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### Justice Brennan's Call to Arms—What Has Happened Since 1977?, 77 Ohio St. L.J. 387 (2016)

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# Justice Brennan’s Call to Arms—What Has Happened Since 1977?

ANN M. LOUSIN\*

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## I. INTRODUCTION

We are about to observe the fortieth anniversary of the publication of a seminal law review article: *State Constitutions and the Protection of Individual Rights* by Associate Justice William J. Brennan.<sup>1</sup> This Article was

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<sup>1</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489, 491 (1977) (arguing for the reappraisal of the strategy to rest claims involving assertions of individual rights on state constitutional grounds, as state constitutions may offer protections beyond those offered under the Supreme Court’s interpretation of federal law).

also the basis of a talk Justice Brennan later gave at The New York University Law School.<sup>2</sup> It is often said that this article, one of the most-cited in American legal scholarship,<sup>3</sup> sparked the “new judicial federalism.”<sup>4</sup>

In 1986, I wrote in a tribute to Justice Brennan: “This one law review article, almost by itself, created the renaissance of state constitutionalism.”<sup>5</sup> I have not really changed my view since then. Yet, what has been the impact of Justice Brennan’s article in practice? Have the state courts simply paid lip service to “individual rights” in state constitutions, giving them a modicum of respect while quietly continuing to give supremacy to the rights in the U.S. Constitution? Have the state courts created a robust jurisprudence that advances the powers of the states in the federal system? In this Article, I shall attempt to answer those questions.

This Article proceeds by answering those questions through four related issues. Part II explores the effect of the *Michigan v. Long* doctrine over the past thirty-plus years since the originating decision. Part III examines the three different approaches taken by state supreme courts in interpreting state constitutions alongside their federal counterpart: lockstepping, limited lockstepping, and independent jurisprudence. Part IV looks at approaches to interpretation where a provision in a state constitution has no analogue in the federal document. Part V asks whether there should be national uniformity in individual rights and, if not, when states should be permitted to deviate from that norm. Through this analysis, the Article evaluates the real-world impact of Brennan’s seminal article.

## II. THE EFFECT OF THE *MICHIGAN V. LONG* DOCTRINE

In 1983, in a seminal case, the United States Supreme Court took a significant step in determining the relationship between state constitutional rights and the Federal Bill of Rights. The Court’s decision endorsed Brennan’s view that individual rights should be viewed independently under state constitutional grounds. However, it is unclear how much of an impact the decision has actually made in practice.

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<sup>2</sup> See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (reprinting Justice Brennan’s talk).

<sup>3</sup> The article ranked twenty-sixth in the list of most-cited law review articles in Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 768 (1996). See also, e.g., Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000); Robert F. Williams, Foreword, *Looking Back at the New Judicial Federalism’s First Generation*, 30 VAL. U. L. REV. xiii (1996).

<sup>4</sup> Friedman, *supra* note 3, at 93–94.

<sup>5</sup> Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge Who Believes in State’s Rights*, 20 J. MARSHALL L. REV. 1, 2 (1986).

The case was *Michigan v. Long*.<sup>6</sup> The case began in the Michigan Supreme Court, which decided a search and seizure case in favor of the accused on both state and federal constitutional grounds.<sup>7</sup> In that opinion, the Michigan Supreme Court conflated its discussion of both the federal and state claims.<sup>8</sup> In reviewing that opinion, Justice O'Connor, speaking for the United States Supreme Court, refused to consider the federal claim because the Michigan Supreme Court had not made it clear that the state constitutional decision relied upon an "adequate and independent state ground."<sup>9</sup>

Justice O'Connor said that the Michigan court had not "ma[d]e clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."<sup>10</sup> Presumably, Justice O'Connor's purpose was to compel state courts to make it clear that they had exhausted all state constitutional claims before ruling on the federal claims.<sup>11</sup> In fact, by this time, it had become quite common for state supreme courts to pay only lip service to state constitutional claims. As one lawyer who clerked for a state supreme court in the 1970s told me, state court opinions would mention both the federal and state constitutional provisions, analyze the federal cases, and then simply state that the analysis and result would be the same under the state constitution. In effect, he said, the opinion would "boilerplate" an adequate and independent state ground.<sup>12</sup>

Of course, by 1983, federal judges were aware of this trend.<sup>13</sup> However, because there was no robust jurisprudence concerning the state constitutional claims, few observers, much less judges, cared. If the search and seizure was

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<sup>6</sup> *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>7</sup> *Id.* at 1033–34.

<sup>8</sup> See Charles G. Douglas, III, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 136 (1988) ("The significance of *Long* is that it requires state judges to stand up and be counted. No longer can they be lazy and use the United States Supreme Court as an excuse to avoid thought and analysis about issues the drafters of the Bill of Rights never even considered . . .").

<sup>9</sup> *Long*, 463 U.S. at 1042–43.

<sup>10</sup> *Id.* at 1041.

<sup>11</sup> The *Long* Court adopted the plain statement rule to demonstrate "respect for state courts, and . . . to avoid advisory opinions." *Id.* at 1040. By establishing the plain statement rule, the Supreme Court hoped to encourage state judges to develop an independent body of state constitutional law. See *id.* at 1041; see also Larry M. Ellison & Dennis NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177, 195–200 (1984) (providing an explanation and critique of *Michigan v. Long*).

<sup>12</sup> See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 84 (2006) ("[T]he New Hampshire high court has customarily added boilerplate language to its constitutional decisions specifying that it reaches the state constitution first and cites federal precedent, if at all, merely for its persuasive power."); Fred L. Morrison, *An Introduction to the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 287, 304 (1994).

<sup>13</sup> During the 1980s, several federal judges told me this privately.

to be held valid under either claim, what difference did it make if the state and federal courts decided under one constitution or the other?

For their part, it is not clear if state supreme courts have truly established the practice of considering *all* state claims before proceeding to consider federal claims. Each state seems to have marched to its own drummer. This has sometimes resulted in confusion, with state and federal claims bouncing up and down in the courts. Two examples are the Indiana voter identification cases<sup>14</sup> and the Illinois “dog sniff” cases.<sup>15</sup>

Indiana enacted a voter identification statute that required presentation of an approved identification card at the polls before a voter could take a ballot.<sup>16</sup> The challenge, *Crawford v. Marion County Election Board*, began in federal court on federal grounds.<sup>17</sup> The United States Supreme Court ultimately decided that the Indiana statute did not violate federal constitutional standards.<sup>18</sup> That should have been the end of the litigation. However, the League of Women Voters of Indiana then brought a separate action purely on state constitutional grounds in state court.<sup>19</sup> In *League of Women Voters of Indiana, Inc. v. Rokita*, the Court of Appeals of Indiana held that the voter identification statute violated the Indiana Constitution.<sup>20</sup> On appeal, the Indiana Supreme Court reversed, holding that the statute comported with the state constitution’s standards,<sup>21</sup> apparently because those standards merely reflected the federal standards.

What would have happened if the Indiana Supreme Court had affirmed the Indiana Court of Appeals? Doing so may very well have rendered the United States Supreme Court’s opinion in *Crawford* moot. In effect, the United States Supreme Court would have wasted its time as far as the Indiana statute was concerned. At best, one could have said that *Crawford* still had the effect of establishing that a voter identification law like Indiana’s would pass federal muster in the United States Supreme Court. In short, that, at least, could have given some guidance to other states.

The Illinois “dog sniff” cases are more complex.<sup>22</sup> They began when an Illinois state police officer stopped Roy Caballes for speeding on I-80, a highway in Illinois.<sup>23</sup> The officer radioed for a colleague with a drug sniffing

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<sup>14</sup> See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *League of Women Voters of Ind., Inc. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009), *vacated*, 929 N.E.2d 758 (Ind. 2010).

<sup>15</sup> See *People v. Caballes (Caballes I)*, 802 N.E.2d 202 (Ill. 2003), *vacated*, 543 U.S. 405 (2005), *remanded to* 851 N.E.2d 26 (Ill. 2006).

<sup>16</sup> *Crawford*, 553 U.S. at 185–86.

<sup>17</sup> *Id.* at 186–89.

<sup>18</sup> *Id.* at 204.

<sup>19</sup> *League of Women Voters*, 915 N.E.2d at 154.

<sup>20</sup> *Id.* at 168.

<sup>21</sup> *League of Women Voters*, 929 N.E.2d at 772.

<sup>22</sup> See *Caballes I*, 802 N.E.2d 202 (Ill. 2003), *vacated*, 543 U.S. 405 (2005), *remanded to* 851 N.E.2d 26 (Ill. 2006).

