

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**SUPREME COURT OF RHODE ISLAND**

**Charles H. MOSBY, Jr., and  
Steven GOLOTTO,**

**Plaintiffs-Appellants**

**vs.**

**Vincent MCATEER, in his capacity as  
Chief of the Rhode Island Bureau of  
Criminal Identification, and  
Sheldon WHITEHOUSE, in his  
capacity as Rhode Island Attorney  
General**

**Defendants-Appellees**

**NO: 2001-0161A**

**STATEMENT OF AMICUS CURIAE**

**CITIZENS RIGHTS ACTION LEAGUE**

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## SUMMARY

This *amicus* believes that the key issue to be decided in this case is whether a citizen has *any* due process right when a government official, here the Attorney General, considers an application for a permit to carry a pistol or revolver. This Court has recognized that, while there is no right to carry a handgun without a license, there is a "right to be licensed to carry a handgun" in Rhode Island. State v. Storms, 112 R.I. 121, 127, 308 A.2d 463, 466 (R.I. 1973). This Court has conditioned the constitutionality of the licensing statute upon whether the legislative delegation of authority to public officials such as the Attorney General "prescribed standards which clearly and reasonably limit the exercise of the assigned authority to the public safety and welfare sought to be served," Id. (citations omitted), and has characterized this exercise of delegated authority as "fact-finding." Id.

The Attorney General appears to assert that his statutory discretion in considering applications is unfettered and unreviewable by any court. Aside from the constitutional questions raised by an unlimited delegation of authority, any interpretation of statute that permits government officials to act arbitrarily and capriciously is unreasonable on its face. Indeed, this Court has noted that, "Even our brief summary of some of the [Firearms] Act's essential provisions clearly evidences that the goal of the Legislature was to prevent criminals and certain other persons from acquiring firearms generally and handguns in particular *without at the same time making unduly difficult such acquisition for other members of society.*" Id. (emphasis added).

Further, such a claim of unfettered and unreviewable discretion is particularly egregious here in light of the explicit guarantee of Article I, Section 22 of the Rhode

Island Constitution, which reads clearly, unequivocally, and in its entirety "The right of the people to keep and bear arms shall not be infringed."

If this Court finds that there is *any* due process right in the review of applications for permits to carry a pistol or revolver, then it would be appropriate to remand this case for further consideration. By the same token, affirmation of the decision below would leave Rhode Island citizens with no meaningful right of review in the face of decisions by a government official that may be arbitrary, capricious, procedurally defective, politically motivated, or manifestly unfair.

### **HISTORICAL PERSPECTIVE**

The right to keep and bear arms has a long and well-researched history. The American Colonial mind was, by all accounts, unanimous in regarding the right to keep and bear arms as among the most important of personal and political rights. Numerous American Colonial writers, including constitutional authorities such as James Madison and Patrick Henry, frequently cited earlier writings on this point by Cicero and Machiavelli.

The first major expression of the right to keep and bear arms in the modern era is the English Bill of Rights of 1689, which enumerated "true, ancient, and indubitable rights" including "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law." (At the time, approximately 90% of the English population were Protestants.) William Blackstone, in his *Commentaries on the Laws of England*, expressed what would become the orthodox view that the right to have arms was one of the "auxiliary rights" essential to protect

fundamental rights:

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 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.

Blackstone, Commentaries, vol. 1, 140-141 (St. George Tucker ed., 1803); 1:136

(Chicago ed., 1979).

Although the first volume of Blackstone's *Commentaries* was published only in 1765 and the fourth and last volume in 1769, the work was enormously influential; just in America nearly 2,500 copies had been sold by the start of the American Revolution in 1775. Malcolm, J.L., To Keep and Bear Arms: The Origin of an Anglo-American Right, Harvard University Press, 1994, p. 142. Of the right to keep and bear arms specifically,

Blackstone further wrote:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law... and is, indeed, a public allowance under due restrictions, of the natural right of resistance and self preservation...

Blackstone, Commentaries, at 143-144 (Tucker); at 1:139 (Chicago).

Although Rhode Island did not adopt a constitution at the time of the American Revolution but instead continued to function under its 1663 Royal Charter, its regard for the importance of the right to keep and bear arms has been evident since at least 1790, when the state convention called to ratify the federal constitution requested that a Bill of Rights be added, including a right to keep and bear arms. Providence Gazette and Country Journal, 5 June 1790, at 23.

By the time Rhode Island finally did adopt its constitution in the wake of the Dorr

Rebellion of 1842, the right to keep and bear arms was firmly entrenched in the basic assumptions of American law. Ugly incidents of mob violence in which people managed to save themselves by the use of personal arms would certainly have been known to the writers of the 1842 constitution, most especially the Snowtown Riots of 1831 where several black freemen used guns to defend themselves and their Providence neighborhood against a murderous mob.<sup>1</sup>

Elisha Reynolds Potter, Jr., a leading participant whose annotated copy of the 1841 constitutional convention<sup>2</sup> draft has been preserved, noted in the margins surrounding what would become today's Article I, Section 22, "Boast of Eng[land] long contended for, sealed with blood of millions..." On the same page, he wondered, "Legislature may disarm people — Will you give this power to Legis[lature] in Cons[titution?]" On the facing page, he noted, "Omitted in P[eople's] C[onstitution]. Power to Gen[eral] A[ssembly] in comparison with which — drop in bucket... This is the great protection of your liberties — the last resort." Constitution of the State of Rhode-

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<sup>1</sup> Because of their liability to racial persecution, historical accounts suggest that blacks in this era frequently carried guns for personal protection. For example, during the Civil War anti-draft riots in New York City, a Negro newspaper reported, "The colored men who had manhood in them armed themselves, and threw out their pickets every day and night, determined to die defending their homes.... Most of the colored men in Brooklyn who remained in the city were armed daily for their self-defense." Quoted in McPherson, The Negro's Civil War, 1965, pp. 72-73. Rhode Island certainly never restricted the bearing of arms on the basis of race, which became a regular practice in Southern states following Nat Turner's Rebellion in 1831. The widespread appearance of such racially discriminatory laws in the 1830s strongly suggests that the activity they were designed to prohibit was widespread as well. Cramer, For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms, 1994, pp. 73-75.

