

The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia

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THE CONSTITUTIONAL RIGHT TO HUNT: NEW RECOGNITION OF AN OLD LIBERTY IN VIRGINIA

Stephen P. Halbrook*

INTRODUCTION	198
I. THE RIGHT TO HUNT, THEN AND NOW	199
A. <i>A Historical Perspective</i>	199
B. <i>Adoption of Virginia's Right to Hunt Amendment</i>	204
C. <i>Testing the Right: Orion Sporting Group v. Nelson County</i>	207
II. IS OPERATION OF A SHOOTING FACILITY PROTECTED BY THE CONSTITUTIONAL RIGHT TO HUNT AND HARVEST GAME?	210
A. <i>As a Constitutional Right, the Right to Hunt Must Be Broadly Construed</i>	210
B. <i>Is the Right to Hunt Broader Than the Right to Pursue and Harvest Game?</i>	212
III. DOES THE RIGHT TO HUNT INCLUDE THE RIGHT TO HUNT PROFICIENTLY, SAFELY, AND HUMANELY?	214
A. <i>Constitutional Rights Include Both Core and Auxiliary Rights</i>	214
B. <i>The Public Policy of the Commonwealth Promotes Firearm Safety and Shooting Facilities for Hunting Purposes</i>	217
C. <i>The Constitutional Right is Not Confined to Narrow Definitions in the Game Code Which Create Crimes and Which Must be Narrowly Construed</i>	219
IV. IF WARM-UP SHOOTING AND SAFETY CHECKS ARE ACCESSORY USES TO HUNTING, DOES THE RIGHT TO HUNT INCLUDE PRACTICE SHOOTING? . . .	221
V. DO LOCAL RULES RUN AFOUL OF THE GUARANTEE'S RESERVATION OF REGULATION TO THE GENERAL ASSEMBLY?	223
A. <i>The Right to Hunt is Subject to Regulation by the General Assembly, Which Has Authorized Counties to Regulate Only in Narrow Circumstances</i>	223
B. <i>A County May Not Restrict the Right to Hunt For Other Constitutionally Impermissible Reasons</i>	226

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CONCLUSION	228
APPENDIX:	
STATE CONSTITUTIONS GUARANTEEING THE RIGHT TO HUNT	229
STATE CONSTITUTIONS GUARANTEEING THE RIGHT TO BEAR ARMS TO HUNT ..	232

INTRODUCTION

The Constitution of Virginia was amended in 2001 to provide: “The people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law.”¹ Currently, ten states recognize hunting as a constitutional guarantee, and proposed amendments are pending in other states.² The oldest, dating back to the American Revolution, sought to guard against royal privilege as practiced in England,³ while the newest, adopted in recent decades, seek to preempt hunting bans sought by “animal rights” zealots.⁴

Unlike the British tradition of privilege, which denied hunting rights to commoners, in America the right to hunt was deemed universal, albeit not explicitly expressed in most constitutions.⁵ Toward the end of the twentieth century, with increasing urban

¹ VA. CONST. art. XI, § 4.

² See *infra* App.

³ See *Cabot v. Thomas*, 514 A.2d 1034,1037 (Vt. 1986) (noting that colonists in what became Vermont “were well aware of the history of abuses that had occurred in England under authority of fish and game laws,” and quoting VT. CONST. ch. II, § 67 as recognizing: “The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.”).

⁴ See, e.g., *Moore v. Kempthorne*, 464 F. Supp. 2d 519 (E.D. Va. 2006) (affirming denial of injunction against black bear hunt); *Fund for Animals v. Mainella*, 294 F. Supp. 2d 46 (D.D.C. 2003) (affirming denial of injunction against black bear hunt); *Mich. Humane Soc’y v. Natural Res. Comm’n*, 404 N.W.2d 757 (Mich. 1987) (holding that the commission may not allow dove season); *Comm’n to Abolish Sport Hunting, Inc. v. Palisades Interstate Park Comm’n*, 444 N.Y.S.2d 161 (N.Y. App. Div. 1981) (affirming denial of injunction against deer hunting); *Defenders of Animals, Inc. v. Dep’t of Env’tl. Mgmt.*, 553 A.2d 541 (R.I. 1989) (holding that the Department may “issue collector’s permit to take wild animals”).

⁵ *Sterling v. Jackson*, 37 N.W. 845, 865 (Mich. 1888), captured the American view as follows:

We can borrow no light, in this discussion, from the English game and forestry laws, which are not a part of our common law, and which are repugnant and hostile to the theory of our institutions. The wild game and fish abounding in our woods and waters have never been the property of the general government or of the state, in the sense that they were held the property of the crown in England. No man here is granted special permission by the national or state government to kill game or catch fish exclusively at certain times or in certain places. Our game and fish laws are general, and apply to and govern the whole people. The fish of our waters, and the game of our woods, and the wild birds of the air, belong to the people, and not to the crown, and should always, when they can be

and suburban encroachment over rural life and the advent of anti-hunting activism, a trend arose to adopt guarantees of the right to hunt in state constitutions.⁶

A survey of the guarantees that have been adopted by different states reveals that very little case law has been generated.⁷ While the wording varies, the guarantees assume that the state legislatures and game departments will regulate hunting consistent with the principles of sound conservation and game management,⁸ and the regulations they adopt are generally upheld.⁹ To what extent will the usual rules of constitutional interpretation be applied to the right to hunt?

As a case study, this Article will focus on Virginia's right to hunt guarantee. Debates in the General Assembly over the proposal reveal policy arguments pro and con. While no reported judicial decision on the meaning of the guarantee has been generated, a case called *Orion Sporting Group v. Board of Supervisors of Nelson County*¹⁰ went to trial and resulted in a thoughtful circuit court opinion on the guarantee. This Article expands on the jurisprudential issues raised in that case as a means of exploring the potential contours of the right to hunt.

I. THE RIGHT TO HUNT, THEN AND NOW

A. A Historical Perspective

Historically, the English game laws made hunting a monopoly of those privileged to do so by the Crown, and imposed draconian penalties—sometimes including the

captured or killed without detriment to private rights, be preserved to the people.

⁶ See *infra* App.

⁷ See, e.g., discussion *infra* Part I.C.

⁸ See, e.g., *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Natural Res.*, 677 N.W.2d 612, 629 (Wis. 2004) (“[T]he 2003 constitution amendment was intended to codify the common law right to hunt that existed prior to its adoption. . . . The 2003 amendment does not impose any limitation upon the power of the state or [Department of Natural Resources] to regulate hunting, other than that any restrictions on hunting must be reasonable.”).

⁹ *Ala. Dog Hunters Ass'n v. State*, 893 So. 2d 1224, 1227 (Ala. Civ. App. 2004) (approving as constitutional “the Department’s interpretation of those statutes as permitting it to limit, in the public interest, how certain animals in portions of Alabama may be hunted to certain methods, in connection with its general regulation of hunting seasons”); *Hunters, Anglers & Trappers Ass'n of Vt., Inc. v. Winooski Valley Park Dist.*, 913 A.2d 391, 394–95 (Vt. 2006) (right not implicated where legislature delegated regulatory function to ban hunting in a district); *Hartley Hill Hunt Club v. County Comm'n of Ritchie County*, 647 S.E.2d 818, 824–25 (W. Va. 2007) (right to bear arms for lawful hunting held consistent with ban on hunting on private land on Sundays). *Hartley Hill* was a challenge supported by the state ACLU, whose executive director humorously said: “Our state motto may say ‘mountaineers are always free’ but in Ritchie County they are only free Monday through Saturday.” Press Release, ACLU of W. Va., ACLU of W. Va. Challenge to Sunday Hunting Prohibition to be Heard in Court on Wednesday (Oct. 3, 2005), available at http://www.acluww.org/Newsroom/PressReleases/10_03_05.htm.

¹⁰ 68 Va. Cir. 195 (2005).

death penalty—on commoners for hunting.¹¹ William Blackstone wrote that “the right of pursuing, taking, and destroying [game] is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery.”¹² He noted that “a reason oftener meant than avowed by the makers of forest or game laws” was “[f]or prevention of popular insurrections and resistance to the government, by disarming the bulk of the people.”¹³ European feudalism was founded on conquest and the rulers wanted to keep the subjects “in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting”¹⁴

By contrast, the American colonists were free to hunt.¹⁵ The accurate marksmanship exhibited by the provincials at the Battle of Bunker Hill “had been derived from hunting, and the ordinary amusements of sportsmen. The dexterity which by long habit they had acquired in hitting beasts, birds, and marks, was fatally applied to the destruction of British officers.”¹⁶

Pennsylvania declared in 1776 “[t]hat the People have a Right to bear Arms for the Defence of themselves and the State,”¹⁷ and also “[t]he inhabitants of this State shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed.”¹⁸ This was a reaction against the English practices, under which “the freeholders of moderate estates [were] deprived of a natural right . . . [T]he body of the people kept from the use of guns are utterly ignorant of the arms of modern war, and the kingdom effectually disarmed, except of the standing forces”¹⁹

When the federal Constitution was proposed in 1787 without a bill of rights, Antifederalists from Pennsylvania demanded a declaration in part: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game”²⁰ They also proposed:

¹¹ See generally 2 WILLIAM BLACKSTONE, COMMENTARIES *408–17; P.B. MUNSCHÉ, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671–1831 (1981); E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

¹² 2 WILLIAM BLACKSTONE COMMENTARIES *409.

¹³ *Id.* at *412.

¹⁴ *Id.* at *413.

¹⁵ See DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 190 (Liberty Classics 1990) (1789).

¹⁶ *Id.*

¹⁷ PA. DECLARATION OF RIGHTS, art. XIII (1776).

¹⁸ PA. CONST. of 1776, ch. II, § 43. William Penn, in *The Frame of the Government of the Province of Pennsylvania in America* (1683), had recognized the settlers’ “liberty to fowl and hunt upon the lands they hold.” WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA: 1680–1684, at 271 (Jean R. Soderlund ed., 1983).

¹⁹ *Remarks on the Resolves Published Against the Plan of Government, by a Gentleman of Neither Party*, PA. EVENING POST, Nov. 5, 1776.

²⁰ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623–24 (Merrill Jensen ed., 1976).

The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.²¹

Virginia Federalist Alexander White argued against these provisions, which were “clearly out of the power of Congress” and were proposed “to induce the ignorant to believe that Congress would have a power over such objects”²² The modern regulatory state was not anticipated.