<sup>23</sup> See *Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

dog.<sup>24</sup> When the dog indicated that there were drugs in the car, the police searched the car, finding marijuana.<sup>25</sup> The challenge to the search and seizure originated in state court.<sup>26</sup> The trial court judge upheld the validity of the search and seizure.<sup>27</sup> So did the Illinois Appellate Court.<sup>28</sup>

On appeal to the Illinois Supreme Court, Caballes's lawyer raised both the Fourth Amendment and the search and seizure provision of the Illinois Constitution, Article I, Section 6.<sup>29</sup> The Illinois Supreme Court reversed the holding that the search and seizure was valid by a vote of 5–3.<sup>30</sup> Neither the majority nor the minority referred to the state constitutional claim.<sup>31</sup> Unsurprisingly, Caballes appealed in federal court.<sup>32</sup> In *Illinois v. Caballes*, the United States Supreme Court held, 6–2, that the search was valid under the Fourth Amendment, thus reversing the Illinois Supreme Court on the federal claim.<sup>33</sup> It remanded the case to the Illinois Supreme Court “for further proceedings not inconsistent” with its opinion.<sup>34</sup>

The remand put the Illinois Supreme Court into a quandary. The federal issue having been decided, the only remaining issue was the Illinois state constitutional claim—which the court had failed to specifically address when the case first arrived at its docket three years previously.<sup>35</sup> The court decided: (1) that it would follow the lockstep doctrine; (2) that it would hold that the state search and seizure provision, despite being cast in different language from the Fourth Amendment, was not broader than the federal provision; and (3) that the specific “right to privacy” in the Illinois Constitution was not implicated in a car search.<sup>36</sup>

Frankly, the history of the litigation is incredibly messy. If the Illinois Supreme Court had fully determined whether the dog sniff was a valid “search” under Article I, Section 6 of the Illinois Constitution *before* it considered the Federal Fourth Amendment claims, we would have a much clearer picture of the relationship between federal and Illinois standards.<sup>37</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 407.

<sup>27</sup> *Id.*; *see* *People v. Caballes*, No. 98-CF-447, 1999 WL 34774109 (Ill. Cir. Ct. Nov. 22, 1999).

<sup>28</sup> *Caballes*, 543 U.S. at 407; *see* *People v. Caballes*, 797 N.E.2d 250 (table) (Ill. App. Ct. 2003).

<sup>29</sup> *See generally* Defendant's Petition for Leave to Appeal at 6, *Caballes I*, 802 N.E.2d 202 (Ill. 2003) (No. 91547), 2001 WL 34387793, at \*6.

<sup>30</sup> *See Caballes I*, 802 N.E.2d at 205.

<sup>31</sup> *See generally id.*

<sup>32</sup> *See Caballes*, 543 U.S. 405.

<sup>33</sup> *Id.* at 410.

<sup>34</sup> *Id.*

<sup>35</sup> *Caballes I*, 802 N.E.2d 202; *see supra* text accompanying note 31.

<sup>36</sup> *People v. Caballes (Caballes II)*, 851 N.E.2d 26, 45–46 (Ill. 2006).

<sup>37</sup> *See generally* John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965 (2013) (discussing

This failure-to-consider phenomenon occurred more recently in Kansas as well.<sup>38</sup> The United States Supreme Court reviewed an Eighth Amendment Claim under the U.S. Constitution when the Kansas Supreme Court had never first exhausted the state constitutional issue.<sup>39</sup>

Perhaps the United States Supreme Court could obviate the danger of further litigation like *Crawford* and *Caballes* by absolutely *requiring* the states to adjudicate state claims before federal litigation ensues. For example, it could require the Chief Justice of the state supreme court to issue a certificate that all state claims have been fully considered; without that certificate, the federal courts could then refuse to hear the federal claims. This would further promote Brennan's thesis by forcing more careful consideration of the state constitutional claims. Even if a state did this, however, the manner in which each state interprets state constitutional claims will illustrate the actual impact of Brennan's article in practice.

### III. THE EFFECT OF THE THREE SEPARATE APPROACHES TAKEN BY STATE SUPREME COURTS INTERPRETING STATE CONSTITUTIONS ALONGSIDE THE FEDERAL CONSTITUTION

In the last four decades, roughly since the appearance of Justice Brennan's article, state supreme courts have taken one of three approaches to determining the relationship between state constitutional rights and federal constitutional rights: the lockstep approach, the limited lockstep approach, and the independent jurisprudence approach.

The first approach is the *lockstep approach*. Under this approach, the state judges its state constitutional provisions in accordance with the jurisprudence interpreting the corresponding or comparable federal provisions.<sup>40</sup> It is not entirely clear which states follow the lockstep approach all of the time, some of the time, or just occasionally.<sup>41</sup> The Florida Constitution actually *mandates*

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the trend of some state courts to largely reject the call for judicial federalism and instead engage in a "lockstep" analysis that requires judges to interpret their state constitutions dependently on the United States Supreme Court's interpretation of analogous federal provisions; and also analyzing the Illinois Supreme Court's attempt to reconcile prior rulings and formal adoption of a "limited lockstep" approach in *Caballes*).

<sup>38</sup> See *Kansas v. Carr*, 136 S. Ct. 633 (2016).

<sup>39</sup> See *id.* at 641. Again, on remand, Kansas courts could still find that even though there was no violation of the U.S. Constitution, there is a violation of the Kansas Constitution, thus rendering the United States Supreme Court's opinion nugatory.

<sup>40</sup> See Long, *supra* note 12, at 48–49.

<sup>41</sup> For good discussions of the lockstep, limited lockstep, and independent jurisprudence approaches, which are sometimes hard to discern, see generally *id.*, discussing the inconsistencies in how state courts interpret their constitutions, and Robert F. Williams, Introduction, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. SURV. AM. L. 211 (2003), discussing the various stages of new judicial federalism, which is characterized by independent interpretations of state constitutions.

Florida courts to follow the federal case law on federal rights in regard to “searches and seizures”<sup>42</sup> and “cruel and unusual punishment.”<sup>43</sup>

The advantage of this approach is its simplicity.<sup>44</sup> The court does not need to research or think about two distinct approaches.<sup>45</sup> If the federal case law on the Fourth Amendment says that a certain kind of search is valid, then the search is valid for both federal and state purposes. The only time the state court has to engage in original thinking is if the state provision has no federal counterpart.<sup>46</sup>

The second approach is the *limited lockstep approach*. Under this approach, the state court judges its state constitutional provisions in accordance with the jurisprudence interpreting the corresponding or comparable federal provisions, unless it is clear from the language or the constitutional history of the provision that the state framers intended a different analysis.<sup>47</sup> In effect, this presumption favors the federal jurisprudence;<sup>48</sup> the burden is upon the party claiming a different analysis to show that the framers sought to have a separate jurisprudence.<sup>49</sup>

Using this presumption seems inappropriate, especially where the language in the state constitution is not the same as the federal Constitution. Illinois provides one example. Illinois did not have any kind of lockstep approach until *People v. Tisler*.<sup>50</sup> Only since that case was decided in 1984 has Illinois given “lockstep deference” to federal constitutional interpretation.<sup>51</sup> Although a few justices of the Illinois Supreme Court have objected to this approach, it seems clear that at least a majority of the current court prefers to

<sup>42</sup> FLA. CONST. art. I, § 12 (“Searches and seizures. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.”).

<sup>43</sup> *Id.* § 17 (“[T]he prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.”).

<sup>44</sup> See Timothy P. O’Neill, *Escape from Freedom: Why “Limited Lockstep” Betrays Our System of Federalism*, 48 J. MARSHALL L. REV. 325, 332 (2014) (“‘Lockstep’ provides for mindless, formalistic uniformity.”).

<sup>45</sup> See *id.* at 332–33.

<sup>46</sup> Some critics have referred to this as the “lazy” approach for that reason. See, e.g., *id.* at 333 (“‘Lockstep’ is an intellectually lazy path pretending no more work is necessary because the ‘Truth’ has already been conclusively established by the United States Supreme Court.”).

<sup>47</sup> See James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63, 102 (2012).

<sup>48</sup> See Michele M. Jochner, *Survey of Illinois Law: Search and Seizure Cases*, 30 S. ILL. U. L.J. 785, 797 (2006).

<sup>49</sup> See Leven, *supra* note 47, at 102.

<sup>50</sup> *People v. Tisler*, 469 N.E.2d 147, 157 (Ill. 1984); see also Leven, *supra* note 47, at 100; O’Neill, *supra* note 44, at 325.