<sup>2</sup> There were three constitutional conventions of this period, one in 1841 before the Dorr Rebellion by the anti-Dorrites and now known as the "Landholder's Convention," one conducted by the Dorrites that called itself the "People's Convention," and one in 1842 after the Dorr Rebellion that was mostly a continuation of the "Landholder's Convention" but which did have some conciliatory tendencies toward the Dorrites. Potter, a leading participant in both the first and the third of these conventions, annotated the report of the first convention apparently for his own use at the third convention. It is the third and last convention which produced the constitution which entered into force in 1843.

Island and Providence Plantations, as adopted by the Convention Assembled at Providence, November 1841, Knowles & Vose, printers, 1842 (manuscript annotated copy in the Elisha Reynolds Potter, Jr., Papers, Rhode Island Historical Society, Box 4, Folder 3). The record of debates from the convention, ordered by the General Assembly to be published in 1859, contains only the briefest mention of the right to keep and bear arms, leading to the inference that, despite Potter's preparations to speak in defense of the principle, it was uncontroversial to the point of unanimity. Journal of the Convention Assembled to Frame a Constitution for the State of Rhode Island, at Newport, Sept. 12, 1842, Knowles, Anthony & Co., state printers, 1859.<sup>3</sup> It is remarkable that the right to keep and bear arms remained an unquestioned principle mere months after the close of what has been characterized as Rhode Island's own civil war.

It appears that Rhode Island made no attempt to license or restrict the carrying of handguns until 1927 with the passage of the Firearms Act. R.I. Public Laws, 1927, ch. 1052. This complete absence of any statutory restrictions whatsoever likely accounts for the consequent lack of case law from this Court interpreting the constitutional provision.<sup>4</sup>

In 1958, the General Assembly formed a Committee to Review the Firearms Statutes, and their report of Feb. 2, 1959, "opposed... legislation designed purely for the convenience of law enforcement officers or for the purpose of circumventing *due process*

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<sup>3</sup> The Journal is divided into formal minutes and a summary of debate. The minutes for the Afternoon Session of Sep. 13, 1842, contain the only reference this *amicus* has been able to locate to the right to keep and bear arms clause, then Section 18, "Sections 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, and 21<sup>st</sup> were adopted to stand part of the article." Journal, at 8. The account in the record of debate is even more brief, "The remaining sections of the 1<sup>st</sup> Article were then considered and adopted." Journal, at 31. This is in contrast with the record of debate from the Morning Session of the same day, which was consumed with extensive discussions of political theory about the nature of sovereignty in the people, an issue of considerable interest immediately following the Dorr Rebellion.

of law." Rhode Island Journal, Feb. 3, 1959 (emphasis added). The Committee also "adopt[ed] the policy that legislation regulating concealable firearms should not be unreasonably restrictive..." Id. Indeed, the Committee provided crystal-clear guidance of legislative intent on the fundamental question now before this Court:

It [the committee] recognized the *constitutional and fundamental right of the law abiding citizen to possess and bear arms*. [The Committee was] opposed to legislation which can make prudent, law abiding citizens unwitting violators, or which denies the right of self defense . . . [Thus it] adopted the policy that legislation regulating concealable firearms should not be unreasonably restrictive, and that licensing the carrying of concealed firearms should license the act of carrying, not the gun itself.

Id. (emphasis added)

In 1975, then-Attorney General Julius C. Michaelson requested that the statutes be amended to transfer his responsibilities for handgun permits to the State Police, since the Attorney General is necessarily a politician subject to political influence. "Gun permits should not be considered political favors," he warned. Michaelson, "A Message to the Honorable General Assembly," Rhode Island Journal, Apr. 4, 1975. It was precisely the present concern about arbitrary and capricious decisionmaking that motivated Michaelson's letter to the General Assembly. "Politics and guns do not mix. I believe that an elected official should not have responsibility for issuing gun permits."

Id.<sup>5</sup>

Attorney General Michaelson also clearly implied that his interpretation of the statute at issue here was directly in conflict with that of Attorney General Whitehouse on the critical point of the limits of official discretion. Saying that he felt his staff was

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<sup>4</sup> The earliest significant federal regulation of the right to keep and bear arms is generally regarded to be the National Firearms Act of 1934.

<sup>5</sup> The General Assembly apparently took no action to amend the statutes in the manner requested.

overtaxed by conducting background investigations of applicants, Michaelson wrote, “Many times this results in delay and creates an injustice to the individual *legally entitled to a permit.*” *Id.* (emphasis added). Note that Michaelson chose this language less than two years after this Court’s opinion in Storms, of which he certainly would have been aware.

It seems clear, then, that the right to keep and bear arms was for much of this state's history regarded as basic, fundamental, and unquestioned, and was for the first three centuries unregulated. A committee of the General Assembly as recently as 1959 "recognized the constitutional and fundamental right of the law abiding citizen to possess and bear arms" and stated that regulations "should not be unreasonably restrictive," *supra*. This Court as recently as 1973 stated that acquisition of licenses should not be "unduly difficult" for law-abiding citizens. Storms, at 466. The General Assembly's Committee to Review the Firearm Statutes simply assumed a "constitutional and fundamental right" and explicitly recognized a due process requirement in the licensing process. The fact that, until very recently, no one has ever apparently sued over the denial of a handgun permit suggests that historical practices of previous Attorneys General were respectful of this constitutional right.

