14, 2008).

203. Sporting Conservation Council, *supra* n. 11, at 58.

204. *Recommendations*, <http://fwp.mt.gov/fwpDoc.html?id=63559>, at 17 (Mont. FWP Fish & Wildlife Licensing Funding Advisory Council Apr. 28, 2014).

not create impacts. Because of the above, FWP and the legislature need to develop/provide mechanisms in addition to license dollars to fund the management and maintenance of the resources that provide these benefits.²⁰⁵

But the council notes that hunters may be concerned that if non-hunters pay for wildlife conservation they will also have a voice in wildlife management that will decrease the influence of hunters' input into management decisions.²⁰⁶

Nevertheless, the council makes a point that may be the key to an understanding between the competing interests that led to the proliferation of state hunting amendments: "The Council believes that, generally, there is a shared set of values between consumptive and non-consumptive users of fish and wildlife."²⁰⁷

IV. A BETTER SOLUTION: RECONCILING VALUES

If at their core hunting amendments are an attempt to protect the traditions of hunting from the encroachment of animal welfare organizations as hunting amendment proponents most often claim, they are fundamentally a clash between rights—the rights of hunters versus the rights of animals.²⁰⁸ As is appropriate in a democratic society, both sides of the hunting debate are using legal systems to protect their values. Animal welfare groups and the growing public that espouse animal protection values use ballot measures and the courts to protect animals from hunting practices. The NRA and hunting supporters use legislatures and constitutional amendment to protect hunting from what they perceive as an all-out attack. In these arenas, their interests collide. The groups are entrenched and fail to recognize that they do have a common value: conservation of wildlife. The players in the debate may not be ready to collaborate, but

205. *Id.* at 17-18.

206. *Id.* at 17.

207. *Id.*

208. See Michael Hutchins & Christian Wemmer, *Wildlife Conservation and Animal Rights: Are They Compatible?* in *Advances in Animal Welfare Science* vol. 3, 111 (Michael W. Fox & Linda D. Mickley, eds., Springer 1986).

wildlife managers already know they work in this context of both controversy and commonality. The need to make wildlife decisions in a human social and cultural context has spawned the science of human dimensions in managing wildlife, which adapts the original science-based conservation philosophy by adding two elements: “1) managers will . . . facilitate decisions which have broad stakeholder acceptance and 2) decisions should be based on sound biological *and* social science information.”²⁰⁹ Wildlife managers should be able to profess that they represent the “best interest of most of society.”²¹⁰ Wildlife managers can manage wildlife to protect the conservation values of both hunters and non-hunters, but not if their decisions are constrained by constitutional language or laws that elevate one interest over others.

The social and cultural context contains two elements that fall outside a conservation solution and require that society allow the debate to continue. First, animal welfare is concerned with not just the preservation of the species, but also the protection of individual animals. While conservation may protect a species, individual animals may be sacrificed for the greater good. Second, hunters have recreational interests in addition to their interests in protecting a heritage. Conservation provides species for purely recreational hunting but non-hunters are less likely to support hunting—and the conservation efforts that support hunting—if they perceive it is strictly recreational. These concerns represent strongly held values that may not be reconcilable, nor do they need to be. Democratic societies provide room for diverging values and construct both legal and non-legal arenas for protecting those values; courts, legislatures, and ballot boxes are equipped to contend with the value clashes and neither side is wrong to use those avenues when appropriate. Where it is not appropriate is the arena of constitutional amendment. Constitutions should protect common values.

209. Michael J. Manfredo et al., *What Is the Future for Human Dimensions in Wildlife?* in *Transactions of the 63rd North American Wildlife and Natural Resources Conference* 278, 283 (Wildlife Mgt. Inst. 1998) (emphasis in original).

210. Decker & Brown, *supra* n. 23, at 602.

CONCLUSION

Hunting is a complex and emotionally charged issue. As American attitudes toward animals shift toward a more mutualist and less utilitarian ethic, hunters believe they are facing the eventual eradication of their sport and even though it appears hunting is not really in danger, proponents of hunting amendments have successfully waged campaigns based on tradition and heritage and some fear-mongering. The result is a series of state constitutions that now contain unnecessary and potentially problematic protections for hunting.

However, while it is inappropriate for a special interest group—the NRA in this case—to co-opt state constitutions, the issues raised in the debate around hunting amendments do resonate with voters—all sixteen hunting amendments were adopted by overwhelming majorities—and therefore should be addressed. Hunting is not endangered, but there is a need to recognize a conservation ethic that can be embraced by both hunters and non-hunters, particularly non-hunters whose values are more protective of animals. There is a similar need for animal welfare proponents to recognize that in this issue at least the welfare of the species can be protected. There will still be value clashes that courts and legislatures and groups of concerned citizens will—and should—debate, but while there are still clashes, they should not become constitutional issues.

APPENDIX A: STATE CONSTITUTIONAL HUNTING PROVISIONS

State	Citation	Year Adopted	NRA Model?	NRA Elements 1 = reasonableness review 2 = traditional methods for taking non-threatened species 3 = preferred management method
Alabama	Ala. Const. art. I, § 36.02	1996	No	
Alabama	Ala. H. 322, 2014 Reg. Sess. (Jan. 21, 2014)		Yes	1, 2 (but not restricted to non-threatened species), 3
Arkansas	Ark. Const. amend. 88, § 1	2010	Yes	2, 3
Georgia	Ga. Const. art. I, § 1, ¶ XVIII	2006	No	
Idaho	Idaho Const. art. I, § 23	2012	Yes	2 (but not restricted to non-threatened species), 3
Indiana	Ind. Sen. Jt. Res. 7, 118th Gen. Assembly, 1st Reg. Sess. (Jan. 7, 2013)		Yes	2 (but not restricted to non-threatened species), 3
Kentucky	Ky. Const. § 255A	2012	Yes	2 (but not restricted to non-threatened species), 3
Louisiana	La. Const. art. I, § 27.	2004	No	

State	Citation	Year Adopted	NRA Model?	NRA Elements 1 = reasonableness review 2 = traditional methods for taking non-threatened species 3 = preferred management method
Minnesota	Minn. Const. art. XIII, § 12	1998	No	
Mississippi	Miss. H. Con. Res. 30, 127th Legis. Sess. (Feb. 7, 2012)		Yes	2 (but not restricted to non-threatened species), 3
Montana	Mont. Const. art. IX, § 7	2004	No	
Nebraska	Neb. Const. XV, § 25	2012	Yes	2 (but not restricted to non-threatened species), 3
North Dakota	N.D. Const. art. XI, § 27	2000	No	
Oklahoma	Okla. Const. art. II, § 36	2008	Yes	1, 2, 3
South Carolina	S.C. Const. art I, § 25	2010	No	
Tennessee	Tenn. Const. XI, § 13	2010	Yes	1, 2 (but not restricted to non-threatened species)
Vermont	Vt. Const. ch II, § 67	1777	No	
Virginia	Va. Const. art. XI, § 4	2000	No	
Wisconsin	Wis. Const. art. I, § 26	2003	No	
Wyoming	Wyo. Const. art I, § 39	2012	No	