<sup>51</sup> See Leven, *supra* note 47, at 100.



keep this approach.<sup>52</sup> In practice, this has meant that federal jurisprudence prevails, especially in search and seizure situations.<sup>53</sup>

I consider this position untenable. The approach is ironic because Article I, Section 6 of the Illinois Constitution is not exactly the same as the Fourth Amendment.<sup>54</sup> Nonetheless, the Illinois courts seem committed to using identical standards in interpreting both search and seizure provisions.<sup>55</sup> There is apparently a fear that a separate jurisprudence for search and seizure would result in more decisions favoring criminal defendants because the state jurisprudence would hold more searches invalid.<sup>56</sup> It is not clear if that would be so.<sup>57</sup> One veteran of both prosecutions and defense practice in Illinois has told me that he thinks the result—valid versus invalid search—would be the same in ninety to ninety-five percent of the cases.

The third approach is the *independent jurisprudence approach*.<sup>58</sup> This approach gives the greatest weight to a state constitutional provision. Under this approach, the state court considers the issue purely under state constitutional grounds, without reference to federal jurisprudence.<sup>59</sup> Only after deciding the state issue does the court consider the federal case law.<sup>60</sup> Sometimes the federal and state provisions are identical in language, as is the case with equal protection and due process language. Then, it may be

<sup>52</sup> See *supra* note 36 and accompanying text.

<sup>53</sup> For example, in *Caballes II*, the Illinois Supreme Court “held that the Illinois Constitution of 1970 does not afford greater protection against unreasonable search and seizure than does the federal constitution.” Jochner, *supra* note 48, at 799; see also *Caballes II*, 851 N.E.2d 26, 46 (Ill. 2006).

<sup>54</sup> Compare U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”), with ILL. CONST. art. I, § 6 (“The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”).

<sup>55</sup> See Jochner, *supra* note 48, at 799.

<sup>56</sup> See Anderson, *supra* note 37, at 1001–03.

<sup>57</sup> See *id.*

<sup>58</sup> This approach is also referred to as a “primacy” or “primary” approach. See, e.g., *id.* at 1002; Leven, *supra* note 47, at 66; Long, *supra* note 12, at 48.

<sup>59</sup> See Anderson, *supra* note 37, at 1002 (“Under the . . . ‘primacy’ or ‘primary’ approach, ‘the state court undertakes an independent [state] constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance.’” (second alteration in original)).

<sup>60</sup> See *id.*; see also Leven, *supra* note 47, at 66; Long, *supra* note 12, at 48 (“Only if the state constitution does not protect the right will the court go on to examine whether the Federal Constitution offers greater protection.”).

permissible to consider federal cases and cases in other states while considering the state constitutional provision.<sup>61</sup>

Clearly, the independent jurisprudence approach most clearly follows the principles of interpretation proposed by Justice Brennan.<sup>62</sup> It validates his thesis by seriously considering assertions of individual rights under state constitutions that may offer more protections. Alternatively, the lockstep and limited lockstep approaches vitiate his thesis by giving deference to the federal provisions.

#### IV. THE JURISPRUDENCE OF NEW STATE CONSTITUTIONAL RIGHTS THAT HAVE NO COUNTERPART IN FEDERAL CONSTITUTIONAL RIGHTS

Further supporting Brennan's thesis and the independent jurisprudence approach is the fact that states have constitutional rights without any federal counterpart. If there is no federal counterpart to a state constitutional right, how can there be any role for the lockstep or limited lockstep approach?

Take, for example, the recent trend towards establishing a state constitutional right to "hunt and fish."<sup>63</sup> Beginning with Vermont in 1777, nineteen states have enacted such rights by constitutional referenda.<sup>64</sup> It is not entirely clear what this right means and how courts should analyze claims asserting this constitutional right. Does it require a strict scrutiny analysis of any regulation of that right? Does the state bear a heavy burden to show why it requires a hunting license or fishing license?

Constitutional rights unique to states do not stop there. On August 5, 2014, Missouri adopted a "right to farm."<sup>65</sup> It is also unclear what this right means.

<sup>61</sup> See Anderson, *supra* note 37, at 1002.

<sup>62</sup> See Brennan, *supra* note 1, at 502 ("The essential point I am making . . . is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.").

<sup>63</sup> See Douglas Shinkle, *State Constitutional Right to Hunt and Fish*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx> [<https://perma.cc/45AL-KBKM>] (last updated Nov. 9, 2015).

<sup>64</sup> Nineteen states guarantee the right to hunt and fish in their constitutions; seventeen of those states have provisions approved by the voters. *Id.* Vermont's language dates back to 1777, and the rest of these constitutional provisions—in Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Wisconsin and Wyoming—have passed since 1996. *Id.* Two states, California and Rhode Island, have language in their respective constitutions guaranteeing only the right to fish, but not to hunt. *Id.* Because of Alaska's strong case law history, advocates in that state also consider the state's constitutional language—"Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use"—to meet the test. *Id.* See *infra* Appendix I for the full language of these provisions.

<sup>65</sup> MO. CONST. art. I, § 35 ("That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage

Does it mean that farmers can resist attempts to put highways across their land through eminent domain? Reports indicate that the impetus for the amendment was to stop the efforts of animal rights activists to regulate the manner by which farmers raised animals.<sup>66</sup> Advocates of the amendment believed that there should be a right for farmers to raise animals as they see fit.<sup>67</sup> If that is true, then perhaps it was an anti-PETA amendment.<sup>68</sup>

Apart from general claims based on federal due process or equal protection guarantees, there seem to be no federal counterparts to the rights to hunt, trap, fish, or farm.

Additionally, over thirty states have enacted state constitutional provisions or statutes that might be called “the right to be free from foreign influence.”<sup>69</sup> Although the texts of the provisions vary, they frequently forbid the use of “international law” or “foreign law.”<sup>70</sup> Nine states—Alabama, Arizona, Kansas, Louisiana, Mississippi, North Carolina, Oklahoma, South Dakota, and Tennessee—have enacted measures regarding the application of foreign or religious law in state courts.<sup>71</sup> Eight states enacted statutes, while Alabama changed its constitution in 2014.<sup>72</sup>

A subset of this movement is the effort to amend state constitutions or pass statutes to forbid the use of “religious law” and specifically “Sharia,” the body of Islamic religious law.<sup>73</sup> So far, only South Dakota’s provision specifically

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in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.”)

<sup>66</sup> See Julie Bosman, *Missourians Approve Amendment on Farming*, N.Y. TIMES (Aug. 6, 2014), <http://www.nytimes.com/2014/08/07/us/right-to-farm-measure-passes-in-missouri.html> [<https://perma.cc/M3EE-57AX>]; Chris Kardish, *Missouri’s ‘Right to Farm’ Vote Isn’t as Simple as It Sounds*, GOVERNING (Aug. 1, 2014), <http://www.governing.com/topics/transportation-infrastructure/gov-right-to-farm-missouri-ballot.html> [<https://perma.cc/UJ73-ZC6K>].

<sup>67</sup> See Kardish, *supra* note 66.

<sup>68</sup> See Marshall Griffin, *Gun Rights and ‘Right to Farm’ Amendments Misled Voters, Critics Tell Missouri Supreme Court*, ST. LOUIS PUB. RADIO (Feb. 25, 2015), <http://news.stlpublicradio.org/post/gun-rights-and-right-farm-amendments-misled-voters-critics-tell-missouri-supreme-court> [<https://perma.cc/9CDQ-Q7G4>].

<sup>69</sup> See Appendix II *infra* for language of nine states’ provisions.

<sup>70</sup> Apparently, thirty-two states have made this move, including Alabama, Arizona, Louisiana, Kansas, Mississippi, North Carolina, Oklahoma, South Dakota, and Tennessee. See *infra* Appendix II; see also FAIZA PATEL ET AL., CTR. FOR AM. PROGRESS & BRENNAN CTR. FOR JUSTICE, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 1, 49 n.1 (May 2013), <https://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf> [<https://perma.cc/RM39-QYND>].

<sup>71</sup> See *infra* Appendix II.

<sup>72</sup> See *infra* Appendix II; see also Greg Garrison, *Amendment Banning ‘Foreign Law’ in Alabama Courts Passes; Will Be Added to Alabama Constitution*, AL.COM (Nov. 4, 2014), [http://www.al.com/news/index.ssf/2014/11/amendment\\_banning\\_foreign\\_law.html](http://www.al.com/news/index.ssf/2014/11/amendment_banning_foreign_law.html) [<https://perma.cc/B8WZ-RMQ2>].