### **CONSTITUTIONAL LANGUAGE**

It is the accepted rule that constitutional language was carefully chosen and should be understood in terms of its plain meaning, and that unqualified constitutional language is more expansive of the rights it protects than qualified constitutional language. The United States Supreme Court has collected and summarized the guidance it has given

over its first century and a half of construing constitutional language:

To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. In expounding the Constitution of the United States,' said Chief Justice Taney in Holmes v. Jennison, 14 Pet. 540, 570, 571, 614, [39 U.S. 540, 570-571 (1840),] 'every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.' See, also, Martin v. Hunter's Lessee, 1 Wheat. 304, 333, 334; Ogden v. Saunders, 12 Wheat. 213, 316; Myers v. United States, 272 U.S. 52, 151 , 47 S.Ct. 21, 37; Williams v. United States, 289 U.S. 553, 572 , 573 S., 53 S.Ct. 751, 757.

Wright v. United States, 302 U.S. 583, 588 (1938).

The Attorney General summarily dismisses the keep and bear arms clause of our Constitution,

The Rhode Island Constitution, without a doubt, confers no constitutional right to carry a weapon or to be granted a permit to carry a weapon. Storms, at 464. Two federal courts have reached the same conclusion. Erdelyi v. O'Brien, 680 F.2d 61, 63 (9<sup>th</sup> Cir. 1982) ("Where law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants [for concealed weapon licenses] do not have a property right in such licenses protected by the Fourteenth Amendment.")

Appellee' Rule 12(A) Statement, at 5-6. (bracketed phrase in original)

This "without a doubt" interpretation of Storms by the Attorney General, as noted, is subject to considerable dispute. It is important to recognize that Erdelyi can be distinguished as it emphatically provides no insight on a constitutional claim, because it arises from California which has no provision for the right to keep and bear arms in its state constitution. Erdelyi speaks to a situation where the only authorization is purely statutory and the statute grants nearly unfettered discretion. By contrast, the Attorney

General in Rhode Island is constrained, firstly, by the straightforward constitutional clause on the right to keep and bear arms, and, secondly, by the limited delegation of a statutory duty which this Court has previously characterized as "fact-finding." Storms, at 466.

As the Superior Court observed below in the case at bar, a liberty or property interest to which due process protection is owed can arise *either* from a state-created statutory entitlement *or* from the Constitution directly. Mosby v. McAteer, C.A. No. 1999-6504, 2001 R.I. Super. LEXIS 18, at 15-16 (R.I. Super. 2001). Erdelyi held that the particular California statute did not meet the first test because it afforded too much discretion to be an entitlement, and, of course, the second test could not be satisfied because of the absence of a constitutional provision in California. This is not the situation in Rhode Island, and no federal court has ever been in a position to speak to whether the right to keep and bear arms clause of the Rhode Island Constitution creates a liberty or property interest. When other states have examined this question in the context of their own constitutions, they have generally found that there is a liberty or property interest and a consequent due process right. Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980); Kellogg v. City of Gary, 462 N.E.2d 685 (Ind. 1990); Rabbitt v. Leonard, 36 Conn. Sup. 108, 112 (Ct. Sup. 1979).

The Attorney General attempts to distinguish numerous court decisions from other states' holdings that there is a liberty or property interest (or both) in licenses to carry a handgun, arguing that in those states the constitutional language is *more* qualified than in Rhode Island. Appellee's Rule 12(A) Statement, at 5. Ohio's constitution provides that "the people have the right to bear arms *for their defense and security*." People's Rights

Organization v. City of Columbus, 925 F.Supp. 1254, 1269 (S.D. Ohio 1996) (emphasis added). Indiana's constitution provides that "The people shall have a right to bear arms, *for the defense of themselves and the state.*" Schubert at 1341 (emphasis added).

Certainly the framers of the Rhode Island Constitution intended *some* purpose in their clause protecting the right to keep and bear arms, and the absence of qualifying language strongly suggests that they intended the right in Rhode Island to be as expansive as possible, to include all reasonable purposes. There is no mention in the Rhode Island clause of a "well-regulated militia," as there is in the federal Second Amendment. Constitutional language is as significant for what it *does not* say as for what it *does* say. It must be assumed, as Chief Justice Taney wrote, that "[e]very word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." Wright, at 588, *quoting Holmes*, at 571.

Maine provides an outstanding precedential guide for Rhode Island, as it has the only other state constitution which contains an unqualified clause protecting the right to keep and bear arms. The clause came to be unqualified in an exceptionally unusual and well documented manner. In 1819, the Maine Constitution was adopted with the provision, "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned." The Maine Supreme Court in 1986 held that this clause, as written, provided no individual or personal right of self-defense to Maine citizens because of the qualifying phrase, "for the common defence." State v. Friel, 508 A.2d 123, 127 (Me. 1986), *cert. denied*, 479 U.S. 843 (1986). Immediately thereafter the citizens of Maine amended their Constitution to overrule Friel, as the Maine Supreme Court judicially noticed:

In 1987, the people of this state voted to amend article I, section 16, of the Maine Constitution to provide that "[e]very citizen has a right to keep and bear arms; and this right shall never be questioned." By their vote the people struck four words, "for the common defence," from the original provision, with the apparent intent of establishing for every citizen the individual right to bear arms, as opposed to the collective right to bear arms for the common defence.

State v. Brown, 571 A.2d 816 (Me. 1990).

