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State v. Buckner and the Right to Keep and Bear Arms in West Virginia

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STATE v. BUCKNER AND THE RIGHT TO KEEP AND BEAR ARMS IN WEST VIRGINIA

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I. INTRODUCTION

The second amendment to the United States Constitution provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms shall not be infringed.”¹ Although this language appears to grant a broad right to keep and bear arms, the Supreme Court has not applied the second amendment to the states. Instead, the second amendment restrains national government infringement of the general right of the *people* to keep and bear the arms necessary for a well regulated militia.² The failure of the Supreme Court to apply the second amendment to them has effectively given the states an unrestrained power to regulate the keeping and bearing of arms by individuals. In light of such broad powers in the states, there has been a growing concern over the lack of protection for this individual right.³ For the protection of the right from state infringement, an overwhelming

1. U.S. CONST., amend. II (emphasis added).

2. See *United States v. Miller*, 307 U.S. 174 (1939); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1875).

3. Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177 (1982).

majority of states⁴ have adopted constitutional provisions securing the right to keep and bear arms.⁵

West Virginians recognized the lack of protection from state infringement and recently adopted a constitutional provision protecting the right to keep and bear arms for the defense of self, family, home and state.⁶ Commonly known as the "Right to Keep and Bear Arms Amendment," article III, section 22 of the West Virginia Constitution provides:

A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.

The amendment guarantees a constitutional right but does not address the extent (if any) to which this right can be regulated. Generally, the state can enact laws for the protection of the health, safety, and welfare of its citizens by virtue of the police power, which is "the power of government inherent in every sovereignty to enact laws, within constitutional limits, to promote the general welfare of its citizens."⁷ The state of West Virginia, through the exercise of police power, has historically regulated the keeping and bearing of arms through statutory provisions.⁸ The extent of statute regulation was never an issue prior to the adoption of the "Right to Keep and Bear Arms Amendment" in November of 1986. However, since the adoption of the amendment, the status of existing statutory provisions regulating the keeping and bearing of arms was questionable, as was the extent (if any) to which the Legislature could constitutionally enact laws infringing upon this right. Since there was no real statement of legislative intent and little legislative history surrounding the constitutional provision,⁹ the burden of expressing standards evaluating the balance between the right to bear arms and

4. *Id.*

5. In *dicta*, the United States Supreme Court recognized that most states have some provision touching on the right to keep and bear arms, with the scope of that right dependent upon the language employed. *Miller*, 307 U.S. at 182.

6. W. VA. CONST. art. III, § 22.

7. *State ex. rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 750, 143 S.E.2d 351, 359 (1965).

8. See McNeely, *The Right of Who to Bear What, When, and Where—West Virginia Firearms Law v. The Right-To-Bear-Arms Amendment*, 89 W. VA. L. REV. 1125 (1987).

9. *Id.* at 1151-52.

the valid exercise of police power in regulating that right ultimately rests with the judiciary.

*State v. Buckner*¹⁰ presented the West Virginia Supreme Court of Appeals the opportunity to assess the constitutionality of statutory provisions against carrying a dangerous or deadly weapon and to assess the extent to which the Legislature may regulate the keeping and bearing of arms in light of the “Right to Keep and Bear Arms Amendment.” The court held that the provisions at issue were unconstitutional but recognized that the right to keep and bear arms is not absolute. This comment will discuss the *Buckner* decision in terms of the criteria the West Virginia Supreme Court of Appeals found were relevant and that it will use when addressing the constitutionality of other statutory provisions regulating the right to keep and bear arms. Finally, it will analyze potential legislative action in light of the *Buckner* decision.

II. STATEMENT OF THE CASE

The factual background giving rise to the West Virginia Supreme Court’s analysis of the “Right to Keep and Bear Arms Amendment” is relatively simple and uncontroverted. After arresting a driver for driving under the influence of alcohol, a Princeton city police officer discovered a .22 caliber automatic pistol when searching the driver’s jacket pocket.¹¹ The driver admitted having no license to carry the pistol.¹²

After the police officer presented this information to a magistrate of Mercer County, the magistrate refused to issue a warrant for carrying a dangerous or deadly weapon.¹³ The magistrate concluded that Chapter 61, Article 7, Section 1 of the West Virginia Code (hereinafter W. Va. Code),¹⁴ the statutory provision against carrying

10. *State v. Buckner*, No. CC972 (W. Va. July 1, 1988) (WESTLAW, 1988 WV 196576).

11. *Id.* No. CC972 at 1.

12. *Id.*

13. *Id.* No. CC972 at 2.

14. The provision against carrying a dangerous or deadly weapon provides as follows: If any person, without a state license therefor or except as provided elsewhere in this article and other provisions of this Code, carry about his person any revolver or pistol, dirk, bowie knife, slung shot, razor, billy, metallic, or other false knuckles, or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor. . . .

W. VA. CODE § 61-7-1 (Repl. Vol. 1988).

a dangerous or deadly weapon without a license, violated article III, section 22.¹⁵

A writ of mandamus was then filed by the prosecuting attorney in the Circuit Court of Mercer County seeking to compel the magistrate to issue the warrant against the driver.¹⁶ After a hearing, the circuit judge concluded that the “Right to Keep and Bear Arms Amendment” voided W. Va. Code § 61-7-1 since the statute prohibits the carrying of firearms without a license.¹⁷

The circuit court stayed the effect of the ruling and certified the following questions to the West Virginia Supreme Court of Appeals:

1. Is *W. Va. Code* Chapter 61, Article 7, Section 1 constitutional in light of the subsequent adoption of Article 3, Section 22 of the Constitution of West Virginia?
2. May the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?¹⁸

The Court of Appeals concurred with the magistrate and circuit court of Mercer County in answering the first certified question “no” and holding that “the statute operates to impermissibly infringe upon the constitutionally protected right to bear arms for defense purposes.”¹⁹

However, the court recognized that the right to bear arms is not absolute by answering the second certified question “yes.” The court held that the West Virginia Legislature may regulate the right to keep and bear arms through the valid exercise of police power. When enacting legislation, “[t]he individual’s right to keep and bear arms and the state’s duty, under its police power, to make regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced.”²⁰

After the court’s opinion in *Buckner* on July 1, 1988, the State of West Virginia filed a petition for reconsideration of remedy on

15. *Buckner*, No. CC972 at 2.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*, No. CC972 at 10.