After the proposal in 1789 of what became the Bill of Rights, including the Second Amendment “right of the people to keep and bear Arms,”²³ Samuel Nasson of Massachusetts wrote his congressman about its effect:

[T]hen their [sic] will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occations [sic] such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy.²⁴

Writing the first commentaries on the Constitution, Virginia jurist St. George Tucker said about the Second Amendment and how the right guaranteed therein was denied by the English game laws:

This may be considered as the true palladium of liberty The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving

²¹ *Id.* at 624.

²² Alexander White, WINCHESTER GAZETTE, Feb. 22, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 404 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

²³ U.S. CONST. amend. II. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” *Id.*

²⁴ Letter from Samuel Nasson to George Thatcher (July 9, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 260–61 (Helen E. Veit et al. eds., 1991).

the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.²⁵

Keeping and bearing arms for hunting was seen as supportive of the “well regulated Militia” the Second Amendment declared as “necessary to the security of a free State.”²⁶ Dismissing an action for trespass against a deer hunter, the South Carolina Constitutional Court in 1818 explained:

The right to hunt on unenclosed lands . . . [is] clearly established . . . Large standing armies are, perhaps, wisely considered as dangerous to our free institutions; the militia, therefore, necessarily constitutes our greatest security against aggression; our forest is the great field in which, in the pursuit of game, they learn the dexterous use and consequent certainty of firearms, the great and decided advantages of which have been seen and felt on too many occasions to be forgotten, or to require a recurrence to.²⁷

²⁵ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE app. at 300 (1803); see Stephen P. Halbrook, *St. George Tucker’s Second Amendment: Deconstructing “The True Palladium of Liberty,”* 3 TENN. J. L. & POL’Y 120, 126–32 (2007). Similarly, Henry St. George Tucker, president of the Virginia Supreme Court, wrote:

The right of bearing arms . . . with us is not limited and restrained by an arbitrary system of game laws, as in England; but is practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting, as a freeman ought, the inroads of usurpation.

1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (1846). While such criticism reflects American rejection of British practices, the English courts interpreted the game laws as not prohibiting a gun in the house as long as not used by an unqualified person for hunting. See, e.g., *Rex v. Gardner*, 187 Eng. Rep. 1240 (K.B. 1738); see also STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 51–53 (1984).

²⁶ U.S. CONST. amend. II.

²⁷ See *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244 (1818); WILLIAM H. SUMNER, AN INQUIRY INTO THE IMPORTANCE OF THE MILITIA TO A FREE COMMONWEALTH IN A LETTER . . . TO JOHN ADAMS . . . WITH HIS ANSWER 39 (1823) (“[I]t is better that the arms should be kept by the men themselves, at their own dwellings, than in the public arsenals. They thus learn to take care of them, at least; and as opportunities for hunting and practical shooting offer, they improve as marksmen.”).

In *District of Columbia v. Heller*,²⁸ which invalidated the District's prohibition on possession of handguns, the Supreme Court observed that "the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."²⁹ The above historical background demonstrates the interrelatedness of these reasons, particularly that hunting facilitates the potential for a militia.³⁰

While the militia may have fallen into disuse today, hunters and gun owners remain a reserve force that could be mobilized in an emergency. At the beginning of World War II, the National Guard was drafted and sent overseas. State protective forces were called out to guard against sabotage and repel possible invasion.³¹ The Virginia Reserve Militia, for instance, consisted of self-armed sportsmen organized locally by the Advisory Council of Fish and Game Conservation.³² "The accepted plan was to interest the sportsmen, trap and skeet shots, the hunters and members of the Izaak Walton League. . . ."³³

Today, hunting is a regulated sport which promotes conservation of wildlife under the public trust doctrine.³⁴ Little thought is given to hunting's contribution to a republican polity as conceived by the Founders. A new elite with the agenda of "animal rights" who abhor hunting has replaced the Crown as the political force seeking to repress hunting by the average person.³⁵ In addition, increasing urban and suburban encroachment on rural life has led to further restrictions on hunting, encouraging the

²⁸ 128 S. Ct. 2783 (2008).

²⁹ *Id.* at 2801.

³⁰ This theme was commonplace in the early Republic. *See* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347, 391–98 (1999).

³¹ *See, e.g., Some Chapter History*, NEWSLETTER (Arlington-Fairfax Chapter, IWLA, Centerville, Va.), Nov.–Jan. 2009/2010, at 19.

³² MARVIN W. SCHLEGEL, VIRGINIA ON GUARD: CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR 131 (1949); *see also* 1945 REP. OF THE ADJUTANT GEN. OF THE ST. OF VA. 24 (1946) ("Virginia Reserve Militiamen, whose forefathers, the Minute-men, gained fame in Revolutionary Days, purchased their own forest green uniforms as well as arms and ammunition.").

³³ 1942 REP. OF THE ADJUTANT GEN. OF THE ST. OF VA. 10 (1943); *see also Some Chapter History*, *supra* note 31, at 19.

³⁴ *See The Right to Hunt in the Twenty-first Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PAC. L.J. 1235 (1996).

³⁵ *See, e.g., Friends of Animals, Inc. v. Hodel*, 1988 WL 236545, *2 (D.D.C. 1988) ("With hunting for deer occurring all over the United States, and having occurred in the past in the Supawna Refuge as well, the Court cannot find that plaintiff—which relies almost exclusively on the aesthetic affront from hunting to its members—would be sustaining irreparable injury in the absence of a preliminary injunction.").

overpopulation of deer.³⁶ Localities seeking to remedy such overpopulation by allowing bow hunting have been challenged.³⁷

Some states have responded to the above by adopting constitutional recognition of the right to hunt.³⁸ Virginia did so by popular vote in the year 2000.³⁹

B. Adoption of Virginia's Right to Hunt Amendment

During the 1997 race for Attorney General of Virginia, the suggestion arose for an amendment to the Virginia Constitution that would protect the citizens' right to hunt.⁴⁰ Democratic candidate William D. Dolan III of Arlington proposed the following:

The citizens have a right to hunt, fish, and take game in a safe manner, subject only to the rights of the owners of affected real property and to reasonable restrictions related to harvest, licensure, seasons, limits, and methods, times, and locations of taking game, and to the health and safety of the citizens of the Commonwealth, as prescribed by law.⁴¹

Dolan accused his Republican rival, State Senator Mark L. Earley of Chesapeake, of not supporting the right to hunt because Earley's law firm represented People for the Ethical Treatment of Animals (PETA).⁴² Earley's campaign responded that Dolan was trying to deflect attention from his prior support for gun control and the National Rifle Association's poor rating of his voting record.⁴³ Moreover, Earley had supported legislation making it unlawful to interfere with fishing, and had not in fact represented PETA.⁴⁴

Earley would win the race for Attorney General, but the idea had caught on.⁴⁵ Delegate A. Victor Thomas (D-Roanoke) asked the General Assembly's Division of

³⁶ See, e.g., Glenn Collins, *Deer Hunt Goes Ahead After Years of Protest*, N.Y. TIMES, Feb. 15, 2008, at B1.

³⁷ See *Kelly v. City of Fort Thomas*, 610 F. Supp. 2d 759 (E.D. Ky. 2009) (rejecting challenge to ordinance allowing bow hunting); *Gordon v. East Goshen Twp.*, 592 F. Supp. 2d 828 (E.D. Pa. 2009) (involving a suit that challenges a township initiative to allow bow hunting).

³⁸ See *infra* App.

³⁹ *Id.*

⁴⁰ See Rex Bowman, *Dolan: Earley firm serves PETA; But, Republican said to have an NRA 'A', for a 'B'*, RICH. TIMES-DISPATCH, Oct. 30, 1997, at B5.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Peter Finn, *Hager Wins Lt. Gov. Seat in Va. Sweep*, WASH. POST, Nov. 5, 1997, at B1.

Legislative Services to draft two proposals for a constitutional amendment.⁴⁶ The first alternative stated:

The people have a right to hunt, fish, and take game, subject only to reasonable restrictions, as prescribed by law, related to the rights of the owners of affected real property, to the methods, times, and locations of hunting, fishing, and taking game, and to the health and safety of the people of the Commonwealth.⁴⁷

The second proposal, which was similar to a constitutional amendment passed in Alabama,⁴⁸ stated: “The people shall have the right to hunt and fish in this Commonwealth in accordance with the laws of the Commonwealth.”⁴⁹ In comparing the two proposals, their drafter said:

Alternate A is, I think, the stronger proposal because it used the phrase “subject only to reasonable restrictions” and would give a basis for challenges to laws that are “unreasonable.” Alternate B states the concept, but leaves to statute the expression of specific rights to hunt and fish.⁵⁰

During the 1999 General Assembly, Delegate Creigh Deeds (D-Bath County) proposed “Alternate A” as an amendment to the Constitution of Virginia.⁵¹ The House Committee on Rules modified it to read: “The people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law.”⁵² The amended proposal was agreed to by the entire Assembly at the Regular Session of 1999 and referred to the 2000 Session.⁵³

When the amendment was brought to the Senate floor in 2000, Senator William Mims (R-Loudoun County) moved to strike the phrase “and harvest game,” and insert, after the clause providing for regulation by the General Assembly, the additional clause “and any city or town may prescribe by charter.”⁵⁴ The Senate rejected both amendments.⁵⁵ Regulations would be made by the General Assembly, not localities.

⁴⁶ Letter from Mary Spain to Hon. Mark L. Earley (Dec. 18, 1997) (on file with Division of Legislative Services for the Commonwealth of Virginia). This letter is in the legislative file for the amendment, which is referred to as the legislative “jacket.”

⁴⁷ *Id.*

⁴⁸ The Alabama amendment states: “All persons shall have the right to hunt and fish in this state in accordance with law and regulations.” ALA. CONST. amend. 597.

⁴⁹ Letter from Mary Spain to Hon. Mark Earley, *supra* note 46.

⁵⁰ *Id.*

⁵¹ H.R.J. Res. 523 (Va. 1999).

⁵² VA. CONST. art. XI, § 4.

⁵³ In 2000, the proposed amended was introduced as House Joint Resolution 124. H.R.J. Res. 124 (Va. 2000), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?001+ful+HJ124>.

⁵⁴ *Id.*

⁵⁵ *Id.*

Additionally, Senator Janet Howell (D-Fairfax County) proposed an amendment that would protect the rights to “golf” and “shop,” which the Senate rejected.⁵⁶ This appeared calculated to depict a declaration of the right of hunting, fishing, and harvesting game as frivolous. Yet golf and shopping were not activities that special interest groups wished to ban, and humans had engaged in hunting since the dawn of humanity.

