

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

REPLY STATEMENT OF AMICUS CURIAE

CITIZENS RIGHTS ACTION LEAGUE

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SUMMARY

We emphasize to this honorable Court that the issue in this case is, narrowly, whether there is *any* due process right when the Attorney General considers whether to issue a license to carry a handgun in public. We emphasize that this Court is not today being asked to determine the detailed scope of this right, but only to decide that there is *some* right to due process. To deny due process would leave the citizens of this state without any right of review when a politically elected official asserts unfettered discretion in denying a license that is necessary to self-defense in connection with many lawful commercial and non-commercial activities and which is prerequisite even to apply for many security-related jobs (such as armored car driver). Most importantly, we believe that a decent respect for the framers of our 1843 Constitution requires that a liberty and property right be recognized in the right to keep and bear arms in Rhode Island.

Appellees and *amici curiae* in support of Appellees raise a number of issues which require a response, most especially their introduction for the first time of the “collective right” theory of the right to keep and bear arms.¹ We show that the “collective right” theory is held only by two states, both on the basis of explicit militia language in their constitutions which has no analogue in Rhode Island, we show that “the people” are never a collective entity in the Rhode Island Constitution, we show that the key linguistic claim in support of the “collective right” theory is grounded in racial discrimination (including slavery) over the past century and a half, and we show that the vast majority of

¹ We apologize to this honorable Court for the length of this present reply, but we feel it is necessary as the “collective right” theory has been raised by Appellees as a new issue at this late stage, and therefore has never been addressed previously by Appellants or *amici* in support of Appellants. This is a complicated issue, with considerable discussion of history and case law needed.

precedent in other states has dismissed the “collective right” theory as without merit.

Appellees and their *amici* make several claims disputing our position on constitutional construction and the constitutional right to be licensed where a license is prerequisite to the exercise of a constitutional right. We demonstrate, through more extensive citation, that our position is correct and consistent with this Court’s precedents.

Appellees and their *amici* claim that pistols and revolvers, or handguns generally, are not considered “arms” given constitutional protection. We show that the great weight of precedent is in favor of regarding handguns as constitutionally protected “arms,” and that the contrary view is based on a misreading of precedent.

Amici in support of Appellees emphasize that many courts have held that the carrying of concealed weapons may be regulated without violating a constitutional guarantee of the right to keep and bear arms. We show that, while this is to some extent true, courts have carefully limited the extent of such regulation. We distinguish the statutory situation in Rhode Island, and we show that the denial of the particular license at issue here works a complete prohibition of the constitutional right and not a mere regulation, and is therefore unconstitutional without due process.

Appellees make a number of assertions regarding legislative intent, citing the simple failure to pass bills as “evidence” of what the legislature has intended. We dispute this, and we provide a formal report adopted by a legislative commission which shows that, on the contrary, where the legislature has chosen to speak formally, it has advocated the position advanced here by Appellants.

Finally, *amici* supporting Appellees dispute our prior statements regarding public policy and the best way to respond to the threat of crime. We show that their statistical

criticisms are without merit and grounded in studies that have never been peer-reviewed, and that the responsible academic consensus is that states with more permissive handgun licensing do not experience increases in crime as a result and, in fact, may experience significant decreases in crime.

REBUTTING THE COLLECTIVE RIGHT THEORY

Appellees and supporting *amici* assert that the plain language of Article I, Section 22 of the Rhode Island Constitution — “The right of the people to keep and bear arms shall not be infringed” — should be read as guaranteeing a “collective” rather than an individual right. Appellees’ Brief of the Attorney General (“AG Brief”), at 35; Brief of Amicus Curiae the Violence Policy Center (“VPC Brief”), at 15; Brief of Amicus Curiae the Brady Center (“Brady Brief”), at 6.

This is a bald attempt to nullify a fundamental constitutional right:

The collective right view claims that while all of the people have a right, the individual person has no right. This essentially means that the right to bear arms protects no one and guarantees nothing, for regardless of how draconian and unconstitutional a law may be, no individual would have standing to challenge such a law.

Dowlut, R., and Knoop, J.A., “State Constitutions and the Right to Keep and Bear Arms,” 7 Okl. City U. L. Rev. 177, 186-187 (1982).

The collective right theory suffers from a logical defect. It is conceptually difficult to see how something can exist in a whole without existing in any of its parts. The collectivists essentially claim that there is a nebulous entity that exists somewhere between the individual and the state which is so important that the Framers protected it with a constitutional guarantee.

Id., at 189.

It is important to note, further, that the “collective right” theory is for the first time raised in the briefs of Appellees and their supporting *amici* subsequent to this Court’s

order for full briefing, and that this theory is manifestly inconsistent with the admission in Appellees' Rule 12(A) Statement, at 4, n2, explicitly citing the Constitution, "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 [State v.] Storms at 464." In fact, that admission is repeated in the AG Brief, at 13, again explicitly citing the Constitution, "Of course, under Rhode Island law, Plaintiffs do have a recognized right to keep and bear arms in their homes, places of business or upon their land. R.I. Const. Art. I, §22, Gen. Laws §11-47-18(a) and [State vs.] Storms, 112 R.I. at 123, 308 A.2d at 464." Assuming *arguendo* that the constitutional right applies only in one's own home or place of business or upon one's own land (an issue we address elsewhere), such right would still necessarily be an *individual* right. Submitting such assertion to this Court in parallel with the collective right theory is not merely arguing in the alternative, but is rather arguing in the contradictory.

The collective right theory was not argued to nor considered by the Superior Court below, and it is therefore open to question whether it is ripe or appropriate for review by this Supreme Court now. Indeed, it appears not to have even occurred to Appellees to put forward the collective right theory in the Superior Court below, which at a minimum suggests the extent to which it is an unnatural and convoluted reading of Rhode Island's constitutional text.

Both States Adhering to the "Collective Rights" Theory are Distinguished by Militia Context in their Constitutional Language

In support of their surprising contention, Appellees and supporting *amici* cite

decisions from Kansas, Massachusetts, and Georgia, but all are emphatically distinguishable by the differing provisions of those states' constitutions, especially the presence of specific militia language either preceding, following, or surrounding the applicable right to keep and bear arms clauses.

As noted in the VPC Brief, the rule in Kansas was originally enunciated in City of Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 620 (Kan. 1905) (“The provision in section 4 of the Bill of Rights ‘that the people have the right to bear arms for their defense and security’ refers to the people as a collective body.”) However, the court, only two sentences later in a section which the VPC Brief chose not to quote, stated that it based its reasoning upon the militia context of the constitutional provision itself, “It [the right to bear arms clause] is followed immediately by the declaration that standing armies in time of peace are dangerous to liberty and should not be tolerated, and that ‘the military shall be in strict subordination to the civil power.’ It deals exclusively with the military. Individual rights are not considered in this section.”² Id.

Massachusetts, whose constitutional right to keep and bear arms clause protects this right explicitly “for the common defence,” also includes specific militia context in the same general vein as that of Kansas.³ The Massachusetts Supreme Judicial Court, in the opinion cited by the AG Brief, the Brady Brief, and the VPC Brief, emphasized that its own constitutional language was different from that of other states, “It may be noted

² Article I, Section 4 of the Kansas Constitution reads, “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.”

that some of the State constitutional provisions can be distinguished from our own because they speak of arms for self-defense as well as for defense of the State...”

Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847, 849 (Mass. 1976).

Even so, the Massachusetts court acknowledged that the maintenance of a militia historically implied that individuals would keep and bear their own weapons, even if the right *per se* was collective. “Provisions like art. 17 were not directed to guaranteeing individual ownership or possession of weapons. This generalization is perhaps subject to a qualification: Militiamen customarily furnished their own equipment and indeed might be under legal obligation to do so. A law forbidding the keeping by individuals of arms that were used in the militia service might then have interfered with the effectiveness of the militia and thus offended the art. 17 right.” *Id.* (citations omitted).

Georgia’s Constitution has a right to keep and bear arms clause that expressly provides for its own limitation by the legislature, and it is therefore so dissimilar to that of Rhode Island’s that it is of very minimal value to compare them. Nevertheless, the relevant case law in Georgia reaches back over a century, and Appellees and their *amici* (AG Brief, at 35; VPC Brief, at 6; Brady Brief, at 16) are in clear error when they assert that Georgia follows the collective right theory, citing Carson v. State, 247 S.E.2d 68 (Ga. 1978). In fact, the issue of interest in Carson was narrowly whether it was constitutional for the state to criminalize by statute the possession of a sawed-off shotgun, and Georgia adheres to the individual right theory when interpreting the right to keep and bear arms

³ Part 1, Article 17 of the Massachusetts Constitution reads, “The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.”

clause of the Georgia Constitution, as the opinion itself makes clear,

The fact that the present Constitution omitted the phrase, “A well-regulated militia being necessary to the security of a free State,” which appeared in earlier Constitutions preceding the provision of the right to keep and bear arms, does not affect the constitutionality of the Act in question, because the Act can be sustained as a legitimate exercise of the police power of the state, as indicated hereinabove. It was not arbitrary or unreasonable to prohibit the keeping and carrying of sawed-off shotguns, which are of a size such as can easily be concealed and which are adapted to and commonly used for criminal purposes. The Act does not prohibit the bearing of All arms. Even the Nunn case, 1 Ga. 243, *supra*, held that a law is unconstitutional “so far as it cuts off the exercise of the right of the citizen Altogether to bear arms . . .” (Emphasis supplied.)

Carson v. State, at 73.

The AG Brief, at 35, quoting Carson thusly, is gravely misleading, “The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne... was never intended to hold that men, women, and children had some inherent right to keep and carry arms or weapons....” (ellipses in original AG Brief). In fact, the final ellipsis in the AG Brief’s quoted excerpt critically changes the meaning, when it is recalled that Carson is about a sawed-off shotgun, “...never intended to hold that men, women, and children had some inherent Right to keep and carry arms or weapons *Of every description...*” Carson, at (emphasis added). Furthermore, the Carson court is, in this phrase, explicitly quoting Strickland v. State, 72, S.E. 260, 263 (Ga. 1911), the basic precedent for an individual rights interpretation of the Georgia Constitution’s right to keep and bear arms clause, where the court holds,

...the right to bear arms, like other rights of person and property, is to be construed in connection with the general police power of the state, and as subject to legitimate regulation thereunder. Where a state Constitution in terms provides, in connection with the right to bear arms, that the state

may regulate this right, or may regulate the manner of bearing arms, these words expressly recognize the police power in direct connection with the constitutional declaration as to the right.

Strickland v. State, at 262.

More recently, the Georgia Supreme Court confirmed its adherence to the individual rights view when it upheld the statutory prohibition on possession of weapons by convicted felons as a reasonable exercise of the police power as expressly authorized by the right to keep and bear arms clause of the Georgia Constitution, Landers v. State, 250 Ga. 501, 299 S.E.2d 707 (1983), citing and following Strickland and Carson.

As early as Hill v. State, 53 Ga. 472, 482-483 (Ga. 1874), the court speaks of the “people” in a sense that endorses the individual rights view, noting that the legislature could not so restrict the right as to render it meaningless,

We think, therefore, that under the power expressly granted to prescribe the manner in which arms may be borne, the legislature may prescribe, not only that they shall be borne openly and plainly exposed to view, but that it may prohibit the bearing at such times and places, and under such circumstances, as is necessary for the preservation of the peace, the protection of the person and property of the citizens, and the fulfillment of the other constitutional duties of the legislature, provided the restriction does not interfere with the ordinary bearing and using arms, so that the ‘people’ shall become familiar with the use of them.

In 1877, subsequent to the decision in Hill, Georgia removed its militia preface.⁴

The Rhode Island Constitution’s right to keep and bear arms clause is clearly distinguished by the absence of any such militia context or military language. Trying to

⁴ At the time Hill was decided in 1874, the relevant provision of the Georgia Constitution read, “A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.” The wording was amended in 1877 to its present form, “The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.”

impute a militia context into the Rhode Island Constitution's right to keep and bear arms clause because of its outward textual similarity to the federal Second Amendment is, in light of their wholly distinct experiences of political evolution, an historical error of the first magnitude. Scholarly analysis has suggested that the "well-regulated militia" preface of the federal Second Amendment is distinct from and addresses a separate concern from the right to keep and bear arms clause which follows it:

Yet the fact that prior to 1788 the Framers who proposed protections for individuals' arms did not propose to protect the militia, and those desirous of protecting the militia did not propose safeguards of individual arms, suggests the quixotic nature of previous attempts to demonstrate that the Framers, as a whole, had a single intent. Is it reasonable to assume that John Adams, obsessed with the risk of mob rule, and Thomas Jefferson, who so lightly praised the virtues of frequent revolutions, were of a single mind when it came to popular armaments? When Virginia constitutionalized the principle that a well-regulated militia was necessary to the proper defense of a free state, and Pennsylvania instead guaranteed that the people had a right to bear arms for defense of themselves and the state, was there in fact an identical understanding which motivated each statement?... The [federal] second amendment was not intended to recognize only a single principle; rather, like the first, fourth, fifth, and sixth amendments, it was intended as a composite of constitutional provisions. Its militia component and its right to bear arms recognition have in fact different origins and theoretical underpinnings. One is a legacy of the Renaissance, brought to fruition by the "Classical Republicans;" the other is the creation of seventeenth century English experience, brought to fruition in the Enlightenment. At the time of the framing of our [federal] Constitution, the militia statement found its primary constituency among the gentry, particularly that of Virginia. The individual right to bear arms provision was primarily advanced by the Radical movement, particularly in Pennsylvania and Massachusetts. Only after the Constitution had received its crucial ninth ratification were the two precepts joined into a single sentence, thereby creating a constitutional "package" which addressed the demands of both schools of thought. Thus neither the militia nor the right to bear arms provision can be taken in isolation as a sufficient explanation of the second amendment, a fact made obvious by the first Congress' retention of both clauses during its extensive paring of Madison's proposals.

Hardy, D.T., “The Second Amendment and the Historiography of the Bill of Rights,” 4 Journal of Law & Politics 1-62, 2-3 (1987).