<sup>73</sup> *Sharia*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Sharia (shə-ree-ə). (1855) *Islamic law*. The body of Islamic religious law applicable to police, banking, business, contracts, and social issues. Sharia is a system of laws, rather than a codification of laws,

mentions “religious code.”<sup>74</sup> The most talked about of these measures is that of Oklahoma, which led the way by forbidding the use of foreign law.<sup>75</sup> Originally, Oklahoma passed a constitutional amendment specifically banning Sharia law.<sup>76</sup> Once that measure was struck down as unconstitutional by *Awad v. Ziriax*,<sup>77</sup> the legislature passed a statute banning the use of “foreign law.”<sup>78</sup> These provisions may be dismissed as merely the result of xenophobia or Islamophobia, but to do so would ignore “real and ominous developments in Western countries with significant Muslim populations.”<sup>79</sup> These provisions raise some serious issues.

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based on the Koran and other Islamic sources.”); see Liz Farmer, *Alabama Joins Wave of States Banning Foreign Laws*, GOVERNING (Nov. 4, 2014), <http://www.governing.com/topics/elections/gov-alabama-foreign-law-courts-amendment.html> [<https://perma.cc/G543-GG2E>].

<sup>74</sup>S.D. CODIFIED LAWS § 19-8-7 (Supp. 2015) (prohibiting enforcement of any religious code: “No court, administrative agency, or other governmental agency may enforce any provisions of any religious code.”).

<sup>75</sup>See generally Steven M. Rosato, *Saving Oklahoma's “Save Our State” Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 SETON HALL L. REV. 659 (2014) (examining the constitutionality of state statutes or constitutional amendments that seek to ban the consideration of Sharia law in state courts).

<sup>76</sup>The original provision states:

C. The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.

H.J.R. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), *invalidated by* *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

<sup>77</sup>*Awad*, 670 F.3d at 1117, 1119.

<sup>78</sup>The new statute states:

Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on foreign law that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the Constitution of this state.

OKLA. STAT. ANN. tit. 12, § 20 (2015).

<sup>79</sup>Rosato, *supra* note 75, at 660.

One issue is whether the state is seeking to prevent the application of federally negotiated treaties in state cases.<sup>80</sup> If so, that effort will fail because treaties entered into by the United States are “the supreme Law of the Land.”<sup>81</sup> Another issue involves religious freedom, enshrined in the Free Exercise Clause of the First Amendment and in state constitutions.<sup>82</sup> Yet another issue arises within the family law sphere. In a number of family situations such as marriage, dissolution of marriage, and inheritance, there is a role for religious customs and even religious law.<sup>83</sup> For the most part, the state courts try to stay out of those controversies.<sup>84</sup> If, however, a citizen of a state that forbids the use of religious law seeks to enforce a religious divorce, what will happen if one of the parties seeks redress in state courts?

Another new right emerging in state constitutions involves health care.<sup>85</sup> There is a developing movement towards inserting a “right to health care” in state constitutions, although it is unclear what that right would entail.<sup>86</sup>

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<sup>80</sup> See Daniel Mach & Chandra Bhatnagar, *Oklahoma Can't 'Save' Itself from the U.S. Constitution*, HUFFINGTON POST (Aug. 20, 2013), [http://www.huffingtonpost.com/daniel-mach/oklahoma-cant-save-itself\\_b\\_3786089.html](http://www.huffingtonpost.com/daniel-mach/oklahoma-cant-save-itself_b_3786089.html) [<https://perma.cc/4YBP-C52W>].

<sup>81</sup> U.S. CONST. art. VI, cl. 2; see also Mach & Bhatnagar, *supra* note 80.

<sup>82</sup> U.S. CONST. amend. I; see also Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 354 (2004). See generally Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103, 107 (2013) (“[S]urveying the principal cases decided under each state’s religious freedom guarantee, whether expressed as ‘free exercise of religion,’ ‘freedom of worship,’ ‘liberty of conscience,’ ‘rights of conscience,’ or some other formulation.”).

<sup>83</sup> See Linton, *supra* note 82, at 108–83 (containing a state-by-state examination and analysis of the role of religion in different types of family situations).

<sup>84</sup> See generally Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, 6 ELON L. REV. 37 (2014) (discussing the proper role and scope of religious exemptions from generally applicable laws).

<sup>85</sup> See Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1056 (2010).

<sup>86</sup> Thirteen states have constitutional provisions mentioning health. See ALA. CONST. art. IV, § 93.12; ALASKA CONST. art. VII, § 4; ARK. CONST. art. XIX, § 19; HAW. CONST. art. IX, §§ 1, 3; ILL. CONST. pmb., art. XI; LA. CONST. art. XII, § 8; MICH. CONST. art. IV, § 51; MISS. CONST. art. IV, § 86; MO. CONST. art. 4, § 37; MONT. CONST. art II, § 3; N.Y. CONST. art. XVII, §§ 1, 3; S.C. CONST. art. XII, § 1; WYO. CONST. art. VII, § 20. For text of these provisions, see the survey included in Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1347–68 (2010); see also Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 925–26 (2011) (exploring the phenomenon that state courts view socioeconomic constitutional provisions as nonjusticiable and therefore underutilize the state’s constitution’s authority); Hiroaki Matsuura, *State Constitutional Commitment to Health and Health Care and Population Health Outcomes: Evidence from Historical US Data*, 105 AM. J. PUB. HEALTH no. S3, July 2015, at e48, e48 (arguing that the existence of provisions correlates with positive outcomes of population health); Soohoo & Goldberg, *supra* note 85, at 1056–71.

Conversely, between 2010 and 2015, at least twenty-two state legislatures enacted measures relating to challenging or opting out of the federal Affordable Care Act (Obamacare),<sup>87</sup> and five states enacted constitutional provisions to prevent the application of the Affordable Care Act in that state.<sup>88</sup> It is unclear how a state can prevent the application of a federal law apart from refusing to accept federal funds offered to assist the state in implementing the federal law.

Each of the new state constitutional rights described above has no federal counterpart. These unique provisions will require state courts to analyze what exactly each right entails, and the courts will be unable to rely on federal jurisprudence on comparable federal constitutional rights for their decisions. Thus, state courts that normally take the lockstep or limited lockstep approach would be forced to create a body of law only for these unique constitutional rights, despite not doing this for state constitutional provisions with a federal counterpart. Alternatively, by taking the independent jurisprudence approach, the state courts could treat each state constitutional right similarly by first considering *all* issues purely under state constitutional grounds without reference to federal jurisprudence. This seems to be the fairest approach.

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<sup>87</sup> See C. STEPHEN REDHEAD & JANET KINZER, CONG. RESEARCH SERV., R43289, LEGISLATIVE ACTIONS TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT (2015) (summarizing legislative actions taken to repeal, defund, delay, or otherwise amend the Affordable Care Act since it was enacted); Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx> [https://perma.cc/PM54-JLMG] (last updated Mar. 17, 2016).

<sup>88</sup> See ALA. CONST. art. I, § 36.04(a) (“In order to preserve the freedom of all residents of Alabama to provide for their own health care, a law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.”); ARIZ. CONST. art. XVII § 2(A), *preempted by* Coons v. Lew, 762 F.3d 891 (9th Cir. 2014) (“A. To preserve the freedom of Arizonans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system.”); OHIO CONST. art. I, § 21 (“(A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system. (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance. (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.”); OKLA. CONST. art. 2, § 37(B) (“To preserve the freedom of Oklahomans to provide for their health care: 1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system . . . .”); WYO. CONST. art. I, § 38 (“(a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person. (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.”).

V. WHEN THERE SHOULD BE NATIONAL UNIFORMITY IN  
INDIVIDUAL RIGHTS AND WHEN THE STATES MAY  
VARY FROM NATIONAL OR UNIFORM STANDARDS

When state constitutional rights do have a federal counterpart, the lockstep and limited lockstep doctrine effectively promote uniformity between states regarding those constitutional rights. The argument for uniformity is based upon the concept of “federal citizenship,” i.e., that as a citizen of the United States all of us have certain basic rights that we carry with us as we move from state to state.<sup>89</sup> In effect, the federal rights are a “floor,” a minimum number of rights enjoyed by all United States citizens.<sup>90</sup>

In a society as mobile as twenty-first century America, this argument carries considerable weight. As we travel from state to state on the interstate highway system, we might well want to have the same rights as we cross borders. But as one drives one’s car from state to state, is it necessary that there be the same rules regarding police searches of that car? As Roy Caballes drove from Iowa across Illinois towards Indiana, he passed through states that may have had very different approaches to police stops and “dog sniffs.” Is that necessarily bad? If Illinois places greater strictures upon searches and seizures that occur within Illinois, why should Iowa and Indiana care?