20. *Id.*, No. CC972 at 23.

July 19, 1988.²¹ The Attorney General's office asked the court to delay the effect of the opinion until the Legislature could meet to correct the unconstitutional provision. However, the court on December 20, 1988 voted unanimously not to reconsider the ruling indicating that, if the issue was of an emergency nature, the Governor or the Legislature itself could call a special legislative session under appropriate rules to deal with the problem.²²

III. PRIOR LAW

A. *Regulating the Keeping and Bearing of Arms*

West Virginia has a long and very colorful history in regulating the keeping and bearing of arms.²³ A brief review of this history illustrates that the first limitation was carried over from Virginia in 1863 when West Virginia was formed. This early statute simply recognized that a bond may be required if a person goes armed with a deadly or dangerous weapon, but individuals with reasonable cause for self-defense were exempted from the regulation.²⁴ Obviously this first statute did little in regulating the carrying of weapons.

The Legislature revised the statute in 1873, eliminating the self-defense exception in the original statute and imposing a duty upon any justice of the peace to cause the arrest of any person within

21. Attorney General's petition for reconsideration of remedy at 13, *Buckner*, No. CC972 (WESTLAW, 1988 WV 196576).

22. *Dominion Post*, Dec. 21, 1988, at 1A, col. 1; *The Charleston Gazette*, Dec. 21, 1988, at 1A, col. 1.

23. This history has been well documented by James W. McNeely in his article titled *The Right of Who to Bear What, When, and Where—West Virginia Firearms Law v. The Right to Bear Arms Amendment*, *supra* note 8.

24. "If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance, with the right to appeal, as before provided, and like proceedings shall be had on appeal." W. VA. CODE ch. 153, § 8 (1868) (amended 1872-73 W. VA. ACTS ch. 226; amended W. VA. CODE ch. 148, § 7 (1884); amended W. VA. CODE ch. 148, § 7 (West Supp. 1909); amended W. VA. CODE ch. 148 § 7 (Barne's Supp. 1923); amended 1925 W. VA. ACTS ch. 95, § 7; amended W. VA. CODE ch. 148, § 7 (Barne's Supp. 1925); recodified W. VA. CODE § 61-7-1 (1931); amended W. VA. CODE § 61-7-1 (1975); current version at W. VA. CODE § 61-7-1 (Repl. Vol. 1988)).

his county in the habit of carrying concealed weapons.²⁵ Upon conviction, an individual was to be fined not in excess of ten dollars with no jail sentences possible. By defining the offense as “habitually carrying” concealed weapons and imposing only a small fine upon offenders, West Virginia continued to be a state relatively free from statutory provisions regulating the bearing of arms.

The Legislature enacted a more restrictive statute, similar to the one held unconstitutional in *Buckner*, in 1882.²⁶ This statute totally prohibited the carrying of dangerous or deadly weapons except in the case of law officers and people carrying such weapons on their own premises.²⁷ Unlike the predecessor statute, the 1882 provision prohibited *any* carrying of weapons, not just those weapons that

25. The 1873 provision states as follows:

If a justice shall, from his own observation or upon information of others, have good reason to believe that any person in his county is habitually carrying about his person concealed weapons, such as dirks, bowie knives, pistols or other dangerous weapons, it shall be the duty of such justice to cause such person to be arrested and brought before him, and if such person upon trial shall be found guilty, he shall be fined not exceeding ten dollars.

1872-73 W. VA. ACTS ch. 226 § 168 (current version at W. VA. CODE § 61-7-1 (Repl. Vol. 1988)). For the history of the development of this statute, see *supra* note 23.

26. The 1882 provision states as follows:

If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, sling shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined . . .; and if any person shall sell or furnish any such weapon as is hereinbefore mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe to be under the age of twenty-one years, he shall be punished as hereinbefore provided; but nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired, and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment, he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self defense and for no other purpose, the jury shall find him not guilty. But nothing in this section contained shall be so construed as to prevent any officer charged with the execution of the laws of the state from carrying a revolver or pistol, dirk or bowie knife.

W. VA. CODE ch. 148, § 7 (1884) (current version at W. VA. CODE § 61-7-1 (Repl. Vol. 1988)). For the history of this statute, see *supra* note 23.

27. *Id.*

are carried in a concealed manner.²⁸ However, the statute recognized an exception for self-defense. To invoke the exception, a defendant had the burden of proving good character and standing in the community in addition to a good faith belief that he was in danger of death or great bodily harm at the hands of another person. Should a defendant meet the burden, the jury was bound by the statute to find him not guilty.

This broad prohibition against carrying dangerous or deadly weapons was enacted in conjunction with the "Red Men Acts,"²⁹ giving some indication of the influences surrounding passage of the statute. The "Red Men Acts" were criminal conspiracy statutes enacted to combat bands of outlaws throughout the state known as "Red Men," "Regulators," "Vigilante Committees," and "White Caps."³⁰ These groups of men, more commonly known as the Klu Klux Klan, organized in secret and appeared in disguise to inflict punishment and death upon those peaceful citizens condemned under their rule of law. Faced with the impossibility of establishing secret conspiracies, through the "Red Men Acts" the Legislature presumed a conspiracy to exist when two or more individuals were caught in such acts of destruction.³¹ Thus, early statutory regulations prohibiting the carrying of dangerous or deadly weapons were influenced by a legislative intent to combat underground activity carried over from the Civil War.

One notable case interpreting the 1882 statutory provision is *State v. Workman*.³² Workman was charged with carrying a pistol in violation of the prohibition against carrying a dangerous or deadly weapon.³³ The constitutionality of the statute was challenged under a due process theory since the defendant was required to prove that he was "a quiet and peaceful citizen, of good character and standing

28. See, *supra* note 23 and accompanying text.

29. W. VA. CODE ch. 148, §§ 9, 10 (1884) (current version at W. VA. CODE § 61-6-7 (Repl. Vol. 1988)).

30. *State v. Porter*, 25 W. Va. 685, 689 (1885).

31. *Id.* See also *State v. Bingham*, 42 W. Va. 234, 24 S.E. 883 (1896), *overruled*, 140 W. Va. 610, 87 S.E.2d 689 (1955).

