THE LICENSING OF CONCEALED HANDGUNS FOR LAWFUL PROTECTION: SUPPORT FROM FIVE STATE SUPREME COURTS

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All but half a dozen states have a state constitutional guarantee of the right to keep and bear arms.[1] All but a dozen states have a "shall issue" law for concealed handguns.[2] Under such laws, an adult with a clean record who passes a background check and (in most states) a safety class can obtain a permit to carry a concealed handgun for lawful protection.[3] During 2003-2004, five state supreme courts were asked to determine whether there was a conflict between state constitutional guarantees and concealed handgun laws. This Article examines the five state decisions and finds that although there were important differences between the cases, all five courts were broadly deferential to legislative decision-making about concealed handguns.

In New Mexico and Missouri, after the legislature enacted concealed handgun licensing laws, the laws were challenged on the grounds that they violated the state constitutional right to arms—since in both New Mexico and Missouri, the arms right guarantee explicitly excludes concealed handguns. The New Mexico and

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[1] David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 827 (2002).

[2] The term "Shall Issue" was created by my co-author, Clayton Cramer. *See* Clayton E. Cramer & David B. Kopel, "*Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 680 (1995).

[3] *See id*. at 680. While most states have a Shall Issue law, it is worth clarifying the situation in a few states. Vermont and Alaska do have Shall Issue permits, but no permit is needed to carry a concealed gun in those states. (People typically obtain permits so as to be able to carry a gun in other states, pursuant to reciprocity laws by which states recognize each other's permits.) Alabama and Iowa have laws which appear discretionary on their face, but are in fact applied as if they were Shall Issue. ("Do Issue" might be the correct term.) The following states have discretionary licensing ("May Issue") and, especially in big cities, it may be very difficult to obtain a permit: California, Delaware, Hawaii, Maryland, and Massachusetts. Illinois, Kansas and Nebraska have no provision at all to license citizens to carry handguns. Wisconsin and Rhode Island are special cases, and discussed in this article.

Missouri Supreme Courts rejected the constitutional challenge; both courts ruled that the constitutional clause about concealed carry means that the legislature has broad discretion, not that the legislature is forbidden to enact a licensing system.

The constitutions of Ohio and Wisconsin also guarantee the right to keep and bear arms, and have no text excluding concealed handgun carrying from the scope of the right. However, both states had laws which almost completely prohibited the carrying of concealed handguns. When the Ohio prohibition was challenged, the Ohio Supreme Court ruled that the prohibition of concealed handgun carrying was constitutional because state law still allowed the carrying of unconcealed handguns. As a result, large numbers of Ohioans began carrying unconcealed handguns and, in response, the Ohio legislature quickly enacted a "shall issue" law to legalize concealed handguns.

In Wisconsin, the Supreme Court ruled that the concealed handgun prohibition was unconstitutional insofar as it applied to a person's home or place of business, but was constitutional as applied to all other locations.

Rhode Island's court faced the most complicated issue because Rhode Island has *two* concealed handgun licensing laws: a discretionary law for licensing by the attorney general and a mandatory law for licensing by towns and cities. The court found both laws to be consistent with Rhode Island's constitutional right to bear arms.

I. NEW MEXICO AND MISSOURI: BECAUSE CONCEALED HANDGUNS ARE EXPLICITLY EXCLUDED FROM THE CONSTITUTIONAL RIGHT, THE LEGISLATURE MAY CREATE A LICENSING SYSTEM

A. New Mexico

The New Mexico Constitution states:

> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, *but nothing herein shall be held to permit the carrying of concealed weapons*. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.[4]

[4] N.M. CONST. art. II, § 6 (emphasis added).

In 2001, the New Mexico legislature enacted a Shall Issue concealed handgun licensing law.[5] The law gave New Mexico's larger cities the choice to opt out of the mandatory licensing system.[6] In 2002, the New Mexico Supreme Court declared the law unconstitutional because the municipal opt-out conflicted with the constitutional rule that: "No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms."[7]

The ruling seems odd because the prior sentence of the state constitutional right to keep and bear arms explicitly states that "the carrying of concealed weapons" is not part of the constitutional right to keep and bear arms.[8] Nevertheless, the court ruled that concealed carrying was at least "an incident of the right to keep arms," even if concealed carrying was not part of the actual right itself.[9] Finding that the municipal discretion exemption was not severable, the court invalidated the entire Shall Issue law.[10]

In 2003, the New Mexico legislature enacted a new Shall Issue law, this time making the law uniform statewide with no municipal opt-out.[11] Opponents of the law brought suit, claiming that the concealed gun licensing law was unconstitutional because of the constitutional language: "but nothing herein shall be held to permit the carrying of concealed weapons."[12]

The argument bordered on the frivolous. The unanimous supreme court explained the obvious meaning of the constitutional language:

> The constitutional provision, on its face, means nothing in Article II, Section 6 shall be held to permit the carrying of concealed weapons. The Constitution neither forbids nor grants the right to bear arms in a concealed manner. Article II, Section 6 is a statement of neutrality, leaving it to the Legislature to decide whether, and how, to permit and regulate the carrying of concealed weapons. To read Article II, Section 6 as a prohibition against carrying concealed weapons . . . would require us to excise the word 'herein' from