Therefore, the right to keep and bear arms clause in the Rhode Island Constitution should be read to stand on its own, without attempting to pretend that there is any militia context. Militia language has given rise to much confusion and debate in the case of the federal Second Amendment and in cases of state constitutions which explicitly include militia language, but Rhode Island is not such a state.

“The People” are Never a “Collective Entity” Elsewhere in Article I

It is unsupportable to claim that, where our Constitution speaks of “the people,” it necessarily means to exclude an individual right. Article I, Section 6 of the Rhode Island Constitution, for example, obviously provides for an individual right, “The right of *the people* to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated...” (emphasis added).

It would be yet more ridiculous to contend that Article I, Section 17 contemplates solely a collective right, “*The people* shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore...” (emphasis added). It is difficult to imagine how fishing, gathering seaweed, and swimming could conceivably be carried out collectively rather than individually.

This Court has spoken directly to the similarity of the use of the term “the people”

throughout the Constitution and has used this similarity to analyze the definition of “the people” in the constitutional context,

The constitution, in its preamble, starts out, “We, the people of the state,” etc. In article 1, §2, it is declared that all governments are instituted for the protection, safety, and happiness of the people. In the same article (section 6) it is further declared that the right of the people to be secure in their persons, papers, and possessions against unreasonable searches and seizures shall not be violated. And again, in section 17: “The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of the state,” etc. These illustrations (and others might be given) show that the term “people,” as used in the constitution, is broad and comprehensive, comprising in most instances all the inhabitants of the state.

In re Incurring State Debts, 19 R.I. 610, 37 A. 14 (R.I. 1896).

This Court has clearly and unequivocally held that “the people” referenced in Article I, Section 17 means every individual person of the state:

But whatever the intention of the respondents may be, it is clear that, if the amending act be valid, they may be given, by the city of Newport, the power to prevent *any of the people* of the state from passing along the shore into that part of it which is to the south of Easton's Beach.

Jackvony v. Powel, 67 R.I. 218, 21 A.2d 554, 556 (R.I. 1941) (emphasis added).

If the amending act now in question be held constitutional, the resulting amended act would authorize the commission to construct any kind of a fence which it chose to construct, of any height, which might be without any gates and by the use of which the commission could prevent *any person or persons* from passing along any part of the shore between Easton's Beach and the line of mean low tide, within the lateral limits specified in the act, for any purpose whatever, be it for fishing, bathing, boating, getting seaweed or sand, or for exercise or any other purpose.

Id., at 558 (emphasis added).

A substantial number of cases citing Article I, Section 17 have arisen in recent years, and, regardless of whatever other matters may have been in dispute, every party to every case has clearly understood the guarantee to “the people” of the “privileges of the

shore” as a right to be exercised by individual persons, which is the plain and obvious meaning of the clause. The Superior Court, citing Jackvony, has decided cases that implicate this constitutional right and always unambiguously interpreted it as an individual right:

In 1986 the most relevant language enumerating specific rights of the shore including “the right of passage along the shore” was added. The original more general language, however, was not viewed as being more restrictive than the 1986 provision. Rather this language, which derived from old English law through the Charter of King Charles II, granted on July 8, 1663, and which created the Colony of Rhode Island and Providence Plantations, merely left undefined and unenumerated the rights of the people.

* * *

Thus with the passage of Art. I, §17 in the original 1842 Rhode Island Constitution, the State of Rhode Island adopted and incorporated the “public trust doctrine” from England. The purpose of the changes made in 1986 was not to alter the original 1842 language but merely to further define those preexisting rights, so as to guard against possible future Rhode Island Supreme Court decisions which might erode away or diminish, through definition, the “people’s rights.” More specifically, the convention delegates and Committee members responsible for the change sought to protect the Rhode Island Supreme Court's decision of *Jackvony v. Powel*, which attempted to define those preexisting rights from future reversal. In *Jackvony*, the Rhode Island Supreme Court held that Easton's Beach Commission of the City of Newport could not erect or cause to be erected a fence or other barrier on the shore between the high and low water lines south of Easton's Beach and only allow people to pass through that barrier who had paid a fee, because to do so would prevent the citizens of the state from exercising their right of “passing along the shore.”

Cavanaugh v. Town of Narragansett, C.A. No. WC 91-0496, 1997 WL 839883 (R.I. Super. 1997) (*denying summary judgment*), 1997 WL 1098081, 6 (R.I. Super. 1997) (citations omitted).

It is worth noting that the Constitutional Convention of 1986 apparently thought that “the people” was clear enough in meaning and agreed with this Court’s definition in Jackvony, and therefore changed this wording neither in the privileges of the shore (while

making other changes) nor in the right to keep and bear arms.

There is no shortage of such cases from the Superior Court, all universally assuming an individual constitutional right, although many resulted in unpublished opinions; see Perrotta v. Rhode Island Port Authority, C.A. Nos. 76-3183 and 76-3184, 1979 WL 196100, 3 (R.I. Super. 1979) (*unpublished*) (“Dr. Seeley’s right to fish the Pond, as well as the right of other members of the corporation to do the same, is not simply a whimsical one. It came to him from the ‘Great Charter’ originally granted to the early colonists in Rhode Island by the King of England. That right was afterwards perpetuated by specific inclusion into our State Constitution. Article 1, Section 17.”) and Town of Middletown v. Wehrley, C.A. No. N-3098-281A, 1999 WL 710629, 3-4 (R.I. Super. 1999) (*unpublished*) (“The Defendant is not prohibited from riding horses on the beach except three months during the summer when the beaches are highly populated. During these summer months, there is no prohibition on the Defendant’s use of or passage on the beach without a horse. Therefore, this time limited ban allows all but the four legged creature to take advantage of the Town beaches. Not only is this reasonable, but it conforms to the ideals of the State Constitution which seek to preserve not only our state’s natural resources but the peoples’ right to enjoy them.”).

Similarly, no one has ever seriously suggested that “the right of the people” against warrantless search and seizure contained in Article I, Section 6 of the Rhode Island Constitution guarantees anything other than an individual right. This Court has repeatedly recognized distinct protections under this provision of the state constitution that exceed those recognized in the similar language of the federal Fourth Amendment, and these have invariably been construed as applicable to individuals:

We may assume, however, on the basis of language in Delaware v. Prouse, [440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)], that the Fourth Amendment would allow the type of nondiscretionary roadblock stops conducted by the town of Warren. Nevertheless, our analysis does not end here because a principled rationale exists to depart from the minimum standards under the Fourth Amendment.

We shall now make an independent analysis of the safeguards afforded under article I, section 6, of the Rhode Island Constitution. Section 6 is similar to the Fourth Amendment and states:

“The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.”

Additionally, the preamble to article I declares that the maintenance and preservation of the “rights and principles hereinafter mentioned” shall be the “paramount obligation” of the executive, legislative, and judicial branches of the government. *See State v. Maloof*, 114 R.I. at 384, 333 A.2d at 678 (citing preamble to article I of Rhode Island Constitution).

Pimental v. Dept. of Transportation, 561 A.2d 1348, 1351 (R.I. 1989).

This Court then left no doubt that the only possible interpretation of “the right of the people” was to protect the rights of individuals, explicitly construing the phrase from the state rather than the federal constitution,

We believe that allowing such roadblocks or checkpoints would diminish the guarantees against unreasonable searches and seizures contained in the Rhode Island Constitution. It is illogical to permit law enforcement officers to stop fifty or a hundred vehicles on the speculative chance that one or two may be driven by a person who has violated the law in regard to intoxication. We therefore hold that roadblocks or checkpoints, established to apprehend persons violating the law against driving under the influence of intoxicating beverages or drugs, operate without probable cause or reasonable suspicion and violate the Rhode Island Constitution.

Id., at 1352.

Indeed, this Court even unambiguously used the precise terms “individuals” and

“citizens” in describing “the people” encompassed within the constitutional language and whose rights are thus protected,

Nevertheless no control or discretion can justify roadblock seizures under Rhode Island law because they are conducted totally in the absence of probable cause or reasonable suspicion that a motor-vehicle violation had occurred. Whereas other states supporting the constitutionality of roadblock programs may find that the drunk-driving problem outweighs the privacy interest of *individuals*, the Rhode Island Constitution grants greater protection and requires that our *citizens* be free from unreasonable searches and seizures of this nature.

Id., at 1353 (emphasis added).

Race and Slavery: Some “People” were Less Than “Citizens”

The supposed linguistic distinction between “people” and “citizens” which the VPC Brief, at 18, and the Brady Brief, at 6 (citing the VPC Brief), seek to make much of is an outrageous appeal to a thoroughly documented history of racial discrimination and consistent legal subterfuge, grounded in the peculiar institution of slavery, which forced slaveholders into increasingly desperate measures to disarm blacks, both slave and free. It is no mere accident that the VPC Brief, at 18, cites Mississippi, Alabama, and Texas as three of its four examples⁵ of the transition to language protecting the right to keep and

⁵ It is utterly puzzling why the VPC Brief offers Connecticut as its fourth example, citing Rabbit v. Leonard, 36 Conn. Super. 108, 413 A.2d 489, 490 (Conn. Super. 1979). The excerpt quoted by the VPC Brief (“A Connecticut court explained that ‘the word “people” refers to a collective body, the militia, and does not imply the absolute right of an individual to carry a gun.’” VPC Brief, at 16, *citing Rabbit*, at 490) is *not* the ruling of the court, but rather simply the court’s summary of case law from Massachusetts and Kansas. The court merely observed two sentences earlier that “State constitutions which provide to the ‘people’ the right to keep and bear arms for the common defense *do not necessarily* grant individuals that same right.” Id. (emphasis added). In fact, the Rabbit court held emphatically in favor of an individual rights interpretation, “It appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process.” Rabbit, at 491. The Connecticut Supreme Court later definitively settled the issue in favor of the individual rights interpretation, “Both the explicit textual limitations and our

bear arms for “citizens” instead of all “people” in the decades preceding the Civil War.

One historian has described the evolving legal framework of the antebellum South as tensions and paranoia rose to the breaking point in the slave states,

Arms restrictions on free blacks increased dramatically after Nat Turner’s Rebellion in 1831 caused the South to become increasingly irrational in its fears. In response to Turner’s Rebellion, the Virginia Legislature made it illegal for free blacks “to keep or carry any firelock of any kind, any military weapon, or any powder or lead.” In addition, the existing law under which free blacks were occasionally licensed to possess or carry arms was repealed, thus making arms possession completely illegal for free blacks. But even before this action by the Virginia Legislature, in the aftermath of Turner’s Rebellion, the discovery that a free black family possessed lead shot for use as scale weights, but did not have powder or a weapon in which to fire it, was considered sufficient reason for a frenzied mob to discuss summary execution of the owner.

Cramer, “The Racist Roots of Gun Control,” Kansas Journal of Law and Public Policy, Winter 1995, at 18 (citations omitted).

It can hardly be necessary to remind this Court of the infamous United States Supreme Court decision in the case of Dred Scott v. Sandford, 60 U.S. 393 (1856), which held that blacks, though “people,” could not be “citizens.” To permit any state to recognize blacks as citizens, the Court wrote,

...would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went.*

precedents persuade us that the constitution protects each citizen’s right to possess a weapon of reasonably sufficient firepower to be effective for self-defense.” Benjamin v. Bailey, 234 Conn. 455, 662 A.2d 1226, 1232 (Conn. 1995).

Dred Scott v. Sandford, at 417 (emphasis added).

The U.S. Supreme Court's contorted reading of constitutional language in Dred Scott was widely criticized even at the time as a breach of the principles enshrined in the Bill of Rights. A year after the opinion was issued, lawyer and future president Abraham Lincoln said of it, "In those days [of the Revolution], our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it is assailed and sneered at, and constructed and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it." Speech at Springfield, Illinois, June 26, 1857; reported in McClure, Lincoln's Yarns and Stories, 1901.

An abundance of case law, which has seen no shortage of academic study, emphatically demonstrates the utter falsity of the key assertion of the VPC in this regard, "The distinction between 'the people' and 'a citizen' is one that is conveniently ignored by those espousing the individual rights position." VPC Brief, at 18, n15.

The North Carolina Supreme Court resorted to some extremely convoluted legal reasoning when it boxed itself in with a series of rulings in the 1840s, first holding that there was an individual constitutional right to keep and bear arms despite qualifying language "for the defence of the State," State v. Huntly, 25 N.C. 311, 314 (3 Ired.) (N.C. 1843), but that it did not apply to blacks because they could not be citizens, State v. Newsom, 27 N.C. 203, 206 (5 Ired.) (N.C. 1844). Cramer wryly notes,

The North Carolina Supreme Court also sought to repudiate the idea that North Carolina's Bill of Rights protected free blacks by pointing out that it excluded free blacks from voting. Therefore, the court reasoned, free blacks were not citizens. But unlike a number of other state constitutions that limit the right to keep and bear arms to citizens, Article seventeen of

the North Carolina Bill of Rights guaranteed this right to the people — and try as hard as they might, it was difficult to argue that a “free person of color,” in the words of the court, was not one of “the people.”

Cramer, “Racist Roots,” at 19.

State judges have been troubled by the more tortuous precedents that have arisen across the eras of slavery and Jim Crow. “The Southern States have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.” *State v. Nieto*, 101 Ohio St. 409, 130 N.E. 663, 669 (Ohio 1920) (Wanamaker, J., *dissenting*). Federal judges have expressed the same view,

The majority falls prey to the delusion — popular in some circles — that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth — born of experience — is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks’ homes for weapons, confiscated those found and punished their owners without judicial process. See Robert J. Cottrol & Raymond T. Diamond, “The Second Amendment: Toward an Afro-Americanist Reconsideration,” 80 *Geo. L.J.* 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id.* at 341-42.

Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), *rehearing en banc denied*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., *dissenting*).

The Connecticut Supreme Court explicitly stated that the term “citizens” is a *limiting* of the right to keep and bear arms clause in the Connecticut Constitution, compared to “the people” or other such alternative language:

Article first, §15, like two other provisions in the state bill of rights, limits the right conferred to “citizens.” See Conn. Const., art. I, §4 (“[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty”); art. I, §14 (“[t]he citizens have a right, in a peaceable manner, to assemble for their common good,

and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance"). In State v. Sinchuk, 96 Conn. 605, 610-15, 115 A. 33 (1921), we held that these provisions by their express terms do not apply to aliens.