32. *State v. Workman*, 35 W. Va. 367, 14 S.E. 9 (1891).

33. *Id.* at 368-69, 14 S.E. at 10.

in the community” to establish a defense under the statute.³⁴ The court rejected this argument and held that there is a general right to self-defense stemming from the United States Constitution and the West Virginia Constitution,³⁵ a right guaranteed to all persons.³⁶ The statute merely provided a presumption of acquittal for persons who showed good moral character and a need to carry arms for self-defense.³⁷ The statute did not deprive persons of self-defense who failed to show good moral character. It only neglected to give this group the presumption.³⁸

After upholding the statute under the due process challenge, the court addressed the constitutionality of the statute in light of the second amendment to the United States Constitution.³⁹ Recognizing that authorities at that time differed as to whether the second amendment applied to the states,⁴⁰ the court justified its conclusion as if the amendment did apply to states.⁴¹ Regarding the “well regulated militia” language of the second amendment, the court classified swords, guns, rifles, and muskets as weapons of warfare used by militia that fall within the protection of the second amendment, but explicitly held pistols to be outside the realm of protection.⁴² Therefore, Workman, who carried a pistol, was properly charged with a violation of the statute.

Once the Supreme Court of Appeals upheld the 1882 statute, the state maintained its broad prohibition against carrying a dangerous or deadly weapon until 1909, when the West Virginia Legislature enacted a weapons licensing statute.⁴³ The new statute permitted the carrying of a dangerous or deadly weapon provided a person first obtain a state license.⁴⁴ To obtain a license, an applicant needed to

34. *Id.* at 369-72, 14 S.E. at 10-11.

35. *Id.* at 370, 14 S.E. at 10.

36. *Id.*

37. *Id.* at 371, 14 S.E. at 10-11.

38. *Id.*

39. *Id.* at 372-75, 14 S.E. at 11-12.

40. *Id.* at 372, 14 S.E. at 11.

41. *Id.*

42. *Id.* at 373, 14 S.E. at 11.

43. W. VA. CODE ch. 148, § 7 (Supp. 1909) (current version at W. VA. CODE § 61-7-1 (Repl. Vol. 1988)). For the history of this statute, see, *supra* note 23.

44. *Id.*

demonstrate a good reason for carrying a weapon and to meet other minimum qualifications, including the posting of a sizeable bond.⁴⁵ The purpose of the statute was found to be the “[r]estraint of all evil wrought by the use of deadly weapons. . . .”⁴⁶ The court necessarily followed a path of rigid enforcement in giving effect to the statute’s broad effort to combat the criminal use of weapons as well as prevent injury by careless or negligent use of deadly weapons.⁴⁷ Thus, the state maintained a policy of strict prohibition against carrying arms as established in *Workman*.⁴⁸

The requirements for obtaining a license were amended in the first extraordinary session of the 1925 legislature.⁴⁹ During this session the Legislature rewrote the 1909 provision and strengthened weapon regulations by requiring United States citizenship and West Virginia residency for license applicants, increasing application fees, and requiring sellers of firearms to keep accurate records.⁵⁰ Also, the added language made it unlawful to carry a weapon, licensed or unlicensed, in “a way or manner to cause, or threaten, a breach of the peace.”⁵¹ The definition of weapons was expanded in a new subsection to include machine guns, sub-machine guns and high powered rifles, but the new subsection exempted the use of weapons for target practice and hunting pursuant to a hunting license.⁵²

The legislative motive for making the weapons provisions more stringent stemmed from the labor wars existing during this period of time. During the early 1900’s, unions attempted to organize West Virginia’s many coal mines, seeking better wages and better working conditions. Union activity led to strikes and increased tension between the mine operators and the workers. Both sides were heavily armed, as exemplified by a typical strike at Cabin Creek and Paint

45. *Id.*

46. *State v. Blazovitch*, 88 W. Va. 612, 615, 107 S.E. 291, 292 (1921).

47. *Id.* at 614, 107 S.E. at 292. *See also* *State v. Kinney*, 92 W. Va. 272, 114 S.E. 677 (1922) and *State v. Merico*, 77 W. Va. 314, 87 S.E. 370 (1915), *overruled*, 305 S.E.2d 284 (1983).

48. *Blazovitch*, 88 W. Va. at 614, 107 S.E. at 292.

49. W. VA. CODE ch. 148 § 7 (Supp. 1925) (current version at W. VA. CODE § 61-7-1 (Repl. Vol. 1988)). For the history of this statute, *see supra* note 23.

50. *Id.*

51. *Id.*

52. *Id.*

Creek in 1912 where the government confiscated 1,872 high-powered rifles, 556 pistols, six machine guns, 225,000 rounds of ammunition, 480 blackjacks, and a large number of assorted other weapons.⁵³ Such bearing of arms by strikers and mine operators led to the famous gunfight in 1920 known as the "Matewan Massacre" in Mingo County which left twelve dead.⁵⁴ In light of the possibility of continued labor violence, the Legislature enacted the more stringent license provisions and added a restriction against employees carrying weapons upon the premises of their employer.⁵⁵

In light of these license provisions, the court in *State v. Foley*⁵⁶ was faced with a claim of self-defense by a murder trial defendant who carried a .32 caliber revolver without a state license.⁵⁷ The defendant argued that the trial court erred by requiring him to answer cross-examination questions regarding whether or not he had a license to carry a pistol on the date in question.⁵⁸ Stating that "[t]he law of self-defense is part and parcel of the law of homicide, and the right to arm for self-defense is distinct from a license to carry a pistol . . . ,"⁵⁹ the court held that compelling the defendant to answer the questions constituted reversible error. Thus, the fact that the accused carried a dangerous or deadly weapon in violation of the state licensing statute in no way impaired his right to assert the claim of self-defense.

From this historical background, the current statutory provisions which regulate arms have evolved with only minor changes.⁶⁰ During the 1931 recodification, the 1925 amendments were recodified in Article 7, Chapter 61 of the West Virginia Code without change. The license provision was then amended in 1975 with only minor changes, such as the addition of a minimum qualification for the

53. H. LEE, BLOODLETTING IN APPALACHIA, 32-33 (1969).

54. *Id.* at 55.