Howell also proposed inserting after “right” the phrase “to food and shelter and,” which was offered by the Senate but did not survive.⁵⁷ She also proposed adding: “The right set out in this section shall not take precedence over any law, currently in effect or enacted in the future, for the prevention, deterrence or prosecution of family abuse or stalking.”⁵⁸ This floor amendment was withdrawn by the Senate.⁵⁹

The proposed amendment, which passed in separate legislative sessions,⁶⁰ was submitted to the citizens of Virginia. It was apparently supported by the Virginia Department of Game and Inland Fisheries, the state agency that regulates hunting.⁶¹

The Fund for Animals (the “Fund”) filed suit against the State Board of Elections (the “Board”), describing it as a “trivialization of the Constitution of Virginia.”⁶² It argued that the ballot must include the full text, not just the summary by the Board, which read: “[s]hall the Constitution of Virginia be amended by adding a provision concerning the right of the people to hunt, fish, and harvest game?”⁶³ The Fund predicted that “local authorities would lose the ability to regulate the possession and use of firearms,” “the validity of protective orders in domestic relations cases restricting the use and possession of firearms would be called into question,” and that “the constitutionality of firearm possession and use will be at issue which will lead to any number of conflicts between state and federal restrictions on hunting.”⁶⁴

The circuit court denied relief, holding that the Board may summarize a constitutional amendment and need not print the full text.⁶⁵ Denying injunctive relief against use of the ballot as printed, the court dismissed the lawsuit.⁶⁶

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Before a constitutional amendment can be enacted in Virginia, the proposed amendment must pass both houses of the General Assembly in two consecutive legislative sessions. VA. CONST. art. XII, § 1.

⁶¹ See BOARD OF GAME & INLAND FISHERIES MEETING MINUTES, Nov. 29, 2005, http://www.dgif.virginia.gov/info/board_meetings/112905_Final_Board_Meeting_Minutes.pdf (noting that new Board member Ward Burton “has donated time to the Department to work for House Bill 38, the constitutional amendment guaranteeing the right to hunt and fish, and other initiatives beneficial to sportsmen and women”).

⁶² Fund for Animals, Inc. v. Va. State Bd. of Elections, 53 Va. Cir. 405,405 (Va. Cir. Ct. 2005).

⁶³ *Id.* at 406.

⁶⁴ *Id.*

⁶⁵ *Id.* at 407.

⁶⁶ *Id.* at 408.

By popular vote on November 7, 2000, the amendment was ratified and became effective on January 1, 2001.⁶⁷ The following analyzes the unreported decision in *Orion Sporting Group v. Board of Supervisors of Nelson County*⁶⁸ and the issues raised therein as a means to exploring the dimensions of the right.⁶⁹

C. Testing the Right: Orion Sporting Group v. Nelson County

The Orion Sporting Group, LLC, operated a hunting preserve licensed by the Virginia Department of Game and Inland Fisheries on its 450-acre estate in a rural part of Nelson County zoned agricultural.⁷⁰ Orion also wished to operate a sporting clays facility on the estate.⁷¹ Sporting clays, including trap, skeet, and helice, consists of shooting at clay pigeons thrown by machines which mimic the flight patterns of game birds and the movements of small game animals.⁷² Orion previously operated such a facility in the county without any controversy.⁷³

The Nelson County Board of Supervisors approved the hunting preserve, but denied Orion's application for a conditional use permit for the sporting clays facility.⁷⁴ Orion appealed this decision to the circuit court, and also filed a separate action seeking a declaratory judgment that operation of a sporting clays facility, *inter alia*, is protected by the constitutional right to hunt.⁷⁵

The case was assigned to Circuit Court Judge J. Michael Gamble.⁷⁶ (This author had the privilege of being engaged by the plaintiff as part of its legal team.) From

⁶⁷ Pamela Stallsmith, *Hunting, Lottery Measures Approved; Some See Little Practical Effect*, RICH. TIMES-DISPATCH, Nov. 8, 2000, at A26.

⁶⁸ 68 Va. Cir. 195 (Va. Cir. Ct. 2005).

⁶⁹ The issue has been raised in at least one other unreported decision. The use of archery to cull overpopulated deer populations in suburban areas has led to opposition by persons who object to hunting of any type. In *James G. Lewis, et al. v. Reston Association*, Cir. Ct. of Fairfax Co., VA, CL-2007-550, landowners challenged a prohibition imposed by an association under a restrictive covenant against deer hunting with archery equipment on their own land. ASSOCIATION OF FISH & WILDLIFE AGENCIES, STAFF REPORT 22 (2008). A preliminary ruling found that no claim existed under Virginia's Right to Hunt guarantee because no state action was involved, but that enforcement by the court of the restrictive covenant would be state action, and unreasonable restrictions were not enforceable. *Lewis v. Reston Ass'n*, 2007 WL 4965207 (Va. Cir. Ct. Dec. 5, 2007) (order) (citing, *inter alia*, *Shelly v. Kramer*, 334 U.S. 1, 14 (1948)). After trial, the court ruled that plaintiffs were grandfathered under the covenants and thus could continue deer hunting, and awarded them attorney's fees of \$42,235. *Lewis v. Reston Ass'n*, 2008 WL 553667 (Va. Cir. Ct., June 11, 2008) (final order).

⁷⁰ Petition for Appeal at 4, *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195, (Va. Cir. Ct. 2005) (No. 04-0019), *petition for appeal denied*, No. 05223 (Va. May 4, 2006).

⁷¹ *Id.*

⁷² *Id.* at 1, 4.

⁷³ See Meeting Minutes of the Bd. of Supervisors 18 (Feb. 4, 2004) (on file with author).

⁷⁴ Petition for Appeal, *supra* note 70, at 4.

⁷⁵ *Orion Sporting Group v. Bd. of Supervisors*, 66 Va. Cir. 16, 21–22 (Va. Cir. Ct. 2004).

⁷⁶ *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195 (Va. Cir. Ct. 2005).

the beginning, the issue focused on whether sporting clays may be protected by the right-to-hunt guarantee.⁷⁷ (At a motions hearing, one of the County Attorneys made the humorous remark: “Your honor, if sporting clays is hunting, I’d like to know what their recipe is for clay pigeons!” This author asked him off the record “So what’s your recipe for crow? Crow hunting is hunting.”)

At a three-day trial on the merits, Orion put on evidence from hunting, conservation, and shooting witnesses, lay and expert, concerning how sporting clays promotes proficient, safe, and humane hunting.⁷⁸ The Board argued that persons can learn to hunt on live game, while conceding that sighting in a gun at the beginning of the season is part of hunting.⁷⁹

The parties disputed the meaning of the term “hunting.” While the Board called no witnesses, the County’s Director of Planning and Zoning Administrator testified that hunting is limited to the taking or killing of live animals and birds.⁸⁰

Orion’s thirteen witnesses described a diverse array of hunting forms practiced in Virginia.⁸¹ Hunting may include the use of simulated and artificial game, and does not always involve the direct pursuit of live animals.⁸² Moreover, sporting clays enhances a hunter’s proficiency, safety, and humaneness.⁸³

Fox hunts involve chasing a real fox or, where there is loss of habitat, pursuing a scent left by dragging a bag.⁸⁴ Falconry involves hunting live or simulated prey, such as a lure.⁸⁵ Hound hunting involves pursuit of a live animal, or pursuit of the trail left by a scent bag.⁸⁶

Wing (bird) shooters had abundant game birds to hunt in Virginia in the 1960s, but game birds in the wild have declined.⁸⁷ Wing shooters may now hunt at preserves, where pheasants are tossed into the air by handlers, or placed in fields to be flushed by dogs.⁸⁸ Sporting clays offers similar targets which replicate the flight patterns of live birds.⁸⁹ The hunting experience is virtually the same.⁹⁰

An environmental psychologist testified that as man has evolved, today hunting is characterized by anticipation, a sense of pursuit, a weapon, and a goal, which “does

⁷⁷ *Id.*

⁷⁸ Petition for Appeal, *supra* note 70, at 4.

⁷⁹ *Id.* at 5.

⁸⁰ Deposition of Fred Boger at 8, 22, 26, *Orion*, 68 Va. Cir. 195 (No. 04-0019) (on file with author).

⁸¹ Petition for Appeal, *supra* note 70, at 4.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Transcript of Record at 468, *Orion*, 68 Va. Cir. 195 (No. 04-0019) (on file with author).

⁸⁵ *Id.* at 428.

⁸⁶ *Id.* at 445–48.

⁸⁷ *Id.* at 396, 401.

⁸⁸ *Id.* 60–63, 68–70.

⁸⁹ *Id.* at 43–47.

⁹⁰ *Id.* at 387–89.

not require the killing of an animal to be hunting.”⁹¹ A hunting journalist found no significant difference between sporting clays and live dove hunting.⁹²

Morris Peterson, Orion CEO, testified that “my preference in hunting today are clay targets and Helice because, one, I don’t enjoy cleaning birds, and I will not kill anything that we’re not going to eat.”⁹³

The Board’s policy was that one can learn to hunt by practicing on wild animals. As stated by the County’s Director of Planning and Zoning Administrator, “Generally, you can learn out in the field to hunt during hunting season.”⁹⁴ However, the Board did consider sighting in and practice to be hunting during a brief time period each year. Asked whether the County would “allow both sighting in of rifles and hunter safety training to be conducted on property as part of a hunting use of property,” he responded “[i]f it’s at the beginning of the hunting season.”⁹⁵

An expert who trains state game departments on the use of sporting clays to make wing shooters more proficient and reduce the incidence of wounded birds addressed “the ethical question of practicing on live game. . . . That just is so beyond the evolving ethic of hunting that we couldn’t even begin to suggest that. There is no way you can shoot enough live game birds to develop that level of proficiency without an incredible wing loss.”⁹⁶ An instructor for the Virginia Hunter Education Program and the 4-H Shooting Education Program testified about the need to teach youngsters safe and proficient shooting skills before hunting live game.⁹⁷

An expert who had insured just under a thousand shooting preserves testified that sporting clays are found at 80–90% of game preserves.⁹⁸ Becoming a competent bird hunter required far more than the safety warmup with sporting clays that Orion conducted before pheasant hunts.⁹⁹

At the end of the trial, the circuit judge viewed the Orion Estate. (This author was present at the judge’s observation.) He observed demonstrations of simulated hunting with sporting clays, and live hunting in which pheasants flew in patterns similar to those in sporting clays. In one scenario, clay pigeons were thrown from a ridge and shot from positions below the ridge. Then pheasants were released from the ridge and shot from the same positions. In another scenario, clay pigeons were thrown upward from a corn field and shot, after which hunting dogs were released to cause pheasants in the field to fly, and the pheasants were then dispatched.

⁹¹ *Id.* at 343; *see also* JAMES A. SWAN, IN DEFENSE OF HUNTING 144 (1995) (describing why people hunt in modern times).

⁹² Transcript of Record, *supra* note 84, at 416–17.