Benjamin v. Bailey, 234 Conn. 455, 662 A.2d 1226, 1231 n6 (Conn. 1995).

“The people” is a *more* expansive term than “citizens,” and the drafters of the 1843 Rhode Island Constitution deliberately meant to include blacks, who were rewarded politically for their adherence to the charter government in the Battle of Chepachet, one of the two principal armed confrontations of the Dorr Rebellion.⁶

Fearing arrest, Dorr fled to Connecticut. On June 25 [1842] several hundred of his diehard supporters... rallied in the village of Chepachet, near the Connecticut border. Dorr came to lead them in a march on Providence. The charter government rallied the forces of law and order, and many black citizens⁷ of Providence volunteered to serve to protect the city — a shrewd political move, as it turned out. As the charter-government forces, twenty-five hundred strong, advanced, Dorr ordered his badly armed and outnumbered forces to disband. Dorr went to New Hampshire.... In November 1842, the Law and Order Party, now under Governor James Fenner, called another constitutional convention. This convention’s work closely resembled the defeated Landholder’s

⁶ It should be noted that Dorr himself was supportive of the civil rights of blacks, and had served as a leader of the Rhode Island Anti-Slavery Society. Because of the Dorr faction’s decision to oppose black suffrage in their People’s Constitution for reasons of political expediency, national anti-slavery leaders, including Frederick Douglass, Abby Kelley, and William Lloyd Garrison actually visited Rhode Island to campaign against the Dorr faction. Conley, P.T., Democracy in Decline, Rhode Island Historical Society, 1977, at 312. Although denying black suffrage, the People’s Constitution would have extended the protection of trial by jury to fugitive slaves. Id., at 310. Elisha R. Potter, Jr., one of the leading figures in the conventions which produced the 1843 constitution, famously noted that the conservative faction “would rather have the negroes vote than the d—d Irish.” Letter to John Brown Francis, July 22, 1842, in the John Brown Francis Papers, Rhode Island Historical Society. Potter’s observation was more political than racial: while the black population was relatively constant, troubles in Ireland had resulted in increasing emigration, and denial of suffrage to Irish immigrants because they failed to meet land and property qualifications was one of the principal causes of the Dorr Rebellion. The existence of an explicit *quid pro quo* on black suffrage, in exchange for armed assistance by the black community to the anti-Dorr charter government whose convention drafted the 1843 constitution, was reported in a first-person account by black leader William J. Brown in his memoirs, The Life of William J. Brown of Providence, R.I., 1883, at 172-173.

⁷ Prof. McLoughlin, of course, is using the term “citizens” in a contemporary sense in his 1978 history. Blacks were not generally regarded as “citizens” in 1842, as discussed *supra*.

Constitution, except that, as a reward for their loyalty in defense of the city, black males over twenty-one were given the same suffrage rights as white males.

McLoughlin, W.G., Rhode Island: A History, 1978, at 134-135.

The conclusion is inescapable that the words of the right to keep and bear arms clause of the Rhode Island Constitution were chosen, firstly, to include a broader class of people, including blacks, who were at that time not generally accorded suffrage or other rights of citizenship, and, secondly, to apply to “people” as individuals in the same sense as in the rest of the Declaration of Rights in Article I.

Collective Rights vs. Individual Rights in Federal and State Jurisdictions

Prior to the era of concern over slavery and race leading up to the American Civil War, guarantees of rights were commonly phrased in terms of protection of rights of “the people” and, where alternative terms such as “a citizen” were used, the terms appear to have been regarded as substantially interchangeable in meaning. For example, during the debates in the Massachusetts convention called to ratify the federal constitution, Samuel Adams objected to the absence of a bill of rights and proposed a resolution which provided that the constitution “be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent *the people* of the United States, who are peaceable *citizens*, from keeping their own arms...” Pierce, B.K., and Hale, C., eds., Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, Held in the Year 1788, Boston, 1856, at 86 (emphasis added).

Likewise, with the demise of racial barriers to citizenship, “the people” has again in the modern era become substantially interchangeable in meaning with “citizens.” The

Rhode Island General Assembly's Committee to Review the Firearms Statutes, clearly interpreting the constitutional "right of the people" to be an individual right, stated in its 1959 report that "[i]t [the committee] recognized the constitutional and fundamental right of the law abiding *citizen* to possess and bear arms." Rhode Island Journal, Feb. 3, 1959 (emphasis added) (Appendix 'A').

The "collective right" theory of the right to keep and bear arms and its attendant nullification of an individual right, it must be understood, has absolutely no supporting documentation prior to 1900, neither in constitution, nor statute, nor case law. Its first emergence appears to have been City of Salina v. Blaksley in Kansas in 1905. No state, in the absence of explicit militia language or a qualifying provision such as "for the common defense," has ever interpreted its constitutional protection of the right to keep and bear arms as a "collective right" only. Only two states, Kansas and Massachusetts, have followed the "collective right" theory, both explicitly citing surrounding militia context in the right to keep and bear arms clauses of their state constitutions.⁸ Dowlut and

⁸ The Hawaii Supreme Court has explicitly declined to decide this question, "In light of the foregoing excerpts and committee reports from the 1950 constitutional convention, it is unnecessary for us to decide whether the framers intended to establish an individual or collective right to bear arms under article I, section 17." State v. Mendoza, 82 Haw. 143, 920 P.2d 357, 367 (Haw. 1996). But for a comma, the Hawaii Constitution exactly quotes the federal Second Amendment, including the militia preface. The Mendoza court included an unusually extensive footnote (at 363, n9) recognizing *in dictum* that the "vast majority" of states (all except Kansas and Massachusetts) have adopted the individual right interpretation: "Although we do not decide the question, we observe that interpreting article I, section 17 to guarantee both a collective and an individual right to bear arms, subject to the State's police power, would be consistent with the vast majority of cases construing the right to bear arms under other state constitutions. *See, e.g., Sklar v. Byrne*, 727 F.2d 633, 637 (7th Cir.1984) (discussing the Illinois Constitution); Bristow v. State, 418 So.2d 927, 930 (Ala.Cr.App.), *cert. denied* (Ala.1982); Dano v. Collins, 166 Ariz. 322, 802 P.2d 1021, 1022-23 (Ct.App.1990), *review denied*, 167 Ariz. 535, 809 P.2d 960 (1991); Fife v. State, 31 Ark. 455, 460 (1876); Rabbitt v. Leonard, 36 Conn.Supp. 108, 413 A.2d 489, 490 (1979); Rinzler v. Carson, 262 So.2d 661, 665-66 (Fla.1972); Landers v. State, 250 Ga. 501, 299 S.E.2d 707, 709 (1983); Carson v. State, 241 Ga. 622, 247 S.E.2d 68, 72 (1978); State v. Grob, 107 Idaho 496, 690 P.2d 951, 953-54 (Ct.App.1984); Matthews v. State, 237 Ind. 677, 148 N.E.2d 334, 338 (1958); Kalodimos v. Morton Grove, 103 Ill.2d 483, 83 Ill.Dec. 308, 315, 470 N.E.2d 266, 273 (1984); Eary v. Commonwealth, 659 S.W.2d 198, 200

Knoop, "State Constitutions," at 191.

The modern impetus in support of the "collective right" theory, despite its isolated acceptance by only two states, is in purported application to the federal Second Amendment, and the case at bar is emphatically not a federal Second Amendment case. In recent years, various authorities have spoken formally on the issue. Statutory guidance in unambiguous support of the individual rights view of the federal Second Amendment has been provided by the United States Congress in Section 1(b) of Pub. L. 99-308, the Firearms Owners' Protection Act of 1986, which appears officially in the historical and statutory notes to 18 U.S.C. 921,

The Congress finds that... the rights of citizens... to keep and bear arms under the second amendment to the United States Constitution... require additional legislation to correct existing firearms statutes and enforcement policies...

In the course of considering what would become the federal Second Amendment, "[o]n Wednesday, September 9, 1789, a motion in the [United States] Senate to insert 'for the common defence' next to the words 'bear arms' was defeated. This underscores a

(Ky.1983); State v. Hamlin, 497 So.2d 1369, 1371 (La.1986); Hilly v. City of Portland, 582 A.2d 1213, 1215 (Me.1990); Eaton County Deputy Sheriffs Ass'n v. Smith, 37 Mich.App. 427, 195 N.W.2d 12, 13 (1972); People v. Brown, 253 Mich. 537, 235 N.W. 245, 246 (1931); State v. LaChapelle, 234 Neb. 458, 451 N.W.2d 689, 690-91 (1990); State v. Smith, 132 N.H. 756, 571 A.2d 279, 280-81 (1990); State v. Dees, 100 N.M. 252, 669 P.2d 261, 263 (Ct.App.1983); State v. Fennell, 95 N.C.App. 140, 382 S.E.2d 231, 233 (1989); State v. Ricehill, 415 N.W.2d 481, 483 (N.D.1987); Arnold v. Cleveland, 67 Ohio St.3d 35, 616 N.E.2d 163, 172 (1993); Ex Parte Thomas, 21 Okla. 770, 1 Okla.Crim. 210, 97 P. 260, 262 (1908); State v. Cartwright, 246 Or. 120, 418 P.2d 822, 829 (1966), *cert. denied*, 386 U.S. 937, 87 S.Ct. 961, 17 L.Ed.2d 810 (1967); Commonwealth v. Ray, 218 Pa.Super. 72, 272 A.2d 275, 279, *vacated on other grounds*, 448 Pa. 307, 292 A.2d 410 (1972); Ford v. State, 868 S.W.2d 875, 878, *reh'g denied* (Tex.Crim.App.1994); State v. Beorchia, 530 P.2d 813, 814-15 (Utah 1974); State v. Duranleau, 128 Vt. 206, 260 A.2d 383, 386 (1969); State v. Rupe, 101 Wash.2d 664, 683 P.2d 571, 596-97 & n. 9 (1984); In re Metheny, 182 W.Va. 722, 391 S.E.2d 635, 638 (1990); State v. McAdams, 714 P.2d 1236, 1237-38 (Wyo.1986). Contra Junction City v. Lee, 216 Kan. 495, 532 P.2d 1292, 1295 (1975) (citing Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 620 (1905)); Commonwealth v. Davis, 369 Mass. 886, 343 N.E.2d 847, 849 (1976) (holding that the right to bear arms under the Massachusetts constitution was not intended to be 'directed to guaranteeing individual ownership or possession of weapons')."

refusal to limit the right to military purposes.” Dowlut, R., “Federal and State Constitutional Guarantees to Arms,” 15 Dayton L. Rev. 59, 66 (1989), *citing* Journal of the First Session of the Senate, 77 (1820).

Cases cited by Appellees, AG Brief, at 13, n14, and supporting *amici* addressing the federal Second Amendment in the Nineteenth Century — such as United States v. Cruikshank, 92 U.S. 542 (1875)⁹ and Presser v. Illinois, 116 U.S. 252 (1896)¹⁰ — are clearly distinguished by the subsequent emergence of the Incorporation Doctrine holding that the Fourteenth Amendment made the federal Bill of Rights applicable to the states. Following such obsolete precedents logically would result in the conclusion that the federal Bill of Rights guarantees neither freedom of speech and press, nor free exercise of religion, nor right to trial by jury, nor right to counsel, nor any of the other rights which have been held to be “incorporated” by the Fourteenth Amendment and thereby protected from infringement by the states.

Justices of the modern U.S. Supreme Court have thoroughly condemned the Reconstruction cases, such as Cruikshank, and the chain of cases following from them, such as Presser, principally by regarding them in historical context. As Justice Thurgood Marshall wrote,

⁹ “The first amendment to the Constitution prohibits Congress from abridging ‘the right of the people to assemble and to petition the government for a redress of grievances.’ This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone.” U.S. v. Cruikshank, at 552.

¹⁰ “We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state. It was so held by this court in the case of U.S. v. Cruikshank...” Presser v. Illinois, at 265.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts....

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts.... Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen. That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward [The Strange Career of Jim Crow (3d ed. 1974)] 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. *See, e. g., Slaughter-House Cases*, [83 U.S. 36,] 16 Wall. 36 (1873); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876).

Regents of the University of California v. Bakke, 438 U.S. 265, 390-391 (1978)
(Marshall, J., *concurring in part and dissenting in part*)

Of course, this "state's rights" interpretation is no longer the rule. "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Gitlow v. New York, 268 U.S.

652, 666 (1925).¹¹

What the federal Second Amendment means is, of course, a matter of considerable dispute. The VPC Brief, at 16, n10, claims that, “[a]s the Supreme Court has recognized, the term ‘the people’ refers to ‘a class of persons,’ which indicates a group rather than an individual. See United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).” This is a rather disingenuous claim, since a quotation in context makes clear that the Supreme Court regards that ‘class of persons’ to be substantially the same as that protected by the rest of the Bill of Rights, “While this textual exegesis is by no means

¹¹ The case at bar concerns specifically procedural due process, and the requirement to be licensed is not *per se* challenged by the parties, but the definition of protected “liberty” has always been more expansive than is minimally required to find a merely procedural protection of a right which is explicitly enumerated in constitutional language. In the context of those few rights to which the constitutional framers have chosen to extend specific protection, the government may be subject to strict scrutiny to show a compelling interest in the particular regulation or limitation of the right. While the U.S. Supreme Court has never definitively decided whether the federal Second Amendment is incorporated by the Fourteenth Amendment and made applicable to the states, there can be absolutely no question that the reasoning of Cruikshank and Presser can no longer be taken seriously. As the U.S. Supreme Court recently stated in Planned Parenthood v. Casey, 505 U.S. 833, 846-847 (1992), discussing the meaning of “liberty” in such a context, “...the Due Process Clause of the Fourteenth Amendment... declares that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ The controlling word in the cases before us is ‘liberty.’ Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since Mugler v. Kansas, 123 U.S. 623, 660-661 (1887), the Clause has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’ Daniels v. Williams, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, [d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion). [T]he guaranties of due process, though having their roots in Magna Carta’s ‘per legem terrae’ and considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation.’ Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)). The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-148 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution. See Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting). But of course this Court has never accepted that view.”

conclusive, it suggests that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of people...” U.S. v. Verdugo-Urquidez, at 265 (citations omitted). Completely at odds with the VPC Brief claim, the U.S. 5th Circuit reads Verdugo-Urquidez as supportive of an individual rights interpretation:

For the sophisticated collective rights model to be viable, the word “people” must be read as the words “members of a select militia.” The individual rights model, of course, does not require that any special or unique meaning be attributed to the word “people.” It gives the same meaning to the words “the people” as used in the Second Amendment phrase “the right of the people” as when used in the exact same phrase in the contemporaneously submitted and ratified First and Fourth Amendments.