55. W. VA. CODE ch. 148 § 76 (Supp. 1925) (current version at W.VA. CODE § 61-7-1 (Repl. Vol. 1988)).

56. *State v. Foley*, 128 W. Va. 166, 35 S.E.2d 854 (1945).

57. *Id.* at 167-70, 35 S.E.2d at 855-59.

58. *Id.* at 178, 35 S.E.2d at 860.

59. *Id.* at 181, 35 S.E.2d at 861.

60. McNeely, *supra* note 8 at 1141.

handling and firing of firearms and an increase in license fees.⁶¹

B. *The Right to Keep and Bear Arms Amendment*

At the behest of gun owners in West Virginia, the National Rifle Association, and the West Virginia State Rifle and Pistol Association, the "Right to Keep and Bear Arms Amendment" was introduced in the West Virginia Legislature on February 21, 1985, as House Joint Resolution 18.⁶² The only debate concerning this bill was whether the word "lawful" should be added in front of "self-defense."⁶³ The word was added to the House bill, but the Senate deleted it.⁶⁴ The Senate version prevailed.⁶⁵ Consequently, the language as originally introduced was approved by the House, ninety-two to six, and the Senate, thirty-one to three,⁶⁶ on April 12, 1985.⁶⁷ Thus, the "Right to Keep and Bear Arms Amendment" attained the necessary two-thirds vote from the Legislature to enable the placing of the amendment on the ballot for voter approval. Such a wide margin of approval, combined with the failed attempts of a few legislators to weaken the language of the amendment, put the "Right to Keep and Bear Arms Amendment" well on its way to becoming a constitutional provision.

The amendment left the Legislature with a small minority of opposition. Delegate James McNeely opposed the amendment and carried that sentiment over into the campaign period prior to the general election. The opponents' main argument centered upon the premise that the effect of this amendment was unknown. Most emphasized were the possibilities that the amendment would take away legislative power to regulate handguns and that current statutory provisions regulating arms could be ruled unconstitutional by the Supreme Court of Appeals.⁶⁸ Opponents reasoned that, given a lit-

61. W. VA. CODE § 61-7-2 (Repl. Vol. 1988).

62. McNeely, *supra* note 8, at 1141. House Joint Resolution 18 was originally introduced in the same language as the current "Right to Keep and Bear Arms Amendment."

63. *Id.* at 1143.

64. *Id.* at 1144.

65. *Id.* at 1145-46.

66. *Id.* at 1146.

67. *Id.*

68. The Charleston Gazette, Oct. 24, 1986, at 5A, col. 1.

eral interpretation of the amendment, the Legislature could not regulate the bearing of arms since such conduct might be for self-defense.⁶⁹ McNeely went even further and asserted that the broad language could be used to challenge state laws denying gun permits to convicted felons or aliens.⁷⁰

Supporters of the amendment stressed that it enhanced and enforced the right to bear arms guaranteed by the federal Constitution. The United Sportsmen of West Virginia, a political action committee, was formed for the purpose of persuading the public to vote in favor of the "Right to Keep and Bear Arms Amendment." Through two advertisements which ran in major newspapers throughout the state⁷¹ prior to the general election, voters were informed of the need to support the amendment. The Committee stressed that forty states already had similar state constitutional amendments, that the amendment was supported by most government officials and over 50,000 NRA members in West Virginia, and that the amendment would prevent infringement of the individual right to keep and bear arms for constitutionally protected purposes. The advertisements also stressed that concealed weapons and instruments of mass destruction may be regulated under the amendment.

The voters of West Virginia approved the amendment on November 4, 1986 by a vote of 342,963 to 67,168. With more than five votes in favor to every one vote opposed, the amendment passed in every county in the state.⁷²

IV. ANALYSIS

A. *Analysis of Case*

Before addressing the constitutionality of W. Va. Code § 61-7-1, the statutory provision against carrying a dangerous or deadly

69. *Id.*

70. The Charleston Gazette, Oct. 30, 1986, at 4A, col. 1.

71. For a full reprint of the newspaper advertisements, see McNeely, *supra* note 8, at 1179-81.

72. Official Election Returns, General Election 1986, *quoted in* McNeely, *supra* note 8, at 1151.

weapon, Chief Justice McHugh, speaking for a unanimous court, recognized that West Virginia has a long history of regulating the use of weapons through statutory provisions.⁷³ Of importance in the court's historical discussion was the analysis given in *State v. Workman*,⁷⁴ discussed earlier. The *Buckner* court, however, dismissed the use of the *Workman* analysis in light of the new constitutional provision⁷⁵ as the *Workman* court had focused upon the "well regulated militia" language of the second amendment⁷⁶ while the state constitutional provision was considered broader in its guarantee of the right to keep and bear arms.

In dismissing the *Workman* analysis, the court implicitly recognized pistols as falling within the protection of the new amendment. The *Workman* court defined protected arms as those that a militia would normally possess and explicitly stated that pistols fail to meet this test.⁷⁷ By recognizing that this definition of arms is not applicable and that the state amendment is a broader definition of a constitutional right, the *Buckner* court included pistols within the protection of the amendment.

Proceeding to consider the first certified question before it, the constitutionality of W. Va. Code § 61-7-1 in light of the amendment, the court established basic principles of constitutional construction⁷⁸ as it could find no real statement of legislative intent.⁷⁹ Noting that the general rules of statutory construction also apply to constitutional construction,⁸⁰ the court concluded that the amendment must be applied in light of its plain meaning since the language is clear and unambiguous.⁸¹

With these principles established, the court held W. Va. Code § 61-7-1 unconstitutional since the statute operates to impermissibly

73. *Buckner*, No. CC972 at 4.

74. *State v. Workman*, 35 W. Va. 367, 14 S.E. 9 (1891).

75. *Buckner*, No. CC972 at 10.

76. *Id.*, No. CC972 at 7.

77. *Workman*, 35 W. Va. at 373, 14 S.E. at 11.

78. *Buckner*, No. CC972 at 9-10.

79. *Id.*, No. CC972 at 9.

80. *Id.*, citing *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973).

