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West Virginia Supreme Court of Appeals

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THE RIGHT OF *WHO TO BEAR WHAT, WHEN, AND WHERE* —WEST VIRGINIA FIREARMS LAW v. THE RIGHT-TO- BEAR-ARMS AMENDMENT

James W. McNeely*

I. INTRODUCTION

The Right to Keep and Bear Arms Amendment to the West Virginia Constitution was approved by the voters of the state by an overwhelming margin on November 4, 1986. The language of that amendment is a concise statement of a constitutional right:

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

Yet, despite its simplicity, the amendment raises many questions. How broad is the term “person”? What actions are contemplated in the phrase “keep and bear”? What weapons are included in the term “arms”? Is the phrase “defense of self, family, home and state” simply another way of securing the right of self-defense, or does it establish some new right to armed defense?

Moreover, where is the interpretation of the new article III, section 22 to be found, so that these and other questions may be addressed? Clearly, the first step is an understanding of the development of the current body of weapon regulation statutes, and the state constitutional basis for such statutes. This Article will provide the statutory, common law, and general historical backdrop against which the constitutional amendment was drafted, proposed, and considered.

A second step in the interpretation is a determination of legislative and voter intent in approval of the amendment. This intent can be addressed by a broad inquiry: Was it the legislature’s and voter’s intent to place in West Virginia’s Constitution a new section that was consistent with the current statutory law in the state, or was it their intent to repeal any or all provisions of current law? This stage of the analysis would review the history of legislative and voter intent for indication of both general intent in terms of the weapons statutes as a whole as well as specific intent as to particular provisions of state law discussed in the course of legislative and voter consideration of the amendment.

This determination of legislative and voter intent to be consistent, or inconsistent, with either the general weapons statutes or some particular weapons statutes would impact in a significant way on the third step of the analysis of the amend-

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ment: the determination of the meanings of the specific phrases and the entirety of the amendment. The meaning of the constitutional terms would therefore, it is suggested, be determined by the current operation of West Virginia weapons statutes and the case law interpreting those statutes if it was the intent of the legislature and the voters that enactment of the amendment was not to alter current law. This might well result in meanings attached to terms that would be narrower than the apparent meaning of the term or phrase.

Finally, the amendment, defined in the light of legislative and voter intent and in the context of the development of weapons regulation would then stand in the constitution as a restriction of the state to take certain actions. But what actions would be restricted or prohibited? Also, to what extent would the amendment impact on future state statutes that go further than the current state law?

This discussion of the amendment will concentrate on the first two of the four suggested steps in interpretation of that amendment. The author will first undertake a comprehensive review of the statutory and case law development of the current weapons statutes in the state. This analysis is divided into chronological periods beginning with the creation of the state, extending into the early part of this century with the development of the modern weapons statutes, and concluding with the state of the law in 1986 when the new amendment was approved. Relevant case law establishing the state court's constitutional and policy interpretations of legislative actions will be reviewed as part of this historical review.

Having brought the reader to the 1985-86 period in development of the law in West Virginia dealing with weapons, a close look will be had at the legislative history of the amendment during the 1985 regular session of the legislature and the campaign history of the amendment during the 1986 general election. This review will include selected excerpts from press coverage of both legislative and campaign activities so that the view of the amendment through the collective eyes of the citizens can be suggested. Through that review of the history of the amendment, some determination of general and specific intent of the legislature and the voters hopefully can be made.

While concentrating on historical development of weapons regulation in West Virginia and a review of the legislative and campaign history of the amendment, the author shall conclude with some suggestions as to the meaning of terms within the amendment, and the meaning of the amendment as a whole, in the context of whether such meanings should be consistent or inconsistent with the state weapons regulation existing at the time of passage of the amendment. Certainly a thorough analysis of the possible meaning of each term in the amendment would be a lengthy study in itself, and a review of that depth will not be attempted as a part of this work.

Finally, some suggestions as to the prospective application of the amendment will be made. These suggestions, like the analysis of the meaning of terms within

the amendment and the amendment as a whole, will assume that the legislative and voter intent with the amendment was to maintain the current state of the law.

At the outset, the author must admit to being a participant-observer during the legislative and campaign history of the right-to-bear-arms amendment. Far from being a neutral by stander in that process, I actively opposed the passage of the amendment in my role as a member of the West Virginia House of Delegates, and was active during the 1986 election campaign in opposition to passage of that measure. Any author who finds himself quoting himself, or reviewing his own legislative actions, does so only with great caution and with even greater notice to the reader. Hopefully the insight into the legislative and campaign process that I can offer, together with the caution I have exercised in my historical analysis, will balance any natural suspicion raised in the mind of a reader of the account of an author who was a participant in the very process he is reporting about as an observer.

II. STATUTORY AND CASE LAW HISTORY: 1863-1986

A. *Pre-license Law: 1863-1909*

When the State of West Virginia was formed in 1863, it continued¹ an existing Virginia statute classified under the title "For Preventing The Commission of Crimes."² This statute stated that a recognizance bond "may be required" if a "person go armed with a deadly or dangerous weapon." However, a self-defense exception was included which allowed the carrying of such arms if an individual had "reasonable cause to fear violence to his person, family or property."³ This statute was codified in West Virginia in 1868.⁴

In 1873, the statute was rewritten,⁵ and the offense was redefined as "habitually carrying about his person concealed weapons, such as dirks, bowie knives, pistols or other dangerous weapons." The revised statute also deleted the self-defense exception found in the earlier law. In addition, it was made the duty of a justice of the peace to cause a person in violation of the statute to be arrested. Rather than the earlier posting of a recognizance bond, the 1873 statute provided for a criminal trial with a penalty upon conviction of a fine not to exceed the sum of ten dollars.⁶ In an apparent effort to encourage enforcement of the statute,

¹ W. VA. CONST. of 1863, art. XI, § 8.

² VA. CODE tit. 55, ch. CCI, § 8 (1860).

³ *Id.*

⁴ W. VA. CODE ch. 153, § 8 (1868) (APPENDIX A, *infra* at 1163).

⁵ 1872-73 W. Va. Acts ch. 226, § 168 (APPENDIX B, *infra* at 1163).

⁶ *Id.*

justices of the peace were made subject to a penalty if they willfully failed to enforce the provisions of the new law.⁷

The first appearance of a statute at all similar to the modern firearms statute in the state was in 1882. The 1873 statute, found in chapter 153, section 8, was first rewritten to require a recognizance bond in the event of a violation of a newly drafted weapon statute.⁸ This new statute⁹ prohibited the carrying by a person "about his person" of a "dangerous or deadly" weapon, and made violation of the statute a misdemeanor. Prohibited weapons were defined as "any revolver or other pistol, dirk, . . . or any other dangerous or deadly weapon of like kind or character. . . ."¹⁰ The statute directed an acquittal upon the finding by a jury that the defendant was of good character and that he was acting in self-defense. Exemptions from the provisions of the 1882 firearms statute included the carrying of weapons by officers of the law and an exemption for the carrying of weapons by an individual about one's "dwelling house or premises."¹¹

Some hint of the cause for passage of this blanket prohibition against the carrying of weapons is found in an examination of the criminal conspiracy laws known as the "Red Men Acts," which were enacted under the same influences, and included in the same legislative act, as the 1882 weapons statute.¹² *State v. Porter*, an 1885 West Virginia Supreme Court of Appeals decision,¹³ noted that the "public history and the exigencies, which led to the 1882 enactments are matters of judicial cognizance."¹⁴ One such exigency which *Porter* alluded to was the existence "in certain counties of the State lawless bands of men, known as 'Red Men', 'Regulators', 'Vigilance Committees', etc., who were in the habit of inflicting punishment and bodily injury upon peaceful citizens, and injuring, carrying away and destroying their property and committing other acts of trespass of the most violent and outrageous character."¹⁵ In a 1975 decision that declared the Red Men Acts unconstitutional,¹⁶ the West Virginia court noted that the passage of the 1882 statute, which included both the Red Men Acts as well as the weapons statute, was a "desperate remedy" to combat that kind of threat to the public safety.¹⁷

Although the Red Men Acts and the weapons statute were codified in different

⁷ *Id.* at ch. 226, § 169.

⁸ 1882 W. Va. Acts ch. 110, § 8.

⁹ *Id.* at ch. 135, § 7 (APPENDIX C, *infra* at 1164).

¹⁰ 1882 W. Va. Acts ch. 135, § 7 (codified at W. VA. CODE ch. 148, § 7 (1887)).

¹¹ *Id.*

¹² *Id.* at (9), (10), (12), & (13) (codified at W. VA. CODE ch. 148, § 7 (1887)).

¹³ *State v. Porter*, 25 W. Va. 685 (1885).

¹⁴ *Id.* at 689.

¹⁵ *Id.*

¹⁶ *Pinkerton v. Farr*, 159 W. Va. 223, 220 S.E.2d 682 (1975). The court found that the presumption of guilt of conspiracy created by the statute failed to establish a rational or reasonable connection between the fact proved and the fact presumed. *Id.* at 223, 220 S.E.2d at 689.

¹⁷ *Id.* at 223, 220 S.E.2d at 689.

articles of the Code in the 1931 recodification,¹⁸ their common birthplace in 1882 and their continuation in the same chapter of the Code from 1882 through 1931¹⁹ suggests that the apparent strictness of the weapons statute, like the Red Men Acts, was fully intended by the legislature. Because the 1882 statute contained the roots of the modern West Virginia statute, its origin—as a statute apparently intended to be a strict blanket prohibition of the carrying of weapons—is an important historical factor in discussing weapons law in the twentieth century.

The 1882 statute was first addressed by the West Virginia Supreme Court of Appeals nine years after passage in *State v. Workman*,²⁰ an opinion written by Chief Justice Lucas and cited by the United States Supreme Court in *United States v. Miller* as one of the “most important decisions” in the country in the field of second amendment analysis.²¹ In *Workmen*, the West Virginia court addressed the constitutional right to self-defense, the constitutionality of statutes such as the 1882 West Virginia statute under a second amendment analysis, and, finally, the definition of the term “arms” in the second amendment phrase “keeping and bearing of arms.”²²

The *Workman* court first found that there was a constitutional right to self-defense under both the due process clause of the fourteenth amendment to the United States Constitution²³ and article III, section 1 of the West Virginia Constitution,²⁴ and found further that this right was guaranteed to all persons, whether of good character or not.²⁵ Although section 7 of 1882 statute²⁶ appeared to grant a self-defense exception only to defendants of “good character,” the court held that the statute was constitutional because the granting of the statutory acquittal to those of good character who established self-defense did not deprive those not establishing good character from advancing a self-defense defense to conviction.²⁷

In upholding the 1882 statute, the court clearly supported the broad prohibition of carrying weapons found in that statute. In finding the presence of a statutory presumption, the court stated that:

The presumption which the law establishes, that every man who goes armed in the midst of a peaceable community is of vile character, and a criminal, is of con-

¹⁸ The RED MEN ACTS were recodified in W. VA. CODE § 61-6-7 to -11 (1931) while the dangerous weapon statutes were recodified in W. VA. CODE § 61-7-1 to -15 (1931).

¹⁹ W. VA. CODE ch. 148 (1887); W. VA. CODE ch. 148 (Barnes 1923).

²⁰ *State v. Workman*, 35 W. Va. 367, 14 S.E. 9 (1891).

²¹ *United States v. Miller*, 307 U.S. 174, 182 (1939). See *c.f.* *United States v. Adams*, 11 F. Supp. 216, 219 (S.D. Fla. 1935); *United States v. Tot*, 28 F. Supp. 900, 903 (D.N.J. 1939); *People v. Brown*, 253 Mich. 537, 233 N.W. 245, 246 (1931); *Carlton v. State*, 63 Fla. 1, 8-9, 58 So. 486, 488 (1912).

²² *Workman*, 35 W. Va. 367, 14 S.E. 9.

²³ *Id.* at 370-71, 14 S.E. at 10.

²⁴ *Id.*

²⁵ *Id.* at 370, 14 S.E. at 10.

²⁶ 1882 W. Va. Acts ch. 135, § 7.

²⁷ *Workman*, 35 W. Va. at 370-71, 14 S.E. at 10.

sonance with the common law, and is a perfectly just and proper presumption, and one which ought to prevail in every community which aspires to be called civilized.²⁸

Having found the statute constitutional despite its restrictive self-defense exception, the court next addressed the second amendment issues. Importantly, the court addressed those issues *as though* the second amendment was a restriction upon state legislation as well as federal legislation.²⁹ The court therefore interpreted the "keep and bear arms" language of the second amendment in a West Virginia context. Such an interpretation was rendered moot by United States Supreme Court decisions holding that the second amendment did not apply to the states,³⁰ but the court's analysis is now of particular interest with the passage of the Right to Keep and Bear Arms amendment to the West Virginia Constitution in 1986.

The court first addressed the general intent of the second amendment, and found it to be the protection of keeping and bearing arms as a popular (or collective) right.³¹ As a collective right, the court concluded that "by law to regulate a conceded [constitutional] right is not to infringe the same."³² In this context, the court compared regulation of the constitutional right to bear arms to the regulation of first amendment freedom of speech and religion.³³ By doing so, the court seemed to suggest that a specific constitutional right to keep and bear arms would subject regulation of those protected weapons to the same scrutiny as laws regulating freedom of speech or religion.³⁴

²⁸ *Id.* at 371, 14 S.E. at 10-11.

²⁹ "Supposing this [the second amendment] to be a restriction upon legislation by the several states, as well as by the congress (a question upon which authorities differ). . . ." *Id.* at 372, 14 S.E. at 11. *Workman* does not stand for the proposition that the second amendment extends to the states, but is rather a decision assuming, but not holding, that the second amendment did apply to the states.

³⁰ Prominent in the decisions cited by W. Va. Attorney General Alfred Caldwell in arguing *Workman* was *United States v. Cruikshank*, 92 U.S. 542 (1875), which addressed the effect of the second amendment on the states in the following language: "The second amendment declares that it [the right to keep and bear arms] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. . . ." *Cruikshank*, 92 U.S. at 553.

Citing *Cruikshank* and other decisions, the United States Supreme Court unanimously held in *Miller v. Texas*, 153 U.S. 535 (1894) that it was "well settled" that the second amendment "operate[s] only upon the Federal power, and [has] no reference whatever to proceedings in state courts." *Miller*, 153 U.S. at 538.

³¹ *Workman*, 35 W. Va. at 372-73, 14 S.E. at 11.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 372, 14 S.E. at 11. This language suggests that the court would have applied such a scrutiny to the West Virginia statute if it had found that handguns were constitutionally protected weapons (*see infra* note 35 and accompanying text) and, if further, the second amendment was found to apply to the states. The kind of scrutiny contemplated by the court in such a case might well be of the type discussed in the *Carolene Products* footnote (*U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938)). Justice Stone's footnote 4 to that decision (304 U.S. at 152) suggested strict scrutiny of statutes infringing upon a specific constitutional right. Although the *Carolene Products* footnote appeared long after *Workman*, it does describe the kind of scrutiny the West Virginia court might have applied if the statute had been found to impact on a specific constitutional right (in this case, the second amendment).

Workman also addressed quite directly, in the context of the second amendment language, the definition of the term “arms.” The court defined that term in the following manner:

[I]n regard to the kind of arms referred to in the [second] amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie knives, billies, and other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state.³⁵

With this definition, the court clearly refused to include handguns in the class of constitutionally-protected weapons under the militia analysis of the second amendment language, apparently leaving the state free to regulate such weapons without constitutional constraint even if second amendment language was found to apply in the state constitutional context. But even further, the court seemed to read such weapons out of any classification of weapons to be protected as personal or family defense weapons.

Having dismissed handguns as constitutionally-protected weapons, the court then addressed the circumstances that would support a self-defense claim under the 1882 statute. Citing its 1890 decision in *State v. Barnett*,³⁶ the court described the self-defense exception by stating:

It is not enough for the defendant to state or show by other witnesses the general proposition that he had good cause to believe and did believe, that he was in danger. . . A mere threat, standing isolated and alone, while admissible in evidence in defense as an item of evidence, is not sufficient to establish good cause on the part of the defendant to fear death or harm. . . .³⁷

The defendant in *Barnett* was a mail carrier who carried a pistol while transporting mail. He was threatened by a resident named Scott who lived along a road that Barnett regularly traveled while carrying the mail. The threats included attack by Scott as well as attack by a “vicious and dangerous dog [owned by Scott], which had frequently attacked defendant while [he was] passing along the road with said mail.”³⁸ The defendant offered evidence that he was of good character, and stated that he carried “said revolver in self-defense, and for no other purpose whatsoever.”³⁹

Those threats were found by the court to be “conditional and . . . insufficient to inspire any serious ground of fear,” and the court found from the record that

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

³⁶ *State v. Barnett*, 34 W. Va. 74, 11 S.E. 735 (1890).