Faced with a court decision which told the citizens of Maine that they had no meaningful right to keep and bear arms for self-defense, through the political process they remedied this *by making their constitution like that of Rhode Island*. Presumably the citizens of Maine could have chosen to insert rather than remove words, perhaps making the clause read "for the defense of themselves and for the common defense," but they evidently thought that merely striking the qualifying words was clear enough in meaning and the court agreed in Brown. The Maine Supreme Court reads their new Rhode Island-like clause as permitting "reasonable regulation," Id., at 817, but certainly would not countenance any attempt to eviscerate the will of the people by means of contorted interpretation.

As a result, the Attorney General's suggested interpretation that the constitutional clause applies only to the exercise of the right in one's own home or place of business or upon one's own land has no basis in the actual constitutional language nor in any ruling by this Court, and is an attempt to interpret the right into a practical nullity. This argument apparently relies upon this Court's observation in Storms that it is constitutional for a license to be required in such cases:

Moreover, defendant, even had he relied upon art. I, sec. 22 of the state constitution which safeguards the right of the people to keep and bear arms, might not be on sound ground. Then he would have been burdened with persuading us of the weakness of what is apparently the prevailing

view, viz., that a constitutional guarantee to keep and bear arms is not infringed upon by legislation which, in broad terms, forbids the unlicensed carrying of a pistol or revolver upon one's person excepting only in his home and place of business or upon his land. Burton v. Sills, 53 N.J. 86, 248 A.2d 521 (1968); Matthews v. State, 237 Ind. 677, 148 N.E.2d 334 (1958). *Contra*, State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921).

Storms, at 464.<sup>6</sup>

No party to the case at bar disputes the constitutionality of a licensing requirement *per se*, an issue decided in Storms. However, it is a *non sequitur* to assert that, because there is no constitutional right to carry a handgun without a license, there is no constitutional right in the license. In fact, the opposite is true: if a license is required to exercise a constitutional right, then this implies that there must be a constitutional right in the license and due process in the decision whether to issue it. The Attorney General, citing the Constitution, admits "Plaintiffs do have a right to keep and bear arms in their own homes and places of business or upon their land. R.I. Constitution, Art. 1, §22; Gen. Laws §11-47-8 and Storms at 464." Appellee's Rule 12(A) Statement, at 4, n2. It is a substantial contortion of the meaning of the word "bear" to assert that it applies only in one's own home or place of business or upon one's own land, in defiance of centuries of case law and common usage.

### **WHAT IT MEANS TO "BEAR ARMS"**

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<sup>6</sup> This Court's representative choice of cases in 1973 has proven ironic. In Schubert, Indiana in 1980 modified the Matthews holding and definitively held that there is a liberty and property interest in permits to carry a handgun, and therefore an attendant due process right. The New Jersey court in Burton noted that there were significant procedural protections written into the statute whose constitutionality was at issue: "To guard against arbitrary official action the Legislature directed early determination and provided for easy appeal to the county court. Review from the county court is readily available in the Appellate Division and, when necessary, in this [Supreme] Court. As has been pointed out elsewhere, these safeguards are probably of greater significance than further details in the statutory standard." Burton, at \_\_

Because the term "bear arms" appears in the federal Second Amendment, considerable scholarship has been invested in examining its historical meaning, although mostly focusing on the issue of its relationship, if any, to the Second Amendment's Militia Clause and whether its meaning there was intended to be primarily military. No authority or court has, to the best of the knowledge of this *amicus*, ever suggested the interpretation advanced here by the Attorney General, that it is limited to one's own home or place of business or upon one's own land. Even the opinion of the Superior Court below in the case at bar is couched in terms of noting the absence of precedent in the context of the statutory framework, rather than in making a substantive assertion:

Based upon the language in Storms and Rhode Island's Constitution, this Court is unable to declare that a person in Rhode Island has a fundamental right to carry a weapon outside the limits of his or her own land or business with or without a license which, in turn, would entitle them to due process protection when applying for a license.

Mosby v. McAteer, C.A. No. 1999-6504, 2001 R.I. Super. LEXIS 18, at 18 (R.I. Super. 2001).

It is apparently the position of the Attorney General that the word "bear" is only meaningful in one's own home or place of business or upon one's own land. At the time our Constitution was drafted, other states had enacted in their constitutions provisions which to various extents affirm and guarantee some right to keep and bear arms. Some of these provisions explicitly allow the state's legislature to limit or regulate this right.

Several state constitutions adopted during the same period of time specify the "right to bear arms for the common defence" or a variant of it: Maine (1819),

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(citations omitted). In addition, the constitutional question in New Jersey, which has no state constitutional guarantee of the right to keep and bear arms, was framed in the context of the federal Second Amendment.

Massachusetts (1780), North Carolina (1776), Tennessee (1796 & 1834). Cramer, For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms, 1994, p. 35.

The historical evidence is clear that "bear arms" was a general term that encompassed the carrying of arms for military service as well as for personal protection, and, in some Colonial-era uses, even for hunting. For example, the Anti-Federalist faction present at Pennsylvania's convention called to ratify the federal Constitution in 1787 included in their request for the addition of a Bill of Rights, "That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game..." Id. Further, numerous state constitutions adopted during the period 1776-1845 follow similarly general usage. "The constitutions of Connecticut (1818), Indiana (1816), Kentucky (1792 & 1799), Michigan (1835), Mississippi (1817), Missouri (1820), Ohio (1802), Pennsylvania (1776 & 1790), Republic of Texas (1838), State of Texas (1845), Vermont (1777, 1786, and 1793), all use the phrase 'bear arms' and variants of the phrase, 'in defence of themselves and the State.' This use in reference to individual self-defense strongly suggests that 'bear arms' was not exclusively of a military or republican nature." Id., at 7.