81. *Buckner*, No. CC972 at 10.

infringe upon the constitutionally protected right to carry dangerous or deadly weapons for the defense of self, family, home and state.⁸² Since the statutory provision totally proscribed the carrying of a dangerous or deadly weapon absent a license or other authorization, the court held the provision overbroad and violative of the amendment.⁸³ In support of its conclusion, the court cited, along with other cases, *City of Lakewood v. Pillow*,⁸⁴ *In re Brickey*,⁸⁵ and *State v. Blocker*.⁸⁶ In these cases, statutes or ordinances were voided in light of a state constitutional provision guaranteeing the right to bear arms for defense. Since the authorities are cited several times in the *Buckner* decision, a closer look at these cases helps to focus the court's analysis of the West Virginia amendment.

In *City of Lakewood v. Pillow*, the Colorado Supreme Court interpreted the constitutionality of an ordinance which made it unlawful to possess, carry or use dangerous or deadly weapons.⁸⁷ The court noted that the ordinance was so general that it made it unlawful for a person to possess a firearm in a vehicle, possess a firearm in a place of business for the purpose of self-defense, transfer guns to and from gunsmiths, or operate a business as a gunsmith, pawnbroker or sporting goods store.⁸⁸ The court stated that several

82. *Id.*

83. *Id.*, No. CC972 at 10-12.

84. *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972).

85. *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902).

86. *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981).

87. LAKEWOOD, COLO., ORDINANCE No. 0-70-47, §§ 3-9 provide as follows:

Unlawful to Possess, Carry or Use Dangerous or Deadly Weapons. (a) It shall be unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description, which may be used for the explosion of cartridges, or any air gun, gas operated gun or spring gun, or any bow made for the purpose of throwing or projecting missiles of any kind by any means whatsoever; provided that nothing in this section shall prevent use of any such instruments in shooting galleries or ranges under circumstances when such instruments can be fired, discharged or operated in such manner as not to endanger persons or property and also in such manner as to prevent the projectile from traversing any grounds or space outside the limits of such gallery or range; and provided further, that nothing herein contained shall be construed to prevent the carrying of any type of gun; when unloaded, or any bow, to or from any range, gallery or hunting areas. (b) Nothing in this section shall prevent the possession or use of any of said instruments by persons duly licensed for such purpose by the City of Lakewood. (c) Nothing in this section shall prevent the use of or possession of any said instrument by law enforcement personnel.

88. *City of Lakewood*, 180 Colo. at 23, 501 P.2d at 745.

of these activities are constitutionally protected⁸⁹ and that all of them may be free from criminal culpability depending upon the circumstances.⁹⁰ Addressing the issue of regulation of constitutional rights, the court warned that regulation under the police power may not be achieved by unnecessarily broad provisions that invade the protected freedoms.⁹¹ Legitimate governmental purposes cannot be achieved by means that stifle fundamental personal liberties when those ends can be more narrowly achieved.⁹²

The case of *In re Brickey* also involved a constitutional challenge to a city ordinance prohibiting the carrying of deadly weapons within the city limits.⁹³ The Supreme Court of Idaho noted that under constitutional provisions⁹⁴ guaranteeing the right to bear arms for security and defense, the legislature can regulate the exercise of that right, but may not prohibit it.⁹⁵

A provision infringing upon the right to bear arms was also voided in *State v. Blocker*. This case involved a constitutional appeal of a conviction for carrying a "billy club"⁹⁶ outside of the home. The Oregon Supreme Court held that possession of a billy club in public was protected by the constitutional right to bear arms.⁹⁷ The text of the constitutional provision at issue did not limit the right

89. The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

90. *City of Lakewood* at 23, 501 P.2d at 745.

91. *Id.*

92. *Id.*

93. *In re Brickey*, 8 Idaho at 598, 70 P. at 609.

94. The people have the right to bear arms for the security and defense, but the legislature shall regulate the exercise of this right by law. IDAHO CONST. art. I, § 11, quoted in *In Re Brickey*, 8 Idaho at 598, 70 P. at 609.

95. *In re Brickey*, 8 Idaho at 599, 70 P. at 609.

96. Defendant was convicted of possessing a "billy" in violation of ORS 166.510(1): (1) Except as provided in ORS 166.515 or 166.520, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries, or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switchblade knife or an instrument or weapon commonly known as a blackjack, slug shot, billy, sandclub, sandbag, sap glove or metal knuckles, or who carries a dirk, dagger or stiletto commits a Class A misdemeanor.

97. The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. OR. CONST. art., I § 27.

to bear arms only to the home.⁹⁸ The court found that the challenged statute totally prohibited the possession of weapons and that it was not merely a restriction on the manner of possession of certain weapons. The *Blocker* court held that this total proscription violated the constitutionally protected right to keep and bear arms for defense.⁹⁹ The West Virginia Supreme Court also credits the *Blocker* court with an insightful discussion of the overbreadth doctrine.¹⁰⁰

Although the West Virginia Supreme Court in *Buckner* correctly held W. Va. Code § 61-7-1 unconstitutional in light of the "Right to Keep and Bear Arms Amendment," the court failed to identify reasons for finding the statute overbroad. However, several possible reasons are identifiable. While assessing the statutory boundaries regulating the bearing of arms in West Virginia, it was necessary for the court to consider the prohibitions against carrying weapons absent a license in conjunction with the recognized statutory exceptions to the license requirement, W. Va. Code § 61-7-3.¹⁰¹ Ba-

98. *Blocker*, 291 Or. at 259, 630 P.2d at 825.

99. *Id.* at 260, 630 P.2d at 826.

100. The *Blocker* court discussed the overbreadth doctrine as follows:

An "overbroad" law, as that term has been developed by the United States Supreme Court, is not vague, or need not be. Its vice is not failure to communicate. Its vice may be clarity. For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make as law as "broad" and inclusive as it chooses unless it reaches into constitutionally protected ground. The clearer an "overbroad" statute is, the harder it is to confine it by interpretation within its constitutionally permissible reach.

It follows that to attack a statute as "overbroad" necessarily implies that it impinges on some constitutionally protected right other than fair notice or "due process." Unlike "vagueness," the vice of "overbreadth" is not necessarily limited to penal laws, and to the extent that an overbroad law forbids what may not constitutionally be forbidden, it is invalid as such without regard to the facts in the individual case.

Id. at 261, 630 P.2d at 827.