³⁷ *Barnett*, 34 W. Va. at 77, 11 S.E. at 736 (cited in *Workman*, 35 W. Va. at 374, 14 S.E. at 11-12).

³⁸ *Id.* at 75, 11 S.E. at 735.

³⁹ *Id.*

“[n]ot a single act of violence or attempted violence on Scott’s part appears.”⁴⁰ The court further held that no fear of injury from a dog justified carrying a revolver under the self-defense exception to the 1882 statute,⁴¹ reasoning that:

[A] mere conditional threat of violence by one person towards another, unaccompanied by any act or conduct on the part of the party making such threat evincing a design to do violence to the other person, will not justify the carrying of a revolver, under section 7, c. 148, Code 1887. . . . If such were the ruling of the courts, it would largely rob this useful statute of the beneficial effect it was intended to accomplish in the preservation of life and the public peace.⁴²

The *Workman* and *Barnett* decisions addressed and resolved a number of issues involving the right to self-defense, the right to bear arms, and the constitutional status of handguns in firearms regulation. Although this thread of analysis was cut off through subsequent federal court decisions⁴³ and state statutory changes,⁴⁴ two major points seem again to be of importance in the current discussion of the right-to-bear-arms amendment: the first being the constitutional treatment of right-to-bear-arms language suggested by *Workman*,⁴⁵ and the second being the analysis of the right to self-defense seen in *Workman* and *Barnett*.⁴⁶ Both of these issues have become potentially relevant in current West Virginia constitutional analysis.

B. *Early License Law: 1909-1925*

In 1909, the West Virginia Legislature abandoned the general prohibition against carrying dangerous weapons⁴⁷ and enacted the state’s first weapon license statute. Rewriting section 7 of chapter 148 of the Code,⁴⁸ the new statute declared it a misdemeanor for any person, “without a state license therefor,” to “carry on or about his person any revolver or other pistol, dirk, bowie knife, slung shot, razor, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character.”⁴⁹

The only exceptions to the requirement for a license to carry such a weapon were found in allowing the carrying of a weapon “in good faith and not for a felonious purpose, upon [one’s] own premises,” and other exceptions for law enforcement and weapon repair. There was no self-defense exception to the license requirement.⁵⁰

⁴⁰ *Id.* at 77, 11 S.E. at 736.

⁴¹ *Id.*

⁴² *Id.* at 77-78, 11 S.E. at 736.

⁴³ See *supra* note 30 and accompanying text.

⁴⁴ As will be discussed *infra*, 1909 legislation (1909 W. Va. Acts ch. 51, § 7) abolished the self-defense exception in favor of a permit system; see *infra* notes 47-50 and accompanying text.

⁴⁵ See *supra* note 35 and accompanying text.

⁴⁶ See *supra* notes 38-42 and accompanying text.

⁴⁷ 1882 W. Va. Acts ch. 135, § 7 (codified at W. VA. CODE ch. 148, § 7 (1887)).

⁴⁸ W. VA. CODE ch. 148, § 7 (1887) (W. VA. CODE ch. 148, § 4338 (West 1906)).

⁴⁹ 1909 W. Va. Acts ch. 51, § 7 (APPENDIX D, *infra* at 1164).

⁵⁰ *Id.*

The 1909 legislative intent to enact and enforce a strict license law could be seen not only in the few exceptions to the license requirement, but also in the amount of the bond required before a license could be issued. Set at the amount of \$3,500 by specific amendment on the floor of the state senate on January 27, 1909,⁵¹ that amount is comparable to a bond of nearly \$40,000 at present values.⁵²

The requirements to gain a license were also demanding. An individual seeking a license was required to apply to the circuit court of the county of his residence after publication of his intent to do so. The applicant had the burden of proving his qualifications for the license, which included being twenty-one years of age or older, of good moral and sober character, and having never been convicted of a felony or a weapons offense. If the applicant was able to meet the minimum requirements, and then satisfy the circuit court that there was "good reason and cause for carrying such weapon," the license would be issued only after payment of fees, posting of the required bond, and meeting other such conditions.⁵³

The legislative intent to ensure enforcement of the statute could be seen in the imposition of penalties upon any "ministerial officer" who willfully failed to report the names of violators of the weapons law, including possible fine and removal from office, and the penalty of a fine of up to one hundred dollars for any person who had knowledge of a violation but failed to both report the crime and "freely and fully give evidence concerning the same."⁵⁴

The purpose of the 1909 statute was examined in two West Virginia Supreme Court of Appeals decisions in the early 1920s. The first, *State v. Blazovitch*,⁵⁵ involved "a single purely legal question, one of interpretation of the basic provision of section 7 of chapter 148 of the Code. . . ."⁵⁶ Applying a rule of strict construction to the "highly penal" statute in a case dealing with the presence of a loaded revolver in a piece of luggage carried by the convicted defendant, the court found that such a statute embraces only what comes within both the spirit and the letter of that statute.⁵⁷

In a definitive statement of the purpose of the 1909 statute, the court held:

The manifest purpose of the statute is prevention of the carrying of deadly

⁵¹ Amendment to Substitute for Senate Bill 34, January 27, 1909, by floor action in West Virginia Senate. SENATE J. 183 (1909). The same bond amount was required to be posted by those permitted to carry the included weapons without a license by floor amendment in the West Virginia House of Delegates on February 11, 1909. HOUSE J. 366 (1909).

⁵² At a 3 % discount rate, the present value of \$3,500 in 1909 would be just over \$36,000 in 1987. The current bond required for a license to carry a weapon under W. VA. CODE § 61-7-2 (1984) is \$5,000, which, if discounted to 1909 value at the same discount rate of 3 %, would be comparable to a bond of just over \$480 in 1909.

⁵³ 1909 W. Va. Acts ch. 51, § 7.

⁵⁴ *Id.*

⁵⁵ *State v. Blazovitch*, 88 W. Va. 612, 107 S.E. 291 (1921).

⁵⁶ 1909 W. Va. Acts ch. 51, § 7 (codified at W. VA. CODE ch. 148, § 7 (West Supp. 1909)).

⁵⁷ *Blazovitch*, 88 W. Va. at 613, 107 S.E. at 291.

weapons, to the end that the temptation and power to employ them in assaults upon human beings, prompted by anger or evil design, may be thwarted, and citizens freed from the terror the brandishment thereof inspires and their lives and limbs preserved. Prevention of injury by careless or negligent use of pistols, or accidental discharge thereof, is within the plain purpose of the statute. . . .

. . . .

To hold that the legislative purpose is limited to prevention of the use of such weapons, only in the case of a quarrel or combat, would give the statute a narrowness of scope and operation not indicated by any of its terms. The generality of its terms impliedly forbids such restriction. It is no respecter of persons. All citizens, except peace officers, are within its terms, women as well as men, peaceable persons as well as quarrelsome, the honest man as well as the thief, burglar, robber and murderer. Restraint of all evil wrought by the use of deadly weapons is clearly within its purpose. Prevention of stealthy robbery, and murder effected by such means is as much within its scope as unlawful injury or homicide wrought in heat of blood, or inflicted by negligence or accident.⁵⁸

The purpose of that statute also was examined the following year in *State v. Kinney*.⁵⁹ In a decision dealing with the exception found in the 1909 statute allowing an unloaded pistol or revolver to be carried by a person "from the place of purchase to his home or place of residence or a place of repair and back to his home or residence, . . ."⁶⁰ the court found that "[s]tatutes of this nature are designed to suppress the habit of going about armed ready for offense or defense in case of conflict with another. . . ."⁶¹ The court also noted that the exception for transport of an unloaded weapon "was designed to take from the weapon its possibility as an instrument of offensive or defensive combat while the purchaser was on premises not his own; such as the highway [or other places] where other persons had the right to be."⁶² While reversing the verdict against the defendant in *Kinney*, the court restated the policy of the state that "[t]he rigid enforcement of the statute against carrying dangerous weapons should not be relaxed, and it is not our purpose to do so. . . ."⁶³

It is clear from *Blazovitch* and *Kinney* that the West Virginia court continued its support of strict weapons regulation into the 1920s. In finding the absence of any right to offensive or defensive use, or possession for any reason outside the statutory exceptions, of revolvers, pistols, or other deadly or dangerous weapons of like kind or character away from a person's own premises without a state license, the court continued the established state policy as seen in *Workman*.⁶⁴

⁵⁸ *Id.* at 614-15, 107 S.E. at 292.

⁵⁹ *State v. Kinney*, 92 W. Va. 272, 114 S.E. 677 (1922).

⁶⁰ W. VA. CODE ch. 148, § 7 (West Supp. 1909).

⁶¹ *Kinney*, 92 W. Va. at 275, 114 S.E. at 678.

⁶² *Id.*

⁶³ *Id.* at 276, 114 S.E. at 678.

⁶⁴ See discussion of *Workman* *supra* notes 20-35 and accompanying text.

The 1909 statute, like earlier statutes, did not address whether rifles, shotguns, and other “long-guns” were included in the phrase “or any dangerous or deadly weapon of like kind or character.”⁶⁵ The phrase “like kind or character” was defined in *State v. Lett*,⁶⁶ a 1908 decision not directly addressing the inclusion of long-guns in such language, as those weapons like the weapons enumerated in the Code “in the respect that they are dangerous or deadly.”⁶⁷ The *Lett* test, if applied to long-guns, would seem to have included such weapons with a test of effect of the weapon, rather than size or shape.

A 1918 opinion of Attorney General E.T. England,⁶⁸ given in response to an inquiry about the arming of industrial plant guards with Winchester high powered rifles, suggested that the criteria set out in *Lett* was only “one element in arriving at the fact of ascertaining as to what the legislature meant to include” by the phrase “of like kind and character.” The opinion stated that an additional test was whether the weapons “resemble in some respect the kind of weapons specifically mentioned in the statute.”⁶⁹ England concluded that in order for a weapon to be included in the dangerous weapon statute,⁷⁰ the weapon had to meet what amounted to a two-part test: first, it had to be dangerous and deadly in its effects, and second, it had to physically resemble one of the enumerated weapons to the extent that it was “of such kind and character that it may be easily concealed about the person.”⁷¹ Given this test, England concluded that he was “of the opinion that it is not necessary to obtain a state license [under the 1909 statute] in order to entitle one to legally carry about his person a Winchester rifle.”⁷²

The England interpretation, rather than the reasoning of *Lett*, was apparently the one accepted by the state government. Governor Ephriam F. Morgan, in his 1923 “Governor’s Message” to the legislature,⁷³ called for the expansion of the coverage of what he termed “our stringent law against ‘pistol toting’” to include

⁶⁵ The 1860 Virginia Code (VA. CODE tit. 55, ch. CCI, § 8) continued in West Virginia by W. VA. CONST. of 1863 (art. XI, § 8) addressed the general category of “a deadly or dangerous weapon” (*see supra* note 2 and accompanying text). The 1873 statute (1872-73 W. Va. Acts ch. 226, § 168) addressed “concealed weapons, such as . . . pistols or other dangerous weapons” (*see supra* notes 5, 6 and accompanying text). Both the 1882 statute and 1909 statutes addressed “any revolver or other pistol . . . or other dangerous or deadly weapon of like kind and character” (*see supra* notes 8-12 and accompanying text).

⁶⁶ *State v. Lett*, 63 W. Va. 665, 60 S.E. 782 (1908).

⁶⁷ *Id.* at 666, 60 S.E. at 782. *Lett* dealt with the question of the inclusion of a “blackjack” in the 1882 statute.

⁶⁸ 28 Op. Att’y Gen. 18 (W. Va. 1918).

⁶⁹ *Id.* at 19.

⁷⁰ 1909 W. Va. Acts ch. 51, § 7 (codified at W. VA. CODE ch. 148, § 7 (West Supp. 1909)).

⁷¹ 28 Op. Att’y Gen. at 19.

⁷² *Id.*

⁷³ Governor’s Message to the Legislature, HOUSE J. (Jan. 10, 1923). The previous Governor, John J. Cornwell, had commented on the “tendency on the part of so many persons to violate the laws of the State, such as prohibition, gambling and pistol-carrying statutes. . . .” in his biennial message to the Legislature on January 13, 1921. *See* 1921 SENATE J. Appendix A, 33. Howard B. Lee, Attorney General of West Virginia, commented in BLOODLETTING IN APPALACHIA, that no permit was required

“high-powered rifles.”⁷⁴ In the same message, framed against the background of the ongoing “mine wars” in the state during the period,⁷⁵ the Governor called for stronger enforcement of existing weapons statutes (the 1909 statute), restrictions on possession of a pistol or revolver by “aliens and persons who have been convicted of [a] felony,” restrictions on sales of pistols and revolvers, and a record keeping requirement for all sales of pistols.⁷⁶

Although the legislature did not respond to his 1923 request, Governor Morgan repeated his call for stronger weapons statutes in a subsequent message to the legislature. In his 1925 message,⁷⁷ Governor Morgan requested the passage of “more stringent laws relative to the exhibition, sale, purchase and carrying of revolvers and high powered rifles, [noting that] promiscuous carrying of fire arms, and frequent shooting affrays and murders . . . mar the peace and happiness and endanger the lives of peaceful citizens. . . .”⁷⁸

The legislature responded to Governor Morgan’s request in the 1925 regular session by actually weakening the 1909 statute. Additional exemptions to the requirement for a license were added to the Code, the maximum penalty for carrying without a license was reduced, and the provision requiring any person with knowledge of a violation of the statute to report the same was deleted.⁷⁹ But those revisions to the statute, for the most part, were to be short-lived. With the urging of new Governor Howard M. Gore, who took office in 1925,⁸⁰ an extraordinary session of the 1925 legislature would enact a modern license statute very similar to that requested by Governor Morgan.

C. *The Modern License Law: From 1925 to the Present*

In his call for the first extraordinary session of the 1925 legislature, Governor Howard M. Gore included the subject of “regulating persons authorized to carry arms.”⁸¹ Except for the additional exceptions to the license requirement, all of the 1925 regular session amendments were rescinded during the extraordinary session.⁸²

for carrying a high powered rifle as of May 19, 1920 (the date of what is known as the “Matewan Massacre” in Mingo County, West Virginia). BLOODLETTING IN APPALACHIA, 53 (1969).

⁷⁴ Governor’s Message to the Legislature, HOUSE J. 49 Appendix A (Jan. 10, 1923).

⁷⁵ *Id.* at 12-16 (discussed by Governor Morgan).

⁷⁶ *Id.* Governor Morgan was proposing modeling the West Virginia statute after a proposed uniform act.

⁷⁷ Governor’s Message to the Legislature, HOUSE J. 1 Appendix A (Jan. 14, 1925).

⁷⁸ *Id.* at 27.

⁷⁹ 1925 W. Va. Acts, ch. 95, § 7 (apparently never codified).

⁸⁰ Governor Gore took office on Mar. 4, 1925, pursuant to W. VA. CONST. of 1872, art. VII, § 1 (repealed 1934).

⁸¹ Proclamation by Governor Howard M. Gore, HOUSE J. (Apr. 27, 1925) (1st Extraordinary Sess.).

⁸² 1925 W. Va. Acts ch. 3, § 7 (1st Extraordinary Sess.) (codified at W. VA. CODE ch. 148, § 7 (Barnes Supp. 1925)) (APPENDIX E, *infra* at 1167).

In addition to restoration of the amended provisions to their pre-1925 language, the extraordinary session rewrote and generally strengthened the law in much the fashion urged by Governor Morgan in 1923. Some of the amendments included:

(1) requirements for United States citizenship and state and county residence for license applicants;

(2) restriction of the effect of an issued license to designated counties;

(3) the doubling of the application fee for a license fee from ten to twenty dollars;

(4) a general prohibition against employees carrying weapons without a license on the premises of their employer (including a corporate employer), with specific exceptions for express company and railroad police employees under bond of their employer;

(5) a new paragraph declaring it a misdemeanor to “carry, expose, brandish, or use” a licensed or unlicensed weapon “in a way or manner to cause, or threaten, a breach of the peace”;

(6) a prohibition of ownership or possession of a firearm “of any kind or character” by an alien, and making it illegal to “sell, rent, give or lend” such a firearm to an unnaturalized person;

(7) making it unlawful to publicly display “to passersby in the streets” any firearm or ammunition; and

(8) requiring record keeping upon the sale of any of the “foregoing arms or weapons.”⁸³

A new subsection (b) was also added to section 7 of the 1909 statute so that the possession of “any machine gun, sub-machine gun, and what is commonly known as a high powered rifle, or any gun of similar kind or character, or any ammunition therefor. . .” was included in the prohibition of carrying weapons without a license.⁸⁴ This new prohibition included exemptions for rifle club members’ use of such weapons for practice and “actual hunting” pursuant to the conditions of a state hunting license.⁸⁵

In the general recodification of 1931, chapter 148, section 7(a) and (b), as amended in 1925, were recodified in article 7 of chapter 61.⁸⁶ With the 1925 amendments and the 1931 recodification, the West Virginia weapon statute took on much of its current character. As has been seen, the development of the law has been one of increasing strictness in terms of carrying weapons away from one’s premises, with neither handguns nor long guns being permitted to be carried off

⁸³ *Id.* at § 7(a).