⁹³ *Id.* at 490.

⁹⁴ Deposition of Fred Boger, *supra* note 80, at 18.

⁹⁵ Transcript of Record, *supra* note 84, at 143–44.

⁹⁶ *Id.* at 221–22.

⁹⁷ *Id.* at 164–69.

⁹⁸ *Id.* at 26–63, 276–77.

⁹⁹ *Id.* at 526–29.

Circuit Judge Gamble issued a letter opinion ruling in favor of the Board and against Orion.¹⁰⁰ The court recognized that “the constitutional right to hunt, fish, and harvest game under the Constitution of Virginia is a fundamental right.”¹⁰¹ However, it relied on criminal cases which gave the term “hunt” a narrow definition, and held that “the word ‘hunt’ in its plain, obvious, and common sense means the pursuit of game. Shooting sporting clays is not the pursuit of game.”¹⁰²

The court rejected the concept that the hunting of “simulated game” to learn to hunt real game properly is implied in the constitutional right to hunt.¹⁰³ “This argument fails because the commonly understood definition of the word ‘hunt’ does not include proficiency, safety, or the humane hunting of game.”¹⁰⁴ Contrariwise, the court found that under the zoning ordinance “the use of sporting clays for warm-ups and safety tests in conjunction with hunts of live animals on the hunting preserve is an accessory use.”¹⁰⁵

Orion filed a petition for appeal with the Virginia Supreme Court, which declined to review the decision.¹⁰⁶

The following explains the circuit court’s thoughtful opinion in more detail and sets forth the arguments Orion made in that court and in seeking review by the Virginia Supreme Court. Since the Supreme Court denied the appeal,¹⁰⁷ the opinion and these arguments remain untested by appellate review. In the absence of precedent on the right to hunt guarantee, this analysis seeks to contribute to a jurisprudence of that right by applying ordinary principles of constitutional interpretation to the subject.

II. IS OPERATION OF A SHOOTING FACILITY PROTECTED BY THE CONSTITUTIONAL RIGHT TO HUNT AND HARVEST GAME?

A. As a Constitutional Right, the Right to Hunt Must Be Broadly Construed

It is well established that “the Constitution ought to receive not a strict and narrow, but a liberal and reasonable construction.”¹⁰⁸ The Constitution must not be construed with “such rigor and inflexibility” that “we not only violate accepted principles of interpretation, but we destroy the rights which the Constitution intended to guard.”¹⁰⁹

¹⁰⁰ Orion Sporting Group v. Bd. of Supervisors, 68 Va. Cir. 195, 195 (Va. Cir. Ct. 2005).

¹⁰¹ *Id.* at 197.

¹⁰² *Id.* at 198–99.

¹⁰³ *Id.* at 199.

¹⁰⁴ *Id.* at 198–99.

¹⁰⁵ *Id.* at 202.

¹⁰⁶ Orion Sporting Group v. Bd. of Supervisors, No. 052233 (Va. May 4, 2006) (denying petition for rehearing).

¹⁰⁷ Orion Sporting Group v. Bd. of Supervisors, No. 052233 (Va. Feb. 24, 2006) (denying appeal).

¹⁰⁸ *In re Broadus*, 73 Va. (32 Gratt.) 779, 786 (1880).

¹⁰⁹ *Moore v. Pullem*, 142 S.E. 415, 421 (Va. 1928) (citation omitted).

Does the right to hunt protect activities which promote hunter safety and proficiency?¹¹⁰ As in other contexts, “[t]his constitutional protection must not be interpreted in a hostile or niggardly spirit.”¹¹¹ “To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.”¹¹²

The *Orion* opinion recognized that “the constitutional right to hunt, fish, and harvest game under the Constitution of Virginia is a fundamental right.”¹¹³ That recognition reflected precedent: “A fundamental right is one explicitly or implicitly guaranteed by the Constitution.”¹¹⁴ The right to hunt, being explicitly protected by the Constitution, is a fundamental right. The “least restrictive alternative” must be followed when “state action impinges on the exercise of fundamental constitutional rights or liberties.”¹¹⁵

“When . . . a statute affects a fundamental right . . . , its constitutionality will be judged by the ‘strict scrutiny’ test.”¹¹⁶ Under the strict scrutiny test, the government must show that (1) it has a “compelling interest in restricting” the activity,¹¹⁷ (2) “the restrictions further such an interest,”¹¹⁸ and (3) “a more narrowly drawn restriction will frustrate its interest.”¹¹⁹ While this test may not apply to action by the Commonwealth—the right being “subject to such regulations and restrictions as the General Assembly may prescribe”¹²⁰—it would seem to apply to action by counties and cities, not to mention litigious “animal rights” activists.

By analogy, the right to free speech protects much more than words; it protects expression of all kinds. Such expression may range from flag burning to theater to video games.¹²¹ Similarly, the right to hunt protects a broad range of activities.

¹¹⁰ Just the day before oral argument before the Virginia Supreme Court on the petition for appeal in the *Orion* case, a tragic fatality was reported from Stafford County in goose hunting season. *Boy, 7, Dies After Hunting Accident*, WASH. POST, Feb. 14, 2006, at B3. Days before that, Vice President Dick Cheney accidentally wounded another hunter. *Cheney Accidentally Shoots Fellow Hunter*, CNN.com, Feb. 13, 2006, <http://www.cnn.com/2006/POLITICS/02/12/cheney/index.html?iref=allsearch> (last visited Oct. 3, 2010).

¹¹¹ *Ullmann v. United States*, 350 U.S. 422, 426 (1956).

¹¹² *Id.* at 428–29.

¹¹³ *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195, 197 (Va. Cir. Ct. 2005).

¹¹⁴ *Ballard v. Commonwealth*, 321 S.E.2d 284 (Va. 1984) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973)).

¹¹⁵ *County Bd. v. Richards*, 231 S.E.2d 231, 234 (Va. 1977) (citation omitted).

¹¹⁶ *Hess v. Snyder Hunt Corp.*, 392 S.E.2d 817, 820 (Va. 1990).

¹¹⁷ *Adams Outdoor Adver. v. City of Newport News*, 373 S.E.2d 917, 923 (Va. 1988).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ VA. CONST. art. XI, § 4.

¹²¹ *Texas v. Johnson*, 491 U.S. 397 (1989) (protecting flag burning); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (protecting theater, which “mixes speech with live action or conduct”); *Am. Amusement Machine Ass’n. v. Kendrick*, 244 F.3d 572, 575 (7th

B. Is the Right to Hunt Broader Than the Right to Pursue and Harvest Game?

The Constitution recognizes that “the people” have a “right to hunt,” a right to “fish,” and a right to “harvest game.”¹²² The “right to hunt,” unlike the right to “harvest,” is not restricted to game. Not only are those activities listed separately, but their separation by the term “fish” makes clear that the term “game” refers only to the term “harvest.” The term “game” does not relate back to or limit the “right to hunt,” which may include activities besides the taking of game. In short, the people have a “right to hunt,” and not just a “right to hunt game.”

Use of the terms “hunt” *and* “harvest game” indicates that these words have meanings that are divergent.¹²³ Since the right to pursue game is implied by the right to harvest game, limiting the “right to hunt” to that activity would render its separate mention meaningless. “Under settled rules of statutory construction, legislative enactments ‘should be interpreted, if possible, in a manner which gives meaning to every word.’”¹²⁴

The above distinction is illustrated by a historian’s comment that, as a youngster, Thomas Jefferson was taught both how to “fire his gun” and to press through the hills “in pursuit of deer and wild turkeys.”¹²⁵ Had an explicit right to hunt been needed in those days, presumably it would have accorded protection to learning how to shoot proficiently and safely. Otherwise no one would have ever harvested any deer or turkeys.

Narrowing the general term “hunt” to nothing more than the specific term “harvest game” would “restrict the meaning of the general words by the more specific and particular description which follows,” the effect of which would be “not to restrict the meaning of the general words, but to render them mere surplusage, or without any meaning.”¹²⁶

The legislative history of the constitutional amendment further clarifies that the right to “hunt” was not intended to be limited to the right to “hunt *game*.” When the proposal was brought to the Senate floor in 2000, Senator William Mims moved to strike the phrase “and harvest game,” so that the opening clause would have read simply: “The people have a right to hunt and fish” The Senate rejected the

Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001) (protecting video games in which players shoot at monsters).

¹²² VA. CONST. art. XI, § 4.

¹²³ For an example of the usage of the term “harvest,” see Va. Code § 28.2-226(B) (“No license shall be required of an oyster grounds leaseholder, or other person authorized or employed by a leaseholder, to harvest oysters or clams from the leasehold.”).

¹²⁴ *Roberts v. Bd. of Supervisors*, 453 S.E.2d 258, 261 (Va. 1995) (citations omitted). “It would be absurd to conclude that the legislature would say the same thing twice in one statutory provision. . . . The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.” *Jones v. Conwell*, 314 S.E.2d 61, 64 (Va. 1984).

¹²⁵ 1 HENRY S. RANDALL, *THE LIFE OF THOMAS JEFFERSON* 14 (1865).

¹²⁶ *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.*, 81 S.E. 93, 97 (Va. 1914).

motion.¹²⁷ This episode in the amendment's drafting history again reinforces that the right to "hunt" and the right to "harvest game" are separate and distinct rights.

A constitutional guarantee that "the people have the right" to hunt guarantees the broad right to engage in activities associated with hunting, which extend beyond merely the taking of live game. Focusing only on the literal act of harvesting live game ignores the right of hunters to enjoy the activities, interests and values involved in the hunting experience, including the right to hunt simulated game.

Moreover, the existence of a right also includes the option not to exercise that right.¹²⁸ Some wish to exercise the right to hunt but *not* the right to harvest game. A narrow view prevents persons from exercising the right to hunt unless they are pursuing and harvesting live game.

The right to hunt is in Article XI of the Constitution, which concerns "Conservation."¹²⁹ While § 4's guarantee of hunting as a "right of the people" makes that activity an individual right just like other such liberties guaranteed in the Bill of Rights,¹³⁰ its placement in the article on Conservation highlights the policy of the Commonwealth to promote and regulate hunting and the harvesting of game for conservation purposes.¹³¹

The circuit court characterized the right to hunt as a "grant of interest in the land itself" or a "profit à prendre."¹³² While not decisive to the issues here, the right to hunt should be analyzed under the public trust doctrine, having roots in Roman law and the Magna Carta. As stated by the U.S. Supreme Court over a century ago:

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or

¹²⁷ See Virginia General Assembly Legislative Information System, May 18, 2010, <http://leg1.state.va.us/cgi-bin/legp504.exe?001+amd+HJ124ASR>.