There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words “the people” have a different connotation within the Second Amendment than when employed elsewhere in the Constitution. In fact, the text of the Constitution, as a whole, strongly suggests that the words “the people” have precisely the same meaning within the Second Amendment as without.

United States v. Emerson, 270 F.3d 203, 227-228 (2001), *cert. denied* 536 U.S. 907, 122 S.Ct. 2362 (2002) (footnotes omitted).

While the individual rights interpretation of the federal Second Amendment is the rule in the U.S. 5th Circuit, the issue in the U.S. 9th Circuit gave rise to an unusually strongly worded series of dissents from the denial of a petition for rehearing *en banc*.

Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), *rehearing en banc denied*, 328 F.3d 567 (9th Cir. 2003). These dissents address issues relevant to the case at bar, beyond the scope of just the federal Second Amendment:

The panel opinion erases the Second Amendment from our Constitution as effectively as it can, by holding that no individual even has standing to challenge any law restricting firearm possession or use. This means that an individual cannot even get a case into court to raise the question. The

panel's theory is that "the Second Amendment" affords only a collective "right," an odd deviation from the individualist philosophy of our Founders. The panel strikes a novel blow in favor of states' rights, opining that "the amendment was not adopted to afford rights to individuals with respect to private gun ownership or possession," but was instead "adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms." It is not clear from the opinion whom the states would sue or what such a suit would claim were they to try to enforce this right. The panel's protection of what it calls the "people's right to bear arms" protects that "right" in the same fictional sense as the "people's" rights are protected in a "people's democratic republic."

Id., at 570-571 (Kleinfeld, J., with whom Kozinski, O'Scannlain, and T.G. Nelson, JJ., join, *dissenting*) (footnotes omitted).

About twenty percent of the American population, those who live in the Ninth Circuit, have lost one of the ten amendments in the Bill of Rights. And, the methodology used to take away the right threatens the rest of the Constitution. The most extraordinary step taken by the panel opinion is to read the frequently used Constitutional phrase, "the people," as conferring rights only upon collectives, not individuals. There is no logical boundary to this misreading, so it threatens all the rights the Constitution guarantees to "the people," including those having nothing to do with guns. I cannot imagine the judges on the panel similarly repealing the Fourth Amendment's protection of the right of "the people" to be secure against unreasonable searches and seizures, or the right of "the people" to freedom of assembly, but times and personnel change, so that this right and all the other rights of "the people" are jeopardized by planting this weed in our Constitutional garden.

Id., at 572 (footnotes omitted).

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.* The sheer ponderousness of the panel's opinion — the mountain of verbiage it must deploy to explain away these fourteen short words of constitutional text — refutes its thesis far more convincingly than anything I might say. The panel's labored effort to smother the Second Amendment by sheer body weight has all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it — and is just as likely to succeed.

Id., at 570 (Kozinski, J., *dissenting*) (emphasis in original).

In another 9th Circuit case, Judge Gould conceded that he was bound by his circuit's precedent on this question, but hoped that he would someday be overruled:

I join the court's opinion, and write to elaborate that Hickman v. Block, 81 F.3d 98 (9th Cir.1996), was wrongly decided, that the remarks in Silveira v. Lockyer, 312 F.3d 1052 (9th Cir.2002), about the "collective rights" theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an "individual rights" view of the Second Amendment, as was adopted by the Fifth Circuit in United States v. Emerson, 270 F.3d 203, 260 (5th Cir.2001), consistent with United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). We should recognize that individual citizens have a right to keep and bear arms, subject to reasonable restriction by the government. We should also revisit whether the requirements of the Second Amendment are incorporated into the Due Process Clause of the Fourteenth Amendment.

Nordyke v. King, 319 F.3d 1185, 1192-1194 (2003) (Gould, J., *specially concurring*) (footnotes omitted).

In the course of this short excerpt from Judge Gould's special concurrence, he inserts four footnotes regarding the current position of the United States, through its Attorney General, in favor of an individual rights interpretation (n1) while retaining reasonable restrictions (n2), "[w]hether and to what extent the Bill of Rights should be incorporated into the Due Process Clause of the Fourteenth Amendment..." (n3), and remarking that "[a]nother potential avenue for incorporation is via the Privileges and Immunities Clause of the Fourteenth Amendment..." (n4). These four extensive footnotes together consume three pages of the Federal Reporter.

But, of course, the federal Second Amendment is of only peripheral interest here.

Kansas' decision in Blaksley has been academically criticized even on its own terms, particularly by comparison with Ohio,

The guarantee to arms of the 1859 Kansas Constitution is an exact copy of Ohio's 1851 constitutional guarantee, and Ohio courts have interpreted their provision to secure an individual right to self-defense.... Hence, any claim that the arms guarantee is inextricably linked and strictly limited to military matters rests on a foundation of quicksand. The Blaksley decision disingenuously turns a constitutional guarantee into an intangible abstraction.

Dowlut and Knoop, "State Constitutions," at 190-191 (footnotes omitted), *citing* Mosher v. City of Dayton, 48 Ohio St. 2d 243, 358 N.E.2d 540, 543 (1976) ("the right of an individual to bear arms" may be regulated in a "reasonable manner"); City of Akron v. Dixon, 36 Ohio Misc. 133, 303 N.E.2d 923, 924 (Akron Mun. Ct. 1972) ("the right secured by the Constitution ... speaks of the citizen's self defense and security and to his right to attain those ends by bearing arms."); State v. Hogan, 63 Ohio St. 202, 58 N.E. 572, 575 (1900) (individual right "for defense of self and property").

Kansas, unlike Rhode Island, does not prohibit unlicensed bearing of arms in public unconcealed, although municipalities can enact ordinances which are more restrictive. The Supreme Court of Kansas has more recently, in fact, pragmatically backed away from its 1905 holding in City of Salina v. Blaksley, invalidating anti-gun ordinances as overbroad exercises of the police power while grounding such decisions elsewhere than in the right to keep and bear arms clause of the Kansas Constitution,

The difficulty with the city ordinance in question here is that it clearly and unequivocally prohibits any non-exempt person within the city limits of Junction City from having in his possession a firearm, except when he is on his own land or in his abode, fixed place of business or office. Anyone reading the ordinance could only conclude that, unless he fell within the category of exempted persons, he could not lawfully transport a firearm from the place where he purchased it or had it repaired or between his office and his home without being in violation of the ordinance. The fact that the Junction City police have taken the benign position that the ordinance should be enforced only against those who have no good reason to have a gun does not make the express language of Ordinance 12-410 any less unreasonable and oppressive.

Junction City v. Mevis, 601 P.2d 1145, 1152 (Kan. 1979).

Often, the surrounding language of the right to keep and bear arms clauses in the constitutions of other states leaves no doubt that the term "the people" recognizes an individual right, emphasizing the artificiality and speciousness of the "collective right" theory, and this has generally been recognized in case law. Most states whose constitutions guarantee the right to keep and bear arms to "the people," even in the

presence of explicit militia language, have nevertheless followed the individual rights theory in case law, including:

? Indiana (“*The people* shall have a right to bear arms, for the defense of themselves and the State.” Ind. Cons., Article I, Section 32 (emphasis added); “We think it clear that our constitution provides our citizenry the right to bear arms for their self-defense.” Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. App. 1980)),

? North Carolina (“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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power...” North Carolina Cons., Article 1, Section 30 (emphasis added); “But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to ‘bear,’ and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution.” State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224 (N.C. 1921)),

? Oregon (“*The people* shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]” Oregon Cons., Article I, Section 27 (emphasis added); “In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same.... When the constitutional drafters referred to an individual’s ‘right to bear arms,’ the arms used by the militia and for personal

protection were basically the same weapons.” State v. Kessler, 289 Or. 359, 614 P.2d 94 (Or. 1980)),

? South Carolina (“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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it.” South Carolina Cons., Article 1, Section 20 (emphasis added); “We, however, cannot regard this as the object of our act, but, on the contrary, we think that the purpose was, as far as may be consistent with the right of the citizen to bear arms...” State v. Johnson, 16 S.C. 187, 191 (1881)), and

? Vermont (“That *the people* have a right to bear arms for the defence of themselves and the State — and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.” Vermont Cons., Chapter I, Article 16 (emphasis added); “Under the general laws, therefore, a person... may carry a dangerous or deadly weapon, openly or concealed, unless he does it with the intent or avowed purpose of injuring another...” State v. Rosenthal, 75 Vt. 295, 55 A. 610, 610-611 (Vt. 1903)).

A number of other states have a right to keep and bear arms clause in their constitutions which guarantee a right to “the people” and have made clear through the political process that they intend an individual rights interpretation. In many of these states, the provisions were added relatively recently in response to a specific effort to recognize an individual, constitutional right. Such states include:

? Utah (“The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.” Utah Cons., Article I, Section 6; the current phrasing was adopted in 1984; the previous phrasing, adopted in 1896, was “The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.”),

? Virginia (“That 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; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.” Virginia Cons., Article I, Section 13; the words “therefore, the right of the people to keep and bear arms shall not be infringed” were added in 1971), and

? Wisconsin (“The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” Wisconsin Cons., Article I, Section 25; this provision was enacted in 1998).

CONSTITUTIONAL CONSTRUCTION: THE RHODE ISLAND CONSTITUTION MEANS EXACTLY WHAT IT SAYS

The Attorney General suggests that the plain meaning of constitutional language is undeterminable and therefore should be accorded little deference. “Without any supporting authority, CRAL writes ‘[c]onstitutional language is as significant for what it

does not say as for what it does say,” AG Brief, at 36, *quoting* 1st CRAL Statement, at 10 (emphasis in original). Yet this is an obvious rule that has repeatedly been reaffirmed explicitly by this Court,

But in order for this argument to have any merit, we would have to disregard our well-established rules of construction, which provide that “[e]very clause of the constitution * * * be given its due force, meaning, and effect, and [that] no word or section can be assumed to have been unnecessarily used, or needlessly added,” or *unnecessarily omitted*. Instead we must assume that the framers carefully weighed and considered the words in each clause and intended those terms to imply a definite meaning.

Bandoni v. State, 715 A.2d 580, 590 (R.I. 1998) (emphasis added), *quoting* City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995) (citation omitted).

The basic rules of constitutional construction are well-settled in Rhode Island by this Court and were concisely summarized in Pawtucket v. Sundlun:

Our task in construing constitutions is to give effect to the intent of the framers. State ex rel. Webb v. Cianci, 591 A.2d 1193, 1201 (R.I.1991). In so doing, we employ the well-established rule of construction that when words in the constitution are free of ambiguity, they must be given their plain, ordinary, and usually accepted meaning. In re Advisory Opinion to the Governor, 612 A.2d 1, 7 (R.I.1992). Every clause of the constitution must be given its due force, meaning, and effect, and no word or section can be assumed to have been unnecessarily used or needlessly added. Id. (quoting and citing Kennedy v. Cumberland Engineering Co., 471 A.2d 195, 198 (R.I.1984)). This court presumes that the language in a clause was carefully weighed and that the terms imply a definite meaning. Bailey v. Baronian, 120 R.I. 389, 391, 394 A.2d 1338, 1339 (1978) (citing Opinion to the Governor, 62 R.I. 316, 6 A.2d 147 (1939)).

In construing a constitutional provision, this court properly consults extrinsic sources, including the proceedings of constitutional conventions and any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment. Cianci, 591 A.2d at 1201. And finally, in our examination of the constitution, we must look to the history of the times and examine the state of affairs as they existed when the constitution was framed and adopted. Opinion to the Governor, 612 A.2d at 8 (quoting In re Advisory Opinion (Chief Justice), 507 A.2d 1316, 1320 (R.I.1986)).

City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995).

It is undeniable that the framers chose to draft the right to keep and bear arms clause of the Rhode Island Constitution with no encumbering militia language or other qualifying limitation. Further, no statutory restrictions on the carrying of pistols and revolvers were enacted until 1927, which was 84 years after the keep and bear arms clause was adopted in 1843. The clause means what it says.

The true inquiry as to the meaning of a constitutional guarantee concerns its understanding by the voters who, by their vote, have given life to the product of the convention. The voters' understanding of a constitutional provision is determined by the common and ordinary meaning of the words employed. Those words "will be understood in the sense most obvious to the common understanding, without resort to subtle and forced construction for the purpose of limiting or extending their operation."

Dowlut and Knoop, "State Constitutions," at 187 (footnotes omitted), *citing* People ex rel. Cosentino v. Adams County, 82 Ill. 2d 565, 413 N.E.2d 870, 871 (Ill. 1980) and Burke v. Snively, 208 Ill. 328, 340, 70 N.E. 327, 329 (Ill. 1904) (Words "shall be given the meaning which they bear in ordinary use among the people"), and *quoting* People v. Stevenson, 281 Ill. 17, 25-26, 117 N.E. 747, 750 (Ill. 1917).

Indeed, the Oregon Supreme Court stated the fundamental guidance which it used in 1980 to analyze very nearly the same question which now confronts Rhode Island,

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

State v. Kessler, at 94

The absence of any qualifying language whatsoever in the Rhode Island

Constitution's right to keep and bear arms clause mandates that it be read to include all lawful purposes, consistent with other broad guarantees for which no explicit purpose is mentioned, such as the right to free speech:

Five¹² state constitutions guarantee the right to keep and bear arms without assignment of a specific purpose. Their guarantees are generally worded as the right "to keep and bear arms shall not be infringed" or "abridged." As this guarantee is without assignment of a purpose, it must be assumed the Framers intended at a minimum to protect the basic historical reasons for a right to arms: (a) the right of personal defense; (b) preference for a militia over a standing army; and (c) the deterrence of governmental oppression. One court simply capsulized the reasons for having arms as follows: "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured." It can also be inferred that the Framers were aware of the guiding principles of interpretation "Inclusio Unis Est Exclusio Alterius" (the inclusion of one is the exclusion of another) and feared that by including or assigning only one of the historical reasons, e.g., militia, the courts would, given their penchant for a restrictive interpretation of the right, limit the guaranteed right only to the purpose stated.