⁸⁴ *Id.* at § 7(b).

⁸⁵ *Id.*

⁸⁶ W. VA. CODE ch. 148, § 7(a) (recodified in W. VA. CODE § 61-7-1 to -6 (1931)). W. VA. CODE ch. 148, § 7(b) (recodified in W. VA. CODE § 61-7-7 to -10 (1931)).

one's premise without either a weapon license, a hunting license, or a statutory exemption from the license statute.

A further look at the criteria for inclusion of a weapon not specified in the statute as a "dangerous or deadly" weapon was seen in *Barboursville v. Taylor* in 1934.⁸⁷ In *Barboursville*, the court appeared to reaffirm the reasoning of *Lett*⁸⁸ that suggested an "effects" test for inclusion of nonenumerated weapons. That "effects" test of *Lett*, of course, was in contrast to that suggested by Attorney General England in his 1918 Attorney General Opinion,⁸⁹ which suggested a two-part test requiring both dangerous and deadly effects and similarity in size and shape for inclusion of such a nonenumerated weapon. That two-part test was implicitly recognized by the governor and legislature during the 1923-25 period, resulting in the specific inclusion of rifles and other long-guns in the statute in 1925.⁹⁰

The *Barboursville* court, returning to a *Lett*-type analysis,⁹¹ found that the statute relating to the carrying of dangerous or deadly weapons⁹² was designed "to proscribe the carrying about the person of such instruments as are dangerous *per se*—inherently, intrinsically, characteristically."⁹³ Dividing such objects which might be included in the statutory regulation into two classes, the court held that "articles intended as weapons," but not specified in the statute, would be "dangerous or deadly within the statutory meaning if in its intended or readily adaptable use it is likely to produce death or serious bodily injury."⁹⁴ Under such reasoning, the 1925 amendment including machine guns, rifles, and the like⁹⁵ would have been unnecessary, since a *Lett-Barboursville* analysis would have included such weapons in the former statute because of both their *per se* nature as dangerous weapons (the *Barboursville* classification) as well as their dangerous and deadly effects (a *Lett* effects test).

It should be noted, however, that *Barboursville* did not address the prosecution of a long-gun violation under West Virginia Code section 61-7-8.⁹⁶ The "weapon" in question in that decision was an easily concealable "fountain pen tear gas gun"⁹⁷ that would have certainly satisfied the 1918 Attorney General's Opinion concealability criteria.⁹⁸ Because neither *Lett* nor *Barboursville* directly

⁸⁷ *Barboursville ex rel. Bates v. Taylor*, 115 W. Va. 4, 174 S.E. 485 (1934).

⁸⁸ See *supra* notes 66-68 and accompanying text.

⁸⁹ See *supra* notes 68-72 and accompanying text.

⁹⁰ See *supra* notes 73-82 and accompanying text.

⁹¹ Though not citing *Lett* by name.

⁹² W. VA. CODE § 61-7-1 (1931).

⁹³ *Barboursville*, 115 W. Va. at 7, 174 S.E. at 487.

⁹⁴ *Id.* at 7-8, 174 S.E. at 487.

⁹⁵ 1925 W. Va. Acts ch. 3, § 7(b) (1st Extraordinary Sess.) (codified at W. VA. CODE § 61-7-8 (1931)).

⁹⁶ W. VA. CODE § 61-7-8 (1931).

⁹⁷ *Barboursville*, 115 W. Va. at 7, 174 S.E. at 486.

⁹⁸ See *supra* notes 68-72 and accompanying text.

addressed the issue of concealability as a criterion for inclusion of long-guns with pistols, revolvers, and other such weapons, that distinction recognized in passage of the 1925 amendments likely remains a valid theoretical one.

That theoretical distinction is important. Since *Workman*, the state seemed to recognize a basic distinction between pistol-type, easily concealable weapons and long-gun-type weapons that were not easily concealable. It was just such a distinction between pistols, revolvers, and other concealable weapons as constitutionally unprotected weapons, and other not-easily-concealed (impliedly long-gun) weapons as constitutionally protected weapons, that was made in the *Workman* analysis.⁹⁹ That same distinction continues to this day in the statutes of the state in sections 1 and 8 of article 7 of chapter 61 of the Code.

Furthermore, the language of section 7(b) of chapter 3, Acts of 1925,¹⁰⁰ clearly indicates that the 1925 legislature understood rifles and long-guns to be excluded from the provisions of the pre-1925 license statute.¹⁰¹ The 1925 amendment, adding section 7(b) to chapter 148, spoke of obtaining a license "as in the case of revolvers and pistols."¹⁰² Inclusion of such language clearly implied that the existing statute was understood not to include the specific weapons, and the general class of not-easily-concealed weapons, brought under Code regulation by the 1925 amendments.

With the adoption of the 1925 amendments, either a *Lett-Barboursville* analysis, or an analysis based on the two-part test suggested in the 1918 Attorney General Opinion and apparently recognized in the passage of the 1925 amendments, would lead to the conclusion that all firearms were now included in the strict carrying license law developed in West Virginia between 1909 and 1925. The effect of this development was to prohibit the carrying, away from one's own premises, any type of firearm for any reason not specified as an exception in the Code without a license.

Such a reason might be self-defense, a constitutional right recognized by the *Workman* court.¹⁰³ But did that right include the right to armed self-defense, and what would the court determine to be the balance between the recognized right to self-defense and the developed general prohibition against the carrying of any firearm for any reason other than with a license or for a statutorily specified reason?

The West Virginia Supreme Court of Appeals addressed the 1909 repeal¹⁰⁴ of the self-defense exception to the West Virginia carrying statute that had existed in

⁹⁹ See *supra* note 35 and accompanying text.

¹⁰⁰ 1925 W. Va. Acts ch. 3, § 7(b) (1st Extraordinary Sess.) (codified at W. VA. CODE ch. 148, § 7 (West. Supp. 1925)).

¹⁰¹ W. VA. CODE ch. 148, § 7 (Barnes 1923).

¹⁰² 1925 W. Va. Acts ch. 3, § 7(b) (1st Extraordinary Sess.).

¹⁰³ See *supra* notes 23-28 and accompanying text.

¹⁰⁴ 1909 W. Va. Acts ch. 51, § 7.

the law either explicitly or implicitly since the formation of the state¹⁰⁵ in *State v. Merico*,¹⁰⁶ a 1915 decision. In *Merico*, the court held that no person had a legal right to carry a pistol even if he feared that someone “would attack him and do him great bodily injury.”¹⁰⁷ Even in the face of a threat that would appear to satisfy the standards established in *Workman* and *Barnett* to support a self-defense defense under the pre-1909 Code,¹⁰⁸ the court concluded that “[t]he present statute [the 1909 statute] makes no such [self-defense] exception.”¹⁰⁹ But *Merico* addressed the self-defense question when only pistols and revolvers, and not long-guns, were regulated. With the 1925 amendments¹¹⁰ and the broad interpretation in *Barboursville* of what was included in such statutes,¹¹¹ all firearms were regulated when carried off one’s own premises. The question then arose as to whether there was any right to armed self-defense despite the provisions of the strict carrying laws.

The West Virginia court addressed this in 1945 in *State v. Foley*.¹¹² Defendant Foley had shot and killed a certain Joe Groves with a revolver¹¹³ carried by Foley without a license to do so under state law.¹¹⁴ Foley claimed self-defense against a charge of homicide and, upon conviction, assigned error to his being required to answer questions on cross-examination as to whether or not he had a state license for the revolver.¹¹⁵

The court held that a defendant in such a matter waives the privilege against self-incrimination by voluntarily taking the witness stand only as to the matters relevant to the issue. Finding that “[w]hether Foley had a license to carry a pistol on the occasion he was armed is not relevant in the least to the common law right to arm for self-defense,”¹¹⁶ the court found reversible error in the “questions propounded and the answers elicited” by the prosecution.¹¹⁷

While finding the license law irrelevant to the right of self-defense, the court did rule that the exercise of that right with a weapon did not preclude prosecution under the misdemeanor license law. The court noted that “the right to arm for

¹⁰⁵ Both the 1860 Virginia statute (VA. CODE tit. 55, ch. CCI, § 8) and the 1882 West Virginia statute (1882 W. Va. Acts ch. 135, § 7) included specific self-defense defenses. The 1873 West Virginia statute (1872-73 W. Va. Acts ch. 226, § 168) implied such a defense by addressing only the “habitual” carrying of a weapon.

¹⁰⁶ *State v. Merico*, 77 W. Va. 314, 87 S.E. 370 (1915).

¹⁰⁷ *Id.* at 316, 87 S.E. at 371.

¹⁰⁸ *See supra* notes 36-42 and accompanying text.

¹⁰⁹ *Merico*, 77 W. Va. at 316, 87 S.E. at 371.

¹¹⁰ 1925 W. Va. Acts ch. 3, § 7 (1st Extraordinary Sess.).

¹¹¹ *See supra* notes 84-89 and accompanying text.

¹¹² *State v. Foley*, 128 W. Va. 166, 35 S.E.2d 854 (1945).

¹¹³ *Id.* at 167, 35 S.E.2d at 855.

¹¹⁴ *Id.* at 176, 35 S.E.2d at 859.

¹¹⁵ *Id.* at 178, 35 S.E.2d at 860.

¹¹⁶ *Id.* at 181, 35 S.E.2d at 861.

¹¹⁷ *Id.* at 183, 35 S.E.2d at 862.

self-defense is distinct from a license to carry a pistol under Code, 61-7-1," and held that the misdemeanor conviction that would result from carrying without a license under that statute would not be precluded by the carrying of the weapon for legitimate self-defense purposes.¹¹⁸

The balance reached by the court between the recognized right of self-defense and the provisions of the license statute were summarized by Judge Fox in his concurring opinion. He noted:

The carrying of a pistol without a state permit is, in itself, a crime, for which the statute provides a punishment; but, notwithstanding this, a person in fear from knowledge of threats of death or great bodily harm, may, without a license choose to arm himself with a pistol and take the risk of punishment, and if, later, he has justifiable cause to use that pistol in his defense and commits homicide, I do not believe the fact that he carried the pistol used therein without a license, is proper testimony to go to a jury in a trial of a charge growing out of its use.¹¹⁹

Although *Foley*, like *Merrico*, did not address a long-gun violation of the statute, the reasoning of *Foley* would seem to clearly extend to the use in self-defense of any firearm carried in violation of the license statute. While recognizing the right to self-defense, the court refused to recognize a right to armed self-defense. The license law would remain effective against even a person exercising the right to self-defense: *Workman's* constitutional right of self-defense would exist apart from the state's right to regulate the carrying of firearms.

With the 1931 recodification and the decision in *Foley*, the field of firearms regulation in West Virginia continued into the 1980s with little statutory activity in substantive areas. Other than several relatively minor amendments made to the weapons statute in 1975,¹²⁰ and a state law precluding any municipal ordinance prohibiting the ownership of firearms or ammunition passed in 1984,¹²¹ no further statutory action occurred until the passage of the right-to-bear-arms amendment by the legislature in 1985 and by the voters in 1986.

III. THE RIGHT-TO-BEAR-ARMS AMENDMENT

A. Legislative History: 1985

The "Right to Keep and Bear Arms Amendment" to the West Virginia Constitution was introduced in the House of Delegates on February 21, 1985, by Delegates J. Martin and W. Carmichael as House Joint Resolution No. 18.¹²² It

¹¹⁸ *Id.* at 181, 35 S.E.2d at 861-62 (quoting F. WHARTON, CRIMINAL EVIDENCE 452).

¹¹⁹ *Id.* at 187-88, 35 S.E.2d at 864 (Fox J., concurring).

¹²⁰ 1975 W. Va. Acts ch. 213 (codified at W. VA. CODE § 61-7-2 (1984)) (APPENDIX F, *infra* at 1173).

¹²¹ W. VA. CODE § 61-7-8 (1984).

¹²² For text see APPENDIX G, *infra* at 1175..

was referred to the House Committee on Constitutional Revision,¹²³ which was chaired by Delegate J. Humphreys.¹²⁴ That committee considered House Joint Resolution 18 on March 15.¹²⁵ According to the abstract prepared for the committee's use, the resolution did "not appear to restrict the authority of the legislature to enact laws regulating the use of arms when it is in the interest of public safety and does not frustrate the guarantees of the constitutional provision."¹²⁶

Although formal analysis of the resolution was apparently not recorded in legislative records, one detailed analysis was received by the Speaker of the House on March 7, 1985, in the form of a letter with an attached paper entitled "ANALYSIS OF PROPOSED WEST VIRGINIA CONSTITUTIONAL GUARANTEE TO KEEP AND BEAR ARMS."¹²⁷ The letter purported to "lay to rest your [*i.e.*, Speaker Joseph P. Albright's] concern about the state's ability to keep firearms from the hands of criminals, minors, and the mentally infirmed."¹²⁸ The analysis attached to the letter was apparently one circulated within the legislative process to some degree. A search of committee and other records indicated that an additional copy of the same analysis was also made available through the National Rifle Association's West Virginia State Liaison.¹²⁹ That analysis, however, was not circulated to the membership of the House of Delegates.

That analysis described the amendment as one that "explicitly protects the traditional lawful rights that gun owners assumed were guaranteed in West Virginia."¹³⁰ That interpretation of the amendment as merely constitutionalizing those existing lawful rights of gun owners in West Virginia was further supported in the body of the analysis. The analysis discusses the bearing of constitutionally-protected arms by first stating that such arms "may be regulated." It indicates that concealed carrying statutes and statutes prohibiting open carrying "for an unlawful purpose" would be upheld if the proposed amendment were adopted, and specifically notes that "[a] license may be required to carry a pistol away from one's home, place of business, or land."¹³¹

¹²³ 1985 HOUSE J., 216 (Feb. 21, 1985).

¹²⁴ *Id.* at [xi].

¹²⁵ No committee minutes. Interview with Chairman Humphreys (Jan. 29, 1987).

¹²⁶ Abstract of H.J.R. No. 18 (Appendix G, *infra* at 1175) (prepared by Jon Snyder, Counsel to House Committee on Constitutional Revisions).

¹²⁷ Letter from Phil Burns, West Virginia State Rifle & Pistol Association, to Joseph P. Albright, Speaker of the W. Va. House of Delegates (Mar. 6, 1985) (For text of ANALYSIS OF PROPOSED WEST VIRGINIA CONSTITUTIONAL GUARANTEE TO KEEP AND BEAR ARMS, see APPENDIX H, *infra* at 1176 (ANALYSIS)).

¹²⁸ *Id.*

¹²⁹ A copy of that analysis was found in legislative files on H.J.R. No. 18 with an attached business card of Charles H. Cunningham, West Virginia State Liaison of the Nat'l Rifle Ass'n.

¹³⁰ ANALYSIS, *supra* note 127, at Appendix H, *infra* at 1176.

¹³¹ *Id.*

The analysis could be summarized as describing the proposed amendment as one protecting the right to keep and bear arms as it currently existed in West Virginia law, including in the definition of "arms" "only such arms as are commonly kept by the people, [including] the rifle, shotgun, and pistol."¹³² The term "person" was defined so as to "guarantee an individual right" while excluding "a person in a high risk category," and, as was discussed previously, the phrase "keep and bear arms" was interpreted specifically *not* to preclude a license law such as the one in West Virginia. The analysis concluded that "[t]his legislative history indicates that the legislature is left with the power to deal effectively with criminal misconduct. On the other hand, it [the amendment] would prevent the decent people of this state from being disarmed."¹³³

House Joint Resolution 18 was reported to the floor of the house on March 18 with recommendation that it pass without amendment.¹³⁴ As introduced and reported, the proposed constitutional language was a new section of article III of that constitution, to read as follows: "[s]ection 22: 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."¹³⁵

Read a first time on March 19,¹³⁶ the resolution was placed on amendment stage, or second reading, on March 20.¹³⁷ It was there amended by motion of Delegate J. McNeely, upon a voice vote of the house, by insertion of the word "lawful" in the resolution just preceding the word "defense," making the amended resolution read: "[s]ection 22: A person has the right to keep and bear arms for the *lawful* defense of self, family, home and state, and for lawful hunting and recreational use."¹³⁸

The amended resolution was placed on third reading, or passage stage, on March 21. Delegate T. Knight successfully sought unanimous consent of the house to offer an amendment at that time that would have made the constitutional right to bear arms specifically subject to the general police power of the state. Knight then moved to return the resolution to second reading for amendment, but his motion failed by a recorded vote of seventy-six to twenty-two.¹³⁹

House Joint Resolution 18, as amended, then passed the house by a vote of ninety-one to seven,¹⁴⁰ with more than the constitutionally required two-thirds of

¹³² *Id.*

¹³³ *Id.*

¹³⁴ HOUSE J. 515 (Mar. 18, 1985).