¹²⁸ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Freedom of association . . . plainly presupposes a freedom not to associate.") (citation omitted).

¹²⁹ See VA. CONST. art. XI, § 1 (describing the conservation policy); *id.* § 2 (describing the natural resources and historical sites); *id.* § 3 (describing the preservation of oyster beds).

¹³⁰ See, e.g., VA. CONST. art. I, § 12 ("[T]he right of the people peaceably to assemble"); *id.* § 13 ("[T]he right of the people to keep and bear arms").

¹³¹ See 2 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1151, 1154 (1974) (noting that Article XI establishes a public trust in the natural resources of the State).

¹³² *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195, 197 (Va. Cir. Ct. 2005).

for the benefit of private individuals as distinguished from the public good.¹³³

Sporting clays offers a hunting experience which promotes conservation by advancing ethical hunting and harvesting of game.¹³⁴ A narrow view discourages practice and proficiency, and encourages hunters to pursue and shoot at live game without adequate preparation and training.¹³⁵ To the contrary, the constitutional guarantee must be understood in a manner to further its dual purposes of protecting a broad “right of the people” and of promoting conservation.

III. DOES THE RIGHT TO HUNT INCLUDE THE RIGHT TO HUNT PROFICIENTLY, SAFELY, AND HUMANELY?

A. Constitutional Rights Include Both Core and Auxiliary Rights

Sporting clays enables the hunter to become more proficient, safe, and humane when hunting and harvesting live game.¹³⁶ A constitutional guarantee protects activities that are ordinary and necessary to exercising the core right. A “right” would be meaningless if one could not take the steps necessary to exercise it in a substantial manner. The “right to hunt” describes a continuum of activities that may, but need not, lead to the actual harvesting of game.

The *Orion* court decided that learning to hunt proficiently, safely, and humanely, such as through sporting clays, is not implied in or incident to the right to hunt.¹³⁷ It stated: “This argument fails because the commonly understood definition of the word ‘hunt’ does not include proficiency, safety, or the humane hunting of game.”¹³⁸

Thus, the court narrowly equated the “right to hunt” with the specific act of hunting live game, ignoring that a constitutional right is an umbrella for exercise of activities that are necessary to exercise the core, primary activity. If the right to hunt “does not include proficiency, safety, or the humane hunting of game,”¹³⁹ then this “right” may be exercised only in its most minimal, crude form—incompetent, unsafe, and inhumane hunting.

¹³³ *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *Hughes* did not disturb the above principle: “[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership.” *Hughes*, 441 U.S. at 335–36.

¹³⁴ *See Orion*, 68 Va. Cir. at 202.

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 199.

¹³⁸ *Id.*

¹³⁹ *Id.*

Every constitutional right includes incidents which are fairly implied in the right expressly recognized.¹⁴⁰ “Without those peripheral rights the specific rights would be less secure.”¹⁴¹

This principle was well recognized by Blackstone, who stated about “the principal absolute rights which appertain to every Englishman”:¹⁴²

But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.¹⁴³

An analogy may be gleaned from the incidents protected by the right to keep and bear arms, which is closely related and essential to the right to hunt.¹⁴⁴ In an 1871 decision, the Tennessee Supreme Court explained:

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; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then *the right to keep arms for this purpose involves the right to practice their use*, in order to attain to this efficiency.¹⁴⁵

¹⁴⁰ See *Robert v. City of Norfolk*, 49 S.E.2d 697, 704 (Va. 1948) (invalidating ordinance which “permits the punishment of *incidents fairly within the protection of the guarantee of a free press*” (emphasis added)).

¹⁴¹ *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (holding that free speech and press include “the right to distribute, the right to receive, . . . and freedom to teach”). “[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” *Id.* at 484.

¹⁴² 1 WILLIAM BLACKSTONE, COMMENTARIES *140.

¹⁴³ *Id.*

¹⁴⁴ VA. CONST. art. I, § 13, provides in part “[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed” See generally Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1 (1993) (discussing the arms guarantees of the United States, Virginia, and West Virginia).

¹⁴⁵ *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178 (Tenn. 1871) (emphasis added). Similarly, *Hill v. State*, noted the objective of a “well regulated militia,” explained:

In 1964, the Virginia General Assembly resolved that “many citizens of this Commonwealth who own and enjoy the use of firearms are greatly disturbed by the proposals of certain groups to regulate and restrict gun ownership,” and noted the necessity of “proper training in the safe and effective use of firearms”¹⁴⁶ Training in safety and proficiency are inherent in any firearms-related activity and thus are within protected rights.

A similar issue arose in a prosecution in Arizona of a licensed hunter for trespassing on state land.¹⁴⁷ The prohibition did not apply to a person “lawfully taking wildlife.”¹⁴⁸ Arizona Attorney General Opinion No. 76-4 stated: “A license issued by Game and Fish carries with it the State’s permission to access State trust land for the purpose of hunting and fishing but does not include any other ‘recreational’ uses.”¹⁴⁹ At trial, the defendant testified that he relied on his hunting license while shooting on such land.¹⁵⁰ The Arizona Superior Court reversed his conviction on the following basis:

“Hunting” involves more than the moment in which an animal is killed by a hunter. Sighting in a rifle for accuracy before seeking game is an integral part of safe and responsible hunting, as is scouting for game, and various other activities in anticipation of taking wildlife; these activities are not “other recreational uses.” To limit hunters’ access to the specific act of shooting at an animal would be to discourage safe and humane hunting. The license held by Appellant essentially granted him an easement for the purpose of hunting. Though “other recreational uses” are excluded, the law recognizes that any easement encompasses activities reasonably necessary and appurtenant to accomplish the purpose of the easement. As a possessor of a valid Arizona hunting license, Appellant was lawfully and with right shooting on state trust land.¹⁵¹

To acquire this skill and this familiarity, the words “bear arms” must include the right to load them and shoot them and use them as such things are ordinarily used, so that the “people” will be fitted for defending the state when its needs demand; and when the constitution grants to the general assembly the right to prescribe the manner in which arms may be borne, it grants the power to regulate the whole subject of using arms, provided the regulation does not infringe that use of them which is necessary to fit the owner of them for a ready and skillful use of them as a militiaman. Any restriction which interferes with this is void, whether it relates to the carrying them about the person, or to the place or time of bearing them.

Hill v. State, 53 Ga. 472, 480–81 (1874).

¹⁴⁶ JOURNAL OF THE SENATE OF VA., 250–51, 472 (1964).

¹⁴⁷ State v. John Lazzeroni, No. CR-65983 (Az. Sup. Ct. Oct. 7, 1999) (on file with author).

¹⁴⁸ *Id.* at 4.

¹⁴⁹ 1990 Ariz. Op. Att’y Gen. 73, 1990 WL 484063, *1 (1990).

¹⁵⁰ *Lazzeroni*, No. CR-65983, at 4.

¹⁵¹ *Id.* at 4–5.

In *Orion*, the Board of Supervisors argued that the view that activities preceding the actual hunt are protected would “extend constitutional protection to shopping for shotgun shells and hunting clothing, and leafing through Cabela’s magazine.”¹⁵² While the court did not opine on that argument, it could be noted that if those activities are not protected, then the Board could ban shotgun shells and other items necessary for hunting, as long as it did not ban the actual pursuit of game. Hunting would be impossible without ammunition and commercial sources for hunting products.¹⁵³ As held about a related right, “the right to keep arms, necessarily involves the right . . . to purchase and provide ammunition suitable for such arms”¹⁵⁴

The constitutional guarantee protects activities that are ordinary and necessary to hunting and harvesting game. If a locality banned buckshot, dove loads, or other shotgun shells, would that not violate the guarantee? Given the right to hunt, could a locality ban hunting clothing such as blaze orange or camouflage coats? Could it ban hunting catalogs without violating the right to hunt, not to mention the right to a free press?

For the above reasons, the right to hunt and to harvest game includes the right to offer and receive training and practice which makes one proficient, safe, and humane in the hunting and harvesting of game. The constitutional right includes incidents fairly within the protection of the guarantee.

B. The Public Policy of the Commonwealth Promotes Firearm Safety and Shooting Facilities for Hunting Purposes

The right to hunt is “subject to such regulations” as the General Assembly may prescribe.¹⁵⁵ The General Assembly has enacted laws which promote firearm safety and training, shooting ranges, and game preserves.¹⁵⁶ While the infrastructure for hunting activities is left primarily to private initiative, these enactments indicate that the public policy of the Commonwealth recognizes that the right to hunt includes activities which make hunters proficient, safe, and humane.

The functions of the Board of Game and Inland Fisheries illustrate the close relation between shooting facilities, hunting, and conservation. The Board is directed to “[c]onduct operations for the preservation and propagation of game birds, game

¹⁵² Defendant’s Response to Plaintiff’s Post-Trial Memorandum at 10–11, *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195 (Va. Cir. Ct. June 3, 2005) (Nos. 04-0019, 04-0020) (on file with author).

¹⁵³ See *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (holding that one has a right to “shop for” and acquire the objects necessary to exercise a primary constitutional right: “The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach *Without those peripheral rights the specific rights would be less secure.*” (emphasis added)).

¹⁵⁴ *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

¹⁵⁵ VA. CONST. art. XI, § 4.

¹⁵⁶ VA. CODE ANN. § 29.1-300.2 (2010) (establishing a hunter education program).

animals, fish and other wildlife,¹⁵⁷ as well as to “acquire lands and waters for game and fish refuges, preserves or public shooting and fishing”¹⁵⁸

To obtain a hunting license, one must either complete a hunter education program or have had a prior license.¹⁵⁹ The Department of Game and Inland Fisheries “shall provide for a course of instruction in hunter safety, principles of conservation, and sportsmanship,”¹⁶⁰ and shall cooperate with organizations with such objectives.¹⁶¹ Hunter education may involve shooting practice.¹⁶²

The right to hunt justifies not just the minimal hunter education course required by law, but also more advanced training. The Department itself sponsors hunting workshops which include shooting practice.¹⁶³ The hunter education program is just a beginning, and practice and proficiency are necessary to learn to hunt live game. The Commonwealth is not expected to provide facilities and training to a hunter to learn to hunt any more than it hands out a free shotgun to every hunter. Shooting facilities serve the Commonwealth’s public policy objectives to promote hunter safety, principles of conservation, and sportsmanship.¹⁶⁴ This would particularly be the case for a shooting preserve licensed by the Department of Game and Inland Fisheries.¹⁶⁵ A shooting facility would allow hunters to practice the efficient and humane taking of game.