101. W. VA. CODE § 61-7-3 (Repl. Vol. 1988) provides in part:

Nothing in this article shall prevent any person from carrying any such weapon as is mentioned in the first section [§ 61-7-1] of this article, in good faith and not having felonious purposes, upon his own premises; nor shall anything herein prevent a person from carrying any such weapon, unloaded, from the place of purchase to his home or residence, or to a place of repair and back to his home or residence; nor shall anything herein prevent a guard . . . from carrying any such weapon while on duty; nor shall anything herein prevent any member of a properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this state, or from the United States for the purpose of target practice, from carrying any revolver or pistol mentioned in this article, unloaded, from his home or place of residence to a place of target practice, and from any such place

sically, by statute it is not a violation to carry a dangerous or deadly weapon without a license upon your own premises, to and from a place of repair, from the place of purchase, and for purposes of hunting.

Although the court did not expressly include W. Va. Code § 61-7-3 in its discussion of the first certified question, holding W. Va. Code § 61-7-1 unconstitutional means that the prohibiting statute along with the statutory exceptions are overbroad restrictions upon the constitutional right. Put simply, the exceptions to the license requirement were not sufficient to guarantee the individual the right to keep and bear arms for defense. Had the exceptions to the license requirement been sufficient, the court could not have held the statutory provision unconstitutional. The constitutional amendment apparently guarantees a right to keep and bear arms absent a license in situations other than those listed in the statute. The court might have felt that the constitutional amendment guarantees a right to bear arms in an automobile, to and from work, while at work, and between place of employment and a target range. Thus, the failure to include any of these exceptions under W. Va. Code § 61-7-3 would provide an explanation for holding W. Va. Code § 61-7-1 unconstitutional.

Another explanation for holding the statute overbroad might lie in its language of “dangerous or deadly weapons.” Dangerous or deadly weapons are defined as “any revolver or pistol, dirk, bowie knife, sling shot, razor, billy, metallic or other false knuckles, or

of target practice back to his home or residence, for using any such weapon at such place of target practice in training and improving his skill in the use of such weapons: but nothing herein shall be construed to authorize any employee of any person, firm or corporation doing business in this [s]tate to carry, on or about the premises of such employer, any such pistol, or weapon mentioned in this article, for which a license is herein required, without having first obtained the license and given the bond as herein provided.

Notwithstanding any other provision of this article or any other provision of this [c]ode, any resident, nonresident or unnaturalized person may lawfully possess, transport, carry and use any firearm he is permitted to use for hunting under any valid license he has been issued by the department of natural resources and which he holds in his possession. At all times such person shall comply with all of the requirements of law set forth in this [c]ode and the rules and regulations promulgated thereunder pertaining to possessing, transporting, carrying and using firearms for hunting.

W. VA. CODE § 61-7-3 (Repl. Vol. 1988).

other dangerous or deadly weapon of like kind or character'¹⁰² One need only examine case law in West Virginia to see the broad definition given to arms under the Code. For example, in *State v. Choat*¹⁰³ the defendant was charged with carrying a dangerous or deadly weapon, a knife with a five and one-half inch blade.¹⁰⁴ The trial judge held as a matter of law that the knife was a dangerous or deadly weapon under the statutory provision.¹⁰⁵ The West Virginia Supreme Court reversed this ruling on the basis that it is for the jury to decide under the circumstances if the knife was a dangerous or deadly instrument.¹⁰⁶ The jury must conclude that the purpose of carrying the knife was its use as a weapon before there is a violation of the statute. Nonetheless, under such a broad definition of arms, carrying a fishing or hunting knife could be construed as carrying a dangerous or deadly weapon. Thus, the definition of arms in W. Va. Code § 61-7-1 is overbroad in light of the new constitutional amendment, under which such activity obviously would be protected.

The West Virginia Supreme Court correctly concluded that W. Va. Code § 61-7-1 sweeps so broadly as to infringe upon a newly granted constitutional right, that to keep and bear arms in defense of self, family, home and state. The court was presented with a provision that used clear and plain language in expressing a right of each West Virginian. Legislative intent was absent, as was any statement of public policy. Presented with such a situation, the court was left with the traditional methods of constitutional analysis. When placed beside the constitutional provision, the statute encroached upon some of the protected areas. Any other construction of the amendment would serve only to circumvent the plain meaning of a constitutional provision adopted by the people of this state.

Having held the Code provision unconstitutional, the court addressed the second certified question: whether the West Virginia Leg-

102. W. VA. CODE § 61-7-1 (Repl. Vol. 1988).

103. *State v. Choat*, 363 S.E.2d 493 (W. Va. 1987).

104. *Id.* at 495.

105. *Id.* at 499.

106. *Id.* at 499-503. The court noted that although the "Right to Keep and Bear Arms Amendment" had been enacted at the time of the decision, the alleged crime took place before the amendment was ratified. Thus, the amendment did not apply to this case.

islature may regulate at all the right of a person to keep and bear arms in the state of West Virginia. The court adopted the universal rule that a constitutional right to keep and bear arms is not absolute, such right being subject to reasonable regulation through the state's police power¹⁰⁷ to promote the safety and welfare of its citizens.¹⁰⁸ The court then cautioned that even a legitimate governmental purpose cannot stifle the right to bear arms when that purpose can be more narrowly achieved.¹⁰⁹ For the remainder of the opinion, the court acted in an advisory capacity, discussing statutory regulations in other jurisdictions also having a right to keep and bear arms amendment.¹¹⁰

The most common regulation is the prohibition against the possession or ownership of handguns by persons previously convicted of a felony.¹¹¹ Other common provisions include prohibitions against the carrying of handguns without a license, against the carrying of only concealed handguns without a license, and against the carrying of handguns in specific places.¹¹² The open carrying of arms has been defined as follows: "[T]he weapon must be open to ordinary observation to those who may come in contact in the usual and

107. The police power in West Virginia has been defined below:

The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As society becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions.

State *ex rel.* Appalachian Power Co. v. Gainer, 149 W. Va. 740, 741, 143 S.E.2d 351, 354 (1965).