¹³⁵ H.J.R. No. 18 as introduced and reported to floor.

¹³⁶ HOUSE J. 567 (Mar. 19, 1985).

¹³⁷ *Id.* at 583 (Mar. 20, 1985).

¹³⁸ *Id.* at 583-84 (emphasis by author).

¹³⁹ *Id.* at 599-600 (Mar. 21, 1985). Interview with Delegate T. Knight (January 29, 1987). Because Delegate Knight's amendment was not formally presented to the house, its contents were not recorded.

¹⁴⁰ *Id.*

the members elected to the house voting in favor of the measure.¹⁴¹ There was no comments by members or vote explanations recorded in the House Journal upon passage of the resolution. According to a press account of the passage of the resolution in the house, the amendment was intended to “prevent municipalities from passing ordinances to ban handguns.”¹⁴² According to the same account, however, the Knight attempt to return the resolution to amendment stage was intended to “reword it to make sure that gun control laws such as pistol permit requirements and a prohibition against convicted felons having a gun would not be nullified.”¹⁴³

House approval of House Joint Resolution 18 was communicated to the West Virginia Senate on March 22, and the resolution was referred to the Senate Committee on Judiciary, chaired by Senator H.T. Chafin.¹⁴⁴ That committee considered the resolution on April 2nd. After defeating a motion by Senator M. Palumbo to delay action on the measure “in order for additional information to be gathered,” the committee adopted an amendment by Senator White to strike the word “lawful” amended to the resolution by the house on March 20. A motion by Senator T. Whitlow to report the resolution to the floor with the recommendation that it pass with amendment was then adopted without recorded dissent.¹⁴⁵

The resolution was then reported to the floor of the senate on April 2 with the recommended amendment, and with the recommendation that the resolution do pass with amendment.¹⁴⁶ Read a first time on April 3,¹⁴⁷ House Joint Resolution 18 was placed on second reading for amendment on April 4.¹⁴⁸ The recommended Judiciary Committee amendment to strike the word “lawful” inserted in the resolution by house amendment¹⁴⁹ was adopted on voice vote.¹⁵⁰

Senator Palumbo moved to amend the resolution by striking the first word of the proposed section and inserting in lieu thereof the following phrase: “[s]ubject only to the police power, a well-regulated militia being necessary to the security of a free state, a”¹⁵¹ That amendment was rejected by a recorded vote of twenty-nine to four, and the resolution ordered to passage stage.¹⁵² House Joint Resolution 18, in its original form as introduced in the house, was approved by the senate on April 5 by a vote of thirty-two to two.¹⁵³

¹⁴¹ W. VA. CONST., art. XIV, § 2.

¹⁴² Charleston Gazette, Mar. 22, 1985, § B, at 6, col. 3.

¹⁴³ *Id.*

¹⁴⁴ 1985 SENATE J. 606 (Mar. 22, 1985).

¹⁴⁵ Minutes, Senate Comm. on the Judiciary 2 (Apr. 2, 1985) (unpublished but available in the office of Clerk of West Virginia Senate, Charleston, W. Va.).

¹⁴⁶ SENATE J. 828 (Apr. 2, 1985).

¹⁴⁷ *Id.* at 878 (Apr. 3, 1985).

¹⁴⁸ *Id.* 910 (Apr. 4, 1985).

¹⁴⁹ *Id.* See *supra* note 138 and accompanying text.

¹⁵⁰ SENATE J. at 910 (Apr. 4, 1985).

¹⁵¹ *Id.*

¹⁵² *Id.* at 910-11.

¹⁵³ *Id.* at 946-47 (Apr. 5, 1985).

Senator Palumbo, who voted in opposition to passage of House Joint Resolution 18¹⁵⁴ after unsuccessfully attempting to amend it on April 4,¹⁵⁵ filed a written vote explanation which was, at his request, inserted into the Appendix to the Senate Journal.¹⁵⁶ Senator Palumbo's explanation was as follows:

MR. PALUMBO: I support the right of an individual to bear arms. However, that is not the issue with House Joint Resolution No. 18. The issue with House Joint Resolution No. 18 and why I voted "No" is because of my strong belief that the right of an individual to bear arms should not be superior to the State's obligation to protect its people under its police power and through its National Guard forces. In my opinion, House Joint Resolution No. 18 will cast considerable doubt on whether the State's police power and National Guard forces will continue to be superior to an individual's right to bear arms. This doubt could result in chaotic events occurring in our State.¹⁵⁷

A press account of the senate passage of the amended resolution described Senator Palumbo's unsuccessful attempt to amend the resolution on April 4, and then commented that "[t]he arms amendment, sought by the National Rifle Association and other opponents of gun control, would place in the State constitution an amendment similar to the one in the Federal Bill of Rights which gives citizens the right to keep and bear arms. . . ."¹⁵⁸

House Joint Resolution 18, as passed by the senate, was communicated to the house on April 8. The house refused to concur in the senate amendment deleting the word "lawful," and requested that the senate recede from that amendment.¹⁵⁹ The senate then refused to recede from its amendment and requested that the house agree to appointment of a conference committee to resolve the difference between the house and senate versions of the resolution. Senate President D. Tonkovich appointed Senators Chafin, J.R. Rogers, and M. Shaw as senate members of that committee.¹⁶⁰

Upon receipt of that senate request on April 9, the house agreed to the appointment of the conference committee. House Speaker Albright appointed Delegates Humphreys, J. Martin and Carmichael as the house members of that committee.¹⁶¹ The sponsor of the amendment adopted by the House on March 20, was not included on that committee.¹⁶²

The conference committee agreed to delete the house amendment inserting the

¹⁵⁴ *Id.* at 946.

¹⁵⁵ *Id.* at 910 (Apr. 4, 1985).

¹⁵⁶ *Id.* at 947 (Apr. 5, 1985).

¹⁵⁷ 1985 SENATE J. 2638 Appendix.

¹⁵⁸ Charleston Gazette, Apr. 6, 1985, § A, at 1, col. 4.

¹⁵⁹ HOUSE J. 1010-11 (Apr. 8, 1985).

¹⁶⁰ SENATE J. 1052 (Apr. 8, 1985).

¹⁶¹ HOUSE J. 1152-53 (Apr. 9, 1985).

¹⁶² *See supra* note 138 and accompanying text.

word "lawful" preceding the word "defense," thereby restoring House Joint Resolution 18 to its language as introduced. That report and the resolution were approved by the house on April 12. The vote on final passage of House Joint Resolution 18 in the house was ninety-two to six in favor of its passage.¹⁶³ The senate approved the report later the same day, and then approved final passage of House Joint Resolution 18 in that body by a vote of thirty-one to three.¹⁶⁴

As has been seen, the legislative history of House Joint Resolution 18 is a sketchy one. What can be seen is a consistent position by proponents that the resolution would not affect existing gun control laws in the state, scattered attempts by opponents of the measure to amend it to include protection of those existing laws by specific reference in the resolution, and press treatment of the resolution as one making no major change in West Virginia statutes.

B. Campaign History: 1986

House Joint Resolution 18, as adopted, placed the Right to Keep and Bear Arms Amendment on the ballot of the general election to be held on November 4, 1986.¹⁶⁵ The campaign for passage of the amendment, designated "Amendment No. 1" by the resolution,¹⁶⁶ included a mass mailing of a National Rifle Association letter encouraging readers to support the passage of Amendment No. 1.¹⁶⁷ The passage of the amendment was described in that letter as "forever securing the right to keep and bear arms in West Virginia."¹⁶⁸ The letter indicated that the state "has a proud heritage of respect for firearms ownership and sports hunting," and noted that "in recent years a number of positive measures have been passed at the state level to benefit *you*." The letter stated the choice in the Amendment No. 1 balloting as "[e]ither *preserve* your rights and *protect* your heritage, or let the anti-gunners have an open door for their activity at the state level sometime in the future."¹⁶⁹ That letter, therefore, stated the position that Amendment No. 1 was intended to protect those lawful rights then in existence under West Virginia law, and further stated that the measure was intended to proscribe certain kinds of gun control measures that might be enacted by some future legislature. There certainly was no indication of any intent to overturn any provision of current law.

Other discussions of the amendment included similar assurances that the passage of the measure would not be inconsistent with current statutes. A *Charleston Gazette* outdoors columnist, Skip Johnson, commented on November

¹⁶³ HOUSE J. 1484-87 (Apr. 12, 1985).

¹⁶⁴ SENATE J. 1640-42 (Apr. 12, 1985).

¹⁶⁵ See H.J.R. No. 18 (APPENDIX G, *infra* at 1175).

¹⁶⁶ *Id.*

¹⁶⁷ Letter from Charles H. Cunningham, West Virginia State Liaison, Nat'l Rifle Ass'n ("Institute for Legislative Action"), to candidates for public office and, reportedly, all NRA members in the state (Oct. 14, 1986).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

1, 1986, that he supported Amendment No. 1, which he described as a measure that “would make an implied right a guaranteed one.”¹⁷⁰ A publication of the Cooperative Extension Service of West Virginia University entitled *AMENDMENTS TO THE WEST VIRGINIA CONSTITUTION FOR THE GENERAL ELECTION 1986*¹⁷¹ stated the general impression of the intent of Amendment No. 1 as it was understood by the voters of the state during the 1986 campaign. The purpose of the publication was “to provide an awareness and understanding of the five amendments [including Amendment No. 1].”¹⁷² Amendment No. 1 was on the ballot, according to the publication, for the following reasons:

Basically it would assure citizens of West Virginia of the right to bear arms. It would prevent local governments in the future from passing laws which would restrict or prohibit a citizen’s right to keep or bear arms.

In addition, it reaffirms the individual rights of West Virginia citizens to bear arms.¹⁷³

Like the Johnson column,¹⁷⁴ the Cooperative Extension Service publication also found that the rights guaranteed in Amendment No. 1 were rights implicitly recognized in existing state laws. The booklet stated that “one can assume since West Virginia citizens have been bearing arms for over 100 years it is an implied right.”¹⁷⁵ The description of Amendment No. 1 in that publication was flawed in its use of the word “citizen” instead of the term “person” as used in the proposed amendment. But, despite its lack of legal preparation and artless use of terms, the publication was widely circulated and quoted by media sources in the state as an authority on the five constitutional amendments on the West Virginia ballot in 1986.¹⁷⁶

The two major newspaper advertisements published by supporters of Amendment No. 1 reflected contrasting views of some effects of the proposed amendment. The first such advertisement was published on October 26, 1986, in newspapers throughout the state.¹⁷⁷ That advertisement made four points:

(1) the suggestion that the West Virginia proposal was similar to those already in the constitutions of forty states;

¹⁷⁰ Charleston Gazette, Nov. 1, 1986, § A, at 5, col. 1.

¹⁷¹ A. FERRISE & D. SMITH, *AMENDMENTS TO THE WEST VIRGINIA CONSTITUTION FOR THE GENERAL ELECTION 1986* (Cooperative Extension Service, W.V.U., R.D. Publication No. 731, Aug. 1986).

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 2.

¹⁷⁴ See *supra* note 170 and accompanying text.

¹⁷⁵ A. FERRISE & D. SMITH *supra* note 171, at 2.

¹⁷⁶ The publication was distributed statewide through the Cooperative Extension Service.

¹⁷⁷ Charleston Gazette, Oct. 26, 1986, § D, at 13, col. 3. This advertisement also ran in other newspapers throughout the state that day, including the Bluefield Daily Telegraph, the Wheeling Intelligencier, the Morgantown Dominion Post, the Beckley Register/Herald, the Fairmont Times, the Huntington Herald Dispatch, the Parkersburg News-Sentinel, the Logan Banner, and the Clarksburg Telegram. For text of advertisement see APPENDIX I, *infra* at 1179.

(2) the implication that the amendment was similar to the second amendment of the U.S. Constitution, and that passage of Amendment No. 1 was necessary to insert such an amendment in the state constitution;

(3) a prominent statement that no existing federal or state law would be repealed by passage, with the statement reading "Amendment 1 keeps Federal and State firearms laws the law"; and

(4) that the ballot proposal was widely supported by officials and citizens of West Virginia.¹⁷⁸

The second advertisement, a more detailed statement of the intent of the proposed amendment, was published in Sunday morning newspapers throughout the state on November 2, 1986, just two days prior to the election.¹⁷⁹ Although paid for by the same National Rifle Association political action committee as the October 26 Amendment,¹⁸⁰ the second advertisement advanced an interpretation of the intent of the measure that was different in a significant fashion from that advanced in the March 1985, *Analysis*,¹⁸¹ the October 26 advertisement,¹⁸² or the previous public statements describing the intent of that amendment.¹⁸³ That November 2 advertisement purported to state, in bold letters, the "INTENT OF CONSTITUTIONAL AMENDMENT 1." In a significant deviation this advertisement stated that "Amendment 1 extends to open carrying of constitutionally protected arms."¹⁸⁴

That statement of intent was directly in conflict with the existing license law in West Virginia¹⁸⁵ requiring a license to carry a firearm, concealed or unconcealed, anywhere off one's own premises.¹⁸⁶ While the March 1985 *Analysis* stated that a license law like West Virginia's would be upheld under the right-to-bear-arms proposal,¹⁸⁷ the November 2 advertisement limited such license laws under an Amend-

¹⁷⁸ *Id.*

¹⁷⁹ Morgantown Dominion Post, Nov. 2, 1986, § D, at 12, col. 2. This advertisement was also published statewide, including all newspapers listed in *supra* note 177. For text of advertisement see APPENDIX J, *infra* at 1180.

¹⁸⁰ United Sportsmen of West Virginia, a campaign committee established in West Virginia and registered in the Secretary of State's office. The name of the registered treasurer, Mr. Robert R. Legg, Jr., was included only in the November 2 advertisement. The committee's pre-general election report, filed on October 30, 1986, reported total receipts of \$33,420.10 and total expenditures of \$31,677.13, including an expenditure of \$30,000 for newspaper ads. Total expenditures of the committee during the Amendment No. #1 campaign are impossible to ascertain as of the writing of this article as a result of that committee's failure to file, as of June 15, 1987, the post-election financial statement required to be filed with the Secretary of State's office not less than 25 days nor more than 30 days after the election. See W. VA. CODE § 3-8-5 (1985).

¹⁸¹ See *supra* notes 127-133 and accompanying text.

¹⁸² See *supra* notes 177-178 and accompanying text.

¹⁸³ See generally discussion *supra* notes 17-21 and accompanying text.

¹⁸⁴ Nov. 2, 1986 advertisement, see *supra* note 179.

¹⁸⁵ W. VA. CODE § 61-7-1 to -12 (1985).

¹⁸⁶ *Id.*

¹⁸⁷ ANALYSIS, *supra* note 127, at APPENDIX H, *infra* at 1176.

ment No. 1 analysis to “[t]he bearing of arms concealed may be regulated by, for example, requiring a license to carry arms concealed. However, licensing would have to be administered with the right to bear arms in mind. Furthermore, the carrying of arms may be restricted in places such as courtroom or polling places.”¹⁸⁸ This interpretation of Amendment No. 1 as inconsistent with the existing license law of the state was in sharp contrast to the prominent assertion in the October 26 advertisement that “Amendment 1 keeps Federal and State firearms laws the law.”¹⁸⁹

The November 2 advertisement also elaborated on the scope of the “criminal misconduct” generally referred to in the 1985 *Analysis* as left in the power of the Legislature to regulate even after passage of Amendment No. 1.¹⁹⁰ While the *Analysis* suggested that the legislature “is left with the power to deal effectively with criminal misconduct,”¹⁹¹ the November 2 advertisement stated that the constitutional amendment “does not protect those who misuse firearms,” and included the following examples of such misconduct that the legislature may prohibit: “using arms to commit robbery, rape, burglary, assault; carrying arms while intoxicated; using arms to unlawfully harass, intimidate, or recklessly endanger someone; shooting in an unsafe place or manner; and poaching.”¹⁹² What is significant in that interpretation of Amendment No. 1 is the implication that other instances of carrying weapons without a license that are currently illegal could not be prohibited after passage of Amendment No. 1. Examples of such instances might include carrying arms without a license while *not* intoxicated, carrying arms without a license when not using those arms to commit any illegal act, and carrying weapons without a license in a rural area when not poaching. The clear implication of the advertisement is, therefore, that the carrying of a weapon without a license without intent to commit or the actual commission of a prohibited act with the firearm, could not be prohibited. Such an implication would suggest that Amendment No. 1 would be inconsistent with existing state law.

So it would appear that the November 2 advertisement suggested an intent in passing Amendment No. 1 that would be inconsistent with existing state law. Such an interpretation, of course, would be contrary to prior statements by proponents of the measure in the legislature and during the campaign, and would certainly be inconsistent with the view of the amendment seen in the March 1985 *Analysis*, the Extension Service publication,¹⁹³ the October 26 advertisement, and, impliedly, the perception of the voting public.