Dowlut and Knoop, "State Constitutions," at 224-225 (footnotes omitted), *quoting* McKellar v. Mason, 159 So.2d 700, 702 (La. App. 1964), affirmed 245 La. 1075, 162 So.2d 571 (La. 1964). Dowlut and Knoop comment, at n216, "This was when the Louisiana Constitution tracked the second amendment. In 1974 it was amended to the present guarantee."

The wisdom of the framers in drafting the Rhode Island Constitution's right to keep and bear arms clause in an unqualified manner was demonstrated by the fact that, as Dowlut and Knoop speculated would occur, Connecticut recently reasoned precisely that "the inclusion of one is the exclusion of another," holding that the qualifying language as to the purpose of the right to keep and bear arms in the Connecticut Constitution is "limiting" in its effect:

¹² Now six, since Maine's 1987 constitutional amendment. The others are Georgia (since 1877), Idaho (since 1978), Illinois (since 1970), Louisiana (since 1879), and Rhode Island (since 1843).

The language of our constitution provides that “[e]very citizen has a right to bears arms *in defense of himself and the state.*” (Emphasis added.) Conn. Const., art. I, §15. The limiting language of the provision may be understood to establish two related principles. First, it demonstrates that the bearing of arms is not valued in and of itself, but only as a means to particular ends. Second, it clearly indicates what purposes are *not* accorded explicit constitutional protection: the bearing of arms for any purpose other than defense of one’s self or the state.

In this connection, the textual link between the right to bear arms and its enunciated purpose itself suggests a limitation on the nature and scope of the constitutional right.

Benjamin v. Bailey, 234 Conn. 455, 662 A.2d 1226, 1232 (Conn. 1995) (emphasis in original).

Oregon has held that the absence of any qualifying language as to location in their state constitutional protection of the right to keep and bear arms means that weapons may be carried in public as well as in one’s own home, provided that the purpose is lawful, such as for self-defense. This is particularly relevant in light of the Appellees’ contention (AG Brief, at 13) that Rhode Island’s constitutional right to keep and bear arms, whatever it may be, is limited to one’s own home and place of business or upon one’s own land, a contention entirely unsupported by and at variance with all historical evidence, legislative intent, and precedent from other states:

The ultimate holding of that case [State v. Kessler, 289 Or. 359, 614 P.2d 94 (Or. 1980)] on the facts there presented was that a person's right simply to possess a billy in his home was constitutionally protected from statutory infringement. We are now asked whether mere possession of a billy outside the home is protected by s 27.

The text of the constitution is not so limited; the language is not qualified as to place except in the sense that it can have no effect beyond the geographical borders of this state.

The state argues that for this court to hold that possession of a billy in a public place is constitutionally protected would be an unwarranted extension of our holding in Kessler. We do not agree.

State v. Blocker, 291 Or. 255, 630 P.2d 824, 825 (1981).

**IF A LICENSE IS REQUIRED FOR THE EXERCISE OF A
CONSTITUTIONAL RIGHT, THERE IS A CONSTITUTIONAL RIGHT IN THE
LICENSE**

The core assertion of Appellants in the case at bar is that they are entitled to due process protection in the consideration of their applications for a license because the license is required for the exercise of a constitutional right, and therefore there is a constitutional right in the license.

It is not surprising that this precise issue does not appear to have been addressed previously in Rhode Island, as no other constitutional right ordinarily requires a license for its exercise. However, other states have held that consideration of an initial application for a weapons permit which is prerequisite to the exercise of a constitutional right comprises a liberty or property interest:

In Schubert's case it is clear from the record that the superintendent decided the application on the basis that the statutory reference to "a proper reason" vested in him the power and duty to subjectively evaluate an assignment of "self-defense" as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant "needed" to defend himself.

Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved.

Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. App. 1980).

Although there appears to be no precedent addressing this specific question in Rhode Island, there is considerable precedent in very similar circumstances. There is no question that, in Rhode Island, a *renewal* of a license is entitled to due process protection:

The plaintiff's inability to renew her license indicates the substantial likelihood of her success on the merits. A property interest exists when a person has a "legitimate claim of entitlement" to a benefit. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972). Licenses granted by the government represent property. Sanderson v. Village of Greenhills, 726 F.2d 284, 286 (6th Cir. 1984); see J. Novak, R. Rotunda and J. Young, Constitutional Law, part 3, ch. 15, § II at 529-30, 549-51 (2d ed. 1983). Deprivation of that entitlement, as in the failure to obtain a license renewal, requires a procedure adhering to due-process guarantees, because the continued possession of a license may become essential in the pursuit of a livelihood. See Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90, 94 (1971); see also H. McClintock, Handbook of the Principals of Equity, ch. 13, §148 (2d ed. 1948).

Leone v. Town of New Shoreham, 534 A.2d 871, 874 (R.I. 1987).

This Court's wording in Leone makes clear that due process must be afforded whenever a license is prerequisite to the enjoyment of, as the U.S. Supreme Court states in Board of Regents v. Roth, 408 U.S. 564, 577 (1972), any benefit to which one has a "legitimate claim of entitlement." Such a legitimate claim of entitlement may arise from a prior act such as the granting of a license,¹³ or may arise from other sources, such as a statute or the constitution directly. It is only necessary that the applicant for the license have some "legitimate claim of entitlement" to do the thing for which the license is required, in which case the denial of a license implies the denial of the exercise of a constitutional right:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

¹³ The Superior Court below noted *in dictum* that due process would be required in order to revoke a weapons carrying permit granted by the Attorney General under R.I.G.L. §11-47-18(a), "This is not to say that once a person has a license a hearing would not be required to revoke it. See Medina [v. Rudman], 545 F.2d 244 (1st Cir. 1976),] at 250 ('once a license, or the equivalent, is granted, a right or status recognized under state law would come into being, and the revocation of the license would require notice and hearing.')

Mosby v. McAteer, C.A. No. 1999-6504, 2001 R.I. Super. LEXIS 18, at 15 (R.I. Super. 2001).

understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly, [397 U.S. 254 (1970)], had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.

Board of Regents v. Roth, at 577.

Where a license or permit was required for exercise of free speech rights, it is a settled question that due process is required in the issuance of the license, Niemotko vs. Maryland, 340 U.S. 268, 273 (1951) (“Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall.”) More recently, the U.S. Supreme Court has said,

...the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official.

Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (citations omitted).

As we discuss in detail elsewhere, a license issued by the Attorney General under R.I.G.L. §11-47-18 is required not merely to carry a *concealed* weapon, but is required under §11-47-8 in order to carry a weapon, *whether concealed or unconcealed*, anywhere but in one’s home or place of business or upon one’s own land (except in certain very limited circumstances), and the denial of this license is therefore a denial of any meaningful exercise of the right to keep and bear arms. Where loss of constitutional rights is at issue, the consequent liberty and property interests are great rather than small:

This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies

rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168-170 (1951) (footnotes and citations omitted).

Numerous states have held that the right to keep and bear arms guaranteed by their state constitutions protects, through *substantive* due process, the right to carry a weapon off one's own premises *unconcealed* without a license. *See, for example, State v. Blocker*, 291 Or. 255, 630 P.2d 824 (Or. 1981), City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971), People v. Zerillo, 219 Mich. 635, 189 N.W. 927 (1922), and State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921). While one could contemplate applying that reasoning in Rhode Island, the legitimacy of the licensing statute is not being challenged before this Court, and Appellants here seek only to establish that they have *some* liberty and property right to a license and, therefore, must be afforded procedural due process. It is illogical that the state could, through the creation of a licensing requirement, effect denial of a constitutional right by indirect means (denial of *procedural* due process) which it would not be permitted to do by direct means (denial of *substantive* due process). Indeed, this implies that constitutionality of the licensing

statute depends upon how license applications are considered by the Attorney General.¹⁴

Ultimately, any assertion that Appellants here have no “legitimate claim of entitlement” rests solely upon the use of the word “may” rather than “shall” in R.I.G.L. §11-47-18(a), “The attorney general *may* issue a license or permit to any person twenty-one (21) years of age or over to carry a pistol or revolver, whether concealed or not, upon his or her person upon a proper showing of need...” (emphasis added). When they deny the existence of this right, Appellees effectively admit that the finding of *any* liberty or property interest in a weapons carrying permit, grounded in statute or constitution, would give rise to a due process right under Roth, “No constitutional or statutory right to carry a weapon outside of one’s home, land, or business exists. Without a constitutional right, grounded on a liberty or property interest, Plaintiffs cannot clear the constitutional hurdle and, therefore, are not entitled to due process protections in their handgun permit applications.” AG Brief, at 19. But, as we note, the lack of such a right would put Rhode Island at variance with the vast majority of other states in which the meaning of their constitutional right to keep and bear arms clause has been clarified by precedent.

The Superior Court’s ruling below, while adverse to the Appellants and phrased to emphasize the absence of guiding precedent, does clearly establish that, if the exercise of

¹⁴ We note that the chain of facts asserted by the Appellees, AG Brief, at 23-26, with regard to the time sequence over which their policy, at 24, was developed appears to be inconsistent with their testimony before the Superior Court. In particular, it is claimed that the policy was brought into existence essentially whole and complete prior to the commencement of this action by Appellant, “In January, 1999, shortly after taking office, then Attorney General Whitehouse created a policy...” Id., at 23. The hearing transcript, at 5, evidences otherwise, that the policy was formulated in June 1999, *subsequent* to the denials of Mosby’s and Golotto’s applications. We regard this as a significant error in the AG Brief, liable to give a materially incorrect impression to this Court. While we believe the Attorney General’s procedures to have been manifestly deficient, we will not further burden this Court as we regard this matter to have been ably discussed by the Brief of Amicus Curiae the Rhode Island Affiliate of the American Civil Liberties Union, January 31, 2003, at 2-7.

a constitutional right is conditioned upon the issuance of a license, there is a constitutional right in the license. “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) (emphasis added).

Although we discuss more thoroughly elsewhere the legislative intent behind the Firearms Act generally and R.I.G.L. §11-47-18 specifically, it has always been the rule in Rhode Island that the use of the word “may” should be read as “shall” when necessary to carry out the intent of the legislature¹⁵ or, as here, of the constitutional framers:

The association argues the use of the word ‘may’ in the section under examination is demonstrative evidence that the legislature intended to permit a party to elect between filing a complaint with either the courts or the labor relations board. We acknowledge the cardinal rule of construction advanced by the association that in construing statutes a court will attribute to words their common, ordinary and natural meaning. Mount Pleasant Cab Co. v. Rhode Island Unemployment Compensation Board, 73 R.I. 7, 53 A.2d 485. Nevertheless, we are also cognizant of another rule of equal dignity in the canons of construction which provides that a court should construe words of a statute according to their plain meaning unless such interpretation would defeat the discovered intent of the legislature. Irish v. Collins, 82 R.I. 348, 107 A.2d 455; State v. Nadeau, 81 R.I. 505, 105 A.2d 194. Moreover, a court should not allow itself to be enslaved to the literal meaning of words and on occasion, albeit with due caution, must eschew the literal and ordinary meaning of words in order to better fulfill the evident purpose of the legislation sought to be construed. O'Brien v. Waterman, 91 R.I. 374, 163 A.2d 31; 82 C.J.S.

¹⁵ The statutory requirement for a showing of need to be made before the Attorney General “may” issue a permit is logically inconsistent with a permissive interpretation, since it would imply that the Attorney General could exercise greater discretion to decline to issue a permit *only after need has been successfully shown*, which makes no sense. This Court held in State v. Storms, 112 R.I. 121, 308 A.2d 463, 466 (R.I. 1973), that determination of need, insofar as it may be an exercise of discretion, is “fact-finding.”

Statutes s 329, p. 651. The present appeal, we feel, is to be included within the rule of the Irish and O'Brien cases.

We readily concur in the association's observation that the verb 'may' is connotative of permissiveness, but we recognize occasions when this court has attributed to it a different meaning in order to fulfill better the ascertained intent of the legislature. Such was the situation in Carlson v. McLyman, 77 R.I. 177, 182, 74 A.2d 853, 855, where this court said:

'* * * We concede that the ordinary meaning of the word 'may' is permissive and not compulsive; yet whether it should be given the latter meaning and construed as 'shall' in a given case depends on the intent of the legislature as ascertained from the language, the nature, and the object of the statute.'

See also Nolan v. Representative Council, 73 R.I. 498, 57 A.2d 730. As in the Carlson and Nolan cases, we feel the present case is one requiring a purposeful interpretation of the word 'may.'

Warren Education Association v. Lapan, 103 R.I. 163, 235 A.2d 866, 872 (R.I. 1967).

We believe that the duty charged to the Attorney General by R.I.G.L. §11-47-18(a) is nothing less than the power to permit or deny the exercise of a constitutional right, and we ask only that the Attorney General's licensing procedure be made subject to due process and not allowed unfettered discretion. Where statutes have by their literal wording appeared to grant discretion in excess of that which would be constitutionally or lawfully permissible, this Court has held that statutes should be interpreted so as to save them insofar as is possible:

In determining whether the statutory standard now under consideration is so vague as to offend due process, we are mindful of the principle that vague legislative standards may be saved if the needed specificity has been supplied by judicial interpretation. Grayned v. City of Rockford, 408 U.S. 104, 111, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222, 229 (1972). The requisite judicial gloss was supplied in Chernov Enterprises, Inc. v. Sarkas, 109 R.I. 283, 287, 284 A.2d 61, 63 (1971), wherein the court emphasized that in authorizing revocation for cause, the Legislature never intended either to confer upon a licensing authority a limitless control or to countenance the use of an unbridled discretion.