108. The court cited the representative cases of *Bristow v. State*, 418 So. 2d 927, 930 (Ala. Crim. App. 1982); *People v. Blue*, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979); *In re Atkinson*, 291 N.W.2d 396, 399 (Minn. 1980); *State v. Angelo*, 3 N.J. Misc. 1014, 1015, 130 A. 458, 459 (1925); *State v. Dees*, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct. App. 1983); *Commonwealth v. Ray*, 218 Pa. Super. 72, 272 A.2d 275 (1970) *vacated*, 448 Pa. 307, 292 A.2d 410 (1972); and *Carfield v. State*, 649 P.2d 865, 871 (Wyo. 1982).

109. *Buckner*, No. CC972 at 16. The court again refers to *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972).

110. *Buckner*, No. CC972 at 12-22.

111. *Id.*, No. CC972 at 19.

112. *Id.*

ordinary associations with one carrying the weapon.”¹¹³ Consequently, concealed arms are those that are not readily identifiable by the public as being carried by an individual. The offense of carrying concealed arms could include carrying a deadly weapon in a handbag or purse,¹¹⁴ under a jacket,¹¹⁵ or in a briefcase.¹¹⁶

The court also addressed the requirements under W. Va. Code § 61-7-2¹¹⁷ for obtaining a license to carry a dangerous or deadly weapon. The license requirements were found by the court to be similar to those of other states with similar constitutional provisions that protect the right to keep and bear arms, except for the requirement that an applicant post a \$5,000 surety bond.¹¹⁸ Thus, by

113. *Prince v. Commonwealth*, 277 S.W.2d 470 (Ky. 1955).

114. *Schaaf v. Commonwealth*, 220 Va. 429, 258 S.E.2d 574 (1979).

115. *State v. Nerwinski*, 69 N.J. Super. 239, 174 A.2d 232 (1961), *cert. denied* 369 U.S. 825 (1962).

116. *People v. Pugach*, 15 N.Y.2d 65, 255 N.Y.S.2d 833, 205 N.E.2d 176 (1964), *cert. denied* 380 U.S. 936 (1965), *appeal dismissed* and *cert. denied*, 382 U.S. 20 (1965) (dismissed for want of jurisdiction). “Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.” *Id.*, *appeal dismissed*, 383 U.S. 575 (1966) (for lack of substantial federal question).

117. The West Virginia Code provides in part:

(a) Any person desiring to obtain a state license to carry any such weapon as is mentioned in the first section of this article [§ 61-7-1], . . . upon application to such court, it may grant such license to such person, in the following manner, to wit:

(b) The applicant shall file with such court his application in writing, duly verified, which application shall show, as basic qualifications, as follows:

(1) That such applicant is a citizen of the United States of America;

(2) That the applicant has been a bona fide resident of this state for at least one year next prior to the date of such application, and of the county sixty days prior thereto;

(3) That the applicant is over eighteen years of age; that he is a person of good moral character, of temperate habits, not addicted to intoxication, not addicted to the use of any controlled substance, and has not been convicted of a felony or of any offense involving the use on his part of such weapon in an unlawful manner, and shall prove to the satisfaction of the court that he is gainfully employed in a lawful occupation and has been so engaged for a period of five years next preceding the date of his application;

(4) The purpose or purposes for which the applicant desires to carry such weapon, the necessity therefor, and the county or counties in which such license is desired to be effective; and

(5) That the applicant has qualified under minimum requirements for handling and firing such firearms. These minimum requirements are those promulgated by the department of natural resources and attained under the auspices of the department of natural resources: Provided, That the court may waive this requirement in the case of a renewal applicant who has previously qualified.

W. VA. CODE § 61-7-2 (Repl. Vol. 1988).

118. *Buckner*, No. CC972 at 20-22.

implication the court approved the statutory requirements (excluding the \$5,000 surety bond provision) for obtaining a state license.

B. Implications

The West Virginia Legislature may regulate the right of a person to keep and bear arms. The *Buckner* opinion illustrates that it is the duty of the Legislature to enumerate precise boundaries regulating the right to keep and bear arms that do not sweep so broad as to infringe upon the constitutionally protected right. The Legislature must balance the individual's right against the state's duty to protect the health, safety, and welfare of its citizens. However, the correctness of the legislative balance remains subject to judicial review as a constitutional right is involved. As is evident from *Buckner*, the court will not uphold regulations when the reason for the regulation does not justify the infringement upon the right.

Subsequent to the passage of the constitutional amendment in November of 1986,¹¹⁹ the West Virginia Legislature failed to make any changes to the statutory provisions. The failure to adjust those statutory provisions resulted in the *Buckner* decision. Consequently, West Virginia effectively is without any remedy to prohibit the carrying of dangerous or deadly weapons. The Legislature could decide not to enact legislation prohibiting the carrying of dangerous or deadly weapons, choosing to rely instead upon other statutory provisions. For example, anyone who carries, exposes, brandishes, or uses arms in a way or manner to cause, or threaten, a breach of the peace could be arrested and prosecuted.¹²⁰ The "breach of the peace" method of regulating the carrying of arms would be constitutional since there is no infringement upon the right to bear arms for defense purposes. A violation would occur only when a person uses a weapon in an offensive manner. Obviously, regulating weapons under this approach would do nothing to *prevent* arms being used in such an offensive manner.

Prior to the *Buckner* decision and subsequent to the passage of the amendment, an effort was made in the state Senate to amend

119. See, *supra* note 70 and accompanying text.

120. W. VA. CODE § 61-7-10 (1984).

sections one, two, and three of the dangerous weapons article to align those provisions with the constitutional amendment. Senate Bill No. 142¹²¹ was introduced by Senator Larry Tucker on January 15, 1988. The bill was referred to the Committee on the Judiciary which recommended that the bill be adopted.¹²² However, the Senate failed to vote on the bill due to time constraints and pending legislation

121. The bill provides in part as follows:

Any person who, without a state license therefore or except as provided elsewhere in this article and other provisions of this code, carries concealed any revolver or pistol, dirk, bowie knife, sling shot, razor, billy metallic or other false knuckles, or other dangerous or deadly weapon of like kind or character, shall be guilty

Nothing in this article shall prevent any person from carrying any such weapon as is mentioned in the first section of this article, in good faith and not having felonious purposes, upon his or her own premises; nor shall anything herein prevent a person from carrying any such weapon, unloaded, from the place of purchase to his or her home or residence, between his or her home and place of business, between his or her home or place of business and a place of target practice, or to a place of repair and back to his or her home or residence; nor shall anything herein prevent a guard . . . ; nor shall anything herein prevent any member of a properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this state, or from the United States for the purpose of target practice, from carrying any revolver or pistol mentioned in this article, unloaded, from his or her home or place of residence to a place of target practice, and from any such place of target practice back to his or her home or residence, or using any such weapon at such place of target practice in training and improving skill in the use of such weapons; but nothing herein shall be construed to authorize any employee of any person, firm or corporation doing business in this state to carry, on or about the premises of such employer, any such pistol, or other weapon mentioned in this article, for which a license is herein required, without having first obtained the license.