The fact that the hunting preserve is a commercial venture does not change the use as a hunting use protected by the right to hunt. Status as a licensed shooting preserve means that “the licensee and such other persons as he may designate, because of payment of fees or otherwise, may hunt on the licensed premises, and shoot . . . any game birds or animals of the species licensed.”¹⁶⁶ Similarly, the right to hunt includes the right to train hunters to hunt and the right to be so trained.

In sum, the public policy of the Commonwealth is to promote shooting activities and facilities which make hunters proficient, safe, and humane. The pertinent

¹⁵⁷ § 29.1-103.3 (2010).

¹⁵⁸ § 29.1-103.4; *see also* § 29.1-106 (allowing the Board to establish “public shooting and fishing preserves”). In addition to hunting, Virginia Wildlife Management Areas offer shooting ranges, including rifle sighting-in ranges, clay-bird shotgun ranges, and elevated stations for archery practice. *See, e.g.*, Amelia WMA, Virginia Department of Game and Inland Fisheries, <http://www.dgif.virginia.gov/wmas/detail.asp?pid=11> (last visited Oct. 3, 2010).

¹⁵⁹ § 29.1-300.1.

¹⁶⁰ § 29.1-300.2.

¹⁶¹ *Id.*

¹⁶² *See, e.g.*, § 29.1-300.3 (noting that the cost of instruction may include range fees and ammunition).

¹⁶³ *See, e.g.*, Outreach Programs and Events, Virginia Department of Game and Inland Fisheries, <http://www.dgif.virginia.gov/events/descriptions.pdf> (last visited Oct. 3, 2010) (offering courses on “shotgun, rifle, archery, hunting techniques for game species”).

¹⁶⁴ *See Avery v. Beale*, 80 S.E.2d 584, 592 (Va. 1954) (noting that game law is “enacted for the conservation of waterfowl, the protection and safety of those engaged in shooting them, and for the promotion of better sport and recreation.”).

¹⁶⁵ *See* VA. CODE ANN. § 29.1-600 (2010) (providing for licenses for shooting preserves).

¹⁶⁶ § 29.1-604.

regulations enacted by the General Assembly demonstrate that the right to hunt protects such activities and facilities.

C. The Constitutional Right is Not Confined to Narrow Definitions in the Game Code Which Create Crimes and Which Must be Narrowly Construed

To define the word “hunt,” the *Orion* court relied on criminal cases involving hunting without a license.¹⁶⁷ The court also relied on dictionaries in support of the same restrictive definitions.¹⁶⁸ The court then held that “the word ‘hunt’ in its plain, obvious, and common sense means the pursuit of game. Shooting sporting clays is not the pursuit of game.”¹⁶⁹

However, the words of a criminal statute are defined narrowly, while constitutional rights are construed broadly.¹⁷⁰ The Commonwealth has an interest in defining hunting as the pursuit of live game for conservation purposes only. Moreover, a bare definition of the word “hunt” is not dispositive of the meaning of the “right to hunt” and of the incidental or auxiliary rights it protects.

In *Commonwealth v. Bailey*,¹⁷¹ which involved the crime of hunting fox without a license, the Virginia Supreme Court quoted definitions of hunting such as “the act of pursuing and taking wild animals; the chase.”¹⁷² Even then, the court also offered broader definitions, such as “to follow with dogs or guns for sport or exercise.”¹⁷³ But *Bailey* involved the meaning of “hunt” under a criminal statute, and “[i]t is a cardinal principle of law that penal statutes are to be construed strictly against the [Commonwealth].”¹⁷⁴ The full scope of a constitutional guarantee may not be limited to the narrow use of terms in a criminal statute.

The game code does define “hunting,” but the definition is restricted as follows: “As used in and *for the purposes of [Title 29.1] only*, or in any of the regulations of the Board, unless the context clearly requires a different meaning.”¹⁷⁵ In language identical to what existed when the right-to-hunt guarantee was adopted, that section provides:

“Hunting and trapping” includes the act of or the attempted act of taking, hunting, trapping, pursuing, chasing, shooting, snaring or netting birds or animals, and assisting any person who is hunting, trapping or attempting to do so regardless of whether birds or animals are actually taken; however, when hunting and trapping are

¹⁶⁷ *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195, 198 (Va. Cir. Ct. 2005).

¹⁶⁸ *Id.* at 198–99.

¹⁶⁹ *Id.* at 199.

¹⁷⁰ *See Ullmann v. United States*, 350 U.S. 422, 438 n.14 (1956) (citation omitted) (instructing that the Constitution should be read broadly).

¹⁷¹ 97 S.E. 774, 774 (Va. 1919).

¹⁷² *Id.*

¹⁷³ *Id.* at 774–75.

¹⁷⁴ *Wade v. Commonwealth*, 116 S.E.2d 99, 103 (Va. 1960).

¹⁷⁵ VA. CODE ANN. § 29.1-100 (2010) (emphasis added).

allowed, reference is made to such acts as being conducted by lawful means and in a lawful manner. The Board of Game and Inland Fisheries may authorize by regulation the pursuing or chasing of wild birds or wild animals during any closed hunting season where persons have no intent to take such birds or animals.¹⁷⁶

The definition is narrow as it applies to the criminal prohibition on hunting without a license and other crimes, reflecting the Commonwealth's interest in the conservation of wildlife.¹⁷⁷ Because wildlife is not harvested while hunting simulated game, it is not included in the definition of "hunting" for purposes of defining crimes.¹⁷⁸

The game code recognizes that hunting need not involve the taking of live game and is an art that can be practiced. As seen above, the statutory definition itself refers to the pursuit of game in the closed season when persons have no intent to harvest game.¹⁷⁹ Field trials with dogs need not involve the shooting of game.¹⁸⁰ Foxes may be hunted on horseback without firearms.¹⁸¹ The law prohibits shooting at live pigeons as a form of target practice,¹⁸² obviously preferring the shooting of clay pigeons for target practice. Hunting is not restricted to pursuing game.¹⁸³

¹⁷⁶ *Id.*; see also 1990 Va. Acts 371; 2002 Va. Acts 157. As noted, hunting includes "assisting" another who "is hunting" in the present tense. In a broader sense, and not for purposes of the criminal provisions regarding hunting, a person operating a shooting facility would be "assisting" a person who "will be hunting," in the future tense, by enhancing the hunter's proficiency. The constitutional right to hunt is broad enough to include activities which directly assist hunters.

¹⁷⁷ See VA. CODE ANN. § 29.1-300 ("It shall be unlawful to hunt . . . without first obtaining a license"); § 29.1-335 (making hunting without license a Class 3 misdemeanor); § 29.1-519(F) (making hunting with unauthorized weapons a Class 3 misdemeanor); § 29.1-521 (making it unlawful to hunt on Sunday, to hunt over the bag limit, or to hunt other than as permitted by law); § 29.1-521.1.A (making it unlawful "to willfully and intentionally impede the lawful hunting . . . of wild birds or wild animals.").

¹⁷⁸ "Hunting" is defined differently for various statutory purposes. See, e.g., § 29.1-526 ("For the purpose of this section, the terms 'hunt' and 'trap' shall not include the necessary crossing of highways for the bona fide purpose of going into or leaving a lawful hunting or trapping area.").

¹⁷⁹ § 29.1-100.

¹⁸⁰ See § 29.1-422 (authorizing the Board to "grant permits to bona fide field trial clubs and associations to hold field trials with dogs If wild game is to be shot over or in front of dogs engaged in such field trials, the person actually shooting must have a license").

¹⁸¹ See § 29.1-300.1(C) (noting that the hunter-education requirement for a hunting license "shall not apply to persons while on horseback hunting foxes with hounds but without firearms").

¹⁸² VA. CODE ANN. § 3.2-6573 (2010) provides in part: "Live pigeons or other birds or fowl shall not be kept or used for the purpose of a target, or to be shot at either for amusement or as a test of skill in marksmanship. . . . Nothing contained herein shall apply to the shooting of wild game."

¹⁸³ See, e.g., VA. CODE ANN. § 18.2-56.1(B) (punishing reckless handling of firearms "while the person is engaged in hunting, trapping or pursuing game") (emphasis added).

Finally, constitutional rights, especially the auxiliary rights that may be necessary to exercise core rights, may not be reduced to bare dictionary definitions. As explained by the U.S. Supreme Court:

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words in a dictionary, but by considering their origin and the line of their growth.¹⁸⁴

No court would hold that the government could ban electronic media on the basis of the argument that the First Amendment guarantees only a right to a free press, and the dictionary definition of the term “press” is “short for printing press.”¹⁸⁵

In sum, the right to hunt provides an umbrella of activities, such as shooting practice, which make it possible to hunt and to harvest game proficiently, safely, and humanely. Constitutional rights are not and have never been limited to definitions found in criminal codes or dictionaries.

IV. IF WARM-UP SHOOTING AND SAFETY CHECKS ARE ACCESSORY USES TO HUNTING, DOES THE RIGHT TO HUNT INCLUDE PRACTICE SHOOTING?

The extent to which practice shooting may be considered as an adjunct right to the primary right to hunt is suggested in the *Orion* court’s analysis of whether sporting clays is an accessory use in an agricultural district under the zoning ordinance.¹⁸⁶ While the court ruled that sporting clays is not generally an accessory use, its discussion bears on the issue of whether the use of sporting clays is what could be called an “accessory” right to the primary right to hunt.¹⁸⁷

Specifically, the court recognized that practice shooting for safety and warmup is part of a specific hunt.¹⁸⁸ That raises the issue of whether a basis exists to limit safety to the time period just before an actual hunt, or to only allow a warmup just before a hunt but not to allow practice at other times.

¹⁸⁴ *Ullmann v. United States*, 350 U.S. 422, 438 n.14 (1956) (citation omitted).

¹⁸⁵ WEBSTER’S NEW WORLD DICTIONARY 1066 (3d Coll. ed. 1991).

¹⁸⁶ Nelson County, Va. Zoning Ordinance § 4-1-12 (2010) permits, by right, “accessory uses” on land that is zoned as an Agricultural District A-1, like the Orion property. An “accessory use” is defined as “a subordinate use . . . customarily incidental to and located upon the same lot occupied by the main use or building.” NELSON COUNTY, VA. ZONING ORDINANCE § 2.2 (2010).

¹⁸⁷ *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195, 195 (Va. Cir. Ct. 2005).

¹⁸⁸ *Id.* at 202.

As the court noted, “John Long, an insurance agent who specializes in insurance for hunting preserves, testified that approximately 80 to 90 percent of hunting preserves nationally have a sporting clays facility.”¹⁸⁹ The court remarked “[a]t first blush, it seems that the sporting clays facility is a subordinate use customarily incidental to the hunting preserve.”¹⁹⁰

However, the court decided that sporting clays would be the main activity, and hence Orion was not entitled to engage in that activity as a matter of right.¹⁹¹ First, it noted that the shooting preserve license allowed hunting game only eight months of the year, but the clays facility could operate all twelve months.¹⁹² However, year-round practice would seem to make the actual hunting of game safer and more proficient.