Certainly the authors of the Rhode Island Constitution were aware of what other states had placed into their constitutions and, with this knowledge, chose to draft our provision broadly and without qualification. If the framers had intended to limit the scope of this right they are likely to have said so.

Judicial interpretations in other jurisdictions of the term "bear arms" have universally been more expansive than our Attorney General suggests. For example, in

Michigan, one James Zerillo was convicted of possessing a revolver without a sheriff's permit, contrary to a newly enacted 1921 statute regulating such conduct. This alleged offense was committed on a public street:

It was made to appear in evidence that, about 5 o'clock in the morning of the 25th day of September, 1921, at the corner of Chase and Russell streets in the city of Detroit, defendant was seated at the wheel of a Marmon touring car...

People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922).

Michigan's Supreme Court was unsympathetic to the new statute, and held that the term "bear arms" included as constitutionally protected conduct, in this case, the defendant's possession of a revolver when on a public street:

Game being property of the state the Legislature may enact laws for its protection, but under the guise of protection of game may not disarm any class, falling within the constitutional guaranty, of the right to *bear arms* in defense of themselves. The guaranty of the right to every person to *bear arms* in defense of himself means the right to possess arms for legitimate use in defense of himself, and necessarily includes the right to defend therewith, by lawful means, his property.

Id. (emphasis added)<sup>7</sup>

In 1903, the Vermont Supreme Court had an opportunity to define the term "bear arms" with regard to the legality of an ordinance that stated, "[N]o person shall carry within the city any ... pistol ... or weapon of similar character, nor carry any weapon concealed on his person, without permission of the mayor or chief of police, in writing..." State v. Rosenthal, 75 Vt. 295, 55 A. 610 (Vt. 1903). " A complaint was filed against the respondent in the city court for carrying within the city, in violation of said

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<sup>7</sup> Michigan today allows bearing arms unconcealed on public streets without a permit, but issues permits as a matter of right and subject to generally non-discretionary criteria that allow bearing arms concealed. Under the modern rule, Michigan treats bearing arms in a motor vehicle as *ipso facto* concealed and therefore requires a permit. The purpose of the Zerillo citation here, however, is simply to illustrate the definition given by the court to the term "bear arms."

ordinance, a pistol loaded with powder and bullets, concealed on his person, without such permission." Id.

The Court ruled that that the term "bear arms" protected the carrying of a concealed weapon, and therefore held the ordinance in question to be illegal:

The people of the state have a right to bear arms for the defense of themselves and the state. Const. c. 1, art. 16. .... Consequently, unless a special permission is granted by the mayor or chief of police for that purpose, a person is prohibited from carrying such weapons in circumstances where the same is lawful by the Constitution and the general laws of the state... The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void.

Id.

This case is particularly illustrative because the Vermont Constitution does not mention any right to *keep* arms, only the right to *bear* arms. The ordinance in question prohibited the carrying of arms publicly — the *bearing* of arms — and was therefore voided by the Court.

North Carolina has a constitutional provision that is similar to our own, yet much more qualified. The Supreme Court of North Carolina, after considering the case of a man convicted of bearing a pistol "off his premises unconcealed," ruled:

The Constitution of this State, sec. 24, Art. 1, which is entitled, 'Declaration of Rights,' provides: 'The right of the people to keep and bear arms shall not be infringed,' adding, 'Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice.' This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further.

State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921).

By affirming the acquittal a on charge of openly carrying a pistol on a public

street pursuant to the right to "keep and bear arms," the Supreme Court of North Carolina clearly affirmed that to "bear arms" means at least to carry a pistol in public.

Indiana held that "bearing arms" protected mere exhibition or display from a motor vehicle in a decision acquitting a defendant of "intimidation" for allowing a holstered handgun to be seen by a motorist in another vehicle. The handgun was not brandished, and was neither pointed at the other motorist nor even removed from its holster. Since the right to "bear" implies doing so in public, presumably it would inevitably be seen by others and thus could not form the basis for "intimidation" absent unlawful intent.

In Indiana, there is a general right to bear arms rooted in Article 1, Section 32, of the Indiana Constitution, which includes the substantive right to carry a handgun with a license, provided that the provisions of the Indiana Firearms Act are met. Kellogg v. City of Gary, 562 N.E.2d 685, 704 (Ind. 1990). Our supreme court has recognized that this right to bear arms, which includes the right to carry a handgun with a license, is both a liberty and property interest protected by the due process clause of the Fourteenth Amendment, for the defense of one's self and property. Id. at 694, 696. Gaddis v. State, 680 N.E.2d 860 (Ind.App. 1997).

The New Mexico Constitution protects the right to "bear arms" by carrying a pistol in public. City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971).

Reversing the conviction of a man who attracted the attention of police officers for what appears to have amounted to vagrancy, the Oregon Supreme Court has held that mere carrying of a knife concealed upon the person, for the purpose of protection on a public street, is protected by the "bear arms" clause of the Oregon Constitution. State v. Delgado, 298 Or. 395, 692 P.2d 610 (Or. 1984), *following* State v. Kessler, 289 Or. 359, 614 P.2d 94 (Or. 1980). The essence of the decision examined the historical intent of the

framers of the relevant constitutional clause in 1859, devoting considerable attention to the application of the enunciated constitutional principles to the modern world.

The United States Court of Appeals for the Fifth Circuit in United States v. Emerson, 270 F.3d 203 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002) extensively analyzed the historical underpinnings of the text and intent of the federal Second Amendment. Although the Second Amendment is not at issue in the case at bar, its language following the Militia Clause is word-for-word identical with Article I, Section 22, of the Rhode Island Constitution, and therefore the Fifth Circuit's thorough textual analysis is of great value here. The terms "bear" and "keep," among others, were analyzed in their historical context.