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[5] N.M. STAT. ANN. § 29-18-1–12 (Michie 2001).
[6] *Id.* § 29-18-11(D).
[7] Baca v. N.M. Dept. of Pub. Safety, 47 P.3d 441, 444 (N.M. 2002); N.M. CONST. art. II, § 6.
[8] N.M. CONST. art. II, § 6.
[9] *Baca*, 47 P.3d at 444.
[10] *Id.* at 445.
[11] N.M. STAT. ANN. §§ 29-9-1–13 (Michie 2003).
[12] State *ex rel.* N.M. Voices for Children, Inc., v. Denko, 90 P.3d 458, 459 (N.M. 2004); N.M. CONST. art. II, § 6.

the face of the Constitution. It is not in our power to do so.[13]

If the plaintiffs' reading of the constitutional language were correct, then it would be unconstitutional for the New Mexico legislature to allow concealed weapons under any circumstances; even allowing police officers to carry concealed weapons would be unconstitutional.[14] The court pointed out that an absolutist interpretation would be inconsistent with New Mexico history:

> New Mexico has long regulated concealed weapons, allowing it in some circumstances and prohibiting it in others. At the time the Constitution was adopted, the territorial law of New Mexico had for many years prohibited the carrying of concealed weapons in most circumstances while allowing concealed weapons to be carried outside of settlements, at one's residence, in the lawful defense of person or property, for protection while traveling, and by law enforcement officers. [citation omitted] That same construct of generally prohibiting concealed weapons while creating limited exceptions for their use, has continued in effect to the present. [citation omitted] Under *Section* 30-7-2, the Concealed Handgun Carry Act does no more than add another exception to the general prohibition against carrying concealed weapons: carrying with a concealed handgun license. [citation omitted] Under Petitioners' reading of Article II, Section 6 none of these laws would be constitutional. If Article II, Section 6 were an absolute prohibition against carrying concealed weapons, the Legislature could not have permitted it in certain instances. Yet it has done so for over 100 years...[15]

Thus, claim that the New Mexico Constitution required absolute prohibition of concealed handguns "would put this Court at odds with at least a tacit understanding on the part of the people and the Legislature as to the clear meaning of Article II, Section 6 of the Constitution."[16] The court also pointed out that the Montana and Colorado constitutions have very similar language in their right to bear arms guarantees, and both states also allow concealed handgun licensing.[17]

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[13] *Denko*, 90 P.3d at 460.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 461
[17] *Id.* (citing MONT. CONST. art. II, § 12) ("but nothing herein contained shall be held to permit the carrying of concealed weapons"); MONT. CODE ANN. § 45-8-321 (2003); COLO.

In sum, the New Mexico court relied on the constitutional text and looked to how other states have applied similar text. The court also found that long-established and consistent historical practice provided an important guide to understanding state constitutional guarantees of the right to arms.

B. Missouri

The issue in Missouri was nearly identical to that in New Mexico. The Missouri Constitution states: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; *but this shall not justify the wearing of concealed weapons*."[18] The language about concealed weapons had been added when Missouri revised its constitution in 1875.[19] The 1875 revisers were concerned about a decision of the Kentucky Supreme Court which had found a concealed weapons prohibition to be in violation of the Kentucky right to keep and bear arms.[20]

Concerns about terrorism appear to have made the American public more supportive of defensive gun ownership and use, so it was perhaps not a coincidence that September 11, 2003, was the day the Missouri legislature over-rode the Governor's veto and enacted the Concealed-Carry Act.[21]

When the new Shall Issue statute was challenged in a lawsuit, the unanimous Missouri Supreme Court began its arms rights analysis by explicating the constitutional text.[22] Rejecting the plaintiffs' theory that the Constitution required total prohibition of concealed handguns, the court explained:

> Read in proper grammatical context, and giving the words their common usage, the clause has no such meaning. To be sure, plaintiffs are correct that the clause is couched as an exception or limitation on the constitutional 'right of every citizen to keep and bear arms. . . .' But it means simply that the constitutional right does not extend to the carrying of concealed weapons, not that citizens are prohibited from

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CONST. art. II, § 13 ("but nothing herein contained shall be construed to justify the practice of carrying concealed weapons"); COLO. REV. STAT. § 18-12-201 (2003).

[18] MO. CONST. art. I, § 23 (emphasis added).

[19] *See id.*

[20] 1 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 439 (1930)*;* Bliss v. Commonwealth, 12 Ky. 90, 94 (1822*).*

[21] MO. REV. STAT. §§ 50.535, 571.030 & 571.094 (2003).

[22] Brooks v. State, 128 S.W.3d 844, 847 (Mo. 2004).