*A. How State Constitutional Analysis Affects Federal Constitutional Analysis*

Thus far, the discussion has focused on how federal jurisprudence affects state courts’ analysis of state constitutional rights. However, decisions based on state constitutions can also impact analysis of rights asserted under the federal Constitution. Two examples are cases involving the issue of same sex marriage and cases involving the right to counsel for indigents accused of a crime.

The most recent important development in the trend toward national uniformity has been the same sex marriage, or marriage equality, movement. On state constitutional grounds, the same sex marriage issue began with *Goodridge v. Department of Public Health* in 2003.<sup>91</sup> There, the Supreme Judicial Court of Massachusetts held that the Massachusetts Constitution forbade the state from depriving two people of the same sex of the right to marry.<sup>92</sup> Litigation in other states ensued, all based on those states’ constitutions.<sup>93</sup> Almost immediately, some states redefined marriage in their

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<sup>89</sup> See Linda White Atkins, *Federalism, Uniformity, and the State Constitution—State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), 62 WASH. L. REV. 569, 584 (1987).

<sup>90</sup> *Id.*

<sup>91</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>92</sup> *Id.* at 948.

<sup>93</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (actually antedating *Goodridge* in some respects). Cases subsequent

state constitutions, stating that marriage could be only between one man and one woman.<sup>94</sup>

The stage was set for federal action. Congress had enacted the Defense of Marriage Act (DOMA) in 1996.<sup>95</sup> It defined marriage for federal purposes as being between a man and a woman, and it also allowed states to not recognize the same sex marriage of another state.<sup>96</sup> When the United States Supreme Court held DOMA unconstitutional in *United States v. Windsor*,<sup>97</sup> the issue was joined at the federal level. Clearly, marriage status, once almost exclusively the province of the states, was now a federal issue.<sup>98</sup>

As each federal circuit court of appeals panel held that the Federal Constitution's Equal Protection Clause required the states to allow same sex marriages, it was clear that the United States Supreme Court would have to decide the issue.<sup>99</sup> Normally, however, the United States Supreme Court waits until there is a conflict among the circuit courts. It is important to note that the Court seemed to be in no hurry to take a same sex marriage case.<sup>100</sup>

The only issue was one of timing: when would the United States Supreme Court feel *compelled* to take a same sex marriage case? The Court appeared to be waiting to see if each circuit court panel would rule, preferably with unanimity.<sup>101</sup> At one point, the Court might have felt that there was a federal consensus favoring same sex marriage as a federal constitutional right.

to *Goodridge* include, for example, *Lockyer v. City and Cty. of San Francisco*, 95 P.3d 459 (Cal. 2004), *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), *abrogated by Obergefell*, 135 S. Ct. 2584.

<sup>94</sup> See, e.g., ALASKA CONST. art. I, § 25, *preempted by Hamby v. Parnell*, 56 F. Supp. 3d 1056 (D. Alaska 2014); HAW. CONST. art. I, § 23; TEX. CONST. art. I, § 32, *invalidated by De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015); WIS. CONST. art. XIII, § 13, *invalidated by Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). See generally Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004).

<sup>95</sup> 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012).

<sup>96</sup> 1 U.S.C. § 7; 28 U.S.C. § 1738C.

<sup>97</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2675–76 (2013).

<sup>98</sup> See Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. S52, S58 (2015).

<sup>99</sup> See *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931, and *cert. denied sub nom. Idaho v. Latta*, 135 S. Ct. 2931, and *cert. dismissed sub nom. Coal. for the Prot. of Marriage v. Sevcik*, 136 S. Ct. 13 (2015); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316, and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271; *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308, and *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286 (2014), and *cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265.

<sup>100</sup> See generally Chris Geidner, *Cert. Denied, Stays Denied, Marriage Equality Advanced*, 76 OHIO ST. L.J. FURTHERMORE 161 (2015).

<sup>101</sup> See *id.*



The issue of a uniform federal right to marry a person of one's own sex came to a head in the Sixth Circuit Court of Appeals.<sup>102</sup> In *DeBoer v. Snyder*, a panel of that circuit held, 2–1, that the issue of same sex marriage should be left to the state legislatures.<sup>103</sup> This holding conflicted with other circuits, which held states' attempt to ban same sex marriage unconstitutional.<sup>104</sup> When the plaintiffs did not petition for a rehearing en banc, it was clear that the circuits were in conflict, and that the United States Supreme Court would need to decide the issue.<sup>105</sup>

On June 26, 2015, the United States Supreme Court issued *Obergefell v. Hodges*, effectively deciding the issue of a federal right to marry a person of one's own sex.<sup>106</sup> It was not surprising that the vote was 5–4.<sup>107</sup> Perhaps it was also not surprising that it took many different cases, following a convoluted route, to get the case before the highest court.<sup>108</sup>

These case histories provide several lessons. One lesson is that litigation over state constitutional provisions is often a necessary step in deciding whether there is a need for a federal, uniform right.<sup>109</sup> If it had not been for *Goodridge* and other state constitutional developments, there would have been no *Obergefell*—or at least, the route to the United States Supreme Court would have been quite different.<sup>110</sup>

Same sex marriage is not the first example of the route to achieve a result first through state constitutions and then eventually through the federal constitution. An earlier example of this phenomenon is the right to counsel for indigents accused of a crime.<sup>111</sup> State constitutions frequently provide for a “right to counsel,” and some states have provided the funds to employ public defenders to assist indigents in their defense.<sup>112</sup> Yet, the United States Supreme Court held in *Betts v. Brady* that a right to counsel did not exist at the

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<sup>102</sup> See *DeBoer v. Snyder*, 772 F.3d 388, 404–08 (6th Cir. 2014).

<sup>103</sup> *Id.*

<sup>104</sup> See *Watts*, *supra* note 98, at S55.

<sup>105</sup> See John A. Sparks, *Conflict Between the Circuits: Gay Marriage Back on the Supreme Court's Table*, CTR. FOR VISION & VALUES (Nov. 21, 2014), <http://www.visionandvalues.org/2014/11/conflict-between-the-circuits-gay-marriage-back-on-the-supreme-courts-table/> [<https://perma.cc/RA67-UHGG>].

<sup>106</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

<sup>108</sup> See *Watts*, *supra* note 98, at S58–S77.

<sup>109</sup> See Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, the Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275, 278, 294–301 (2014).

<sup>110</sup> *Id.* at 305–08.

<sup>111</sup> See STEPHEN D. OWENS ET AL., U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012, at 1 (July 2014), <http://www.bjs.gov/content/pub/pdf/idsus0812.pdf> [<https://perma.cc/9EBS-UMJ7>] (analyzing each state's services for indigents and relevant state law and constitutions).

<sup>112</sup> For an excellent discussion of the history of this movement, see generally *id.*, and MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* 306–17 (2015).

federal level for defendants unable to afford a lawyer when a state brought the criminal charges.<sup>113</sup>

By 1960, it was clear most states realized that, whatever the federal right was or was not, it was necessary to the administration of justice to have proper representation for *all* those accused of a crime.<sup>114</sup> By the early 1960s, only five states refused to offer legal counsel to indigents accused of felonies: Alabama, Florida, Mississippi, North Carolina, and South Carolina.<sup>115</sup> It was probably no coincidence that all of the hold-out states were in the South, where a disproportionate share of the accused was impoverished black males.<sup>116</sup>

Guided by the vast majority of states, the United States Supreme Court, too, soon realized that proper representation for indigent defendants was necessary for justice.<sup>117</sup> To establish this right, there is some evidence that the Supreme Court was simply looking for the proper case to use as a vehicle for overruling *Betts v. Brady*.<sup>118</sup> It found that case when a white drifter, convicted of burglary in Florida, wrote the Court from his prison cell.<sup>119</sup>

The Court appointed a distinguished lawyer, Abe Fortas, to represent the indigent defendant, Clarence Earl Gideon.<sup>120</sup> It is almost certain that the Court engineered *Gideon v. Wainwright*. But look how long it took for the Court to come to the realization that there was a need for national uniformity and the great role that the states played in bringing the Court to reach that conclusion.<sup>121</sup>

### B. Developing Issues in the Relationship Between Federal and State Constitutional Rights

Let us now consider some developing issues in the relationship between federal and state constitutional rights. Two salient examples are the taking of private property from one person to give to another private person and the privacy issues arising in an era of breathtaking technological developments.

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<sup>113</sup> *Betts v. Brady*, 316 U.S. 455, 473 (1942).