We conclude that the phrase "bear arms" refers generally to the carrying or wearing of arms. . . . Finally, our view of "bear arms" as used in the Second Amendment appears to be the same as that expressed in the dissenting opinion of Justice Ginsburg (joined by the Chief Justice and Justices Scalia and Souter) in Muscarello v. United States, [524 U.S. 125,] 118 S.Ct. 1911, 1921 (1998); viz:

"Surely a most familiar meaning [of carrying a firearm] is, as the Constitution's Second Amendment ("keep and *bear* Arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

United States v. Emerson, 270 F.3d 203 (5<sup>th</sup> Cir. 2001)(bracketed phrase in original)

This *amicus* offers these cases primarily for their illustrative value in defining the scope of the term "bear arms," arguing only that our own Constitution, by affirming a right to "bear arms," provides a right to possess arms off of one's premises. This right, whatever its extent, implicates a liberty and property interest, which, in turn, entitles applicants to due process of law in the evaluation of applications for pistol permits.

As noted, the Rhode Island Constitution's protection of the right to keep and bear arms is not qualified by a militia clause. It is absurd to claim that the term is restricted to one's own home or place of business or upon one's own land. Had the drafters of Rhode Island's Constitutional protection of the right to keep and bear arms intended such an unusual and unprecedented restriction — and it is difficult to see why they would have bothered to put such a limited protection into the Constitution at all — then they most assuredly would have said so.

### **THE STORMS PRECEDENT AND SELF-DEFENSE**

While the case at bar is to a significant extent one of first impression, Storms, as this Court's only precedent speaking to Article I, Section 22 of the Rhode Island Constitution, looms over it. This is unfortunate, as Storms appears to have been strangely argued in such a way as to place this Court in a difficult position. Most troublesome is that Mr. Storms argued his case on the basis of Section 23 (now Section 24), which is the residual rights clause,<sup>8</sup> rather than Section 22, the keep and bear arms clause. It appears that Mr. Storms asserted a right to self-defense that he theorized could be derived from the residual rights clause. This Court then generously imputed a Section 22 claim *sua sponte* and proceeded to analyze that claim to an extent appropriate to the criminal context of that case, but without benefit of argument.

Substantial confusion and misinterpretation has resulted in the case at bar because of the odd circumstances of Storms. For example, Appellee repeatedly incorrectly

asserts:

Our Supreme Court recognizes, however, that the Rhode Island Constitution's provision – “The right of the people to keep and bear arms shall not be infringed” – “in no sense assures a right of self defense.” State v. Storms, 308 A.2d 464, 464 (R.I. 1973).

Appellee's Rule 12A Statement, at 4.

Whether based on a liberty or property interest, Plaintiff's argument fails because, as we learned in State v. Storms, 308 A.2d 463, 466 (R.I. 1973), Article I, §22 “in no sense assures a right of self defense.”

Appellee's Responsive 12A Statement, at 2.

In fact, it is clear that this Court in Storms said no such thing, and this Court's language quoted above dismissing the claim of a right to self-defense applies only to the claim made under the residual rights clause. The right to self-defense has been recognized in law since time immemorial, and Blackstone in his *Commentaries on the Laws of England* explicitly ties the right to keep and bear arms to “the natural right of resistance and self preservation” as noted *supra*. Blackstone, Commentaries, at 143-144 (Tucker); at 1:139 (Chicago). The General Assembly Committee to Review the Firearms Laws in 1959 stated that it was "opposed to legislation which can make prudent, law abiding citizens unwitting violators, or *which denies the right of self defense...*" as noted *supra*. Rhode Island Journal, Feb. 3, 1959 (emphasis added).

The criminal charge against Mr. Storms was that he was unlawfully carrying a pistol without a license. Presumably the basis for his theory of defense to this charge was that he needed the pistol for the purpose of self-defense. For whatever reason, he chose not to raise any constitutional claim under the keep and bear arms clause. The record is

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<sup>8</sup> The residual rights clause reads: “The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people. The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States.”

silent on the question of whether he could have obtained a permit, whether he had been denied a permit, or whether he was ineligible for a permit. If he simply never applied for a permit, then it is hard to view his claim of self-defense sympathetically. If there was some reason why he was unsuitable for a permit, then his claim of self-defense may be even less worthy. His claim of self-defense was presumably further impaired by R.I.G.L. §11-47-4, which regards the plain fact that he was caught carrying a handgun without a license as *prima facie* evidence that his intentions were criminal. It is for this reason, as this Court noted, that the Legislature established a licensing regime in the first place.

The history of the right to keep and bear arms is not exclusively grounded in the right to self-defense, as noted, and historically the bases advanced for it have also included the maintenance of a republican system of government, specifically by placing responsibility for military defense in the whole citizenry rather than in a professional, standing army, thereby preventing a tyrannical government from using a standing army to oppress its own people. This Court could find that the liberty and property interest at issue is sufficiently grounded in the unqualified constitutional language, even without a right to self-defense at all. However, since this Court's only precedential guidance, Storms, is clearly focused on the right to self-defense, the repeated apparent confusions and misinterpretations of that opinion must be examined closely.