This apparent shift in the National Rifle Association interpretation of the

¹⁸⁸ Nov. 2, 1986 advertisement *see supra* note 179.

¹⁸⁹ Oct. 26, 1986 advertisement, *see supra* note 177.

¹⁹⁰ Nov. 2, 1986 advertisement, *see supra* note 179.

¹⁹¹ ANALYSIS, *supra* note 127, at APPENDIX H, *infra* at 1176.

¹⁹² Nov. 2, 1986 advertisement, *see supra* note 179.

¹⁹³ *See supra* note 171.

amendment seen in the November 2 advertisement was quickly challenged by a legislative opponent of the measure. Delegate McNeely, who had amended the resolution on the floor of the West Virginia House of Delegates (only to see the amendment lost in conference committee in the final version of the constitutional amendment),¹⁹⁴ charged in November 3 newspaper articles that the National Rifle Association was attempting to use the published advertisements as a foundation for a challenge to existing gun regulation statutes in the state.¹⁹⁵

In a *Charleston Gazette* article, McNeely said that

The NRA has consistently denied this [Amendment No. 1] would do anything to existing law—until now. The people of this state have been sandbagged. . . . They're [the NRA] running these ads to try to establish the legal intent of the voters . . . so that afterward they can go into court and say the people had this ad in front of them when they voted. . . . This [the November 2 advertisements] is not a political ad. It is a statement [of intent of the voters] they are going to take into court.¹⁹⁶

In at least two of the articles published on November 3, National Rifle Association representatives were quoted as previously stating that the amendment would not impact on current weapons laws. The West Virginia liaison of the NRA was quoted in the Morgantown *Dominion-Post* as having said "earlier" that "the amendment would have no impact on present gun laws. . . . It is designed to prevent local or state laws being passed that would ban guns. . . ."¹⁹⁷ In the *Charleston Gazette* article, an NRA lawyer¹⁹⁸ was quoted as having said that the NRA "doesn't plan to challenge any existing gun laws." He was further quoted as stating that "the amendment would merely strengthen a current West Virginia law that prohibits municipalities from banning guns."¹⁹⁹

In an election day statement, McNeely's charges were answered by NRA attorney Robert Dowlut.²⁰⁰ Charging that McNeely's statements were "the alarmist views of one who tried to defeat it [Amendment No. 1] in the Legislature," Dowlut was quoted as "reiterat[ing] the NRA position that passage of the amendment . . . would not replace present gun regulations." Responding to the charge that the "open carrying of constitutionally protected arms" language in the November 2 advertisement indicated an interpretation inconsistent with the current license law in the state, Dowlut was quoted as maintaining that "[p]resent laws essentially allow open carrying for legitimate purposes."²⁰¹

¹⁹⁴ HOUSE J. 583-84 (Mar. 20, 1985).

¹⁹⁵ *Charleston Gazette*, Nov. 3, 1986, § A, at 11, col. 3.

¹⁹⁶ *Id.*

¹⁹⁷ *Morgantown Dominion Post*, Nov. 3, 1986, § A, at 2, col. 1 (quoting Charles H. Cunningham, West Virginia Liaison for the Nat'l Rifle Ass'n).

¹⁹⁸ *Charleston Gazette*, Nov. 3, 1986, § A, at 11, col. 3.

¹⁹⁹ *Id.* (quoting Robert Dowlut as an "NRA lawyer").

²⁰⁰ *Charleston Gazette*, Nov. 4, 1986, § A, at 10, col. 1.

²⁰¹ *Id.*

Contending that the intent of the amendment was “to protect traditional gun uses and gun ownership—permitting people to protect themselves, their families and their owns, that sort of thing,” Dowlut denied that the November 2 advertisement was designed to support any challenge of current laws, and stated that he saw no challenge to existing weapon laws “unless the Legislature would enact some draconian gun law.” Dowlut’s views were echoed in that article by John Hopf, regional NRA representative, who was quoted as stating that the amendment “would not negate present gun regulations. If you needed a permit before, you’d still need one, or if state regulations say you can’t carry a loaded gun, you still couldn’t.”²⁰² And, in a statement informally indicating legislative intent, Delegate Humphreys, chairman of the House Committee on Constitutional Revisions that considered the measure in 1985, was quoted as stating that “our [the committee] opinion was that it would not put Matt Dillon back on the streets.”²⁰³

The Amendment No. 1 campaign ended, therefore, with the same exchange of views that characterized that measure’s progress through its legislative and campaign history—with opponents of the measure charging that the amendment appeared to impact on existing state laws, and proponents denying any intent to negate any such law. With the counting of the ballots cast in the November 4 election, the voters of the state resolved the issue of whether Amendment No. 1 was to place article III, section 22 in the state constitution. The amendment was ratified by a vote of 342,963 in favor to 67,168 opposed, carrying every county in the state.²⁰⁴

IV. THE IMPACT OF THE RIGHT-TO-BEAR-ARMS AMENDMENT

A. *The Impact on Existing State Weapons Statutes*

The effect of Amendment No. 1 on the constitution and statutes of West Virginia was a major point of controversy during the legislative and campaign history of the measure. As has been discussed,²⁰⁵ proponents generally took the position that the amendment would have no effect on existing state law (with the prominent exception of the November 2, 1986, advertisement)²⁰⁶ while opponents expressed concern about the broad, unconditional language of the amendment as it seemed to contradict existing state laws.²⁰⁷

With no real statement of legislative intent prepared by any of the legislative bodies that considered the proposal, and no existing record of even any substantial

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Official Election Returns, General Election, 1986 (available in Secretary of State’s office, State Capitol, Charleston, W. Va.).

²⁰⁵ See generally *supra* notes 122-204 and accompanying text.

²⁰⁶ See *supra* note 179 and accompanying text.

²⁰⁷ See generally *supra* notes 122-204 and accompanying text.

research done by any of the legislative committees that recommended the measure for passage, there is little in the legislative history to assist in fixing any specific meaning to the words, phrases, or the whole of the amendment. All that can be said without question was that legislative proponents consistently took the position that the amendment, if adopted, would not change existing laws, and that legislative opponents consistently attempted, with no ultimate success, to amend the measure to assure that the state would retain its ability to maintain the existing state of the law.²⁰⁸ With that general description of legislative activity, it could be argued that the legislative process on the measure was marked by a very real lack of any research, statements, or other formal procedures that might assist in assigning formal meaning to the amendment.

The campaign history of the amendment is hardly more helpful than the legislative history. There was virtually no opposition to the measure, and certainly no organized opposition.²⁰⁹ Except for the notable exception of the November 2 advertisement, the proponents used their organized campaign to reaffirm the idea that Amendment No. 1 would have no impact on existing state laws.²¹⁰

So if the language in the November 2 advertisement suggesting that the amendment was inconsistent with the existing state license law is discounted as either a misdrafted advertisement or an ineffective attempt to lay the groundwork for a legal challenge to those statutes,²¹¹ there would seem to be no real argument that legislative and voter intent was to do anything other than place an amendment in the state constitution that would be completely consistent with existing state law. That general intent seems, on the available record, to be so pervasive on the part of both legislative and voter proponents that any analysis on the impact of the amendment would have to be based upon that foundation of intent.

What do the terms in the amendment mean? The general rule in West Virginia is that constitutional construction is governed by the same general rules as those applied in statutory construction,²¹² so the meaning of a phrase or terms would generally first be sought in the plain and ordinary meaning of the words themselves.²¹³ To the extent that no ambiguity or obscurity exists in the meanings, such a term or phrase should be applied, and not interpreted or construed.²¹⁴

²⁰⁸ *Id.*

²⁰⁹ The Secretary of State's office had no committee registered in opposition to Amendment No. 1 as of Feb. 27, 1987.

²¹⁰ See *supra* note 179 and accompanying text; see also *supra* notes 122-204 and accompanying text.

²¹¹ The November 2 advertisement appears to be inconsistent with public statements of proponents of Amendment No. 1 both before and after the publication of that advertisement. See *supra* notes 179-193 and accompanying text.

²¹² *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973).

²¹³ *Ray v. McCoy*, 321 S.E.2d 90, 92 (W. Va. 1984); *State ex rel. Dunbar v. Stone*, 159 W. Va. 331, 334-35, 221 S.E.2d 791, 793 (1976) (and cases cited therein).

²¹⁴ *Foster v. Cooper*, 155 W. Va. 619, 622-23, 186 S.E.2d 837, 839 (1972). See also *Ray*, 321 S.E.2d at 92; *Dunbar*, 159 W. Va. at 335, 221 S.E.2d at 793.

If there is, however, an unclear or ambiguous phrase or term, interpretation may proceed according to well-recognized rules of construction of written documents, which allow consideration of extrinsic evidence of the meaning of the constitutional provision.²¹⁵ This may include recourse to legislative proceedings,²¹⁶ definitions given phrases and terms by previous judicial decisions²¹⁷ (although the West Virginia court has declared that it is not bound by decisions of other state courts or federal courts as to meaning of terms,²¹⁸ a potentially important point in the analysis of new article III, section 22 of the state constitution), contemporaneous and practical construction,²¹⁹ and finally, consideration of the ascertainable intent of the people in adopting the amendment.²²⁰

The amendment then must be considered as a whole with effect given, if possible, to every part and word of the provision.²²¹ Furthermore, the amendment as a whole should be applied to the West Virginia Constitution and existing statutes as "the latest expression of the will of the people."²²² The general rule in such application is that any antecedent constitutional provision that is inconsistent with the adopted amendment to the extent that harmonization of the two is impossible, or any antecedent statute with no reasonable construction that would uphold its constitutionality in light of the new constitutional language, would be impliedly, if not expressly, repealed.²²³

Early in the history of the state, the West Virginia court recognized the state constitution as a limitation on the plenary power of the legislature to act. In *Ex parte William Stratton*,²²⁴ an 1866 decision, the court noted that "[o]ur legislature possessing all the legislative power of the State, it follows that it [was] competent for it to pass [the act], prescribing the test oath in question, unless such power is excluded by the terms of the constitution, . . . or by clear and necessary implication."²²⁵ That view of legislative power in the state pursuant to article III, section 2 of the constitution²²⁶ being plenary in nature unless "foreclosed by some other

²¹⁵ See generally *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 122 S.E.2d 436 (1961).

²¹⁶ See generally *May v. Topping*, 65 W. Va. 656, 64 S.E. 848 (1909).

²¹⁷ *Ex parte Bornee*, 76 W. Va. 360, 363, 85 S.E. 529, 530 (1915). "The settled construction of a constitutional provision made before its adoption into the Constitution of this State should be held as the just interpretation thereof." *Id.* at 363-64, 85 S.E. at 530, citing *People v. Webb*, 38 Cal. 467).

²¹⁸ *State v. Wender*, 149 W. Va. 413, 420, 141 S.E.2d 359, 364 (1965).

²¹⁹ *Bornee*, 76 W. Va. 360, 85 S.E. 848. See also *State ex rel. Charleston v. Sims*, 132 W. Va. 826, 839-40, 54 S.E.2d 729, 737 (1949). But see *May*, 65 W. Va. at 664-65, 64 S.E. at 851-52 (for limitations on use of contemporaneous or practical construction).

²²⁰ *Brotherton*, 157 W. Va. at 110-11, 207 S.E.2d at 427.

²²¹ *Diamond*, 146 W. Va. at 553-54, 122 S.E.2d at 442-43.

²²² *State ex rel. Kanawha County Bldg. Comm. v. Paterno*, 160 W. Va. 195, 203, 233 S.E.2d 332, 337 (1977).

²²³ *Id.* at 203-04, 233 S.E.2d at 337.

²²⁴ *Ex parte Stratton*, 1 W. Va. 304 (1866).

²²⁵ *Id.* at 305.

²²⁶ "All power is vested in, and consequently derived from, the people." W. VA. CONST. art. III,

provision of the Constitution” was reaffirmed as being beyond question in *Kanawha County Public Library v. County Court*,²²⁷ a 1958 West Virginia decision.

At the same time, the court in *Kanawha County Public Library* noted that an “Act of the Legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.”²²⁸ With the foundation of clear legislative and voter intent that the right-to-bear-arms amendment not impact on any existing state laws, the question becomes one of whether the terms, phrases, and the whole of the new constitutional language can be given reasonable meanings that cause the amendment to be applied and construed in such a way as to carry out that intent. The thrust of this analysis is to suggest that Amendment No. 1 must be given meaning as a whole that is consistent with legislative and voter intent to retain all existing state laws if at all possible, even if the meaning of a specific term or phrase within the amendment in the plain and ordinary meaning of the words themselves²²⁹ might seem inconsistent with existing state law. Given a clear legislative and voter intent to retain existing case and statutory law coupled with the complete absence of a statement expressing any intent to repeal such case law or statute, the “guiding star” in the analysis should be the preservation, if possible, of existing statutes and case law.

It is beyond the scope of this Article to delve into the current, historical, and possible meanings for each term or phrase in the amendment. But several more general comments can be made about the wording of Amendment No. 1 that are based not upon a detailed common law study of the meaning of terms, but rather upon case law and statutory treatment of those terms and phrases in West Virginia during the development of its weapons statutes. Other meanings can be assigned based upon the clear intent of the legislature and the voters in passage of Amendment No. 1. So it might be suggested that much of the assignment of meaning to the amendment can be found within that historical context.

First, what is a “person” in the context of Amendment No. 1? It can be argued that the voters believed that term meant “citizen” as they voted for the

§ 2. See also W. VA. CONST. art. VI, § 1 (“The legislative power shall be vested in a Senate and House of Delegates.”).

²²⁷

Since *Ex Parte Stratton*, 1 W. Va. 305, the position that this section [W. VA. CONST. art. III, § 2] vests in the Legislature of this State almost plenary powers on every subject, not foreclosed by some other provision of the Constitution, has not been questioned. The powers of the Legislature of this State are not to be confused with those of the Congress of the United States. The Federal Constitution is a grant of power, while the Constitution of this State is a restriction of power. While we look to the Federal Constitution to see what Congress may do, we look to our Constitution to see what the Legislature may not do.

Kanawha County Pub. Library v. County Court, 143 W. Va. 385, 390-91, 102 S.E.2d 712, 716 (1958).

²²⁸ *Id.* at 391, 102 S.E.2d at 716.

²²⁹ See *supra* notes 213-14 and accompanying text.

measure—in fact, the Cooperative Extension Service publication explaining all of the amendments proposed in the 1986 general election described Amendment No. 1 as one that “basically . . . would assure *citizens* of West Virginia of the right to bear arms.”²³⁰ The October 26, 1986, advertisement²³¹ supporting the passage of the measure flatly stated that “Yes on Amendment #1 protects the rights of all *law-abiding citizens* in West Virginia. . . .”²³² And even the November 2, 1986, advertisement²³³ assured the reader that “excluded from this right [to keep and bear arms] would be convicted felons, mental incompetents, minors and illegal aliens.”²³⁴ All of the excluded categories listed are *persons*, but none enjoys the full rights of *citizens*.

The March 1985 *Analysis*²³⁵ supplied to the legislature by proponents of the measure indicated “[t]he proposed amendment guarantees an individual right.” But, it went on to say that “[n]evertheless, a person in a high risk category would not enjoy this right. That, e.g., felons, minors, and the mentally infirm are treated differently has gained . . . universal acceptance. . . .”²³⁶ Again, the listed categories are those without full citizenship rights.

So, the term “person” in the amendment would have to be construed to have a narrower meaning than the broad definition of “a human being”²³⁷ generally assigned the term. It seems to be clear that the understanding and intent of the voter was that the term “person” mean “a person who is a citizen.”

²³⁰ See *supra* notes 171-175 and accompanying text.

²³¹ See *supra* note 177 (Text at APPENDIX I, *infra* at 1179).

²³² *Id.*

²³³ See *supra* note 179 (Text at APPENDIX J, *infra* at 1180).

²³⁴ *Id.*

²³⁵ See *supra* note 127 (Text at APPENDIX H, *infra* at 1176).

²³⁶ *Id.*

²³⁷ BLACK'S LAW DICTIONARY 1028 (5th ed. 1979). The term “person” in the W. VA. CODE also includes corporations if not restricted by the context of its use. 21A MICHIE'S JUR. *Words and Phrases* 304 (1987). The inclusion of a specific prohibition against employees being armed upon the premises of an employer without a license in the 1925 statute would imply that the term “person” in the 1909 statute included the right of an artificial person to arm itself through its agents upon its own premises.