Notwithstanding any other provision of this article or any other provision of this code, any resident, nonresident or unnaturalized person may lawfully possess, transport, carry and use any firearms he is permitted to use for hunting under any valid license he has been issued by the department of natural resources and which he holds in his possession. At all times such person shall comply with all of the requirements of law set forth in this code and the rules and regulations promulgated thereunder pertaining to possessing, transporting, carrying and using firearms for hunting.

NOTE: The purpose of this bill is to change language in code sections regarding the offense of carrying a dangerous weapon without a license and the application process and requirements for such a license so that:

- (1) Carrying such a weapon without a license "concealed" (rather than "about his person") is a misdemeanor for a first offense;
- (2) The minimum penalty of six months imprisonment for the first is eliminated;
- (3) The application procedure for obtaining such a license is simplified and some application requirements are eliminated; and
- (4) Exceptions to the prohibition of carrying dangerous weapons expanded to include the carrying of such weapons between home and place of business and between home or place of business and place of target practice.

S. 142, 69th Leg., Reg. Sess. (1988).

122. Telephone interview with Senator Larry Tucker, (October 14, 1988).

deemed more important.¹²³ Therefore, the Legislature will most likely act during an upcoming session to amend the dangerous weapon provision in light of *Buckner*.

An analysis of Senate Bill No. 142 illustrates that the court could find that bill constitutional under *Buckner*. Applying the balancing test from *Buckner*, the state's interest in protecting the health, safety and welfare of its citizens by prohibiting concealed carrying of weapons is greater than the infringement upon the individual's constitutional right to keep and bear arms. The purpose of prohibiting concealed weapons is that of protecting the public by preventing an individual from having readily available a weapon of which the public is unaware, and which might be used by that individual in an offensive rather than defensive manner.¹²⁴ Such concerns weigh heavily against those individuals who desire to carry concealed weapons. The constitutional provision *only* guarantees the right to bear arms for defensive purposes, not the right to bear concealed arms. Senate Bill No. 142 only regulates the manner in which an individual can bear arms and permits an individual to keep and bear arms in an open fashion for defensive purposes. By allowing an individual to bear arms openly while prohibiting concealed carrying, the proposed bill only slightly infringes upon the constitutional right. With such a strong state interest balanced against a minor infringement upon the constitutional right, prohibiting concealed weapons would pass constitutional muster under the *Buckner* balancing test. And the court in *Buckner* implicitly recognized that the state can regulate the carrying of concealed handguns by noting that other states with similar constitutional provisions have done so.¹²⁵ Also, the prohi-

123. *Id.*

124. Annotation, *Offense of Carrying Concealed Weapon as Affected by Manner of Carrying or Place of Concealment*, 43 A.L.R.2d 492, 495.

125. *Buckner* at 19. Arizona prohibits concealed weapons and weapons within immediate control of person in or on a means of transportation. ARIZ. REV. STAT. ANN. § 13-3102 (Supp. 1987). New Hampshire prohibits loaded pistols in vehicle or concealed upon a person. N.H. REV. STAT. ANN. § 159:4 (1977). Oregon prohibits concealed weapons and readily accessible weapons about the person within any vehicle, but explicitly states firearms carried openly in belt holsters are not concealed within the meaning of the statute. OR. REV. STAT. § 166.250 (1987). South Dakota, Utah, Washington and Wyoming simply prohibit the carrying of concealed weapons. S.D. CODIFIED LAWS ANN. § 22-14-9 (1988); UTAH CODE ANN. § 76-10-513 (Supp. 1988); WASH. REV. CODE ANN. § 9.41.050 (1988); WYO. STAT. § 6-8-104 (1977, 1988).

bition does not unnecessarily invade the realm of protection guaranteed by the "Right to Keep and Bear Arms Amendment," satisfying the *Buckner* court's caveat pertaining to such regulation.¹²⁶ Thus, by changing the dangerous or deadly weapon statute, as proposed by Senate Bill No. 142, to require a license only when carrying concealed weapons, the amended statute would probably be constitutional in light of the constitutional amendment and the *Buckner* decision.

V. CONCLUSION

Should the West Virginia Legislature choose to regulate weapons, it must balance the duty of the state to protect the health, safety, and welfare of its citizens against the individual's guaranteed right to keep and bear arms. The state's long history of restrictive statutory regulations must give way to the recently adopted constitutional amendment, providing West Virginians with more freedom in the keeping and bearing of arms. The *Buckner* decision placed the state on a path of repeal and revision of statutory regulations infringing upon the constitutionally guaranteed right. A fair reading of *Buckner* implies a right to armed self-defense, with the parameters of that right to be fixed by the Legislature through the valid exercise of police power and through future judicial challenges. Constitutional challenges to statutory regulations for violation of the "Right to Keep and Bear Arms Amendment" are just beginning.

In trying to assess the parameters of the constitutional right to keep and bear arms, it is important to appreciate the will of the people. The "Right to Keep and Bear Arms Amendment" was extremely popular among legislators and, more importantly, among the general population of West Virginia. Perhaps no other constitutional amendment in the history of the state has received such widespread support. Such support should not be surprising considering that West Virginia is a rural state, where hunting constitutes

126. The court warned that "a governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed in our state constitution." *Buckner*, No. CC972 at 23 (citations omitted).

a portion of the lives of many people and firearms are considered commonplace. The people want relaxed firearms provisions, and in support of relaxed firearm regulations, authorities have reported no increase in crime or in gun sales since the *Buckner* ruling.¹²⁷

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127. Dominion Post, Sept. 23, 1988, at 5A, col. 1.

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