<sup>114</sup> See Charles C. Brown, Jr., *Betts v. Brady—After Twenty Years*, 17 INTRAMURAL L. REV. N.Y.U. 304, 305–09 (1962).

<sup>115</sup> ANTHONY LEWIS, *GIDEON'S TRUMPET* 133 (1964).

<sup>116</sup> See *id.* at 147–48.

<sup>117</sup> See *id.* 3–10; UROFSKY, *supra* note 112, at 315; Josh Blackman, *Popular Constitutionalism After Kelo*, 23 GEO. MASON L. REV. 255, 256 (2016).

<sup>118</sup> See LEWIS, *supra* note 115, at 48, 54; UROFSKY, *supra* note 112, at 312–14; Elizabeth Berenguer Megale, *Gideon's Legacy: Taking Pedagogical Inspiration from the Briefs that Made History*, 18 BARRY L. REV. 227, 230 n.28 (2013).

<sup>119</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963); Robert F. Kennedy, Att'y Gen. of the U.S., Address at the New England Conference on Defense of Indigent Persons Accused of Crime 2 (Nov. 1, 1963) (transcript available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-01-1963Pro.pdf> [<https://perma.cc/3PJF-JEV9>]).

<sup>120</sup> *Gideon*, 372 U.S. at 335.

<sup>121</sup> See Tom C. Clark, *Gideon Revisited*, 15 ARIZ. L. REV. 343, 344 (1973).

The leading case on private takings in recent years has been *Kelo v. City of New London*.<sup>122</sup> This much criticized case was a 5–4 opinion in the United States Supreme Court.<sup>123</sup> The decision allowed a city in Connecticut, possibly under the influence of corruption, to declare some private homes “blighted” and have them moved or torn down so that the city could transfer the land to Pfizer Pharmaceuticals to build a new headquarters and an industrial complex.<sup>124</sup> The justification for the enrichment of the coffers of Pfizer, a private company, at the expense of private homeowners was economic development.<sup>125</sup> The city claimed that studies showed the Pfizer development would create new jobs and provide much needed tax revenue for the residents of New London.<sup>126</sup> Economic development, it said, was a “public use,” and the Supreme Court sided with the city.<sup>127</sup>

The states have created their own jurisprudence on economic development takings, often rejecting *Kelo*. Three years before *Kelo*, the Illinois Supreme Court had held a similar plan invalid in *Southwest Illinois Development Authority v. National City Environmental*.<sup>128</sup> The Southwest Illinois Development Authority (SWIDA) was a state agency created to promote economic development in southwestern Illinois.<sup>129</sup> It helped create a private racetrack, and, when the racetrack needed a larger parking lot, SWIDA condemned a nearby privately owned landfill.<sup>130</sup> There was no indication of blight, and there was apparently no master plan for development of the area, as had been the case in *Kelo*.<sup>131</sup> For all of those reasons, and because state rights, not federal rights, were involved, the Illinois Supreme Court sided with the landfill owner.<sup>132</sup>

Illinois has certainly not been the only state to choose a path separate from the deference to state officials accorded by the *Kelo* case. Because forty-five states enacted legislation or state constitutional amendments to prevent *Kelo*-

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<sup>122</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>123</sup> *Id.* at 470.

<sup>124</sup> *See id.* at 473, 475.

<sup>125</sup> *Id.* at 483.

<sup>126</sup> *Id.* at 474.

<sup>127</sup> Ironically, the economic development never occurred. *See Pfizer and Kelo’s Ghost Town*, WALL STREET J. (Nov. 11, 2009), <http://www.wsj.com/articles/SB10001424052748704402404574527513453636326> [<https://perma.cc/2XRC-FTGC>]. The homes were moved. *See id.* Pfizer suffered so many setbacks during the Great Recession of 2008 that it never built the complex. *See id.*; Shubhankar Chhokra, *Ten Years Later, the Seizure of Private Property in Kelo Hasn’t Done Anything for the Public*, NAT’L REV. (June 23, 2015), <http://www.nationalreview.com/article/420180/visiting-kelo-lots-ten-years-later-shubhankar-chhokra> [<https://perma.cc/VTY9-WLTB>].

<sup>128</sup> Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1, 11 (Ill. 2002).

<sup>129</sup> *Id.* at 3.

<sup>130</sup> *Id.* at 4.

<sup>131</sup> *See id.* at 9–10.

<sup>132</sup> *Id.* at 11.

style decisions in those states,<sup>133</sup> it is impossible to delineate those developments here in detail. It is safe to say that the citizens of most states, the state legislatures, and to a great extent the state courts, have soundly rejected the type of transfer of private property validated in *Kelo*.<sup>134</sup>

The second issue that may be spawning a separate jurisprudence in the states is that of privacy in an era of rapidly changing technology. The leading recent case in the United States Supreme Court is probably *United States v. Jones*.<sup>135</sup> In *Jones*, all nine Justices made it clear that the private owner of a car had an expectation of privacy, and that police could not attach a global positioning system (GPS) device to the bottom of the car without a warrant, at least in most instances.<sup>136</sup> The discussion in the opinions definitely show an awareness of the technological capabilities of both public law enforcement officers and private parties in establishing a surveillance of a private citizen unaware that he or she is being surveilled.<sup>137</sup>

Sooner or later, the courts, including the United States Supreme Court, must address an even newer development, that of commercial or hobby drones.<sup>138</sup> By this, I mean privately owned drones, not military drones. Every day one can see drones in the air space of Chicago and its suburbs. Amazon has even proposed the use of drones to send packages to customers requesting speedy delivery.<sup>139</sup>

Apart from the safety issues, it is clear that some drones could easily invade privacy.<sup>140</sup> Some drones carry cameras.<sup>141</sup> The people near a drone have no idea whether they are being photographed, i.e., surveilled, and have no effective way of stopping the drone. Here is an example: in the autumn of 2015, a friend asked me if I had seen the drone outside my office window the previous day. I said I had not. She said the drone flew over a nearby small park, climbed to a height just outside my eighth floor window and then climbed even higher to clear a taller office building to the west. I have to wonder if that drone took pictures of my office—and possibly me—while I was unaware of the activity. In any event, why was that drone outside my window?

There are reports of homeowners shooting down drones flying above their houses and yards. One homeowner in the South is reported to have shot down

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<sup>133</sup> See Blackman, *supra* note 117, at 256.

<sup>134</sup> For an excellent discussion of these developments, see *id.* at 261.

<sup>135</sup> *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>136</sup> *Id.* at 9, 12.

<sup>137</sup> See generally *id.*

<sup>138</sup> See generally Matthew R. Koerner, Note, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1129 (2015) (analyzing drones against the backdrop of the Supreme Court's current Fourth Amendment jurisprudence).

<sup>139</sup> *Amazon Unveils Futuristic Plan: Delivery by Drone*, CBS NEWS (Dec. 1, 2013), <http://www.cbsnews.com/news/amazon-unveils-futuristic-plan-delivery-by-drone/> [<https://perma.cc/673K-44BX>].

<sup>140</sup> See Koerner, *supra* note 138, at 1143–47.

<sup>141</sup> See *id.* at 1158.

a drone with his firearm.<sup>142</sup> When the private owner of the drone objected to the destruction of his drone, the homeowner said that if any drone flew so low over his property, he could shoot it because it was a drone that was invading his airspace and his privacy.<sup>143</sup> Absent federal regulation, the states will have to determine when drones invade privacy by using state standards.<sup>144</sup>

The standards for drones may well vary from state to state.<sup>145</sup> We in Chicago are used to being in the public eye, so to speak. As city dwellers, we may not care about drones outside our office windows as much as Southern rural homeowners might be upset by drones flying low over their backyards. What will happen when there is litigation? The Illinois Constitution contains a specific “right to privacy” in Article I, Section 6.<sup>146</sup> Will Illinois courts be vigorous in their defense of that right in the face of GPS and drone technology? Will Illinois courts be vigorous in protecting Illinoisans from warrantless surveillance by the government, a danger Edward Snowden revealed to us?<sup>147</sup>

In other words, is the government or a private party less able to snoop under state law than under federal law? How will we as a people reconcile the federal constitutional issues with the state constitutional issues? As the articles in this symposium suggest, there will always be a tension between the federal and state jurisprudence on individual rights.