This *amicus* respectfully suggests that there is a fundamental, natural right to self-defense, that this right has been recognized by every significant legal commentator since at least Blackstone, and that it is one of the obvious underlying bases for the right to keep and bear arms. The right to defend one's own life, safety, and property are the very essence of a fundamental liberty and property interest for which due process protection is

essential. That this Court declined in Storms to ground the right of self-defense in the residual rights clause did not extinguish the right. As this Court emphasized in Storms, the Firearms Act was by no means intended by the Legislature to constrain the exercise of the right of self-defense by law-abiding citizens. “Even our brief summary of some of the [Firearms] Act’s essential provisions clearly evidences that the goal of the Legislature was to prevent criminals and certain other persons from acquiring firearms generally and handguns in particular without at the same time making unduly difficult such acquisition for other members of society.” Storms, at 466.

It follows, then, that the due process problems raised by the Appellants arise from the manner in which the Attorney General may have applied the licensing regime rather than the licensing regime itself. The delegated statutory duty of the Attorney General is that of “fact-finding,” Id., at 466. “To accomplish its purposes, the Legislature, among other things, established licensing procedures and delineated the broad parameters within which those selected by it might *determine the facts* upon which *the right to be licensed* to carry a handgun hinged.” Id. (emphasis added).

It is difficult to see why a delegated fact-finding function should be unreviewable by the courts. By definition, “fact-finding” should be conducted according to rules of procedure which assure basic fairness, such as the right to be heard and the right to have knowledge of adverse evidence and challenge its accuracy. While fact-finding may require considerable “training and experience,” Id., at 467, the nature of it presumes that any sufficiently qualified expert would be very likely to reach the same conclusion as any other sufficiently qualified expert. This makes a fact-finding process highly amenable to review.

For the Attorney General to deny that his decisions are subject to review is tantamount to denying that his duty is that of a fact-finder, as this Court described that duty in Storms. It is not the province of the Attorney General to exercise legislative power, and attempting to do so would render his exercise of such power unconstitutional as beyond the scope of what this Court in Storms held that the legislature may constitutionally delegate.

Nevertheless, it is not necessary at this time for this Court to delineate precisely what process is due nor to define the exact scope of either the constitutional or statutory language. All that is required is for this Court to hold that the Appellants have *any* liberty or property interest at stake in the issuance of a permit, and that *some* due process right is therefore present which triggers a right of court review.

### **EVOLUTION OF THE PREVAILING VIEW SINCE STORMS**

As has been noted in footnote 6 *supra*, this Court's choice of cases in 1973 to cite in describing the "prevailing view," Storms, at 464, has proven ironic. Indiana, in Schubert (1980) and Kellogg (1990), explicitly recognized a liberty and property interest in handgun permits and attendant due process rights in their issuance, modifying the Matthews precedent cited by Storms.

Rhode Island prohibits both unconcealed and concealed carry without a permit, R.I.G.L. §11-47-8, and any permit issued by the Attorney General authorizes both unconcealed and concealed carry, R.I.G.L. §11-47-18.

In the thirty years since Storms was decided, at least 32 of the 50 states have come to issue permits or licenses to their citizens to carry concealed, loaded handguns for

personal protection as a matter of right without requiring that they show any specific need, subject to generally non-discretionary criteria.<sup>9</sup> Of these, at least 20 also allow carrying openly and unconcealed without a permit.<sup>10</sup> An additional eight states that do not allow citizens to obtain permits to carry concealed as a matter of right do allow carrying firearms openly and unconcealed without a permit.<sup>11</sup> In other words, 40 of the 50 states allow either unconcealed carry without a permit, concealed carry with a permit obtainable as a matter of right and subject to generally non-discretionary criteria, or both. Some of these states have made their decisions at least in part based upon legal and constitutional considerations, as in Indiana, and others have made their decisions based solely upon public policy grounds.

In 1980, Florida was among the first states to adopt highly specific non-discretionary criteria for issuing concealed weapons permits. As of December 31, 2002, there were 309,826 valid permits in Florida; 2.44% of Floridians over the age of 18 years

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<sup>9</sup> The states which allow concealed carry as a matter of right and subject to generally non-discretionary permit issuance criteria are Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. National Rifle Association Institute for Legislative Action, Compendium of State Firearms Laws.

<sup>10</sup> Of the states which allow concealed carry as a matter of right and subject to generally non-discretionary permit issuance criteria, Alabama (except in motor vehicles), Alaska, Arizona, Idaho, Kentucky, Louisiana, Maine, Michigan (except in motor vehicles), Mississippi, Montana, Nevada, New Hampshire (except in motor vehicles), North Carolina, Oregon, Pennsylvania (except in motor vehicles), South Dakota, Vermont, Virginia, West Virginia, and Wyoming also allow unconcealed carry without a permit. National Rifle Association Institute for Legislative Action, Compendium of State Firearms Laws.

<sup>11</sup> The states which allow unconcealed carry without a permit, but which do not allow concealed carry at all, are Kansas (in some cities and counties), Missouri, Nebraska, New Mexico, Ohio (in some cities and counties) and Wisconsin. Delaware and Colorado (in some cities and counties) allow unconcealed carry without a permit, but also issue concealed carry permits subject to discretionary criteria. National Rifle Association Institute for Legislative Action, Compendium of State Firearms Laws.

have concealed carry licenses.<sup>12</sup> Only about 2,200 permits have been revoked for cause since October 1, 1987. Per published statistics of the Florida Department of Agriculture and Consumer Services, Division of Licensing.

In Utah, which also issues generally non-discretionary permits as a matter of right, as of December 31, 2002, there were 51,564 valid permits; 3.35% of the population of Utah over the age of 18 years have concealed carry licenses. There have been only 813 revocations for cause since 1994. Per published statistics of the Utah Department of Public Safety, Bureau of Criminal Identification.

Of the six New England states, four — Connecticut, Maine, New Hampshire, and Vermont — as a matter of right and subject to generally non-discretionary criteria allow ordinary law-abiding citizens to carry concealed handguns, and three — Maine, New Hampshire, and Vermont — allow unconcealed carry without a permit.