The necessity of reading the word “person” more narrowly than its common meaning in order to follow legislative and voter intent can be seen in the impact of the use of the term in other constitutions. Only four other state constitutions use the term “person” in their right-to-bear-arms provisions (COLO. CONST. art. II, § 13; DEL. CONST. art. I, § 20; MICH. CONST. art. 1, § 6; MONT. CONST. art. II, § 12). A Michigan statute prohibiting possession of a pistol by an unnaturalized foreign born resident (a legal alien), which is comparable to current W. VA. CODE § 61-7-2 (1984) (alien cannot obtain a license to carry a weapon), W. VA. CODE § 61-7-8 (1984) (legal alien cannot keep or bear a firearm except for lawful hunting purposes), and W. VA. CODE § 61-7-9 (1984) (supply of weapon to legal alien except for hunting purposes unlawful), was declared unconstitutional by the Michigan court in *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922) because of the use of the term “person” in the Michigan constitution. The Colorado court, applying that state's right-to-bear-arms constitutional language to a statute prohibiting the possession by a felon of a firearm, found that a felon-defendant charged under that statute could raise the affirmative defense that such possession was for a constitutionally protected purpose, thereby recognizing that the use of the term “person” did include felons in the right to bear arms. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

The phrase "has the right to keep and bear" is easily defined consistent with the intent of the legislature and voters to preserve existing state law. It would mean, in the narrowest interpretation, the traditional right in West Virginia law to own, keep, and carry firearms on one's own property or premises.²³⁸ That is a right that has never been questioned by West Virginia law from the inception of the state.²³⁹ In the March 1985 *Analysis*, proponents of the amendment generally described the proposed measure as one "explicitly protect[ing] the *traditional lawful* rights that gun owners assumed were guaranteed in West Virginia."²⁴⁰ The October 26 advertisement declared that "Amendment #1 keeps Federal and State firearms laws the law,²⁴¹ and proponents were consistently quoted state wide as declaring that the amendment would keep intact the license law in West Virginia.²⁴²

On the other hand, the November 2 advertisement suggested that the right to carry weapons without a license would extend to open carrying without license.²⁴³ That advertisement, as has been noted, was effectively disclaimed by prominent proponents of the amendment shortly after its publication,²⁴⁴ and there is certainly no other suggestion of such a reading of the amendment to be found in any other statements of proponents. More importantly, any reading of the amendment to repeal the existing license statute would be completely inconsistent with legislative and voter intent as well as understanding of the amendment; and would be totally inconsistent with traditional weapons regulation in the state that, since early in the century, has required either a hunting license, a gun permit, or statutory authorization to carry a weapon off one's own premises.²⁴⁵

What meaning should be assigned the term "arms" in the amendment? Certainly this term may be defined by the common law use of the word, but the context of the amendment suggests a clear meaning that is already established in the case law of the state. As has been noted, definitions given phrases and terms by previous judicial decisions, such as the specific refusal of the *Workman* court to classify pistols, revolvers, and other handguns as constitutionally-protected weapons,²⁴⁶ are incorporated into succeeding constitutional amendments and statutes unless expressly repealed, or repealed by necessary implication.²⁴⁷ Certainly, no competent drafter of firearms laws or constitutional amendments could be unaware of the specific holding in *Workman* that handguns are not constitutionally pro-

²³⁸ See generally *supra* notes 1-121 and accompanying text.

²³⁹ See *supra* note 237.

²⁴⁰ See generally *supra* notes 122-204 and accompanying text.

²⁴¹ See *supra* note 177.

²⁴² See generally *supra* notes 122-204 and accompanying text.

²⁴³ See *supra* note 179.

²⁴⁴ See *supra* notes 200-204 and accompanying text.

²⁴⁵ See *supra* notes 122-204 and accompanying text.

²⁴⁶ *Workman*, 35 W. Va. at 373, 14 S.E. at 11.

²⁴⁷ See *supra* notes 216-21 and accompanying text. See also *Kanawha County Pub. Library*, 143 W. Va. at 391, 102 S.E.2d at 712.

tected "arms" in West Virginia.²⁴⁸ Though it is true that *Workman* was defining terms in the militia context of the United States Constitution second amendment, the language of *Workman*²⁴⁹ as well as a line of cases extending through the state's case law on firearms strongly suggests that such easily concealable weapons have never been recognized by the legislature or by the West Virginia Supreme Court of Appeals as having an equal status with long-guns, such as rifles and shotguns.²⁵⁰

Arguably, the term "arms" can include only those weapons that are recognized under state law and tradition as used for the "defense of self, family, home and state."²⁵¹ There is no language following the term "arms," such as "including pistols, revolvers and like firearms," that would have addressed the *Workman* definition of "arms" in the state. The term would exclude, therefore, such handguns. Also excluded would be other weapons not recognized in the state as traditional firearms for use in all of the listed uses. What would be included, therefore, would be the long-guns, such as rifles and shotguns, and such firearms that are appropriate for all the listed constitutional uses and that have traditionally received recognition from the West Virginia court as appropriate personal and militia weapons.²⁵²

Whatever the classes of firearms protected by the amendment, does the language of the amendment permit the carrying of those weapons for those particular purposes without a license to do so? Contextually, this requires considering the phrase "has the right to keep and bear" with the phrase "for the defense of

²⁴⁸ *Workman*, 35 W. Va. at 373, 14 S.E. at 11.

²⁴⁹ Although the primary analysis in *Workman* was of militia-type weapons, or those "arms to be used in defending the State and civil liberty," the *Workman* court clearly expressed its attitude towards the carrying of pistols and revolvers in describing such firearms as those "usually employed in brawls, street fights, duels, and affrays, and [those that] are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state." *Id.*

²⁵⁰ Prior to 1925, long-guns could apparently be carried in the state without a permit. See *supra* notes 71-82 and accompanying text for discussion of inclusion of long-guns in 1925 firearms statute. See discussions of *Workman*, *Barnett*, *Blazovitch*, and *Kinney*, *supra* notes 20-64 and accompanying text for the court's interpretation of legislative intent and the court's support of that intent to suppress the carrying of pistols, revolvers, and other such handguns.

²⁵¹ W. VA. CONST. art. III, § 22 (1986) (the right-to-bear-arms amendment).

²⁵² The contextual analysis suggests that the phrase "for the defense of self, family, home and state" would include, because of the use of the conjunctive "and," only those weapons recognized for use in all categories listed. A tear gas pen might be an appropriate personal defense weapon, but would not be an appropriate militia (defense of state) weapon. On the other hand, a sophisticated military weapon would not be an appropriate personal defense weapon. Further support for the conjunctive analysis is seen in the inclusion of the phrase "and for lawful hunting and recreational use," set off by a comma from the preceding phrase, in the amendment. This suggests that such use is in addition to the weapons included in "the defense of self, family, home and state."

The alternative available to the drafter of the amendment would have been to use the disjunctive "or" in the phrase, making it read "for the defense of self, family, home or state." This would have included any weapon appropriate for use in any one of the four categories, rather than the conjunctive inclusion of only those arms appropriate in all four categories as in the amendment as passed.

self, family, home and state.” These two phrases together do suggest a right to defense while armed with constitutionally protected weapons. This could have the effect of creating an exception to the *Foley*²⁵³ holding that the right to self-defense under the West Virginia Constitution²⁵⁴ did not include the right to armed self-defense.²⁵⁵ Such an exception would recognize the right to armed self-defense under the standards established in *Workman*²⁵⁶ and *Barnett*,²⁵⁷ provided that the amendment’s language is found to be as broad as the right to self-defense.²⁵⁸ Yet, even if a right to armed defense as broad as the right to self-defense is found to have been created by the passage of Amendment No. 1, there is no language in that amendment modifying the strict standards necessary to establish the right to self-defense enumerated in *Barnett* and *Workman*.²⁵⁹

The final phrase in the amendment—“and for lawful hunting and recreational use”—is the one that has the clearest meaning. It incorporates the traditional statutory exception to the license statutes which allows a hunting license to serve as a license to carry the lawful hunting weapon under circumstances as set out by the hunting regulations.²⁶⁰

How can the right-to-bear-arms amendment be summed up in the context of state law, case law in West Virginia through the development of weapons statutes, and the implications of the amendment itself? Several conclusions might be suggested:

²⁵³ *Foley*, 128 W. Va. 166, 35 S.E.2d 854 (discussed *supra* notes 112-119 and accompanying text).

²⁵⁴ W. VA. CONST. art. III, § 1. See *Workman*, 35 W. Va. at 370-71, 14 S.E. at 10.

²⁵⁵ *Foley*, 128 W. Va. at 181, 35 S.E.2d at 861-62; see also *supra* note 118 and accompanying text.

²⁵⁶ *Workman*, 35 W. Va. at 374, 14 S.E. at 11-12.

²⁵⁷ *Barnett*, 34 W. Va. at 77-78, 11 S.E. at 736.

²⁵⁸ Self-defense in West Virginia is defined as the right to defend one’s self, one’s relatives, and one’s habitation and property. 9B MICHIE’S JUR. *Homicide* § 39, 46-47 (1984) (and cases cited therein). A more general definition is “the right of a man to repel force by force even to the taking of a life in defense of his person, property or habitation, or of a member of his family, against anyone who manifests, intends, attempts or endeavors by violence or surprise, to commit a forcible felony.” BLACK’S LAW DICTIONARY 1219 (5th ed. 1979).

Any defense of state is lawful only upon a lawful summons from the state. See *Zerillo*, 219 Mich. 635, 189 N.W. 927 (Michigan court implied condition of lawful summons into right-to-bear-arms language similar to that in W. VA. CONST. Art. III, § 22). Logic would compel such an implication, since a person could not defend a state against that state’s will.

The phrase “defense of self, family, home” in Amendment No. 1 would appear, by the use of the word “home” rather than the term “property” or the term “premises,” to be somewhat narrower than either the accepted definition of self-defense or the statutory exception from the license law for carrying arms “upon one’s premises.” W. VA. CODE § 61-7-3, 61-7-8 (1984).

²⁵⁹ For discussion of incorporation of current state of the law into constitutional amendments, see *supra* notes 212-29 and accompanying text.

²⁶⁰ All the statutes prior to the 1925 amendments apparently did not address the carrying of long-guns. See *supra* note 250. The 1925 statute, and all amendments since that year, have included in the requirement for a license to carry a high powered rifle or other such firearms an exemption for such weapons carried incident to lawful hunting use. See *supra* note 82 (1925 statute, APPENDIX E, *infra* at 1167), *supra* note 120 (1975 statute, APPENDIX F, *infra* at 1173).

— A citizen may own, keep at his home, and use in defense of himself, his family, and his home firearms of a kind and character determined by the state, except that the state may not deny such a citizen access to an assortment of firearms sufficient to accomplish the constitutionally-protected defenses. Handguns, under the *Workman* analysis, would not be included as constitutionally-protected weapons;²⁶¹

— Such a citizen may affirmatively assert the right of self-defense to any prosecution under the license laws of the state, but only if the self-defense satisfies the *Barnett-Workman* standards;²⁶²

— Such a citizen may carry firearms according to hunting license regulations; and

— Other than the constitutional right to keep a reasonable assortment of constitutionally-protected weapons at his home and the right to advance the affirmative defense of self-defense against a license law violation if the weapon used was a constitutionally-protected one, such a citizen is subject to all existing weapon statutes in the state.

Again, the above discussion is limited to an examination of the meaning of the amendment in the context of an intended presumption that it is consistent with state common law and all constitutional provisions. A complete analysis of the amendment would require a thorough analysis of the common law and statutory meanings assigned the terms and phrases. It is suggested, however, that if the intent of the legislature and voters was to prepare and approve a constitutional amendment consistent with existing law and cases—and there appears to be abundant evidence to support such a contention—²⁶³ the guiding star of that intent must necessarily lead to an interpretation that places reasonable meanings on the terms and phrases, and the entirety of the amendment consistent to the greatest extent possible with the current state of the law in West Virginia.

B. *The Impact on Future State Weapons Statutes*

From statements by the proponents of Amendment No. 1, it appears that the primary intent of the measure was to constitutionalize current state law forbidding municipalities from banning the ownership of firearms.²⁶⁴ It would appear that this purpose would be accomplished. However, the *Workman*²⁶⁵ holding that handguns were not constitutionally-protected weapons could well serve to withhold this constitutional protection from such firearms. If the amendment was held to overturn the *Workman* holding, despite the lack of specific language implying such effect, handguns would receive constitutional protection.

²⁶¹ See *supra* note 35 and accompanying text.

²⁶² See *Barnett-Workman* discussion *supra* notes 20-46 and accompanying text.

²⁶³ See *supra* notes 122-204 and accompanying text.

²⁶⁴ W. VA. CODE § 61-7-8 (1984).

²⁶⁵ See *supra* note 35 and accompanying text.

Under any interpretation of the amendment, some kinds of firearms must be available for ownership and carrying about one's home. The exact kinds of weapons might well be subject to regulation in the future, as long as a reasonable assortment remained available sufficient to provide the type of defenses allowed in the constitution.

The only other impact on future state firearms regulations that the amendment might have would be the creation of a constitutional self-defense exception to all license law provisions, provided that the weapon used is a constitutionally protected one and the self-defense satisfies the standards established by *Barnett-Workman* (or some future state standard).²⁶⁶ Arguably, the amendment has created a constitutional right to armed self-defense, to the extent that the language of the amendment is read as coextensive with the recognized right to self-defense.

The impact on future state actions would be dependent on the application of the amendment to current statutes and case law. To the extent that the amendment is interpreted consistent with those statutes and holdings, future development of the statutes may continue. Any repeal by implication of state law would preclude the state from acting in that area in the future.

V. CONCLUSION

The Right to Keep and Bear Arms Amendment to the West Virginia Constitution was a popular amendment both in the legislature and among the voters of the state. But the legislative process failed to give the amendment's language any real definition beyond a general sense that passage of the amendment would leave undisturbed current law and constitutionalize existing state law prohibiting municipal governments from banning the ownership of weapons or ammunition.²⁶⁷ Sadly lacking in the legislative process was any indication of independent research on the part of members or staff. The very popularity of the concept seemed to insulate the proposed amendment from the "hard look" analysis appropriate for amendments to a constitution.

In searching for a framework for analysis of Amendment No. 1, a review of the history of weapon regulation in West Virginia²⁶⁸ indicates that the state has historically allowed a citizen to own and keep upon his premises virtually any firearm. Only federal law prevents the ownership and possession of particular weapons upon one's premises in the state. The attitude of the state has been, it seems, that every citizen has a right to arm his "castle" as he sees fit.

Coupled with this lenient attitude toward ownership and possession upon one's own premises has been a negative attitude about possession of weapons away

²⁶⁶ See *supra* notes 36-42 and accompanying text.

²⁶⁷ W. VA. CODE § 61-7-8 (1984).

²⁶⁸ See *supra* notes 1-121 and accompanying text.

from one's own premises. From its inception, the state government steadily increased regulation of firearms carried off one's premises. In the face of the labor and social unrest of the late nineteenth and early twentieth century, the state toughened its regulation of firearms to prohibit the carrying of weapons without either statutory authorization or a license (either a license to carry a firearm or a hunting license).²⁶⁹

The current state of the law represents that balance—a virtually unlimited right to purchase and possess weapons upon one's own premises, but a highly restrictive carrying statute. It was in this balanced environment that the Right to Keep and Bear Arms Amendment was introduced and approved.

As is indicated by a review of the legislative and campaign history of the amendment,²⁷⁰ there was no indication of any intent to upset that balance during legislative debate by the proponents of the measure. In fact, it might be suggested that the primary argument used to gain passage was that the constitutional amendment would not impact on the existing state of the law.

As was indicated at the outset, the concentration of this Article has been an overview of the historical development of firearms regulation in the state and the legislative and campaign history of the approval of Amendment No. 1. Such an overview can hopefully serve as a basis for further study of the impact of the passage of the amendment on both the existing state of the law and future statutes.

A general look at the possible impact of the amendment has indicated,²⁷¹ however, that the analytical foundation for ascertaining that impact ought to be the legislative and voter intent that the amendment be interpreted consistent with the current state of the law. Adoption of such a foundation would make that intent the "guiding star" of judicial interpretation of the amendment, with each word, phrase, and the entirety of the amendment reasonably defined to remain consistent with the existing state of weapons. Finally, the amendment as defined consistent with the current state of the law has been briefly reviewed as to its possible impact on future statutes.²⁷²

At the outset, the desire of the legislature and the voters of West Virginia to place the new article III, section 22 in the constitution was recognized. The question addressed in this Article has been not whether some right was granted, but rather how the amendment fits into the history of the state, its current weapons laws, and its ability to respond to future situations with statutory provisions.

²⁶⁹ 1882 W. Va. Acts ch. 135, § 7 (*see supra* notes 10-12 and accompanying text); 1909 W. Va. Acts ch. 51, § 7 (*see supra* notes 49-54); 1925 W. Va. Acts ch. 3, § 7 (1st Extraordinary Sess.) (*see supra* notes 82-89 and accompanying text).

²⁷⁰ *See supra* notes 122-204 and accompanying text.

²⁷¹ *See supra* notes 205-260 and accompanying text.

²⁷² *See supra* notes 267-271 and accompanying text.