A.J.C. Enterprises v. Pastore, 473 A.2d 269, 274 (R.I. 1984).

This Court has recognized that there is a “right to be licensed to carry a handgun” in Rhode Island. State v. Storms, 112 R.I. 121, 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 “right to be licensed to carry a handgun” is an exercise of the right to keep and bear arms guaranteed by the Rhode Island Constitution, licenses prerequisite to the exercise of constitutional right are liberty and property interests, and no person shall be deprived of liberty and property without due process of law.

HANDGUNS ARE “ARMS”

The Brady Center alleges that “courts have repeatedly held that handguns are not ‘arms’ under state constitutions.” Brady Brief, at 7. They cite several cases in support of this contention, such as City of Seattle v. Montana, 919 P.2d 1218 (Wa. 1996), in which two criminal defendants were convicted of carrying concealed fixed-blade knives, but no guns of any type. At no time did the court decide that any weapon was or was not an arm, “In absence of a Gunwall analysis on the question of whether, or what type of, knives constitute ‘arms’ under art. I, §24, we decline to reach this question.” City of Seattle v. Montana, at 1222.

Furthermore, the same court had 12 years earlier held that a pistol was a

constitutionally protected arm:

The challenged evidence included the admission of several weapons: (1) a CAR 15 semiautomatic rifle (civilian version of the military's M-16), (2) a 12-gauge shotgun with one shortened barrel, (3) a .22 caliber rifle, and (4) *a pistol with interchangeable barrels*

State v. Rupe, 683 P.2d 571, 594 (Wa. 1984) (emphasis added).

Although we do not decide the parameters of this right, here, defendant's behavior — possession of legal weapons — falls squarely within the confines of the right guaranteed by Const. art. 1, §24. Defendant was thus entitled under our constitution to possess weapons...

Id., at 596.

As the Brady Brief indicates, the City of Seattle v. Montana court does list many cases which address the question of what constitutes an arm for constitutional purposes. Some of the listed cases hold that a pistol is an arm while others hold that some pistols are not. In general, when a court has held that a pistol is not an "arm," the reference is to a limited and particularized type, e.g. Hill v. State, 53 Ga. 472, 475 (1874) ("arms" includes firearms used in militia, not weapons customarily used in 'private quarrels or brawls'), Fife v State, 31 Ark. 455, 461, 25 Am.Rep. 556 (1876) ("arms" are those weapons used in civilized warfare and not those used by ruffians, brawlers or assassins"), and State v. Comeau, 233 Neb. 907, 448 N.W.2d 595, 596 (Neb. 1989) (sustaining a criminal charge of possessing "a firearm from which the manufacturer's identification marks or serial numbers had been removed, defaced, altered, or destroyed"). The class of pistols excluded from protection as "arms" consists narrowly of those which, due to their unusual features or purposes, are primarily of value to criminals and of no value otherwise.

As any person who has served in the armed forces of the United States knows

firsthand, a pistol is an invaluable tool in warfare, especially for personal defense. Many soldiers, including those who are pilots, tankers and military policemen, carry the Beretta M9 9mm pistol as their primary personal weapon.¹⁶ Prior to the M9 having been adopted as the standard sidearm for our forces in the mid 1980s, soldiers carried the 1911A1 .45ACP caliber pistol and had for decades. This pistol saw use in World War II, the Korean Conflict and Vietnam. It is well established that a pistol is a weapon used in warfare.

Some courts have held that what constitutes “arms” depends upon the purpose for which the right to bear them is granted. The Rhode Island Constitution is unqualified as to the purpose for which arms may be borne.

Certainly, a pistol is an appropriate arm not just for warfare, as discussed, but also for personal defense, People v. Brown, 253 Mich. 537, 235 N.W. 245, 247 (Mich. 1931)¹⁷ (“ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure”).

Regardless, the question of whether or not handguns are “arms” in Rhode Island has been addressed by this Court, “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*

¹⁶ The Beretta 92FS is an identical model, except for its model number, available for sale to civilians.

¹⁷ See also State v. Shelby, 90 Mo. 302, 2 S.W. 468, 469 (1886) (“a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution...”), Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980) (“handgun”), State v. Kerner, 181 N.C. 574, 107 S.E. 222, 224 (1921) (“We are of the opinion, however, that ‘pistol’ *ex vi termini* is properly included within the word ‘arms,’ and that the right to bear such arms cannot be infringed. The historical use of pistols as ‘arms’ of offense and defense is beyond controversy.”).

to carry a handgun hinged.” State v. Storms, 112 R.I. 121, 308 A.2d 463, 466 (1973) (emphasis added). Storms clearly suggested that a handgun is an arm citizens have a right to be licensed to carry in Rhode Island.

In 1959, our General Assembly showed that they considered pistols to be “arms” when the Committee to Review the Firearms Statutes “...recognized the constitutional and fundamental right of the law abiding citizen to possess and bear arms” in their “Report to the General Assembly,” Rhode Island Journal, February 1959.

As we note in more detail elsewhere, then-Attorney General Michaelson, in April of 1975, spoke of “the individual legally entitled to a permit” to carry a handgun in his “Message to the Honorable General Assembly” (Appendix ‘B’).

DENIAL OF WEAPONS CARRYING LICENSE IS A COMPLETE PROHIBITION OF BEARING ARMS, NOT MERELY A REGULATION

Appellees and their supporting *amici* have each to some extent mischaracterized the question before this court. An examination of their briefs shows that they speak of licenses to carry *concealed* weapons:

[Appellants’] argument, moreover, wrongly focuses on whether the ‘right to keep and bear arms’ is a liberty or property interest entitled to due process protection rather than the far narrower issue before this Court, *i.e.*, whether there is a liberty or property interest *in a license to carry a loaded concealed handgun in public*.

Brady Center Brief, at 13 (emphasis in original).

In its discretion, the Rhode Island Legislature decided to closely regulate *concealed weapons*, requiring that anyone carrying such a weapon first obtain a permit.

Violence Policy Center Brief, at 12 (emphasis added).

In addition, neither *amici (sic)* produces any Rhode Island historical

evidence to support the proposition that the right to keep and bear arms equals an individual's right to carry a *concealed handgun* in public.

Brief of the Attorney General, at 34 (emphasis added).

They then advance the argument, supported by the case law they cite, that, because restrictions upon carrying concealed weapons merely regulate the manner in which arms are borne, such restrictions are constitutional. Further, they argue that, because these restrictions are constitutional, there is no right to carry a concealed weapon and therefore no due process should be afforded applicants for this permit.

Actually, the handgun carrying permit sought by plaintiffs does not merely allow the bearing of concealed weapons, *but rather it is prerequisite to the bearing of arms in any manner whatsoever*, whether concealed, not concealed, or otherwise.¹⁸

This is a critically important aspect of the instant case. In order to carry a handgun openly or concealed (or in any manner whatsoever) in Rhode Island, a person must possess a permit issued by our Attorney General pursuant to R.I.G.L. §11-47-18,¹⁹

No person shall, without a license or permit issued as provided in §§11-47-11, 11-47-12 and 11-47-18, carry a pistol or revolver in any vehicle or conveyance or on or about his or her person *whether visible or concealed...*

R.I.G.L. §11-47-8(a) (emphasis added).

A person in Rhode Island who does not possess said license does not merely find the manner in which they can exercise their right to bear arms limited or regulated, but rather they find the exercise of their right to bear arms completely prohibited. Because

¹⁸ This fact seems to have been overlooked especially by *amicus* Brady Center, who used the term “loaded concealed handgun(s)” fifteen times in the first six pages of their brief. At no time did they address the due process issues related to carrying a handgun openly.

the Appellants were denied this license by the Attorney General, their right to bear arms in Rhode Island *is not merely subjected to a restriction as to the manner of bearing arms*; rather their exercise of this constitutional and fundamental right is *completely prohibited*.

Because of the broad and unqualified nature of Article 1, §22 of our Constitution, we do not concede that licensed bearing of concealed weapons in Rhode Island lacks constitutional protection. However, we can and will demonstrate that the case law cited by Appellees and their supporting *amici* in conjunction with other case law overwhelmingly holds that, in a state in which there is any constitutional right to keep and bear arms, restrictions on the bearing of *concealed* weapons are constitutionally permissible *only to the extent* that they do not prohibit or frustrate the exercise of the right to keep and bear arms generally.

Amicus Brady Center asserts, “In 1897, the United States Supreme Court explained and embraced the common historical understanding that ‘the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons.’” Brady Brief, at 6, *quoting* Robertson v. Baldwin, 165 U.S. 275, 281-282 (1897). The Robertson case is unrelated to bearing arms in any way. The Court was simply giving examples of well recognized limitations of many rights and in no way is this a holding that a person’s right to keep and bear arms can be completely prohibited to achieve the limited goal of prohibiting the carrying of concealed weapons. In fact, a fair reading of Robertson is that the Supreme Court suggested, albeit *in dictum*, that a restriction on the carrying of *concealed* weapons would be constitutional precisely

¹⁹ R.I.G.L. §11-47-11(a) provides that a licensing authority “shall issue” a similar permit, but

because it went no further.²⁰

The Brady Center also quotes State v. McAdams, “a[n] absolute right to bear arms, concealed or otherwise, has never been recognized, even at common law.” Brady Brief, at 6 (citations omitted). However, the McAdams court held that the right to bear arms is entitled to substantial, though not absolute, protection:

The police power cannot, however, be invoked in such a manner that it amounts to the destruction of the right to bear arms. People v. Brown, 253 Mich. 537, 235 N.W. 245, 82 A.L.R. 341 (1931); State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968). This precept is well stated in the case of State v. Wilforth, 74 Mo. 528, 530[, 41 Am.Rep. 330] (1881):

" * * * A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional. * * * "

State v. McAdams, 714 P.2d 1236, 1237 (Wy. 1986).

It is established in the record of this case that Attorney General Whitehouse routinely denied permits (and the renewal of permits) to persons who were not either law enforcement officers or persons who work closely with law enforcement officers.

permits issued under said statute only allow a handgun to be carried concealed: “...issue a license or permit to the person to carry *concealed* upon his or her person a pistol or revolver...” (emphasis added).

²⁰ From the limited quotation used by *amici* Brady Center, it is not clear that the case cited is unrelated to the right to keep and bear arms and that the Court was simply teaching us (by listing examples) that rights are not absolute but rather are “subject to certain well-recognized exceptions, arising from the necessities of the case.” Robertson, at 281. A broader excerpt illustrates this: “Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (U. S. v. Ball, 163 U.S. 662, 627 [(1896)], 16 Sup. Ct. 1192); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (Brown v. Walker, 161 U. S. 591 [(1896)], 16 Sup. Ct. 644, and cases cited). Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.” Robertson, at 281-282.

Citing a Nebraska Supreme Court ruling, the Brady Center claims, “Courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens.” Brady Brief at 13, *citing State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989). In Comeau, the issue before the court was whether or not the state could sustain convictions of two individuals, one for possessing a firearm with a “removed, defaced, altered or destroyed” serial number and the other for being a “felon in possession of a firearm having a barrel less than 18 inches in length.” Comeau, at 596.

The court engaged in an examination of whether or not the Nebraska constitution’s right to keep and bear arms provision²¹ was absolute or if it is subject to reasonable regulation. Finally, the court held, “We conclude that the statutes in question are reasonable regulations of the right to keep and bear arms and the judgments dismissing the informations were erroneous.” Id., at 600. But the Comeau court also said “We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved.” Id., at 598, *citing City of*

²¹ The Nebraska constitution’s amendment under consideration was adopted in 1988 and reads “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.”

Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744 (Co. 1972).²²

These cases support our view that the constitutional right to keep and bear arms may be subject to reasonable regulation, but it is not subject to prohibition. Because the weapons carrying permit denied to Appellants is required to lawfully bear arms in any meaningful manner in Rhode Island, the denial of this permit is a prohibition — and not a mere restriction — of their right. In addition to the cases cited by the Brady Center discussed *supra*, many other cases exist which teach us that a prohibition on possession and bearing of arms, in a state whose constitution affirms a right to do so, is unacceptable. In fact, our country’s history and record is replete with such precedent.

The Supreme Court of Georgia held that regulation of the right to keep and bear arms is acceptable while a complete prohibition against it is not:

We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence,²³ or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.

Nunn v. State, 1 Ga. (1 Kel.) 243, 1846 WL 1167, 11 (Ga. 1846) (emphasis in original).

Additionally, in 1902 the Supreme Court of Idaho voided a conviction for

²² Comeau is easily distinguished from the instant case because the Nebraska court was examining whether or not (1) a felon could be prohibited from possessing certain types of firearms and (2) whether or not a restriction on a type of firearm which is of use primarily to a criminal (one with no serial number) was reasonable. In the case at bar, neither plaintiff is a criminal nor is there any indication that they would engage in criminal activity.

²³ Note that the Court, in this holding, also makes reference to the “natural right of self defense” and adds emphasis to the word “natural.”

carrying a loaded revolver in violation of state law, holding:²⁴

A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void.

In re Brickey, 70 P. 609 (Id. 1902).

In North Carolina, it is well and long established since 1921 that the open carrying of a pistol is constitutionally protected and the requirement of any license or permit to do so offends their constitution as unreasonable regulation:²⁵

The statute in this case, Public Local Laws 1919, c. 317, is especially objectionable in that it requires (section 2) that in order to carry a pistol off his own premises, even openly, and for a lawful purpose, the citizen must make application to the municipal court, if a resident of a town; or to the superior court, if not residing in town, describing the weapon and giving the time and purpose for which it may be carried off his premises and must pay to the clerk of the court the sum of \$5 for each permit and must file a bond in the penalty of \$500 that he will not carry the weapon except as so authorized. In the case of a riot or mob violence, or other emergency requiring the defense of public order, this would place law-abiding citizens entirely at the mercy of the lawless element. As a regulation even this is void because an unreasonable regulation, and, besides, it would be void because for all practical purposes it is prohibition of the constitutional right to bear arms. There would be no time or opportunity to get such permit and to give such bonds on an emergency.

State v. Kerner, 107 S.E. 222, 225 (1921).