Second, the court noted evidence that sporting clays was useful for attracting women shooters and offered an alternative to those who did not wish to engage in the “blood sports.”¹⁹³ Yet presumably, some such persons would eventually engage in the hunting of live game. Some persons practice an activity more than others before engaging in the actual activity.

Third, the court noted testimony that the sporting estate would not be feasible without the sporting clays course.¹⁹⁴ Yet the court had recognized previously that hunting preserves generally have sporting clays.¹⁹⁵ It would be no surprise that a hunting preserve with inadequate facilities for practice and safety training would not be a commercial success. A sporting clays facility is an integral part of a hunting preserve.

An Indiana appellate court held that a skeet range and shooting range were accessory uses to a recreational country home with 40 acres.¹⁹⁶ The *Orion* court sought to distinguish that case because the recreational use there occurred primarily on weekends.¹⁹⁷ Yet the Indiana court held that the result would be the same even if the skeet range was used every day, as the issue was “the nature of the use, not the degree of intensity with which the use is pursued.”¹⁹⁸

An instructive analogy may be made between sporting clays as an auxiliary right to the primary constitutional right to hunt and sporting clays as an accessory use to the main hunting use under a zoning ordinance. The *Orion* court itself found that a limited amount of sporting clays is an accessory use to hunting as follows:

I do find that the use of sporting clays for warm-ups and safety tests in conjunction with hunts of live animals on the hunting

¹⁸⁹ *Id.* at 200.

¹⁹⁰ *Id.* at 201.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 200.

¹⁹⁶ *Boone County Area Plan Comm'n v. Kennedy*, 560 N.E.2d 692, 697 (Ind. App. 1990).

¹⁹⁷ *Orion*, 68 Va. Cir. at 202.

¹⁹⁸ *Kennedy*, 560 N.E.2d at 696 n.2.

preserve is an accessory use. The facts establish that this limited use of sporting clays is customary to allow a hunter to warm-up prior to engaging in a hunt of wild game and for the staff and guides to evaluate the proficiency of the hunter for safety purposes. Thus, and for this limited purpose, the shooting of sporting clays is allowed as an accessory use. Accordingly, while a sporting clays facility is not an accessory use under the Nelson County Zoning Ordinance to a hunting preserve, shooting of sporting clays, or for that matter skeet or trap, is subordinate and incidental to the hunting preserve for purposes of warm-ups and safety evaluations.¹⁹⁹

If shooting sporting clays to warm-up for a hunt and to allow a safety check are part of hunting at the time of a specific hunt, so too, it would seem, are practice and safety training at other times. One plays basketball not just during the warm-up before a game, but also on practice days. And if safety is a legitimate part of hunting just before an actual hunt, it is equally legitimate at other times. In short, given that proficiency and safety are proper objectives of a specific hunt, promotion of these same objectives at other times appears to be encompassed in the right to hunt.

V. DO LOCAL RULES RUN AFOUL OF THE GUARANTEE'S RESERVATION OF REGULATION TO THE GENERAL ASSEMBLY?

A. The Right to Hunt is Subject to Regulation by the General Assembly, Which Has Authorized Counties to Regulate Only in Narrow Circumstances

The right to hunt can only be regulated or restricted by the General Assembly.²⁰⁰ In *Orion*, the County's Director of Planning and Zoning testified to the Board's restriction that one must "learn out in the field to hunt during hunting season."²⁰¹ However, the Board allowed "both sighting in of rifles and hunter safety training to be conducted on property as part of a hunting use of property," only "if it's at the beginning of the hunting season."²⁰² Sighting in at the beginning of the season is allowed because it is "ordinarily, customarily part of a hunting use," i.e., "of the hunting of live game," but not so "if you're shooting at targets outside the hunting season"²⁰³

¹⁹⁹ *Orion*, 68 Va. Cir. at 202.

²⁰⁰ See VA. CONST. art. XI, § 4.

²⁰¹ Plaintiff's Exhibit 12 at 18, *Orion*, 68 Va. Cir. 195 (No. 04-0019) (testimony of Fred Boger).

²⁰² 1 Transcript of Trial at 143-44, *Orion*, 68 Va. Cir. 195 (No. 04-0019).

²⁰³ Plaintiff's Exhibit 12 at 40-41, *Orion*, 68 Va. Cir. 195 (No. 04-0019).

The constitutional guarantee includes the proviso that the right to hunt is “subject only to such regulations and restrictions as the General Assembly may prescribe by general law.”²⁰⁴ This negates any local power to regulate the right. Indeed, the declaration of the right to hunt with this proviso squarely prohibits local regulation.²⁰⁵

The legislative history of the amendment demonstrates the rejection of any local power to restrict the right to hunt. Senator William Mims moved to insert “allowing regulation as any city or town may prescribe by charter” at the end. As reworded by Mims, the amendment would have stated: “The people have a right to hunt and fish, subject to such regulations and restrictions as the General Assembly may prescribe by general law and any city or town may prescribe by charter.”²⁰⁶ The Senate rejected the amendment.²⁰⁷ The proviso that the right is subject to regulation only by the General Assembly was carefully chosen to prohibit restrictions based on local ordinances or local land use decisions.²⁰⁸

Where counties have no power to pass ordinances restricting certain activities, restricting the same activities through land-use decisions cannot be considered reasonable exercises of the county’s police power. “In determining the constitutional scope of the zoning police power delegated to local governments in Virginia, we look first to our own enabling statutes.”²⁰⁹ The Virginia Court of Appeals has explained:

In Virginia, the boards of supervisors of the counties do not have broad general authority to adopt whatever ordinance they deem appropriate or desirable. The power of a county, like that of a municipal corporation, is controlled by Dillon’s Rule, which authorizes the locality to exercise those powers or adopt ordinances that the legislature expressly authorizes by statute or that are conferred by necessary implication.²¹⁰

The General Assembly has authorized counties to pass ordinances to prohibit hunting only pursuant to strict criteria. Hunting may be prohibited in or within one-half

²⁰⁴ VA. CONST. art. XI, § 4. Even before ratification of the amendment, it was held that “absent specific authority to the contrary, county boards of supervisors are not authorized to pass ordinances regulating hunting.” 1993 Op. Va. Att’y Gen. 157, 2 n.1 (determining that the locality may not prohibit bow hunting on private property).

²⁰⁵ “The proviso . . . is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause.” *Commonwealth v. Ford*, 70 Va. (29 Gratt.) 683, 688 (1878) (citation omitted).

²⁰⁶ See HJ124, Virginia General Assembly, Legislative Information System, <http://leg1.state.va.us/cgi-bin/legp504.exe?001+amd+HJ124ASR> (last visited Oct. 3, 2010).

²⁰⁷ *Id.*

²⁰⁸ Compare *id.* with H.R.J. Res 124, 2000 Leg., 504th Sess. (Va. 2000).

²⁰⁹ *Bd. of Supervisors v. Rowe*, 216 S.E.2d 199, 208 (Va. 1975).

²¹⁰ *Lawless v. County of Chesterfield*, 465 S.E.2d 153, 154 (Va. App. 1995).

mile of a subdivision or other heavily populated area if it would be dangerous.²¹¹ Hunting may be prohibited on or within 100 yards of a highway,²¹² school, or park.²¹³ A county may prohibit hunting with a shotgun loaded with slugs or a rifle larger than .22 caliber rimfire.²¹⁴ A county has no authority to prohibit hunting with a shotgun loaded with shot, which is used in sporting clays.

Similarly, the General Assembly has authorized counties to pass ordinances to prohibit the discharge of firearms only pursuant to clearly defined criteria. A county may prohibit the shooting of firearms in areas of the county which are “so heavily populated as to make such conduct dangerous to the inhabitants thereof.”²¹⁵ A county may not circumvent this provision through a land use decision rather than an ordinance,²¹⁶ by prohibiting shooting of firearms in areas which are not so populated as to make shooting dangerous to the inhabitants.²¹⁷

The General Assembly has also preempted localities from adopting any ordinance or taking any action governing the purchase, possession, transfer, ownership, carrying or transporting of firearms or ammunition except as expressly authorized by statute.²¹⁸ Even aside from preemption statutes, localities do not have power to regulate firearms

²¹¹ VA. CODE ANN. § 15.2-1210 (2008).

²¹² VA. CODE ANN. § 29.1-526.

²¹³ § 29.1-527.

²¹⁴ § 29.1-528(A).

²¹⁵ § 15.2-1209. Section 15.2-1209 provides:

Any county may prohibit the shooting of firearms . . . in any areas of the county which are in the opinion of the governing body so heavily populated as to make such conduct dangerous to the inhabitants thereof.

.
Any county that prohibits the outdoor shooting of firearms . . . shall provide an exemption for the killing of deer pursuant to § 29.1-529. Such exemption for the shooting of firearms shall apply on land of at least five acres that is zoned for agricultural use.

²¹⁶ Similar policies are explained in *Duff v. Twp. of Northampton*, 532 A.2d 500, 507 (Pa. Commw. Ct. 1987), *aff'd*, 550 A.2d 1319 (Pa. 1988), as follows:

The problem of hunting wild game with weapons must be uniform and comprehensive, else chaos, confusion and danger to the public would result. . . . To permit each municipality to pass its own version of the Game Law would prevent the Game Commission from freely utilizing its experienced decision-making powers in determining the appropriate balance between the rights of hunters to hunt, the control of wild game and the safety of the citizens of this Commonwealth.

See also *Kaluszka v. Town of E. Hartford*, 760 A.2d 1282 (Conn. Super. Ct. 1999) (ordinance permitting police chief to close area to hunting preempted by state hunting statutes).

²¹⁷ *See* *Bd. of Supervisors v. Rowe*, 216 S.E.2d 199, 212 (Va. 1975) (“Nor is there any evidence that such uses are noxious, dangerous, or otherwise inimical to the public health, safety, or welfare.”).

²¹⁸ § 15.2-915.

use absent specific authority. The Virginia Attorney General has summarized the familiar rules as follows:

Virginia follows the Dillon rule of strict construction concerning the powers of local governing bodies. Under that rule of construction, local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.

. . . [W]hen a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. The mention of one thing in a statute implies the exclusion of another.²¹⁹

Applying the above rules, Attorney General opinions have consistently opined that local regulation of firearms is invalid unless explicitly authorized.²²⁰ In short, if a county is not empowered to pass an ordinance prohibiting certain activity, it may not achieve the same result through a land-use decision.