Vermont allows carrying of handguns openly or concealed with no permit whatsoever. This is as a result of a ruling by that state's Supreme Court that any licensing requirement "is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void." State v. Rosenthal, 75 Vt. 295, 55 A. 610 (Vt. 1903).

An attempt was made to establish how many permits are issued in these four New England states and how many have been revoked for cause. New Hampshire issues licenses through local authorities and does not maintain a central, statewide database of licenses. Even if they did, New Hampshire law forbids the release of information

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<sup>12</sup> The U.S. Census Bureau states that the population of Florida in 2000 was 15,982,378, of whom

concerning the issuance of pistol permits. Likewise, Maine issues permits at the local level and lacks a central database of information from which general statistics can be drawn. Vermont, of course, has no statistics on permits because they do not require a license or permit of any type to carry a concealed handgun.

Connecticut, however, does centrally issue permits through their State Police agency<sup>13</sup> and therefore maintains a statewide database of permits. As of February 5, 2003, there are approximately 128,000 valid permits issued to residents of Connecticut. This represents about 5% of the population over the age of 18 years.<sup>14</sup> In its history, Connecticut has revoked only approximately 700 permits for cause. Per telephone inquiry to Ms. Diane Morrell, Office Supervisor, Special License and Firearms Unit, Connecticut State Police.

It is now the norm for states to regard the right to keep and bear arms as of fundamental importance in actual practice, and licensing regimes have generally been instituted with a view to their exercise by substantial percentages of those citizens who are eligible. Although each state has made its own choices as to the particular system which it will follow, the trend has been toward either allowing unconcealed carry without a permit or allowing concealed carry as a matter of right and subject to generally non-discretionary criteria for issuance of permits.

Presumably this Attorney General in being restrictive in the issuance of permits,

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22.8% were under the age of 18 years.

<sup>13</sup> Connecticut residents are required to get a temporary pistol permit from their local law enforcement agency. Once this is obtained, the resident must apply to the state police for a permanent license, which will be valid for 5 years from the issuance date or until revoked for cause.

<sup>14</sup> The U.S. Census Bureau states the population of Connecticut in 2000 was 3,405,565, of whom 24.7% were under the age of 18 years.

which was established in the record, was motivated by public policy considerations. Perhaps this Attorney General believes that the right to keep and bear arms is outmoded, antiquated, or obsolete, and that trying to render it a nullity through creative interpretation of constitutional and statutory language is in furtherance of some higher objective. The fact remains, however, that the people of Rhode Island through their Constitution and their representative Legislature have protected a fundamental, constitutional right to keep and bear arms, and have established a statutory mechanism for its practical exercise.

As the experience of other states demonstrates, such public policy reservations are misplaced as well, and our neighboring state of Connecticut has had good success implementing its generally non-discretionary permit system. The fact that approximately 5% of the population of Connecticut over the age of 18 years have chosen to avail themselves of their right to a concealed handgun permit is strong evidence that the faith in the people expressed by those who drafted our Constitution was not misplaced, and that the right to keep and bear arms should not be allowed to be swept under the constitutional rug.

It is evident that significant portions of the law-abiding citizenry take advantage of the opportunity to apply for concealed handgun permits in states which allow them to do so, and that those citizens certainly regard such permits as a fundamental liberty and property interest. Some due process is therefore necessary in the administration and consideration of concealed handgun permits.

## CONCLUSION

This *amicus* believes that the key issue to be decided in this case is whether a citizen has *any* due process right when a government official considers an application for a permit to carry a pistol or revolver. The voluminous history and case law cited establishes that our Constitution's broad and unqualified right to keep and bear arms provision does indeed affirm, protect and guarantee a citizen's right to keep and bear — that is, possess and carry — arms for any reasonable purpose, and that the act of “bearing” arms necessarily and inherently includes carrying arms outside the limits of one's home, land and business. It is not necessary that this court define in detail the scope of the right to bear arms to find that a liberty and property interest exists in the license to carry a handgun. A due process right exists because there is at least *some* right to keep and bear arms.

Additionally, despite the Attorney General's misreading of Storms, there is a right to self-defense, but this right is not prerequisite for the right to keep and bear arms, as explicitly guaranteed in our Constitution, to be accorded due process. Storms does not deny a right to self-defense, as the Attorney General claims, but merely holds that such a right is not grounded in the residual rights clause of our Constitution.

Storms establishes that, although a licensing requirement to carry a handgun is constitutionally permissible, this does not mean that there is no constitutional right in the license. To the contrary, Storms speaks of “*the right to be licensed to carry a handgun.*” Storms, at 466 (emphasis added). It follows logically that if a license is required to exercise a constitutional right then there is a due process right in the license. Clearly, the Legislature believed that there was a fundamental and constitutional right to keep and

bear arms when they reviewed the Firearms Act in 1959 and said so in their report to the General Assembly.

Further, Storms establishes that the role of the Attorney General in handgun licensing is one of “fact-finding.” Id. It is not the province of the public official to whom a fact-finding function is delegated to exercise powers reserved to the Legislature.

Because there is a liberty and property interest in the permit required for the exercise of a constitutional right, the Attorney General does not have unfettered discretion and must afford due process to applicants for permits. The sufficiency of due process is reviewable by the courts.

This honorable Court is urged to find that there is a liberty and property interest in a license to carry a handgun and remand this case to the Superior Court for further proceedings.

Respectfully submitted,

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**CERTIFICATION OF SERVICE**

REDACTED

The undersigned hereby certifies that a true copy of the within has been sent to the above attorney of record by regular mail, postage prepaid on this \_\_\_\_\_ day of February, 2003.

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