The Supreme Court of Colorado held:

It is apparent that the statute above quoted was designed to prevent

²⁴ Note that the Idaho Constitution's right to keep and bear arms provision allows the legislature to regulate the practice, "The language of section 11, art. 1, Const. Idaho, is as follows: 'The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law.'" In re Brickey, 70 P. 609 (Id. 1902).

²⁵ "The Constitution of this state [North Carolina], section 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.'" State v. Kerner, 107 S.E. 222, 223.

possession of firearms by aliens, as much, if not more, than the protection of wild game within the state. It is equally clear that the act wholly disarms aliens for all purposes. The state may preserve its wild game for its citizens, may prevent the hunting and killing of same by aliens, and for that purpose may enact appropriate laws, but in so doing, it cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person, and property. The guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection. Under this constitutional guaranty, there is no distinction between unnaturalized foreign-born residents and citizens.

People v. Nakamura, 99 Colo.262, 62 P.2d 246, 247 (Co. 1936).

There is no shortage of more recent precedents.

In New Mexico in 1971, a man walked into a police station to file a complaint.

Holstered in plain view on his hip was a pistol. He was arrested and charged with carrying a pistol in violation of a city ordinance. His conviction was reversed by the

Court of Appeals of New Mexico:

No contention is made that the evidence supported the carrying of a concealed weapon. Defendant was found guilty by the district court of violating the particular ordinance through carrying a deadly weapon, which, in this case, as stated, was in plain view.

* * *

Ordinances prohibiting the carrying of concealed weapons have generally been held to be a proper exercise of police power.

Such ordinances do not deprive citizens of the right to bear arms; their effect is only to regulate the right. As applied to arms, other than those concealed, the ordinance under consideration purports to completely prohibit the 'right to bear arms.'

It is our opinion that an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void.

City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737, 738 (1971) (citations omitted).

The Supreme Court of Colorado in 1972 voided an ordinance which prohibited

the possession of a gun in a vehicle (among other places) and the transportation of a gun to and from various places as a violation of Article II, §13 of that state's Constitution.²⁶

Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo. Const. art. II, s 13.

City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744, 745 (1972).

The Court further held:

A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Id., (citations omitted).

Oregon's Supreme Court has repeatedly examined this question. Holding in regard to a statute prohibiting the possession of a switchblade knife, "The problem here is that [the statute] absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit." State v. Delgado, 298 Or. 395, 692 P.2d 610, 614 (1984). In affirming a lower appellate court's reversal of a conviction for possession, in public, of a club, the Oregon Supreme Court held, "The statute is written as a total proscription on the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected." State v. Blocker, 291 Or. 255, 630

²⁶ Article II, §13 of the Colorado Constitution provides "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

P.2d 824, 826 (1981).

In 1988, the Supreme Court of Appeals of West Virginia ruled similarly:

Based upon the foregoing, we conclude that the language embodied in *W.Va.Code*, 61-7-1 [1975] sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state, guaranteed by art. III, §22. Accordingly, *W.Va.Code*, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the *West Virginia Constitution*, known as the “Right to Keep and Bear Arms Amendment.” It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

State of West Virginia ex rel. City of Princeton v. Buckner, 180 W.Va.457, 377 S.E.2d 139, 144-145 (W.Va. 1988).

Accordingly, the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the *West Virginia Constitution*, known as the “Right to Keep and Bear Arms Amendment.” However, a governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed in our State *Constitution*.

Id., at 149.

From the examined case law we see that, in states such as Rhode Island where there is a right to keep and bear arms, the exercise of this right may at most be regulated but may not be prohibited. “[A] governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms...” Id. “A statute which, under the pretense of

regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional.” State v. Wilforth, 41 Am.Rep. 330, 74 Mo. 528, 530 (1881), *quoted by State v. McAdams*, 714 P.2d 1236, 1237 (Wy. 1986).

Appellees and their supporting *amici* claim that denying Appellants their right to bear arms without due process constitutes merely a reasonable restriction on the manner in which they bear arms. “Rhode Island’s concealed handgun licensing requirement is a reasonable regulation of the manner in which firearms are carried, rather than a deprivation of a recognized liberty or property interest.” Brady Brief, at 13. This argument is a *non sequitur*. Clearly, prohibiting the Appellants from bearing arms (by denial of license) is not merely regulation of the manner of bearing arms, but complete prohibition. Otherwise, our right to bear arms is a nullity. A denial of the weapons carrying license sought by plaintiffs is not a restriction but a prohibition, and is therefore unconstitutional without due process. As a “mere” restriction it would be one that sweeps too broadly to pass constitutional muster.

LEGISLATIVE INTENT IS EVIDENCED BY FORMAL REPORTS, NOT BY FAILURE TO PASS BILLS

In their review of our Firearms Act’s legislative history, Appellees accurately review the statute’s time line but then speculate on the intent of the legislature. Noting that a bill to change the word “may” to “shall” in R.I.G.L. §11-47-18(a) did not pass out of our Senate’s Judiciary Committee, Appellees stated, “This evidences that the intent of the General Assembly remains the same today as in 1950 — for the Attorney General to

exercise broad discretion in determining who may carry a concealable handgun in public.” AG Brief, at 38. The failure of one committee of the General Assembly to vote a recommendation (either in favor of or in opposition to) any bill is not an expression of the General Assembly’s intent. If it were, we could cite *many* failed bills which were intended to restrict, restrain and otherwise limit the possession, carrying and sale of firearms as evidence that the General Assembly strongly supports each person’s right to own and carry firearms. In our current session, two identical bills, H5863 and H6292, seek to change R.I.G.L. §11-47-11(a) from “shall issue” to “may issue.” If neither bill passes from the House Judiciary Committee, we presume Appellees would not say that this lack of action “evidences” that our General Assembly intends to support gun rights.

We do agree with Appellees that the legislative history of our Firearms Act is an important consideration in this proceeding. In 1958, the General Assembly formed a Committee to Review the Firearms Statutes. We are very fortunate that this Committee chose to prepare a report for their colleagues in which they described their intent (Appendix ‘A’). 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 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)

Ironically, Appellees and their supporting *amici* assert the importance of the legislative history of the firearms act and the role of the General Assembly in adopting firearms policy *yet simultaneously deny* what the General Assembly itself said so clearly; that is, that each “law abiding citizen” has a “constitutional and fundamental right to possess and bear arms” and also has “the right of self defense.”

**INFRINGING THE RIGHT TO BEAR ARMS DOES NOT MAKE US
“SAFER”**

Amicus Brady Center has asserted that states which have “experimented” with laws commonly referred to as “shall issue” laws have seen increases in all manner of violent crime. They certainly wish to convey an impression that social scientists and other academic researchers have overwhelmingly concluded that “shall issue” concealed weapons permit laws cause increases in crime.²⁷ Further, they attack the research of a well respected professor of economics, John Lott, claiming that his peer-reviewed and published research has been “debunked” and implying that no other researcher has reached similar conclusions. Despite their claim that a “host” of researchers have concluded that “shall issue” laws increase crime, the Brady Center finally relies upon a

²⁷ As before, the Brady Center has not addressed the issue of carrying a handgun openly and unconcealed.

“study”²⁸ that is unpublished (except via their own web site), lacks the authors names and credentials, and makes no claim of having been peer-reviewed.²⁹

Notwithstanding the Brady Center’s use of the term “debunked,” the question of whether or not these “shall issue” laws affect crime in any way is still hotly debated by reputable academic researchers whose findings fall on both sides of the question. “Most recently, the prominent Stanford law and economics professor Dr. John Donohue has used Lott and Mustard’s own methodology — adding updated statistics for recent years — to debunk their claims about the effects of ‘shall issue’ laws.” Brady Brief, at 19. In April 2003, two researchers writing in the Stanford Law Review critically examined Dr. Donohue’s research. Drs. Plassmann and Whitley stated:

Unlike previous authors, Ian Ayres and John Donohue claim to have found significant evidence that right-to-carry laws increased crime.

However, they have misread their own results. The most detailed results they report following the change in crime rates on a year-by-year basis before and after right-to-carry laws were adopted clearly show large drops in violent crime that occur immediately after the laws were adopted. Their hybrid results showing a small increase in crime immediately after passage are not statistically significant and are an artifact of fitting a straight line to a curved one. When one examines a longer period, from 1977 to 2000, even this type of result disappears.

Plassmann, F., and Whitley, J., “Confirming ‘More Guns, Less Crime,’ 55 Stanford Law Review 1313 (2003).

There is published, peer-reviewed research available to support the premise that the issuance of concealed carry permits reduces crime:

²⁸ The Brady Center asserts, “Further proof of deleterious effects of mandatory issuance regimes is found in a 1999 study by the Brady Center...” Brady Brief, at 21. With some effort we were able to locate this document on the Brady Center web site. The Court will find this document on the Internet at <http://www.bradycampaign.org/facts/research/conctruth.asp>

Preventing law-abiding citizens from carrying handguns does not end violence; it merely makes victims more vulnerable to attack. While people have strong views on either side of this debate, and one study is unlikely to end this discussion, the size and strength of my deterrence results and the lack of evidence that holders of permits for concealed handguns commit crimes should at least give pause to those who oppose concealed handguns. In the final analysis, one concern unites us all: Will allowing law-abiding citizens to carry concealed handguns save lives? The answer is yes, it will.

Lott, J.R., Jr., More Guns Less Crime, 2d ed., University of Chicago Press, Chicago, 2000, at 165.

Other researchers besides Dr. Lott have demonstrated that guns reduce crime:

When used for protection firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime. Furthermore, the fact that the national patterns show little violent crime where guns are most dense implies that guns do not elicit aggression in any meaningful way. Quite the contrary, these findings suggest that high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.

Sutfield, P., and Tetlock, P., “Research and Policy: The Case of Gun Control,” Psychology and Social Policy, (1992).

Writing about how frequently a gun is used in self defense, Dr. Gary Kleck, a Florida State University criminologist, states:

Like serious crime victimization, the absolute prevalence of defensive gun use, i.e., the percent of the population that has had this experience, is low. However, when translated into raw numbers of events, as crime figures are commonly reported, the percentages imply large numbers of defensive uses. All of the surveys imply at least 700,000 annual defensive gun uses.

Kleck, G., and Kates, D., Armed: New Perspective on Gun Control, Prometheus Books, New York, 2001, at 215.

Therefore, the Brady Center claim that the question concerning whether or not

²⁹ Similarly, *amicus* VPC cites a document on their own web site (“License to Kill III: The Texas Concealed Handgun Law’s Legacy of Crime and Violence”) in n18 of their brief. Although this document names its authors, there is no indication that it has ever been published or peer reviewed.

“shall issue” laws reduce crime has been answered is invalid. Although considerable evidence supports “shall issue” laws, the topic will continue to be debated for some time.

The Brady Center also addresses our use of data from Florida, stating “advocates of ‘shall issue’ laws triumph Florida as a forerunner and model for other states seeking to enact such laws.” Brady Brief, at 20. In fact, we selected Florida, among other states to examine, because that state’s “sunshine” laws require full disclosure of information of this type, making data acquisition and examination much easier than with other states.

While checking the claims of the Brady Center that our numbers from the report they cite are in error,³⁰ we discovered that Florida routinely updates this web page periodically.³¹ We have, therefore, printed the current version of this web page, updated June 1, 2003, and included it herein as Appendix ‘C’.

In criticizing our analysis, the Brady Center said “concealed carry licenses are often revoked from individuals because license-holders committed violent crimes after they received their licenses. Thus, the vast majority of more than 2,300 licenses (not 2,200, as cited by 1st CRAL Statement, at 25) was revoked in Florida because the person possessing the concealed carry license committed a crime — often a violent or deadly crime, and at times with the concealed weapon itself.” Brady Center Brief, at 20. From examining the very data cited by the Brady Center in their brief at 20, n16, (and included herein) this assertion cannot be supported. In fact, it is *wildly* speculative. We do know that of the 2,400 revocations documented during the approximately 15 years covered by

³⁰ Florida Department of Agriculture and Consumer Services, Concealed Weapon/Firearm Summary Report, October 1, 1987 – May 31, 2003, available at http://licgweb.doacs.state.fl.us/stats/cw_monthly.html

this report, 482 are classified as being pursuant to “Crime Prior to Licensure” and the remaining 1,735 were pursuant to “Crime After Licensure.” Only 159 revocations are marked “—Firearm Utilized—.” This is all that can be known from this report which, again, was the report cited by the Brady Center as their source of data. For each revocation pursuant to a crime, we do not know if the crime was a violent or a non-violent crime. Of the 159 revocations pursuant to a crime involving a firearm, we do not know if the firearm used was a handgun, a long gun or a shotgun, or perhaps even an airgun, paintball gun, BB gun or so on. We do not even know if a firearm was used in a violent way, or was merely possessed, transported, sold or stolen. It is reasonable to infer that of the 2,400 revocations, 2,241 (all those not among the 159 revocations marked “—Firearm Utilized—”) *did not* involve a firearm, so to say that the crimes resulting in a revocation were “often a violent or deadly crime” that at times involved “the concealed weapon itself” is pure exaggeration and speculation that cannot be supported by the cited data.

Even among those revocations that may have been pursuant to a violent crime, there is no reason to believe that the perpetrator would not have committed the same violent crime if he had not had a concealed carry license. A violent criminal bent on committing a violent crime is probably not going to step back and say to himself, “Whoa, I want to go ‘knock over’ that gas station up the road, but I had better not! It’s illegal to carry a gun without a permit!” And finally, we point out that the percentage of permit holders whose permit was revoked pursuant to any crime is 0.26%. We maintain this is a

³¹ This likely explains the discrepancy between our citing 2,200 revocations and the Brady Center

very low rate of revocation.³²

Next, the Brady Center asserts that people are allowed to commit a crime and enter a plea to a reduced charge, and therefore keep their concealed carry permit. As evidence, they cite a “study” conducted by the Violence Policy Center, a political activist group who opposes gun rights and is an *amicus* here. We could find no evidence that the cited document was ever published at all, and only a summary is available on the VPC web site.³³ The authors are not named and there is no indication that the work has ever been peer reviewed. No concise methodology is identified, making the work unverifiable. We also point out that whether to allow a defendant to plead to a lesser offence that would allow him to keep his concealed handgun permit is a decision that is left to the sound discretion of the Florida prosecutors and judges. Certainly these public officials understand the effect of any plea agreement. The Brady Center is, in essence, claiming that the abuse of discretion by Florida prosecutors and judges allows defendants to retain their gun permits, resulting in more violent crime, yet it is precisely this discretion they advocate we vest in our Attorney General regarding the granting of handgun carry licenses.