> doing so, or that the General Assembly is prohibited from enacting statutes allowing or disallowing the practice.
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> Parsing the clause proves the point. The subject is the word 'this,' which refers back to 'the right of every citizen to keep and bear arms. . . .' The operative words are 'shall not justify.' 'Shall not,' which are words of prohibition, modifies 'justify,' which is:
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> 1a: to prove or show to be just, desirable, warranted or useful: VINDICATE. . .b: to prove or show to be valid, sound or conforming to fact or reason: furnish grounds or evidence for: CONFIRM, SUPPORT, VERIFY. . .c(1) to show to have had sufficient legal reason. . .
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> Thus, the clause in its entirety must be read in this way: 'but this [the right of every citizen to keep and bear arms . . .] shall not justify [shall not warrant, shall not furnish grounds or evidence for, shall not support, or shall not provide sufficient legal reasons for] the wearing of concealed weapons.'[23]

Although the court found the Shall Issue law to be consistent with the Missouri right to keep and bear arms,[24] the court also found that the new law, at least as applied to some counties, violated another part of the state constitution—the Hancock Amendment, which forbids unfunded state mandates on local governments.[25] The court found, with respect to four Missouri counties, the increased costs associated with implementing the act might exceed the fee which the sheriffs were allowed to collect, and, accordingly, held the act unenforceable in those counties.[26] As a result, St. Louis County and St. Louis City do not currently issue permits. However, residents of these counties can readily obtain handgun carry permits from other states, and those permits are valid in Missouri because the new Missouri law explicitly recognizes permits issued by other states.

II. OHIO AND WISCONSIN: CHALLENGES TO ABSOLUTE PROHIBITIONS ON CONCEALED CARRYING

Ohio and Wisconsin faced the converse of the issue addressed by New Mexico and Missouri. Ohio and Wisconsin both have a state

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[23] *Brooks*, 128 S.W.3d at 847 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1228 (3d ed. 1993)).

[24] *Id.* at 847–48.

[25] *Id.* at 850; MO. CONST. art. X, §§ 16, 21.

[26] *Id.*

constitutional right to keep and bear arms, and neither constitution includes an exception removing concealed handgun carry from the scope of the right.[27] Nevertheless, both Ohio and Wisconsin completely outlawed concealed carry.[28]

When the total prohibitions were challenged, Ohio upheld the concealed carry ban because the law contained an affirmative defense usable by people who carried for legitimate defensive purposes. To the extent the ban applied to one's home or place of business, Wisconsin held the concealed carry ban unconstitutional. The supreme court decisions in both states have been a boost to the enactment of a Shall Issue licensing law: Ohio now has such a law and the Wisconsin legislature came within a single vote of overriding the governor's veto to enact a Shall Issue law.

A. Ohio

1. Majority Opinion

In *Klein v. Leis*, the Supreme Court of Ohio repeated its previous holding in *Arnold v. Cleveland* that the right to arms in Ohio is a fundamental right.[29] Reiterating the standard set in *Arnold*, the court stated that even when a fundamental right is at stake, a law must be proven "unconstitutional beyond a reasonable doubt."[30]

Like the New Mexico court, the Ohio court looked to its state's historical practices regarding concealed carry. The Ohio carry ban was enacted in 1859, which was eight years after Ohio's revised constitution, containing the current version of the right to arms, was ratified.[31] (The 1802 Ohio constitution also had a right to arms.) Although statutory language changed, the concealed carry ban had remained in effect ever since and had been upheld against constitutional challenge in 1920.[32]

The *Klein* court offered the same rationale as the 1920 *Nieto* court: the law did not prohibit the carrying of weapons, but merely

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[27] OHIO CONST. art. I, § 4; WIS. CONST. art. I § 25.

[28] OHIO REV. CODE ANN. § 2923.12 (Anderson 2003); WIS. STAT. ANN. § 941.23 (West 2004).

[29] Klein v. Leis, 795 N.E.2d 633, 636 (Ohio 2003) (citing Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993)).

[30] *Klein*, 795 N.E.2d at 636 (quoting *Arnold*, 616 N.E.2d at 169). *Arnold* is discussed in David B. Kopel, Clayton E. Cramer & Scott G. Hattrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1218–37 (1995).

[31] *Klein*, 795 N.E.2d at 640.

[32] State v. Nieto, 130 N.E. 663 (Ohio 1920).

regulated "the *manner* in which weapons can be carried."[33] There is no statewide law in Ohio against carrying unconcealed guns. Thus, while there was obviously a constitutional right to carry guns, there was no constitutional right to carry them concealed.[34]

2. Dissent

Two judges dissented. They argued that the majority's "reasonableness" standard of review was incorrect, stating:

> However, as the majority articulates, R.C. 2923.12 regulates only the manner in which a firearm may be carried. [citation omitted] Because a restriction on the manner of exercising a right necessarily leaves open other means of exercising the right, the lesser standard of intermediate scrutiny is applicable. [citation omitted] A manner restriction on the right to bear arms should be subjected to the same level of scrutiny as a manner restriction on the right of free speech. Thus, I would invoke intermediate scrutiny.[35]

Thus, "[u]nder intermediate scrutiny, a regulation will be upheld only if the regulation is narrowly tailored to serve an important government interest and leaves open other means of exercising the right."[36] The interest in public safety was important, and "the statute leaves open the ability to bear arms by openly carrying a firearm, satisfying the third prong of the test."[37]

Nevertheless, the statute was constructed so that anyone carrying a concealed handgun would be arrested.[38] In court, a defendant could put forward an affirmative defense that his carrying was for reasonable self-defense.[39] The dissent argued that arrest first, with evidence of innocence later, was inappropriate for the exercise of a constitutional right:

> Moreover, the opportunity for the accused to establish that he was exercising a fundamental right does not justify subjecting him to arrest each time he exercises the right. This is as offensive as a statute allowing the arrest of anyone who speaks in public, but permitting the speaker to prove at

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[33] *Klein*, 795 N.E.2d at 638 (citing *Nieto*, 130 N.E. at 664).
[34] *Klein*, 795 N.E.2d at 638.
[35] *Id.* at 640 (O'Connor, J., dissenting).
[36] *Id.* (O'Connor, J., dissenting).
[37] *Id.* (O'Connor, J., dissenting).
[38] OHIO REV. CODE ANN. § 2923.12(A) (Anderson 2003).
[39] *Id.* § 2923.12(C).

> trial that the speech was constitutionally protected. [citation omitted]….
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> I would hold R.C. 2923.12 unconstitutional because it treats a fundamental right as a mere affirmative defense. R.C. 2923.12 as a whole would be constitutional only if the state bore the burden of proving that the defendant's actions fell outside those protected as fundamental rights. The statute as written does not permit this.[40]

The dissent cited some of the Shall Issue laws in other states as good examples of how "states have successfully balanced the rights of citizens to bear arms with the state's compelling public-safety interest via constitutional statutory regulation."[41]

3. What Happened Next in Ohio

Since 1994, many Ohio citizens pushed for the enactment of a Shall Issue law. Although they gained a comfortable margin of support in the state legislature, they were not able to garner enough votes to over-ride gubernatorial vetoes. Like many states, Ohio allows the open carry of handguns as a matter of law; but in practice, the right to open carry does not exist. Police who find someone carrying openly will tend to arrest the person under any available pretext. The *Klein* issue brought matters to a head. Citizen activists began organizing safety parades in which they would carry handguns openly, as the *Klein* court had said was lawful and constitutionally protected in Ohio. The parades proved so upsetting to the Ohio government that the Governor finally relented and signed a Shall Issue bill which the legislature had passed in the wake of *Klein*.

The new Ohio law is more restrictive than its counterparts in most other states and was a disappointment to some Ohio activists who wanted nothing less than the Vermont and Alaska system—anyone who may lawfully own a handgun may carry it concealed, with no need for licensing. Nevertheless, the people of Ohio, like the people in all states bordering Ohio, now have the ability to carry a handgun for lawful protection without fear of arrest.

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[40] *Klein*, 795 N.E.2d at 641 (O'Connor, J., dissenting).

[41] *Id.* (O'Connor, J., dissenting) (listing various state code provisions).

B. Wisconsin

Like Ohio, Wisconsin had a long tradition of severely restricting concealed carry. Also like Ohio, Wisconsin did not restrict open carry in most public places. Unlike Ohio, Wisconsin's constitutional right to arms was brand new, enacted in a 1998 referendum.

In the 1995–96 Wisconsin legislative session, and again in the 1997–98 legislative session, the Wisconsin legislature had passed a state constitutional right to arms amendment by wide margins.[42] Having twice been passed by the legislature, the amendment was then referred to the people, who voted seventy-four percent in favor of the amendment in the 1998 general election.[43] The new amendment states: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[44] Yet a Wisconsin statute declares: "Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor."[45] The statute was notable because it had no affirmative defense, as the Ohio statute did, for defensive carrying. And if the statute were read broadly, it appeared to outlaw concealed carry even on one's own property.

The Wisconsin statute was challenged in two cases, which the Wisconsin Supreme Court decided on the same day. The first case, *State v. Cole*, set forth the basic framework for right to arms analysis in Wisconsin. The second case, *State v. Hamdan*, applied the *Cole* doctrines and held that the government could not constitutionally prohibit concealed carry in one's home or place of business, even though open carry in such places was already legal.

1. *Cole*

During a Milwaukee traffic stop in 1999, police found Philip Cole in possession of a small quantity of marijuana and two loaded handguns in his car.[46] The Wisconsin court found that the state constitutional right to bear arms was fundamental. After all, "[I]t is indeed a rare occurrence for the state constitution's Declaration of

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[42] *See* State v. Cole, 665 N.W.2d 328, 331 (Wis. 2003) (citing *Bulletin of the Proceedings of the Wisconsin Legislature, 1995–96 Assemb. Sess.,* at 394–95); *Bulletin of the Proceedings of the Wisconsin Legislature, 1997–98 Assemb. Sess.,* at 316–17; Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?,* 2001 WIS. L. REV. 249, 250 n.10.

[43] Monks, *supra* note 42, at 250 n.10.

[44] WIS. CONST. art. I, § 25.

[45] WIS. STAT. ANN. § 941.23 (West 1996).

[46] *Cole*, 665 N.W.2d at 330–31.