Given the legislature's failure to provide clear legislative intent in any formal sense, it shall be up to the judicial branch of the state to interpret the amendment consistent with its language and demonstrated intent. With that interpretation, the court may continue the state's traditional legal attitude toward firearms by finding the amendment consistent with state law, or it may embark the state on an uncharted course of repeal and revision of long-standing statutes and case law.

It might be suggested, therefore, that the lack of formal legislative intent creates a situation in which the judicial branch of the state government must chart the public policy of the state in weapons regulation. A literal reading of the amendment would certainly seem at odds with the clear intent of the legislature (although informally expressed) and the voters. The West Virginia Supreme Court of Appeals will therefore eventually be asked to determine the future public policy of the state in the absence of formal legislative findings as to the impact of Amendment No. 1 on current and future firearms regulation in West Virginia. It is, perhaps, ironic that such a lack of legislative research and formal legislative findings, coupled with the broad, unqualified language of Amendment No. 1,²⁷³ have combined to place the future of firearms regulation, heretofore primarily a legislative activity, in the hands of the judicial branch of state government.²⁷⁴

²⁷³ The drafting of Amendment No. 1 suggested an unconditional grant to all persons, particularly when read in context with existing state constitutional provisions. *Compare with* W. Va. Const. art. III, § 22 (1986).

²⁷⁴ In a case still in litigation as this Article is prepared for publication, A West Virginia circuit court judge has declared W. VA. CODE § 61-7-1 (1984) unconstitutional. In *State ex rel City of Princeton v. Buckner*, No. 87-C-337-F (Mercer County Cir. Court, May 12, 1987) (order denying writ of mandamus), Chief Judge John R. Frazier found that article 3, section 22 of the West Virginia Constitution (the right to keep and bear arms amendment) has voided W. VA. CODE § 61-7-1 insofar as it requires a license for the carrying of firearms.

Judge Frazier stayed the effect of his findings until the matter could be resolved by the West Virginia Supreme Court of Appeals, and certified the question of the constitutionality of the statute as well as the question of the power of the legislature to regulate the right to keep and bear arms to that court. *Buckner* was filed with the Supreme Court of Appeals on June 3, 1987. As of June 15, 1987, no further action had been taken on the matter.

[In the following appendices, the original citation form and style remains intact.
Ed.]

APPENDIX A

W. VA. CODE Ch. CLIII, § 8 (1868)

8. 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.

APPENDIX B

1872-73 W. VA. ACTS ch. 226, §§ 168-69

Chapter CCXXVI

168. 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.

169. If any justice of the peace shall willfully fail to execute the duties imposed on him by the . . . one hundred and sixty-eighth [section] of this act he shall be deemed guilty of a misdemeanor, and liable to an indictment in the circuit court of his county for the same, and if found guilty, shall be fined not exceeding fifty dollars.

APPENDIX C

1882 W. VA. ACTS ch. 135, § 7

CHAPTER CXXXV

7. If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung 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 not less than twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one, nor more than twelve months; 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 other pistol, dirk or bowie knife.

APPENDIX D

1909 W. VA. ACTS ch. 51, § 7

CHAPTER 51.

Sec. 7. If any person, without a state license therefor, carry about his person any revolver or other pistol, dirk, bowie knife, slung shot, razor, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind and character, he shall be guilty of a misdemeanor, and upon conviction thereof be confined in the county jail for a period of not less than six nor more than twelve months for the first offense; but upon conviction of the same person for the second offense in this state, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years, and in either case fined not less than fifty nor more than two hundred dollars, at the discretion of the court;

and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense, and if it shall be the second offense it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense nor in introducing evidence to prove the same on the trial; *provided*, that boys under the age of eighteen years, upon the second conviction, may, at the discretion of the court, be sent to the reform school of the state. Any person may obtain a state license to carry any such weapon within any county in this state by publishing a notice in some newspaper published in the county in which he resides, setting forth his name, residence and occupation, and that on a certain day he will apply to the circuit court of his county for such state license, and after the publication of such notice for at least ten days before said application is made and at the time stated in said notice upon application to said circuit court, it may grant such person a license in the following manner, to-wit:

First. Such person must prove to said court that he is over twenty-one years of age; that he is a person of good moral character, of temperate habits, and is not addicted to intoxication, and has not been convicted of a felony nor of any other offense involving the use on his part in an unlawful manner of any such weapon.

Second. He shall file with said court an application stating the purpose or purposes for which he desired to carry any such weapon, and shall show in such application, and prove to the court, good reason and cause for carrying such weapon. Thereupon, if such circuit court be satisfied from the proof that there is good reason and cause for such person to carry such weapon, and all of the other conditions of this act be complied with, said circuit court may grant said license; but before the said license shall be effective such person shall pay to the sheriff, and the court shall so certify in its order granting the license, the sum of ten dollars, and shall also file a bond with the clerk of said court, in the penalty of three thousand five hundred dollars, with good security, signed by a responsible person or persons, or by some surety company, authorized to do business in this state, conditioned that such applicant will not carry such weapon except in accordance with his said application and as authorized by the court, and that he will pay all costs and damages accruing to any one by the accidental discharge or improper, negligent or illegal discharge or use of said pistol. Any such license shall be good for one year, unless sooner revoked, and be co-extensive with the state, and all licenses collected hereunder shall be accounted for to the auditor and paid over by the sheriffs as other license taxes are collected and paid, and the state tax commissioner shall prepare all suitable forms for licenses and bonds and certificate showing that such license has been granted, and do anything else in the premises to protect the state and to see to the enforcement of this act.

Provided, that nothing herein shall prevent any person from carrying any such weapon, in good faith and not for a felonious purpose, upon his own premises, nor shall anything herein prevent a person from carrying any such weapon (and if

it be a revolver or other pistol unloaded) from the place of purchase to his home or place of residence or a place of repair and back to his home or residence; and, *provided, further*, that in cases of riot, public danger and emergency, a justice of the peace or other person issuing a warrant may authorize [sic] a special constable and his posse to carry weapons for the purpose of executing a process, and a sheriff in such cases may authorize a deputy or posse to carry weapons, but the justice shall write on his docket the causes and reasons for such authority and the person so authorized, and index the same, and the sheriff or other officer shall write out and file with the clerk of the county court the reasons and causes for such authority and the person so authorized, and the same shall always be open to public inspection, and such authority shall authorize such special constable, deputies and posses to carry weapons in good faith only for the specific purposes and times named in such authority, and upon the trial of every indictment the jury shall inquire into the good faith of the person attempting to defend any such indictment under the authority granted by any such justice, sheriff or other officer, and any such persons so authorized shall be personally liable for the injury caused any one by the negligent or unlawful use of any such weapon. It shall be the duty of all ministerial officers, consisting of the justices of the peace, notaries public and other conservators of the peace of this state, to report to the prosecuting attorney of the county the names of all persons guilty of violating this section, and any person wilfully failing so to do, shall be guilty of a misdemeanor and shall be fined not exceeding two hundred dollars, and shall, moreover, be liable to removal from office for such wilful failure: and it shall likewise be the duty of every person having knowledge of the violation of this act, to report the same to the prosecuting attorney, and to freely and fully give evidence concerning the same, and any one failing so to do, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one hundred dollars; *provided, further*, that nothing herein contained shall be so construed as to prohibit regularly elected sheriffs, their regularly appointed deputies, who collect taxes in each county, and all regularly elected constables in their respective counties and districts, and all regularly appointed police officers of their respective cities, towns or villages, from carrying such weapons as they are now authorized by law to carry, who shall have given bond in the penalty of not less than thirty-five hundred dollars, conditioned for the faithful performance of their respective duties, which said officers shall be liable upon their said official bond, for the damages done by the unlawful or careless use of any such weapon, whether such bond is so conditioned or not.

All other acts or parts of acts inconsistent with this act are hereby repealed.

APPENDIX E

1925 W. VA. ACTS (First Extraordinary Sess.) ch. 3, § 7

§ 7. Carrying weapons.

If any person, without a state license therefor, carry about his person any revolver or other 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 and upon conviction thereof be confined in the county jail for a period of not less than six nor more than twelve months for the first offense; but upon conviction of the same person for the second offense in this state, he shall be guilty of a felony and be confined in the penitentiary not less than one or more than five years, and in either case fined not less than fifty nor more than two hundred dollars, in the discretion of the court; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense, and if it shall be the second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record of evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense nor in introducing evidence to prove the same on the trial; *provided*, that boys or girls under the age of eighteen years, upon the second conviction, may, at the discretion of the court, be sent to the industrial homes for boys and girls, respectively, of the state. Any person desiring to obtain a state license to carry any such weapon within one or more counties in this state shall first publish a notice in some newspaper, published in the county in which he resides, setting forth his name, residence and occupation, and that on a certain day he will apply to the circuit court of his county for such state license; and after the publication of such notice for at least ten days before said application is made and at the time stated in said notice upon application to said court, it may grant such person a license in the following manner, to-wit:

The applicant shall file with said court his application in writing, duly verified, which said application shall show:

First: That said applicant is a citizen of the United States of America.

Second: That such 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 next prior thereto.

Third: That such applicant is over twenty-one years of age; that he is a person of good moral character, of temperate habits, not addicted to intoxication, and has not been convicted of a felony nor of any offense involving the use on his part of such weapon in an unlawful manner.

Fourth: The purpose or purposes for which the applicant desires to carry such

weapon and the necessity therefor and the county or counties in which said license is desired to be effective.

Upon the hearing of such application the court shall hear evidence upon all matters stated in such application and upon any other matter deemed pertinent by the court, and if such court be satisfied from the proof that there is good reason and cause for such person to carry such weapon, and all of the other conditions of this act be complied with, said circuit court or the judge thereof in vacation, may grant said license for such purposes, and no other, as said circuit court may set out in the said license (and the word "court" as used in this act shall include the circuit judge thereof, acting in vacation); but before the said license shall be effective such person shall pay to the sheriff, and the court shall so certify in its order granting the license, the sum of twenty dollars, and shall also file a bond with the clerk of said court, in the penalty of three thousand five hundred dollars, with good security, signed by a responsible person or persons, or by some surety company, authorized to do business in this state, conditioned that such applicant will not carry such weapon except in accordance with his said application and as authorized by the court, and that he will pay all costs and damages accruing to any person by the accidental discharge or improper, negligent or illegal use of said weapon or weapons. Any such license granted after this act becomes effective shall be good for one year, unless sooner revoked, as hereinafter provided, and be co-extensive with the county in which granted, and such other county or counties as the court shall designate in the order granting such license; except that regularly appointed deputy sheriffs having license shall be permitted to carry such revolver or other weapons at any place, within the state, while in the performance of their duties as such deputy sheriffs and except that any such license granted to regularly appointed railway police shall be co-extensive with the state, and all license fees collected hereunder shall be paid by the sheriff and accounted for to the auditor as other license taxes are collected and paid, and the state tax commissioner shall prepare all suitable forms for licenses and bonds and certificates showing that such license has been granted and to do anything else in the premises to protect the state and see to the enforcement of this act.

The clerk of the court shall immediately after license is granted as aforesaid, furnish the superintendent of the department of public safety a certified copy of the order of the court granting such license, for which service the clerk shall be paid a fee of two dollars which shall be taxed as cost in the proceeding; within thirty days after this act becomes effective it shall be the duty of the clerks of each court in this state having jurisdiction to issue pistol licenses to certify to the superintendent of the department of public safety a list of all such licenses issued in his county.

Provided, that nothing herein shall prevent any person from carrying any such weapon, in good faith and not for a felonious purpose, 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 place of residence, or to a place

of repair and back to his home or residence; 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 act for which a license is herein required, without having first obtained the license and given the bond as herein provided; and, *provided, further*, that nothing herein shall prevent agents, messengers and other employees of express companies doing business as common carriers, whose duties require such agents, messengers and other employees to have the care, custody or protection of money, valuables and other property for such express companies, from carrying any such weapon while actually engaged in such duties, or in doing anything reasonably incident to such duties; *provided*, such express company shall execute a continuing bond in the penalty of thirty thousand dollars, payable unto the state of West Virginia, and with security to be approved by the secretary of state of the state of West Virginia, conditioned that said express company will pay all damages, accruing to anyone by the accidental discharge or improper, negligent or illegal discharge or use of such weapon or weapons by such agent, messenger or other employee while actually engaged in such duties for such express company, in doing anything that is reasonably incident to such duties; but the amount which may be recovered for breach of such condition shall not exceed the sum of three thousand five hundred dollars in any one case, and such bond shall be filed with and held by the said secretary of state, for the purpose aforesaid, but upon the trial of any cause for the recovery of damages upon said bond, the burden of proof shall be upon such express company to establish that such agent, messenger or other employee was not actually employed in such duties for such express company nor in doing anything that was reasonably incident to such duties at the time such damages were sustained; and, *provided further*, that nothing herein shall prevent railroad police officers duly appointed and qualified under authority of section thirty-one of chapter one hundred forty-five of Barnes' code or duly qualified under the laws of any other state, from carrying any such weapon while actually engaged in their duties or in doing anything reasonably incident to such duties; *provided*, such railroad company shall execute a continuing bond in the penalty of ten thousand dollars payable unto the state of West Virginia and with security to be approved by the secretary of state of the state of West Virginia conditioned that said railroad company will pay all damages accruing to anyone by the accidental discharge or improper, negligent or illegal discharge or use of such weapon or weapons by such railroad special police officer whether appointed in this or some other state while actually engaged in such duties for such railroad company, in doing anything that is reasonably incident to such duties, but the amount which may be recovered for breach of such condition shall not exceed the sum of three thousand five hundred dollars in any one case, and such bond shall be filed with and held by the said secretary of state for the purpose aforesaid but upon the trial of any cause for the recovery of damages upon said bond, the burden of proof shall be upon such railroad company to establish that such railroad police officer was not actually employed in such duties for such railroad company nor in doing anything that was reasonably incident to such duties at the

time such damages were sustained; and *provided, further*, that in case of riot, public danger and emergency, a justice of the peace, or other person issuing a warrant, may authorize a special constable and his posse whose names shall be set forth in said warrant, to carry weapons for the purpose of executing a process, and a sheriff in such cases may authorize a deputy or posse to carry weapons, but the justice shall write in his docket the cause and reasons for such authority and the name of the person, or persons, so authorized, and index the same, and the sheriff or other officer shall write out and file with the clerk of the county court the reasons and causes for such authority and the name, or names of the persons so authorized, and the same shall always be open to public inspection, and such authority shall authorize such special constable, deputies and posses to carry weapons in good faith only for the specific purposes and times named in such authority, and upon the trial of every indictment the jury shall inquire into the good faith of the person attempting to defend such indictment under the authority granted by any such justice, sheriff or other officer, and any such person or persons so authorized shall be personally liable for the injury caused to any person by the negligent or unlawful use of any such weapon or weapons. It shall be the duty of all ministerial officers, consisting of the justices of the peace, notaries public and other conservators of the peace of this state, to report to the prosecuting attorney of the county the names of all persons guilty of violating this section, and any person wilfully failing so to do, shall be guilty of a misdemeanor and shall be fined not exceeding two hundred dollars, and shall, moreover, be liable to removal from office for such willful failure; and it shall likewise be the duty of every person having knowledge of the violation of this act, to report the same to the prosecuting attorney, and to freely and fully give evidence concerning the same, and any one failing so to do, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one hundred dollars; *provided, further*, that nothing herein contained shall be so construed as to prohibit sheriffs, their regularly appointed deputies, who actually collect taxes in each county, and all constables in their respective counties and districts, and all regularly appointed police officers of their respective cities, towns or villages, all jailors and game protectors who have been duly appointed as such, and members of the department of public safety of this state, from carrying such weapons as they are now authorized by law to carry, who shall have given bond in the penalty of not less than three thousand five hundred dollars, conditioned for the faithful performance of their respective duties, which said officers shall be liable upon their said official bond, for the damages done by the unlawful or careless use of any such weapon or weapons, whether such bond is so conditioned or not.

It shall be unlawful for any person armed with pistol, gun, or other dangerous or deadly weapon, whether licensed to carry same or not, to carry, expose, brandish, or use, such weapon in a way or manner to cause, or threaten, a breach of the peace. Any person violating this provision of this act shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty nor more than three hundred dollars or imprisoned in the county jail not less than thirty nor more than

ninety days, or be punished by both fine and imprisonment in the discretion of the court.

Any circuit court granting any such license to carry any of the weapons mentioned in this act, the governor, or the superintendent of the department of public safety, with the consent of the governor, may, for any cause deemed sufficient by said court, or by the governor or by the superintendent of the department of public safety with the approval of the governor aforesaid, as the case may be, revoke any such license to carry a pistol or other weapon mentioned in this act for which a license is required, and immediate notice of such revocation shall be given such licensee in person, by registered mail or in the same manner as provided by law for the service of other notices, and no person whose license has been so revoked shall be re-licensed within one year thereafter; *provided*, that the authority so revoking such license may, after a hearing, sooner reinstate such licensee.