The Brady Center also points out “...while Rhode Island ranks among the states with the lowest levels of violent crime, Florida continues to be the state with the highest rate of violent crime in the nation.” Brady Brief, at 21, citing a U.S. Dept. of Justice

asserting 2,300 revocations. The current number is 2,400.

³² It was our intention to contrast the percentage of permit holders who committed a crime with the members of the general population who committed a crime. Unfortunately, although Florida has statistics on crimes and arrests, we could not discern the number of actual offenders from the available data.

³³ VPC requests \$10.00 for the cited document. We respectfully suggest to the Court that acquiring this document would be a waste of money.

report which we have included as Appendix 'D'. An examination of the report indicates both that the Brady Center has been disingenuous and that this argument is specious. The use of this data is disingenuous because, while it is true that Florida is the *state* with the highest per capita incidence of violent crime with 854.0 incidents per 100,000 persons, *it is clear that the District of Columbia has nearly double the incidence of violent crime* with 1,627.7 incidents of violent crime per 100,000 persons. The Brady Center well knows that the District of Columbia has the strictest gun control laws in the entire nation and any permits to carry a handgun are subject to complete discretion of the responsible public officials. Unless a D.C. resident purchased and registered their handgun prior to February 5, 1977, he or she may not even possess a handgun. No new handguns may be registered, resulting in a *de facto* ban on handguns. From the NRA Compendium of Firearm Laws, regarding the District of Columbia:

The sale of handguns in the District is prohibited.

No handgun can be legally possessed in the District unless it is registered. All handguns registered in the District prior to Sept. 24, 1976, were required to have been reregistered by Feb. 5, 1977. After that date, no more handguns could be registered.

Thus, it is unlawful to possess, acquire, or bring into D.C. any handgun which was not registered as of Feb. 5, 1977.

Carrying a handgun in the District is prohibited. All firearms are to be kept at one's home or place of business.

All firearms must be unloaded and disassembled or locked with a trigger lock except when kept at a registrant's place of business or while being used for lawful "recreational" purposes. A D.C. license to carry a pistol is needed for one's home or business and the pistol must also have been registered prior to September 24, 1976.

Self-defense in one's home with a firearm is therefore legally precluded.

Therefore, it makes no sense to argue that this report is evidence that the Florida

“shall issue” law causes Florida to be the state with the most violent crime.

Further, this argument is specious because establishing a correlation between factors such as the rate of violent crime and handgun carrying laws requires sophisticated statistical and mathematical analysis and cannot be performed simply by noting how much crime each state has relative to another. Even if this could establish a correlation, such a correlation cannot by itself prove a causal relationship.

If, however, this Court feels the U.S. Department of Justice report cited by the Brady Center is valuable, we are happy to examine it. The report contains more information which serves to contradict the Brady Center claims. As noted in our prior brief, Vermont has no requirement that people be licensed to carry a handgun, concealed or otherwise. Maine and New Hampshire both have “shall issue” right-to-carry laws. These three states figure prominently in the cited report. They³⁴ are numbers 47, 48 and 49 respectively on this list, three of the four states with the lowest incidence of violent crime per capita. The only state with less violent crime per capita than our three northern New England neighbors is North Dakota, which is also a “shall issue” right-to-carry state. Conversely, California and New York are numbers 10 and 11. New York and California both allow unfettered discretion to their public officials in handgun carry licensing decisions, and neither state affords its citizens a constitutional right to bear arms.

For the reasons listed, the Brady Center’s assertions that the U.S. Department of Justice report that they cited somehow proves or even suggests that “shall issue” laws increase violent crime is invalid.

The Brady Center also asserts, “Over the past fifteen years, *several* states have *experimented* with laws requiring the mandatory issuance of a concealed carry license to any qualified applicant who requests one.” Brady Brief at 18, (emphasis added).

In our previous statement, CRAL informed this Court that 32 of the 50 states now have “shall issue” laws mandating the issuance of a permit to carry a concealed handgun to any qualified applicant. No party to the case at bar has disputed this fact.³⁵ Since then (February 2003), three additional states, Colorado, New Mexico and Minnesota, have adopted “shall issue” right-to-carry permit laws. As of this writing, *70% of the states have laws mandating the issuance of carry permits to qualified applicants*. Additionally, Alaska has repealed their restrictions on unpermitted carrying of handguns and now joins Vermont in *not* requiring a permit or license of any type to carry a handgun, whether openly or concealed.³⁶ The Missouri legislature has passed and sent their governor a bill to allow permitted carry in that state, but the governor has, as of yet, neither signed nor vetoed the bill.

In light of this, it is hard to understand how the Brady Center can fairly characterize this 70% of the states as being merely “several” states. Additionally, they assert, or at least imply, with no foundation whatsoever that these laws are in some way experimental. We have not found any case in which one of these laws was adopted with a

³⁴ In their brief, the Brady Center apparently renumbered the rankings in this report such that D.C. was eliminated and Florida became number 1. We have therefore kept their numbering scheme to maintain consistency.

³⁵ It was pointed out that in our prior brief we incorrectly asserted that Florida had adopted its “shall issue” law in 1980. In fact, this law was adopted in 1987. We acknowledge this error and offer our apologies to the Court.

³⁶ Alaska did, however, retain their permit system so that Alaskans who wish can request and be granted a permit on a “shall issue” basis. This is so that Alaskans can continue to enjoy the reciprocity privileges extended by many states to permit holders of other states.

“sunset” provision, as an experimental or trial law often is. If these laws are in any way experimental, then the experiments appear to have been a roaring success. We have found no case in which any state has ever repealed a “shall issue” law. As to the contention by Appellees and their supporting *amici* that “shall issue” laws are dangerous public policy, it is clear that the constitutional framers and the legislatures of at least 35 states disagree. The good people of Rhode Island can be trusted as well as the good people of these other 35 states.

While presenting their claims that allowing wide discretion to our Attorney General in gun permit issuance will somehow make us safer, the Brady Center has overlooked the possibility that the Attorney General will bow to political or other pressure to issue a permit to a person who is not suitable to hold one.³⁷ This is not a new idea. In April of 1975 then-Attorney General Julius C. Michaelson presented “A Message to the Honorable General Assembly.” In this message (which we include herein as Appendix ‘B’), Mr. Michaelson said:

The office of Attorney General is an elected position. Not unlike other public officials, the Attorney General receives numerous requests for assistance from his constituents. Unfortunately, many of these requests include requests for gun permits.

Politics and guns do not mix. I believe that an elected official should not have the responsibility for issuing gun permits. Gun permits should not be considered political favors.

Additionally, Mr. Michaelson said (emphasis added):

³⁷ We are not suggesting that Attorney General Lynch is in any way corrupt or would bow to such pressure, but we must recall that Mr. Lynch will not be our Attorney General forever.

Before issuing a permit under the present law, this office has an obligation to investigate the applicant. This office does not have the staff to conduct an appropriate investigation. Many times this results in a delay and creates an injustice *to the individual legally entitled to a permit*.

In summary, the Brady Center's arguments that affording unfettered discretion to public officials to deny concealed handgun licenses makes us "safer" is not supported by academic study nor their own data. In fact, there is significant academic research to the contrary.

Even if it was established, *which it is not*, that allowing a public official unfettered discretion to make arbitrary decisions concerning who should be licensed and who should not be somehow makes us all "safer," this is not necessarily a reason to infringe or prohibit the exercise of a constitutional and fundamental right. The Attorney General and their supporting *amici* would have us sliding down the most slippery of slopes. It could certainly be strongly argued that allowing police officers to detain people without reasonable suspicion and to arrest people without probable cause would make us all "safer." So too can it be said that searching people at random to seize their property might result in fewer illegal drugs and other contraband items on our streets. Assemblies become violent occasionally, so perhaps prohibiting the right to assemble will enhance "safety." In fact, all of these rights are currently subject to reasonable restrictions *pursuant to due process of law*. But, an arbitrary prohibition on the exercise of these rights is not tolerated in our constitutional republic. Nor should we tolerate an arbitrary prohibition on the exercise of our right to keep and bear arms.

CONCLUSION

Our state and its people have a long tradition of personal liberty and individual rights. Even before the adoption of our Constitution, the 1663 Royal Charter, granted to our people by King Charles II and still on display in our State House, provided us certain rights which could not be violated. After several unsuccessful attempts and an armed rebellion, the people of our state finally adopted a carefully considered and written Constitution in 1843. The very first article of this document declares the basic guarantees of rights for all our people by drawing lines which our government may not cross. Whether Appellees and the Washington, D.C.-based anti-rights organizations who joined them like it or not, one of these rights is the right to keep and bear arms. This right was included in our original Constitution and remains there, unmodified through the 160 years of the Constitution's history even as other rights were added or modified. From then until 1927, our law-abiding people enjoyed this right to bear arms with no statutory restrictions whatsoever. In 1927, the right to bear arms was made subject to license by our General Assembly, but nevertheless remained a right. In 1959 the General Assembly reaffirmed that this is a "fundamental and constitutional right."

As we have shown, the text of Article I, §22 and other sections of the Article I Declaration of Rights, our history, the actions of our General Assembly, and the past practice of our public officials indicates what is plainly clear: that every individual person in Rhode Island has the right to keep and bear arms, that handguns are arms, that this right may not be infringed without due process of law, and that this right is broadly unqualified. While this right is subject to reasonable regulation, it is not limited to being exercised only in our own homes or places of business as the Appellees insist.

The case at bar comes to this Court after so much history because, at some point in the past twenty-five years, some of our police chiefs began referring persons who requested gun permits (pursuant to R.I.G.L. §11-47-11) to the office of the Attorney General rather than processing them personally. The Attorneys General had been issuing permits — until Mr. Whitehouse was elected. After he took office, Attorney General Whitehouse sought to formalize this procedure by requesting that each police chief refer all applicants to his office and deny any applicants who insisted on applying directly to them. Upon information and belief, almost all, if not all, chiefs complied.³⁸ Then, in a marked departure from the policy of his predecessors, Mr. Whitehouse began denying applications for both new and renewal gun permits in significant numbers. Until challenged by Appellants, he and his staff acted arbitrarily, with no guiding policy or procedures, in deciding who may exercise their right to bear arms and who may not. Applicants were denied the most basic elements of due process of law.

This *amicus* strongly believes that each individual person in Rhode Island has a fundamental and constitutional right to keep *and bear* arms. We believe that arms include

³⁸ Then-Westerly Police Chief David Smith confirmed the existence of an “agreement between most of Rhode Island’s police chiefs [and] the state attorney general’s office” to the effect that police chiefs would refuse to issue permits under R.I.G.L. §11-47-11(a) and instead refer applicants to the Attorney General to apply for a permit to be issued under §11-47-18(a). Westerly Sun, March 17, 2002, <http://www.thewesterlysun.com/articles/2002/05/17/news/export10712.txt> (attached as Appendix ‘E’). Hopkinton Police Chief John Scuncio was also reported to be following this “agreement.” Id. The “shall issue” language of the statute pertaining to police chiefs, §11-47-11(a), was circumvented because the statute requires that applicants be “suitable” and the test of suitability was defined to be that an applicant already hold a permit from the Attorney General under §11-47-18(a). “Smith and [Westerly] Town Solicitor Steve Hartford say that requiring an applicant for a Westerly-issued permit to first hold an Attorney General permit is an acceptable standard in determining whether an applicant is suitable to be licensed.” Westerly Sun, July 3, 2002, <http://www.thewesterlysun.com/articles/2002/07/03/news/export9381.txt> (attached as Appendix ‘F’). This practice was widespread; one of us, Archer, found it necessary to obtain a writ of mandamus compelling the Smithfield police chief to accept and consider an application for a pistol permit pursuant to R.I.G.L. §11-47-11(a), which the police chief had previously refused to do. Archer v. McGarry, Providence County Superior Court CA No. 02-5593, mandamus entered December 9, 2002.

handguns and that the exercise of our right is not limited to our homes and businesses. Rather, our right is broadly unqualified in all aspects, including where it can be exercised and with what type of arms. We respect that this court has held that a license may be required to exercise this right and that the General Assembly may delegate this authority. However, we strongly oppose the notion that this means the public official to whom this duty is entrusted may act arbitrarily. This Court has held that this licensing responsibility is a narrow grant of discretion and is primarily a duty of fact-finding. We respectfully remind this Court that this license is required to bear arms *in any manner* and that being denied this license is equivalent to being denied the exercise of the right to bear arms.

Therefore, Appellee the Attorney General is licensing the exercise of a fundamental and constitutional right. It follows, then, that he is obligated to extend due process to applicants. We accept that not all applicants should be granted a license, but only those barred from exercising their right for some objective reason (e.g., a felony conviction) should be denied. Appellants in the case at bar are both law-abiding persons with no criminal history who have proper reasons and need for this license. They suffer no lawfully imposed disability upon the exercise of their civil rights and therefore should have been granted the requested license.

Amici filing in support of Appellees strongly argue that we are all “safer” when the Attorney General has unfettered discretion in this regard. There is significant academic research which indicates that exactly the opposite is true. To date, thirty-five state governments have enacted “shall issue” right-to-carry laws. Not one state has ever repealed such a law, showing that there has not been a resulting crime problem and that their people are worthy of the faith placed in them by their founders and governments.

Yet there is a safety risk to consider. The real danger facing us springs from public officials who, however well intentioned, seek to arbitrarily prohibit the exercise of a fundamental and constitutional right. This we can not afford.

We urge this honorable Court to find that Appellants have a due process right in the pistol permit licensing procedure stemming from Article I, §22 of our Constitution and to remand this case 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 attorneys of record by regular mail, postage prepaid on this 30th day of June, 2003.