Rights to be amended."[47] Nevertheless, the Wisconsin court announced that a party challenging a statute as unconstitutional bore the burden of proof beyond a reasonable doubt.[48] The only exceptions were First Amendment cases or cases where proper procedures had not been followed in enacting a statute.[49] Further, instead of strict scrutiny, the court would apply a "reasonableness standard."[50] The reason for such a low standard of review was "because the interests of public safety involved here are compelling."[51]

Logically, the court's rationale was not compelling. The strict scrutiny and the intermediate scrutiny tests both take into account whether there is a compelling state interest. The existence of a compelling state interest might well determine whether a controversial statute would pass the strict scrutiny or intermediate scrutiny test, but passing the test is not the same as being exempted from the test. All rights, after all, may be limited because of a compelling state interest. Why downgrade a particular right under the rationale that a compelling state interest is involved? Even if Wisconsin's concealed carry law, which aims to prevent gun crime, were enacted in pursuit of a compelling state interest, not every gun law necessarily involves a compelling state interest. For example, a law which forbade hunter safety classes to be conducted on public school property might involve a state interest (animal welfare or the moral sensibilities of people who oppose hunting), but the state interest would not be a compelling one.

The court did explain that its reasonableness test should not be mistaken for a rational basis test. The explicit grant of a fundamental right to bear arms clearly requires something more, because the right must not be allowed to become illusory. When a state has a right to bear arms amendment, the test generally changes from "[I]s it a 'reasonable' means of promoting the public welfare?" to "[I]s it a 'reasonable' limitation on the right to bear arms?"[52] Thus, "the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have

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[47] *Id.* at 336.
[48] *Id.* at 333.
[49] *Id.* at 334 (citing State v. Weidner, 611 N.W.2d 684 (Wis. 2000); City of Oak Creek v. DNR, 518 N.W.2d 276 (Wis. Ct. App. 1994)).
[50] *Cole*, 665 N.W.2d at 336.
[51] *Id.* at 337.
[52] *Id.* at 338 (quoting Monks, *supra* note 42, at 275 n.147).

concluded the law could promote the public welfare." [53]

The court then turned to the textual argument that Wisconsin, unlike some other states, does not specifically exempt concealed carry from the right to keep and bear arms. Wisconsin, therefore, may not restrict the right, appellant argued.[54] The appellant also pointed out that the Wisconsin constitutional provision does not contain a specific reservation of the state's police power, as does the Illinois Constitution.[55] The court answered:

> We are not persuaded that the absence of such language in Article I, Section 25 prevents such restrictions in Wisconsin. As discussed, police powers are inherent in the State's authority. An early draft of the amendment actually contained an explicit reservation of the State's right to regulate the manner of bearing arms.[56]

The court's latter point, however, militates against the court's conclusion. Turning to the right of self-defense, the court quoted a student note from the *University of Chicago Law Review*:

> [I]t might be argued that these laws impede the purpose of self-defense if they deny an individual the right to carry a weapon when he is most likely to be attacked. This argument is countered by two considerations: the danger of widespread presence of weapons in public places and police protection against attack in these places. Thus, in view of the benefit to be derived from these laws, place and manner regulations which do not restrict possession in homes or businesses do not seem to subvert unduly the self-defense purpose.[57]

Empirically, the court's statement is dubious. In most public places in Wisconsin, there is not a police officer nearby who could protect a victim from an attack by a violent criminal. In Wisconsin, as in other states, the victim of a violent crime has no right to sue the police for failing to provide adequate protection. The notion that the police make public spaces so safe that there is never a need for anyone to carry a gun for protection is, at best, a legal fiction.

The Wisconsin court was also mistaken in its legal history. The

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[53] *Cole*, 665 N.W.2d at 338.

[54] *Id.* at 340 (citing COLO. CONST. art. II, § 13; FLA. CONST. art. I, § 8(a). The court also could have cited Missouri, Montana and New Mexico.

[55] *Cole*, 665 N.W.2d at 340 (citing ILL. CONST. art. I, § 22).

[56] *Cole*, 665 N.W.2d at 340.

[57] *Id.* at 344 (quoting Michael D. Ridberg, Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation,* 38 U. CHI. L. REV. 185, 204 (1970)).

court quoted a 1953 Kentucky case which claimed: "At common law or by very early statute in England, people were prohibited from going armed that they might not terrorize the King's subjects."[58] This is a garbled reference to the *Sir John Knight's* case, a 1687 decision which vindicated the right to carry a firearm for lawful protection.[59] The court explained that the law only banned the carrying of arms when the carrying was for the purpose of causing terror.

Lastly, the court rejected Cole's claim that the statute against carrying a concealed weapon negated his right to self-defense in an automobile because state law only allowed guns in cars if they were unloaded and placed in the trunk.[60] The court rejected this claim because there was "no evidence of any threat at or near the time he was arrested."[61] But *Cole*'s companion case, *State v. Hamdan*, was not so rigorous in demanding a nearly-contemporaneous threat before a potential crime victim could raise an "as applied" challenge to the constitutionality of the carrying a concealed weapon prohibition. Chief Justice Abrahamson concurred, noting:

> I am not persuaded that there is any difference between rational basis test and the majority opinion's "reasonable exercise of police power" test. The exercise of police power must always be reasonable, that is reasonably and rationally related to a legitimate government interest. The concealed weapons statute is constitutional if it represents a reasonable exercise of the State's police power and does not eviscerate the constitutional right to keep and bear arms.[62]

Chief Justice Abrahamson's willingness to uphold any law which "does not eviscerate" the constitutional right hardly seems respectful of the constitutional right. Normally, courts are expected to protect constitutional rights from infringement, not just from evisceration.