In his article, Justice Brennan sought to persuade the state courts to find more rights in their state constitutions than the Burger Court had found in the Federal Constitution.<sup>148</sup> Brennan was right but for the wrong reasons. It is not a matter of the states finding *more* rights than the federal courts do. Federal decisions on federal rights will ebb and flow in cycles. What is important is that we preserve the *federalism* of the federal and state rights. It is this dual nature of individual rights in the United States that creates a competition in the interaction between federal and state rights.<sup>149</sup>

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<sup>142</sup> Ryan Cummings, *Hillview Man Arrested for Shooting Down Drone; Cites Right to Privacy*, WDRB.COM (July 28, 2015), <http://www.wdrb.com/story/29650818/hillview-man-arrested-for-shooting-down-drone-cites-right-to-privacy> [<https://perma.cc/UF92-8YBJ>].

<sup>143</sup> *Id.*

<sup>144</sup> For good preliminary discussions on the use of drones, see generally Toby Sells, *Rise of the Drones*, MEM. L. MAG., Fall 2015, at 11, and Jeanne M. Hill, *Drones: The Latest Threat to the Right to Privacy*, CASE IN POINT (July 16, 2015), <http://www.judges.org/drones-latest-threat-right-privacy/> [<https://perma.cc/YMT9-M97L>].

<sup>145</sup> See Taly Matiteyahu, Note, *Drone Regulations and Fourth Amendment Rights: The Interaction of State Drone Statutes and the Reasonable Expectation of Privacy*, 48 COLUM. J.L. & SOC. PROBS. 265, 280–90 (2015) (describing state drone statutes).

<sup>146</sup> ILL. CONST. art. I, § 6.

<sup>147</sup> James Ball, *Edward Snowden NSA Files: Secret Surveillance and Our Revelations So Far*, GUARDIAN (Aug. 21, 2013), <http://www.theguardian.com/world/2013/aug/21/edward-snowden-nsa-files-revelations> [<https://perma.cc/UC8D-GZJK>].

<sup>148</sup> See Brennan, *supra* note 1, at 491.

<sup>149</sup> For good discussions of the federal policy argument, with special emphasis upon Illinois, see generally James K. Leven, *Attention Gun-Rights Advocates! Don't Forget the*

In effect, individual rights are a continuous public conversation. And that is how it should be and will be.

## VI. CONCLUSION

Nearly forty years after Justice Brennan's article, many questions still remain as to the proper role of state constitutions in the federal system. And today, as states and the federal government prepare to respond and adapt to technology and other modern developments, we may continue to observe the delicate shifting of power between state constitutional sovereignty and federal supremacy. However, despite the lingering questions, it is apparent that, in at least some states, the "new federalism" championed by Brennan is alive and well.

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*Illinois Constitutional Right to Keep and Bear Arms*, 48 J. MARSHALL L. REV. 53 (2014), and O'Neill, *supra* note 44.

## APPENDIX I: STATE CONSTITUTIONAL GUARANTEES TO HUNT AND FISH

*Alabama*

Sportsperson's Bill of Rights.

All persons shall have the right to hunt and fish in this state in accordance with law and regulations.

ALA. CONST. amend. 597 (ratified in 1996).

*Alaska*

Common Use.

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

ALASKA CONST. art. VIII, § 3.

*Arkansas*

[Right to Hunt, Fish, Trap, and Harvest Wildlife]

(a)(1) Citizens of the State of Arkansas have a right to hunt, fish, trap, and harvest wildlife.

(2) The right to hunt, fish, trap, and harvest wildlife shall be subject only to regulations that promote sound wildlife conservation and management and are consistent with Amendment 35 of the Arkansas Constitution.

(b) Public hunting, fishing, and trapping shall be a preferred means of managing and controlling nonthreatened species and citizens may use traditional methods for harvesting wildlife.

(c) Nothing in this amendment shall be construed to alter, repeal, or modify:

(1) Any provision of Amendment 35 to the Arkansas Constitution;

(2) Any common law or statute relating to trespass, private property rights, eminent domain, public ownership of property, or any law concerning firearms unrelated to hunting; or

(3) The sovereign immunity of the State of Arkansas.

ARK. CONST. amend. 88, § 1 (adopted Nov. 2, 2010).

*California*

Fishing rights over public lands; legislative regulation.

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

CAL. CONST. art. I, § 25 (adopted Nov. 8, 1910).

*Georgia*

Fishing and Hunting.

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.

GA. CONST. art. I, § 1, ¶ 28 (adopted Nov. 7, 2006).

*Idaho*

The rights to hunt, fish and trap.

The rights to hunt, fish and trap, including by the use of traditional methods, are a valued part of the heritage of the State of Idaho and shall forever be preserved for the people and managed through the laws, rules and proclamations that preserve the future of hunting, fishing and trapping. Public hunting, fishing and trapping of wildlife shall be a preferred means of managing wildlife. The rights set forth herein do not create a right to trespass on private property, shall not affect rights to divert, appropriate and use water, or establish any



minimum amount of water in any water body, shall not lead to a diminution of other private rights, and shall not prevent the suspension or revocation, pursuant to statute enacted by the Legislature, of an individual's hunting, fishing or trapping license.

IDAHO CONST. art. I, § 23 (adopted Nov. 6, 2012).

### *Kentucky*

Personal right to hunt, fish, and harvest wildlife—Limitations.

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

KY. CONST. § 255A (adopted Nov. 6, 2012).

### *Louisiana*

Freedom to Hunt, Fish and Trap.

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

LA. CONST. art. I, § 27 (adopted Nov. 2, 2004).

*Minnesota*

Preservation of hunting and fishing.

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 and shall be managed by law and regulation for the public good.

MINN. CONST. art. XIII, § 12 (adopted Nov. 3, 1998).

*Mississippi*

Right to hunt, fish and harvest wildlife.

The people have the right to hunt, fish and harvest wildlife, including by the use of traditional methods, subject only to laws and regulations that promote wildlife conservation and management and that preserve the future of hunting and fishing, as the Legislature may prescribe by general law. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. This section may not be construed to modify any provision of law relating to trespass, property rights, the regulation of commercial activities or the maintenance of levees pursuant to Article 11.

MISS. CONST. ANN. art. 3, § 12A (adopted Nov. 4, 2014).

*Montana*

Preservation of harvest heritage.

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 and does not create a right to trespass on private property or diminution of other private rights.

MONT. CONST. art. IX, § 7 (adopted Nov. 2, 2004).

*Nebraska*

Right to hunt, to fish, and to harvest wildlife; public hunting, fishing, and harvesting of wildlife; preferred means of managing and controlling wildlife.

The citizens of Nebraska have the right to hunt, to fish, and to harvest wildlife, including by the use of traditional methods, subject only to laws, rules, and regulations regarding participation and that promote wildlife conservation and management and that preserve the future of hunting, fishing, and harvesting of wildlife. Public hunting, fishing, and harvesting of wildlife shall be a preferred means of managing and controlling wildlife. This section shall not be construed to modify any provision of law relating to trespass or property rights. This section shall not be construed to modify any provision of law relating to Article XV, section 4, Article XV, section 5, Article XV, section 6, or Article XV, section 7, of this constitution.

NEB. CONST. art. XV, § 25 (adopted Nov. 6, 2012).

### *North Dakota*

[Right to hunt, trap and fish.]

Hunting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good.

N.D. CONST. art. XI, § 27 (adopted Nov. 7, 2000).

### *Oklahoma*

Right to hunt, fish, trap and harvest game and fish.

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

provision of common law or statutes relating to trespass, eminent domain, or any other property rights.

OKLA. CONST. art. II, § 36 (adopted Nov. 4, 2008).

### *Rhode Island*

Fishery rights—Shore privileges—Preservation of natural resources.

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

R.I. CONST. art. I, § 17 (amended Nov. 3, 1970).

### *South Carolina*

Hunting and fishing.

The traditions of hunting and fishing are valuable parts of the state's heritage, important for conservation, and a protected means of managing nonthreatened wildlife. The citizens of this State have the right to hunt, fish, and harvest wildlife traditionally pursued, subject to laws and regulations promoting sound wildlife conservation and management as prescribed by the General Assembly. Nothing in this section shall be construed to abrogate any private property rights,

existing state laws or regulations, or the state's sovereignty over its natural resources.

S.C. CONST. art. I, § 25 (adopted Nov. 2, 2010).

### *Tennessee*

[Fish and game.]

The General Assembly shall have power to enact laws for the protection and preservation of Game and Fish, within the State, and such laws may be enacted for and applied and enforced in particular Counties or geographical districts, designated by the General Assembly.

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

TENN. CONST. art. XI, § 13 (adopted Nov. 2, 2010).

### *Texas*

Right to Hunt, Fish, and Harvest Wildlife.

(a) The people have the right to hunt, fish, and harvest wildlife, including by the use of traditional methods, subject to laws or regulations to conserve and manage wildlife and preserve the future of hunting and fishing.