(b) It shall be unlawful for any person to carry, transport, or to have in his possession any machine gun, sub-machine gun, and what is commonly known as a high powered rifle, or any gun of similar kind or character, or any ammunition therefor, except on his own premises or premises leased to him for a fixed term, until such person shall have first obtained a permit from the superintendent of the department of public safety of this state, and approved by the governor, or until a license therefor shall have been obtained from the circuit court as in the case of pistols and all such licenses together with the number identifying such rifle shall be certified to the superintendent of the department of public safety. *Provided, further*, that nothing herein shall prevent the use of rifles by *bona fide* rifle club members who are freeholders or tenants for a fixed term in this state at their usual or customary place of practice, or licensed hunters in the actual hunting of game animals. No such permit shall be granted by such superintendent except in cases of riot, public danger, and emergency, until such applicant shall have filed his written application with said superintendent of the department of public safety, in accordance with such rules and regulations as may from time to time be prescribed by said department of public safety relative thereto, which application shall be accompanied by a fee of two dollars to be used in defraying the expense of issuing such permit, and said application shall contain the same provisions as are required to be shown under the provisions of this act by applicants for pistol license, and shall be duly verified by such applicant, and at least one other reputable citizen of this state. Any such permit as granted under the provisions of this act may be revoked by the governor at his pleasure and upon the revocation of any such permit the department of public safety shall immediately seize and take possession of any such machine gun, sub-machine gun, high powered rifle, or gun of similar kind and character, held by reason of said permit, and any and all ammunition therefor, and the said department of public safety shall also confiscate any such machine gun, sub-machine gun, and what is commonly known as a high powered rifle, or any gun of similar kind and character and any and all ammunition therefor so owned, carried, transported or possessed contrary to the provisions of this act, and shall safely store and keep the same, subject to the order of the gover-

nor. No alien shall own, keep or possess any firearm of any kind or character. It shall be unlawful for any person, firm or corporation to place or keep on public display to passersby on the streets, for rent or sale, any revolver, pistol, dirk, bowie knife, slung shot or other dangerous weapon of like kind or character or any machine gun, sub-machine gun or high powered rifle or any gun of similar kind or character, or any ammunition for the same.

All dealers licensed to sell any of the foregoing arms or weapons shall take the name, address, age and general appearance of the purchaser, as well as the maker of the gun, manufacturer's serial number and caliber, and report the same at once in writing to the superintendent of the department of public safety.

It shall be unlawful for any person to sell, rent, give or lend any of the above mentioned arms to an unnaturalized person.

Any person violating the provisions of sub-section (b) of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars, nor more than three hundred dollars, or confined in the county jail not less than thirty days nor more than six months, or both such fine and imprisonment, in the discretion of the court.

All acts and parts of acts inconsistent herewith are hereby repealed.

APPENDIX F

1975 W. VA. ACTS ch. 213

ARTICLE 7. DANGEROUS WEAPONS.**§ 61-7-2. License to carry weapons; how obtained.**

Any person desiring to obtain a state license to carry any such weapon as is mentioned in the first section of this article, within one or more counties in this state, shall first publish a notice setting forth his name, residence and occupation, and that on a certain day he will apply to the circuit court of his county for such state license. Such notice shall be published as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such person resides. Such notice shall be published at least ten days before such application is made. After the publication of such notice and at the time stated in such notice, upon application to such court, it may grant such license to such person, in the following manner, to wit:

The applicant shall file with such court his application in writing, duly verified, which application shall show:

- (a) That such applicant is a citizen of the United States of America;
- (b) 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 next prior thereto;
- (c) 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;
- (d) 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
- (e) 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.

Upon the hearing of such application the court shall hear evidence upon all matters stated in such application and upon any other matter deemed pertinent by the court, and if such court be satisfied from the proof that there is good reason

and cause for such person to carry such weapon, and all of the other conditions of this article be complied with, the court, or the judge thereof in vacation, may grant such license for such purposes, and no other, as such court, or the judge in vacation, may set out in the license (and the word "court" as used in this article shall include the circuit judge thereof, acting either in term or vacation); but, before such license shall be effective such person shall pay to the sheriff, and the court shall so certify in its order granting the license, the sum of fifty dollars, and shall also file a bond with the clerk of such court, in the penalty of five thousand dollars, with good security, signed by a responsible person or persons, or by some surety company, authorized to do business in this state, conditioned that such applicant will not carry such weapon except in accordance with his application and as authorized by the court, and that he will pay all costs and damages accruing to any person by the accidental discharge or improper, negligent or illegal use of such weapon or weapons. Any such license granted shall be good for three years, unless sooner revoked, as hereinafter provided, and be coextensive with the county in which granted, and such other county or counties as the court shall designate in the order granting such license; except that upon a proper showing the court granting such license to any person regularly employed as a security guard may, in its discretion, in the order granting such license extend the period of the validity of such license for a period not to exceed four years, under such terms and conditions as the court deems proper; except that regularly appointed deputy sheriffs having license shall be permitted to carry such revolver or other weapons at any place, within the state, while in the performance of their duties as such deputy sheriffs; and except that any such license granted to regularly appointed railway police shall be coextensive with the state. All license fees collected hereunder shall be paid by the sheriff and accounted for to the auditor as other license taxes are collected and paid, and the state tax commissioner shall prepare all suitable forms for licenses, bonds and certificates showing that such license has been granted and shall do anything else in the premises to protect the state and see to the enforcement of this section.

The clerk of the circuit court shall, immediately after license is granted as aforesaid, furnish the superintendent of the department of public safety a certified copy of the order of the court granting such license, for which service the clerk shall be paid a fee of two dollars which shall be taxed as cost in the proceeding. It shall be the duty of the clerk of each circuit court to furnish to the superintendent of the department of public safety, at any time so required, a certified list of all such licenses issued in his county.

APPENDIX G

HOUSE JOINT RESOLUTION NO. 18

(By Delegate J. Martin and Delegate Carmichael)

(Introduced February 21, 1985; referred to the Committee on Constitutional Revision.)

Proposing an amendment to the Constitution of the State of West Virginia, amending article three thereof by adding thereto a new section, designated section twenty-two, relating to the right of a person to keep and bear arms; numbering and designating such proposed amendment; and providing a summarized statement of the purpose of such proposed amendment.

Resolved by the Legislature of West Virginia, two thirds of all the members elected to each House agreeing thereto:

That the question of ratification or rejection of an amendment to the Constitution of the State of West Virginia be submitted to the voters of the State at the next general election to be held in the year one thousand nine hundred eighty-six, which proposed amendment is that article three thereof be amended by adding a new section, designated section twenty-two, to read as follows:

ARTICLE III. BILL OF RIGHTS.

§ 22. *Right to keep and bear arms.*

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.

Resolved further, That in accordance with the provisions of article eleven, chapter three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, such proposed amendment is hereby numbered "Amendment No. 1" and designated as the "Right to Keep and Bear Arms Amendment" and the purpose of the proposed amendment is summarized as follows: "To allow a person to keep and bear arms for defense of self, family, home and state and for recreation."

APPENDIX H

ANALYSIS OF PROPOSED WEST VIRGINIA CONSTITUTIONAL GUARANTEE TO KEEP AND BEAR ARMS

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.

This proposal explicitly protects the traditional lawful rights that gun owners assumed were guaranteed in West Virginia.

A Person

The proposed amendment guarantees an individual right. Nevertheless, a person in a high risk category would not enjoy this right. That, e.g., felons, minors, and the mentally infirm are treated differently has gained such universal acceptance that commentators mention only in passing that such persons do not enjoy the full benefits of this right. Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U.L. Rev. 177, 191 & n. 71 (1982).

The Constitutions of 40* states contain a right to bear arms. These guarantees have not been an obstacle to reasonable regulation. Statutes prohibiting possession of firearms, e.g., by convicted felons have been consistently upheld. Examples of such decisions include *Carfield v. State*, 649 P. 2d 865 (Wyo. 1982); *State v. Fant*, 53 Oh. App. 2d 87, 371 N.E.2d 588 (1977); *State v. Amos*, 343 So. 2d 166 (La. 1977); *State v. Cartwright*, 246 Ore. 121, 418 P. 2d 822 (1966); *Jackson v. State*, 68 So. 2d 850 (Ala. App. 1953), cert. denied 68 So. 2d 853 (1953). Over a century ago a court upheld a conviction under a statute forbidding selling, giving, or lending weapons to minors. *Coleman v. State*, 32 Ala. 581 (1858).

*In the 1984 elections the voters in Utah strengthened their present guarantee and the voters in North Dakota added a right to keep and bear arms to their constitution.

Keep and Bear Arms

The term "arms" refers only to such arms as are commonly kept by the people. Constitutionally protected arms would include the rifle, shotgun, and pistol. *State v. Kessler*, 289 Ore. 359, 614 P.2d 94 (1980); *Taylor v. McNeal*, 523 S.W. 2d 148, 150 (Mo. App. 1975); *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972); *People v. Brown*, 253 Mich. 537, 235 N.W. 245 (1931); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886); *State v. Duke*, 42 Tex. 455, 458-59 (1875); *State v. Andrews*, 50 Tenn. 165, 8 Am. Rep. 8 (1871).

Bombs, cannon, poison gas and the like are arms which do not come under the protection of the constitutional umbrella. *State v. Kessler*, *Rinzler v. Carson*, *People v. Brown*, *State v. Kerner*, *State v. Shelby*, supra.

A person may only keep or bear constitutionally protected arms. The right to keep arms includes the following:

What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted. . . . The right to keep arms, necessarily involves the right to purchase them, to keep in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. *Andrews v. State*, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871).

The bearing of constitutionally protected arms may be regulated. Concealed carrying statutes, e.g., are routinely upheld. *State v. Kessler*, 289 Ore. 359, 614 P.2d 94, 99 (1980); *Holland v. Commonwealth*, 294 S.W. 2d 83, 85 (Ky. 1956); *Porello v. State*, 121 Oh. St. 280, 168 N.E. 135 (1929); *McIntire v. State*, 170 Ind. 163, 83 N.E. 1005 (1908); *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44 (1840). Even open carrying for an unlawful purpose may be prohibited. *State v. Dawson*, 272 N.C. 535, 159 S.E. 2d 1 (1968). A license may be required to carry a pistol away from one's home, place of business, or land. *Schubert v. DeBard*, 73 Ind. Dec. 510, 398 N.E. 2d 1339 (Ind. App. 1980). Carrying a gun while drunk is outside the protected boundaries of the right to bear arms. *People v. Garcia*, 197 Colo. 550, 595 P. 2d 228 (1979) (en banc). One may not be armed in court, church, at elections or concerts. *Hill v. State*, 53 Ga. 473, 476 (1874). Unauthorized parading with arms may be prohibited. *Commonwealth v. Murphy*, 166 Mass. 171, 44 N.E. 138 (1896). Discharging a firearm without lawful excuse within the city limits is not constitutionally protected conduct. *State v. Johnson*, 76 S.C. 39, 56 S.E. 544 (1907).

Defense of self, family, home

The lawful defense of self, family, and home has ancient roots. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendment*, 4 Geo. Mason L. Rev. 1, 5 (1981); Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 Detroit Col. L. Rev. 789, 794; Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U.L. Rev. 177, 183 (1982); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L. Q. 285 (1983).

There is no social interest in preserving the lives and wellbeing of criminal aggressors at the cost of their victims. The only defensible policy society can adopt is one that will operate as a sanction against unlawful aggression. The police have no duty to protect the individual. *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc). One court reduced this principle of law to the succinct com-

ment that “there is no constitutional right to be protected by the state against being murdered by criminals or madmen.” *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

The proposed guarantee is a victims’ rights measure. It will guarantee that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home.

Defense of state

During World War II the National Guard was activated for overseas service. In a number of states the armed citizens were called upon to perform militia duty in an effort to protect the state and fill the void left by the absence of the National Guard. The people served in the militia and used their personally owned firearms to protect the state. See Dowlut and Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 196-98, 233-35 (1982).

Lawful hunting and recreational use

The constitutions of New Mexico, Nevada, and North Dakota explicitly guarantee a right to have arms for lawful hunting and recreational use. The seminal idea for this right may be traced to a 1787 Pennsylvania proposal based on experiences with British game laws designed to disarm the people. Dowlut and Kno *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 193 .

The term “lawful” was inserted as a matter of superabundant caution to indicate that hunting and recreational uses may be regulated by law. Thus possessing a firearm on a game reserve for the purpose of hunting may be proscribed without infringing on the right to bear arms. *State v. McKinnon*, 153 Me. 15, 133 A.2d 885 (1957).

Conclusion

This legislative history indicates that the legislature is left with the power to deal effectively with criminal misconduct. On the other hand, it would prevent the decent people of this state from being disarmed. *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980); *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744 (1972); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971); *Glasscook v. City of Chattanooga*, 157 Tenn. 518, 11 S.W. 2d 678 (1928); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921).

APPENDIX I

TEXT OF OCTOBER 26, 1986 NEWSPAPER ADVERTISEMENT

**PROTECT YOUR RIGHTS
VOTE YES ON #1**

On November 4, one of the most critical votes ever cast in West Virginia will protect your *right* to own and use firearms.

Amendment #1 will amend the West Virginia Constitution to include for the first time a right to keep and bear arms protection in West Virginia.

Amendment #1 would add Section 22 to Article 3 of the Constitution of the State of West Virginia to read as follows:

Section 22: "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."

**WHY YOU SHOULD
VOTE YES ON #1**

- Forty states already have a state constitutional amendment; West Virginia will make it forty-one.
- Yes on Amendment #1 protects the rights of all law-abiding citizens in West Virginia because some courts have ruled that the Second Amendment to the U.S. Constitution only applies to the Federal government and not to the states (Quillici vs. the Village of Morton Grove, 1982).
- Amendment #1 keeps Federal and State firearms laws the law.
- Amendment #1 has been endorsed by most government officials including Governor Arch Moore, the entire West Virginia delegation to the U.S. Congress, more than 90% of the West Virginia Legislature, by the National Rifle Association of America, by the United Sportsmen of West Virginia, law enforcement officials, and over 50,000 law-abiding NRA members in West Virginia.

**JOIN THEM
VOTE YES ON #1**

Paid political advertisement paid for by the United Sportsmen of West Virginia, the official political action committee for the Yes on #1 Campaign of the National Rifle Association of America.

APPENDIX J

TEXT OF NOVEMBER 2, 1986 NEWSPAPER ADVERTISEMENT

YES ON #1

On November 4, one of the most critical votes ever cast in West Virginia will protect **your right to own and use firearms.**

Amendment #1 will amend the West Virginia State Constitution to include for the first time a right to keep and bear arms guarantee in West Virginia.

Amendment #1 would add Section 22 to Article 3 of the Constitution of the State of West Virginia to read as follows:

Section 22: "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."

INTENT OF CONSTITUTIONAL AMENDMENT #1

- Yes on Amendment #1 guarantees that arms may be kept or carried for traditional purposes, such as hunting, target shooting, and self-defense. This includes the right to purchase arms and ammunition and to keep arms in a state of repair.
- Yes on Amendment #1 means that the individual right to keep and bear arms for a Constitutionally protected purpose may not be infringed. Thus, laws banning the possession or sale of Constitutionally protected arms, laws requiring a license to possess or acquire such arms, requiring the registration of such arms or imposing special taxation on such arms would not be permitted.
- Yes on Amendment #1 does not extend to every conceivable weapon or instrument. Constitutionally protected arms include rifles, shotguns, revolvers, pistols and hunting knives, thus, weapons not commonly kept by the people, such as instruments of mass destruction such as bombs or rockets, find no protection under this guarantee.
- Yes on Amendment #1 extends to open carrying of Constitutionally protected arms. The bearing of arms concealed may be regulated by, for example, requiring a license to carry arms concealed. However, licensing would have to be administered with the right to bear arms in mind. Furthermore, the carrying of arms may be restricted in places such as courtrooms or polling places.
- Yes on Amendment #1 does not protect those who misuse firearms. The types of misconduct that the state legislature may forbid and punish are well-known and self-evident. Examples of such misconduct include using arms to commit rob-

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RIGHT-TO-BEAR-ARMS AMENDMENT

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bery, rape, burglary, assault; carrying arms while intoxicated; using arms to unlawfully harass, intimidate, or recklessly endanger someone; shooting in an unsafe place or manner; and poaching. Also, excluded from the enjoyment of this right would be convicted felons, mental incompetents, minors and illegal aliens. That such persons may be excluded is a well-established principle of law.

**PROTECT YOUR RIGHTS
VOTE YES ON #1**

Paid political advertisement paid for by the United Sportsmen of West Virginia, the official political action committee for the Yes on #1 Campaign of the National Rifle Association of America, Robert R. Legg, Jr., Treasurer.