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[58] *Cole*, 665 N.W.2d at 344 (quoting Williams v. Commonwealth, 261 S.W.2d 807, 807 (Ky. 1953)).

[59] Sir John Knight's Case, 87 Eng. Rep. 75, 90 Eng. Rep. 330 (King's Bench 1687). The court and jury were affirming the traditional interpretation of the 1328 Statute of Northampton, and rejecting the innovative effort of King James II to turn the old statute into a general ban on gun-carrying. *See* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104–05 (1994).

[60] *Cole*, 665 N.W.2d at 345–46 (finding these claims that may present restrictions on the transportation of weapons did not need to be analyzed because the possible restrictions are beyond the facts of the case).

[61] *Id.* at 346.

[62] *Id.* at 347 (Abrahamson, C.J., concurring).

2. *Hamdan*

The companion case to *State v. Cole* was *State v. Hamdan*.[63] Mr. Hamdan owned and ran a small grocery store in a dangerous neighborhood in Milwaukee. His own grocery store had been robbed four times.[64] Hamdan kept a handgun under the counter for protection, and placed the gun in his pocket at the end of business hours the night this incident occurred.[65] The counter area was not accessible to the public.[66]

> Hamdan claims that on one occasion an armed assailant held a gun to his head and actually pulled the trigger. The weapon misfired and Hamdan survived. In February 1997 Hamdan engaged in a struggle with an armed assailant who was attempting to rob the store. In the course of this attack, Hamdan shot and killed the robber in self-defense. The other homicide at the store occurred in April 1998. Incidents of violent crime continued in and around the store after Hamdan's prosecution, including shootings that resulted in bullets striking the store.[67]

One evening in 1999, two police officers came by to conduct a business license check. They asked him if he had a gun. He told the truth; the gun was confiscated and he was later charged with carrying a concealed weapon.[68] The Wisconsin Supreme Court ruled that the concealed carry prohibition could not be enforced against people such as Hamdan, stating:

> [I]t was unreasonable and unconstitutional to apply the CCW statute to punish Hamdan on the facts as we understand them. Strict application of the CCW statute effectively disallowed the reasonable exercise of Hamdan's constitutional right to keep and bear arms for the lawful purpose of security. Considering the diminished public interest in applying the CCW statute in the context of Hamdan's conduct, we hold that the State's police power must yield in this case to Hamdan's reasonable exercise of the constitutional right to keep and bear arms for security. This right, when exercised within one's own business and

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[63] 665 N.W.2d 785 (Wis. 2003).
[64] *Id.* at 791.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 789.

> supported by a factual determination that no unlawful purpose motivated concealment of the weapon, will usually provide a constitutional defense to a person who is charged with violating the CCW statute.[69]

Although the state had the authority to impose reasonable regulations on the keeping and bearing of arms:

> [T]he State may not apply these regulations in situations that functionally disallow the exercise of the rights conferred under Article I, Section 25. The State must be especially vigilant in circumstances where a person's need to exercise the right is the most pronounced. If the State applies reasonable laws in circumstances that unreasonably impair the right to keep and bear arms, the State's police power must yield in those circumstances to the exercise of the right. The prohibition of conduct that is indispensable to the right to keep (possess) or bear (carry) arms for lawful purposes will not be sustained.[70]

The prosecutor had argued—and the trial court had agreed—that concealed carry could be entirely prohibited because Hamdan could carry the gun openly instead.[71] Chief Justice Abrahamson made the same point in a dissenting opinion.[72] But the majority argued that concealed carry was, in a practical sense, "indispensable" in Hamdan's circumstances.[73]

> Requiring a storeowner who desires security *on his own business property* to carry a gun openly or in a holster is simply not reasonable. Such practices would alert criminals to the presence of the weapon and frighten friends and customers. Likewise, requiring the gun owner to leave a handgun in plain view in his or her store so that he or she avoids a CCW charge fails the litmus test of common sense. We do not think it is necessary to spell out the dangers created by making firearms *more* accessible to children, to assailants, to strangers, and to guests. In fact, leaving a firearm in the open could expose a gun owner to other liability, both criminal and civil.[74]

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[69] *Id.* at 790.
[70] *Id.* at 799.
[71] *Id.* at 799.
[72] *Id.* at 821 (Abrahamson, C.J., dissenting).
[73] *Id.* at 799.
[74] *Id.* at 809. The court noted that: "Under the CCW statute, it is technically unlawful for a homeowner to conceal a weapon in a nightstand within reach of the homeowner's bed." *Id.* at

> There is no dispute that most storeowners have the right to possess a firearm. As a practical matter, the storeowner who keeps a firearm for security must have the gun within easy reach. Requiring a storeowner to openly display weapons as the only available means of exercising the right to keep and bear arms for security is impractical, unsettling, and possibly dangerous. If the State prosecutes a storeowner for having a concealed weapon within easy reach, it is strongly discouraging the use of firearms for security and is practically nullifying the right to do so. Such a prosecution is very likely to impair the constitutional right to bear arms for security.[75]