(b) Hunting and fishing are preferred methods of managing and controlling wildlife.

(c) This section does not affect any provision of law relating to trespass, property rights, or eminent domain.

(d) This section does not affect the power of the legislature to authorize a municipality to regulate the discharge of a weapon in a populated area in the interest of public safety.

TEX. CONST. art. I, § 34 (added Nov. 3, 2015).

*Vermont*

[Hunting; fowling and fishing.]

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

VT. CONST. § 67.

*Virginia*

Right of the people to hunt, fish, and harvest game.

The people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law.

VA. CONST. art. XI, § 4 (adopted Nov. 7, 2000).

*Wisconsin*

Right to fish, hunt, trap, and take game.

The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.

WIS. CONST. art. I, § 26 (adopted Apr. 1, 2003).

*Wyoming*

Opportunity to hunt, fish and trap.

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.

WYO. CONST. art. 1, § 39 (adopted Nov. 6, 2012).

APPENDIX II: STATE PROVISIONS PREVENTING THE APPLICATION OF  
FEDERALLY NEGOTIATED TREATIES IN STATE CASES

*Alabama*

(a) This amendment shall be known and may be cited as the American and Alabama Laws for Alabama Courts Amendment.

(b) The law of Alabama provides:

(1) The State of Alabama has developed its unique public policy of laws based on the United States Constitution, as protected by Amendment 10 to the United States Constitution.

(2) Upon becoming a state in 1819, Alabama adopted its first constitutional and statutory enactments, upon which it has built the rights, privileges, obligations, and requirements of its government and citizens.

(3) Both the provisions of the Alabama Constitution and the statutes and regulations of the State of Alabama, with interpreting opinions by its courts of competent jurisdiction, have developed the state's public policy.

(4) The public policy of the State of Alabama protects the unique rights of its citizens beginning with Article I, Section 1 of the Constitution of Alabama of 1901, guaranteeing the equality and rights of men. Except as permitted by due process of law and the right of the people to vote for self-determination, the rights, privileges, and immunities of the citizens of the State of Alabama are inviolate.

(5) Different from the law of the State of Alabama is foreign law, which is any law, rule, or legal code, or system established, used, or applied in a jurisdiction outside of the states or territories of the United States, or which exist as a separate body of law, legal code, or system adopted or used anywhere by any people, group, or culture different from the Constitution and laws of the United States or the State of Alabama.

(6) Alabama has a favorable business climate and has attracted many international businesses. While Alabama business persons and companies may decide to use foreign law in foreign courts, the public policy of Alabama is to prohibit anyone from requiring Alabama courts to apply and enforce foreign laws.

(7) The public policy of this state is to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the Alabama Constitution or of the United States Constitution, including, but not limited to, due process, freedom of religion, speech, assembly, or press, or any right of privacy or marriage.

(8) Article IV, Section 1, of the United States Constitution provides that full faith and credit shall be given by each state to the public acts, records, and judicial proceedings of other states. Provided, however, when any such public acts, records, and judicial proceedings of another state violate the public policy of the State of Alabama, the State of Alabama is not and shall not be required to give full faith and credit thereto.

(c) A court, arbitrator, administrative agency, or other adjudicative, arbitral, or enforcement authority shall not apply or enforce a foreign law if doing so would violate any state law or a right guaranteed by the Constitution of this state or of the United States.

(d) If any contractual provision or agreement provides for the choice of a foreign law to govern its interpretation or the resolution of any dispute between the parties, and if the enforcement or interpretation of the contractual provision or agreement would result in a violation of a right guaranteed by the Constitution of this state or of the United States, the agreement or contractual provision shall be modified or amended to the extent necessary to preserve the constitutional rights of the parties.

(e) If any contractual provision or agreement provides for the choice of venue or forum outside of the states or territories of the United States, and if the enforcement or interpretation of the contract or agreement applying that choice of venue or forum provision would result in a violation of any right



guaranteed by the Constitution of this state or of the United States, that contractual provision or agreement shall be interpreted or construed to preserve the constitutional rights of the person against whom enforcement is sought. If a natural person subject to personal jurisdiction in this state seeks to maintain litigation, arbitration, an administrative proceeding, or a similarly binding proceeding in this state, and if a court of this state finds that granting a claim of forum non conveniens or a related claim violates or would likely lead to the violation of the constitutional rights of the nonclaimant in the foreign forum with respect to the matter in dispute, the claim shall be denied.

(f) Any contractual provision or agreement incapable of being modified or amended in order to preserve the constitutional rights of the parties pursuant to the provisions of this amendment shall be null and void.

(g) Nothing in this amendment shall be interpreted to limit the right of a natural person or entity of this state to voluntarily restrict or limit his, her, or its own constitutional rights by contract or specific waiver consistent with constitutional principles. However, the language of any such contract or other waiver shall be strictly construed in favor of preserving the constitutional rights of the natural person in this state. Further, no Alabama court shall be required by any contract or other obligation entered into by a person or entity to apply or enforce any foreign law.

(h) Except as limited by subsection (g), without prejudice to any legal right, this amendment shall not apply to a corporation, partnership, limited liability company, business association, or other legal entity that contracts to subject itself to foreign law in a jurisdiction other than this state or the United States.

(i) Where the public acts, records, or judicial proceedings of another state violate the public policy of the State of Alabama, the State of Alabama shall not give full faith and credit thereto.

*Arizona*

A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States or conflict with the laws of the United States or of this state.

ARIZ. REV. STAT. ANN. § 12-3103 (Supp. 2015).

*Kansas*

Any court, arbitration, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.

KAN. STAT. ANN. § 60-5103 (West Supp. 2015).

*Louisiana*

B. The legislature finds that it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the constitution of this state or of the United States, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state.

C. A court, arbitrator, administrative agency, or other adjudicative, mediation, or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States.

D. If any contractual provision or agreement provides for the choice of a foreign law to govern its interpretation or the resolution of any dispute between the parties, and if the enforcement or interpretation of the contractual provision or agreement would result in a violation of a right guaranteed by the constitution of this state or of the United States, the agreement or contractual provision shall be modified or amended to the extent necessary to preserve the constitutional rights of the parties.

E. If any contractual provision or agreement provides for the choice of venue or forum outside of the states or territories of the United States, and if the enforcement or interpretation of the contract or agreement applying that choice of venue or forum provision would result in a violation of any right guaranteed by the constitution of this state or of the United States, that contractual provision or agreement shall be interpreted or construed to preserve the constitutional rights of the person against whom enforcement is sought. Similarly, if a natural person subject to personal jurisdiction in this state seeks to maintain litigation, arbitration, agency, or similarly binding proceedings in this state, and if a court of this state finds that granting a claim of forum non conveniens or a related claim violates or would likely lead to the violation of the constitutional rights of the nonclaimant in the foreign forum with respect to the matter in dispute, the claim shall be denied.

LA. STAT. ANN. § 9:6001 (Supp. 2015).

### *Mississippi*

Application of foreign laws in judicial proceedings.

(1) In this section, “foreign law” means any law, rule, legal code or legal system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, the constitution and laws of another state of the United States, Native American tribal law, the Mississippi Constitution of 1890, and the laws of this state.

(2) A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right

guaranteed to a natural person by the United States Constitution or the Mississippi Constitution of 1890.

MISS. CODE ANN. § 11-63-1 (West Supp. 2015).

### *North Carolina*

In recognition that the United States Constitution and the Constitution of North Carolina constitute the supreme law of this State, the General Assembly hereby declares it to be the public policy of this State to protect its citizens from the application of foreign law that would result in the violation of a fundamental constitutional right of a natural person. The public policies expressed in this section shall apply only to actual or foreseeable violations of a fundamental constitutional right resulting from the application of the foreign law.

N.C. GEN. STAT. § 1-87.13 (2015).

### *Oklahoma*

B. Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on foreign law that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the Constitution of this state.

OKLA. STAT. ANN. tit. 12, § 20 (West 2015).

### *South Dakota*

No court, administrative agency, or other governmental agency may enforce any provisions of any religious code.

S.D. CODIFIED LAWS § 19-8-7 (Supp. 2015).

*Tennessee*

It is the public policy of this state that the primary factor which a court, administrative agency, arbitrator, mediator or other entity or person acting under the authority of state law shall consider in granting comity to a decision rendered under any foreign law, legal code or system against a natural person in this state is whether the decision rendered either violated or would violate any right of the natural person in this state guaranteed by the Tennessee Constitution or the United States Constitution or any statute or decision under those constitutions.

TENN. CODE ANN. § 20-15-102 (Supp. 2015).