B. A County May Not Restrict the Right to Hunt For Other Constitutionally Impermissible Reasons

Shooting facilities may be opposed based on the objection of neighbors citing various reasons; noise considerations, lead pollution, safety, and simple dislike of activities involving firearms. They may say that shooters should go someplace else to practice and pursue their sport. However, where noise ordinances are not being violated, environmental standards are being met, safety is not an issue, and the area is rural or otherwise consistent with such use, a shooting facility should not be prohibited. Not only is shooting an essential aspect of the right to hunt and pursue game as well as the right to keep and bear arms, restrictions thereon must not be based on constitutionally impermissible reasons.

The “negative attitude of the majority of property owners” is not a legitimate reason to deny a zoning permit.²²¹ “[D]enial of [a] permit [is] arbitrary [where] the decision to deny was not related to any substantial zoning interest, but was instead motivated principally [by] the heavy opposition of neighbors [expressed] at [a]

²¹⁹ 1998 Op. Va. Att’y Gen. 56, 1 (citations omitted).

²²⁰ *Id.* (locality may require concealed handgun applicant to be fingerprinted only if it adopts ordinance, which was authorized by statute); 1982 Op. Va. Att’y. Gen. 163 (absent express grant, county may not prohibit carrying of a loaded firearm); 1983 Op. Va. Att’y Gen. 755 (absent grant, locality may not require a permit for purchase of handgun).

²²¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

public hearing.”²²² Zoning officials may not rely “on public distaste for certain activities”²²³

In making zoning decisions, counties must be cognizant of and respect constitutional rights. “As the Board says, the police power is ‘elastic.’ But its stretch is not infinite. If it were, no property right, indeed, no personal right, could co-exist with it.”²²⁴

In *Orion*, although the Estate complied with the county noise ordinance, noise was the reason given by the Board for its denial of the permit.²²⁵ One neighbor testified that he is opposed to ever hearing *any* gunshot sound.²²⁶

A reasonable level of sound is inherent in the constitutional rights to hunt and to keep and bear arms, as both necessarily involve the discharge of firearms at targets, whether game or non-game. A right may not be suppressed because someone objects to a characteristic inherent in the exercise of the right.²²⁷

As the U.S. Supreme Court asked in a First Amendment case, must a person’s ability to use a sound truck “depend on the whim or caprice of the Chief of Police,” and on his ability to “prove to the satisfaction of that official that his noise will not be annoying to people?”²²⁸ To the contrary, “Noise can be regulated by regulating decibels” and “by narrowly drawn statutes.”²²⁹

A permit to conduct a constitutionally protected activity cannot be denied because the right might be exercised someplace else. As held in an analogous situation, “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”²³⁰ In *Orion*, the Estate sat on a rural 450 acres zoned agricultural, in Nelson County—one of Virginia’s most rural counties which is renowned for hunting.²³¹ The sporting clays facility was essentially banned from the entire county.

²²² Marks v. City of Chesapeake, 883 F.2d 308, 311 n.3 (4th Cir. 1989) (alteration in original) (citation omitted).

²²³ *Id.* (quoting Bayou Landing, Ltd. v. Watts, 563 F.2d 1172, 1175 (5th Cir. 1977).

²²⁴ Bd. of Supervisors v. Rowe, 216 S.E.2d 199, 209 (Va. 1975).

²²⁵ Plaintiff’s Exhibit 2N at 5–6, *Orion Sporting Group v. Bd. of Supervisors*, 68 Va. Cir. 195, 195 (Va. Cir. Ct. 2005) (No. 04-0019) (citing Transcript of the Board of Supervisors Meeting, Feb. 4, 2004, at 18–23, 29).

²²⁶ Plaintiff’s Exhibit 1A, *Orion*, 68 Va. Cir. 195 (No. 04-0019) (citing Transcript of Planning Committee Meeting, Nov. 19, 2003, at 50).

²²⁷ Prior to 2009, Virginia did not encourage noise reduction for firearms. See VA. CODE ANN. § 18.2-308.6 (2008) (repealed) (felony to possess unregistered firearm muffler or silencer).

²²⁸ Saia v. New York, 334 U.S. 558, 561–62 (1948).

²²⁹ *Id.* at 562.

²³⁰ *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

²³¹ Shooting facilities have been upheld on far smaller tracts. See, e.g., *Oak Haven Trailer Court, Inc. v. W. Wayne Defendant Conservation Ass’n*, 141 N.W.2d 645 (Mich. 1966) (a 62-acre tract with shooting facilities, zoned agricultural with the community surrounding the gun club not highly developed, in an area in which deer hunting was carried on in season—gun club clearly appropriate); *Evergreen State Builders, Inc. v. Pierce*, 516 P.2d 775 (Wash. 1973)

In sum, given the proviso that the right to hunt is “subject only to such regulations and restrictions as the General Assembly may prescribe by general law,”²³² a locality may not relegate to itself the power to define to what extent shooting activities constitute “hunting” and are or are not allowed. Recognition of the activity of sighting in a gun as a hunting activity only at the beginning of the hunting season is beyond the purview of a locality.

CONCLUSION

The definitive precedent on the nature of the emerging constitutional right to hunt has yet to be written in any State. Indeed, virtually no court at any level has so much as opined on the issue, due perhaps to the recency of adoption of the guarantees and the lack of any legislative onslaught against hunting in the States that have guarantees. The single exception is Vermont, which has recognized the liberty to hunt since 1777²³³ and whose highest court has had occasion to speak to the issue.²³⁴ States without such guarantees are perhaps most likely to ban hunting, or at least specific kinds of hunting, based on reasons that some may allegedly arise out of politically correct, “Bambi” view of nature.²³⁵

At least in those States where hunting is or may become a constitutional right, it remains to be seen to what extent the right will be taken seriously by the courts. The guarantees themselves explicitly recognize the legitimacy of general regulation of hunting pursuant to State law, including delegation of regulation to game and fish commissions and departments. What is certain is that animal rights activists and other opponents of hunting will continue to pursue their agendas, and localities will occasionally overreach by prohibiting hunting or activities like shooting that promote proficiency, safety, and humaneness. In the inevitable courtroom conflicts, eventually a jurisprudence of the right to hunt will evolve.

(70-acre wooded tract with shooting facilities in an area that, over the years, had become a suburban residential zone—urbanization of society should not be permitted to destroy such kinds of recreation).

²³² VA. CONST. art. XI, § 4.

²³³ VT. CONST. of 1777, ch. 2, § 39.

²³⁴ See *Cabot v. Thomas*, 514 A.2d 1034, 1037 (Vt. 1986) (hunt guarantee “offers a general delineation of not only the respective rights of landowners and sportsmen but also the authority of government to regulate those rights in the context of hunting and fishing”); *State v. Norton*, 45 Vt. 258 (1872) (“The numerous statutes which have been passed for the protection of game and fish have been deemed necessary to the beneficial enjoyment of the constitutional right.”).

²³⁵ See *New Jersey Animal Rights Alliance v. New Jersey Dept. of Env'tl. Prot.*, 934 A.2d 52 (N.J. 2007) (animal rights groups challenged black bear management policy by the Commissioner of the Department of Environmental Protection, Division of Fish and Wildlife, after which the Commissioner withdrew her approval of the policy; sportsmen clubs challenged the withdrawal, but court invalidated the original policy).

APPENDIX:

STATE CONSTITUTIONS GUARANTEEING THE RIGHT TO HUNT

The following States have constitutional guarantees of the right to hunt or have amendments pending to do so.

Alabama: ALA. CONST. amend. 597 (adopted in 1996)

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

Arkansas: Language that will be on the 2010 General Election Ballot:

SECTION 1.

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

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

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

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

- (1) Any provision of Amendment 35 to the Arkansas Constitution;
- (2) Any common law or statute relating to trespass, private property rights, eminent domain, public ownership of property, or any law concerning firearms unrelated to hunting; or
- (3) The sovereign immunity of the State of Arkansas.

Georgia: GA. CONST. art. I, § 1, para. XXVIII (adopted in 2006)

The tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good.

Louisiana: LA. CONST. art I, § 27 (adopted in 2004)

The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. Hunting, fishing and trapping shall be managed by law and

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

Minnesota: MINN. CONST. art. XIII, § 12 (adopted in 1999)

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

Montana: MONT. CONST. art. IX, § 7

Preservation of Harvest Heritage. The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right to trespass on private property or diminution of other private rights.

North Dakota: N.D. CONST. art. XI, § 27 (adopted in 2000)

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

Oklahoma: OKLA. CONST. art. II, § 36 (adopted in 2008)

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

South Carolina: Language that will be on the 2010 General Election Ballot in South Carolina:

Section 25. The traditions of hunting and fishing are valuable parts of the state's heritage, important for conservation, and a protected means of managing nontthreatened wildlife. The citizens of this State have the right to hunt, fish, and harvest wildlife traditionally pursued, subject to laws and regulations promoting sound wildlife conservation and management as prescribed by the General Assembly. Nothing in this section shall be construed to abrogate any private property rights, existing state laws or regulations, or the state's sovereignty over its natural resources.

Tennessee: Passed the legislature in 2008, must pass again in 2010 to be on the 2010 Ballot.

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

Vermont: VT. CONST. ch. II, § XXXIX (adopted in 1777)

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

Virginia: VA. CONST. art. XI, § 4 (adopted in 2000)

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

Wisconsin: WIS. CONST. art. I, § 26 (adopted in 2003)

Right to Fish, Hunt, Trap, and Take Game. The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.

RIGHT TO BEAR ARMS TO HUNT

Delaware: DEL. CONST. art. 1, § 20 (adopted in 1987)

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

Nebraska: NEB. CONST. art. I, § 1 (adopted in 1988)

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Nevada: NEV. CONST. art. I, § 11, cl. 1 (adopted in 1982)

Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.

New Mexico: N.M. CONST. art. 2, § 6 (adopted in 1971, amended in 1986)

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

North Dakota: N.D. CONST. art. I, § 1 (adopted in 1984)

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

West Virginia: W. VA. CONST. art. 3, § 22 (adopted in 1986)

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.²³⁶

Wisconsin: WIS. CONST. art. 1, § 25 (adopted in 1998)

The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.

²³⁶ In addition, W. VA. CONST. article VI, § 55, provides in part:

Revenues and properties applicable to fish and wildlife conservation. . . .
Nothing in this section shall prevent the Legislature from reducing or increasing the amount of any permit or license to hunt, trap, fish or otherwise hold or capture fish or wildlife or to repeal or enact additional fees or requirements for the privilege of hunting, trapping, fishing or to otherwise hold or capture fish or wildlife.