Moreover, the majority explained, the normal rationales for restricting concealed carry were attenuated in cases such as Hamdan's. These rationales were: 1.) preventing impulsive violence, 2.) putting the public on notice that a person was armed (since his gun would be unconcealed), and 3.) stigmatizing socially harmful behavior.[76]

> None of these rationales is particularly compelling when applied to a person owning and operating a small store. Although a shopkeeper is not immune from acting on impulse, he or she is less likely to do so in a familiar setting in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain. There is less need in these circumstances for innocent customers or visitors to be notified that the owner of a business possesses a weapon. Anyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible. A shopkeeper is not likely to use a concealed weapon to facilitate his own crime of violence in his own store. The stigma of the law is inapplicable when the public expects a shopkeeper to possess a weapon for

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809 n.34. It seemed difficult to find a public safety interest in forcing the owner to put the handgun on top of the nightstand, rather than in a drawer. As Justice Bablitch wrote in a concurrence:

> Based on the Chief Justice's interpretation, it is lawful to have a gun on top of your night table or bureau, but not in a drawer; it is lawful to have a gun case in the home if the guns inside can be seen, but unlawful if the guns are behind a solid door and cannot be seen. With all due respect, that just doesn't make sense.

Id. at 814 (Bablitch, J., concurring).

[75] *Id.* at 809.

[76] *Id.* at 803–04.

> security.[77]
>
> [Thus,] a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business. Conversely, the State's interest in prohibiting concealed weapons is least compelling in these circumstances, because application of the CCW statute 'has but a tenuous relation to alleviation' of the State's acknowledged interests.[78]

Or, as the New Hampshire Supreme Court stated: "If the restriction of a private right is oppressive, while the public welfare is enhanced only [to a] slight degree, the offending statute is void as an invalid exercise of the police power."[79] In support of the social legitimacy of a shopkeepers being armed, the Wisconsin court cited a U.S. Supreme Court case stating a victim of a violent crime is "entitled to stand his ground, and meet any attack made upon him with a deadly weapon."[80] As Justice Abrahamson pointed out in her dissent, the majority's methodology was not necessarily limited to home-owners or business owners:

> The constitutional right to bear arms in Wisconsin now includes a right not only for all owners of privately owned and operated businesses and persons in their private residences to carry concealed weapons for purposes of security, but for many others as well. The majority not only concludes that for the right to bear arms to mean anything it must mean that a person can conceal arms to 'maintain the security of his private residence or privately operated business,' but also that the constitutional right to bear arms in Wisconsin further protects the right of any other person to carry a concealed weapon if a *court* determines that the person's interest in carrying a concealed weapon

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[77] *Id.* at 804.

[78] *Id.* at 807 (quoting Moore v. East Cleveland, 431 U.S. 494, 500 (1977) (Powell, J., plurality opinion)).

[79] *Id.* at 807–08 (quoting Kennedy v. Town of Sunapee, 784 A.2d 685, 688 (N.H. 2001)). A concurring and dissenting opinion by Justice Crooks would have held the entire statute unconstitutional under the theory that the court had no authority to create exceptions to the statute, and, without the exceptions, the statute was unconstitutional. *Id.* at 815 (Crooks, J., dissenting).

[80] *Id.* at 804 (citing Beard v. United States, 158 U.S. 550, 564 (1895)). For more on *Beard* and similar cases, see David B. Kopel, *The Self-Defense Cases: How the United State Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First Century*, 27 AM. J. CRIM. L. 293 (2000).

> 'substantially outweighs' the State's interest in enforcing the concealed weapons statute. The number of individuals who can fit under the umbrella is large.[81]

Hamdan had argued that the statutory prohibition was for someone who "goes armed," and Hamdan did not go anywhere. He just walked a few feet within his own store. The court rejected Hamdan's theory that "locomotion" was necessary for a person who "goes armed."[82] Although many definitions of "goes" do imply locomotion, some do not.

> To illustrate, if Hamdan were to come out of the back room without wearing shoes and socks, he could not deny that he was 'going' barefoot.[83] [Further,] even if we were to accept 'locomotion' as a requirement, we fail to see how Hamdan's act of moving around his store would not be an act of 'locomotion' under a common understanding of the term.[84]

Although Hamdan lost on the statutory definition of "goes," he won on the constitutional definition of security:

> The common understanding of 'security' does not implicate an imminent threat. Rather, it connotes a persistent state of peace. We believe the domain most closely associated with a persistent state of peace is one's home or residence, followed by other places in which a person has a possessory interest. A person is less likely to rely on public law enforcement for protection in these premises and is more likely to supply his

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[81] *Hamdan*, 665 N.W.2d at 826 (Abrahamson, C.J., dissenting). Chief Justice Abrahamson provided some examples of persons who now had a right to carry, under the *Hamdan* standard:

> The two questions the majority opinion establishes for determining whether a constitutional defense is available are broad sweeping and potentially apply to countless individuals under any number of circumstances. For example, an owner of a privately operated business caught carrying a concealed weapon while walking to deposit the store's earnings in a bank can certainly argue that he is exercising his right to keep and bear arms under circumstances in which the need to exercise the right is substantial and that concealment, while walking to and upon entering the bank, is the only reasonable means for exercising the right to bear arms under the circumstances. So too can a store manager in charge for an absentee owner argue that she is exercising her right to keep and bear arms under circumstances in which the need to exercise the right is substantial and that concealment is the only reasonable means for exercising the right. Indeed, what is to stop any person from claiming this right in his or her workplace? Similarly, anyone who must walk home from a bus stop every night after work through a high crime neighborhood can surely argue that his or her need to exercise the right to bear arms is high, concealment is necessary, and that his or her interests in self-protection substantially outweigh the State's interest in regulating concealed weapons.

Id. at 826 n.48 (Abrahamson, C.J., dissenting).

[82] *Id.* at 794.

[83] *Id.*

[84] *Id.*

> own protection. In fact, a person who takes no initiative to provide security in these private places is essentially leaving security to chance. Firearms ownership has long been permitted in Wisconsin. We infer that the inclusion in the amendment of the right to bear arms for security was intended 'to include a personal right to bear arms to protect one's person, family, or property against unlawful injury and to secure from unlawful interruption the enjoyment of life, limb, family, and property'..., subject to reasonable regulation.[85]

In *Cole*, the court majority had said that people in automobiles could be forced to rely on the police for protection. The majority in *Hamdan* implied that people who rely on police protection for security in their home or business were being irresponsible: "a person who takes no initiative to provide security in these private places is essentially leaving security to chance."[86] Accordingly, "[t]he unreasonableness of applying certain gun regulations when they prohibit sensible conduct on one's own property is commonly recognized."[87] The *Hamdan* majority concluded:

> The approval of a state constitutional right to keep and bear arms for security, defense, hunting, recreation, and any other lawful purpose will present a continuing dilemma for law enforcement until the legislature acts to clarify the law. We urge the legislature to thoughtfully examine Wis. Stat. § 941.23 in the wake of the amendment and to consider the possibility of a licensing or permit system for persons who have a good reason to carry a concealed weapon."[88]

4. What happened in Wisconsin

The result of *Cole* and *Hamdan* is that the people of Wisconsin have a fundamental right to keep and bear arms. In practical terms, an activity which was once absolutely forbidden (concealed carry in homes and businesses) is now a constitutional right for which a citizen need not even seek government permission. Moreover, the Wisconsin Supreme Court is pressuring the Wisconsin General Assembly to enact a Shall Issue statute for

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[85] *Id.* at 807 (quoting Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms,* 7 OKLA. CITY U. L. REV. 177, 190 (1982)).

[86] *Hamdan*, 665 N.W.2d at 807.

[87] *Id.* at 805.

[88] *Id.* at 812.

carrying concealed guns in public. The pressure appears to be working; the legislature came within a single vote of overriding the Governor's veto in 2004. If Wisconsin follows the pattern of Missouri, Ohio, New Mexico, and many other states which have enacted Shall Issue laws during the last decade, opponents of the Shall Issue may continue to conduct goal-line defenses for awhile. These goal line defenses may succeed—just as the National Rifle Association ("NRA") was able to stop the Brady Bill from passing Congress in 1988, 1989, 1990, 1991, and 1992. But the Brady Bill finally did pass in 1993. Ironically, the Wisconsin right to arms amendment appears to have been a direct result of overreaching by gun prohibitionists. As detailed in *Cole*:

> Milwaukee and Kenosha placed gun control referenda on the November 1994 election ballot. These referenda were not advisory; they were mandatory. The Milwaukee referendum asked voters whether all handguns with barrels less than 10 inches should be banned in Milwaukee. Commenting on the Milwaukee referendum, the *Los Angeles Times* reported that 'no U.S. city has ever adopted such a strict gun-control measure. Chicago and Washington, D.C., outlaw the sale of handguns, but neither has tried to eliminate the hundreds of thousands of pistols residents already own.'[89]
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> Representative DuWayne Johnsrud announced that he would introduce legislation to preempt municipalities from enacting gun control ordinances that were stricter than state law. Representative Johnsrud stated: 'Cities like Madison are creating a patchwork of regulations across the state. . . . I want to make sure that individuals have the law-given ability to own a firearm if they feel it is necessary.' Johnsrud introduced 1995 Assembly Bill 69 on January 30, 1995. After intense controversy and debate, it became 1995 Wis. Act. 72 in November 1995.[90]

The constitutional right to carry firearms is not as well-protected in Wisconsin as it is in most other states. But the right does exist, and judicial enforcement of that right has removed a very large number of people from the ambit of Wisconsin's law against concealed handguns.

III. RHODE ISLAND: AN ABSOLUTE RIGHT TO KEEP ARMS, BUT NOT TO

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[89] *Cole*, 665 N.W.2d at 348–49 (Prosser, J., concurring).
[90] *Id.* at 349 (Prosser, J., concurring).

BEAR THEM

Rhode Island has two handgun carry licensing statutes. One statute provides for applications to city or town authorities and is a Shall Issue statute:

> The licensing authorities of *any* city or town *shall,* upon application of any person twenty-one (21) years of age or over having a bona fide residence or place of business within the city or town, or of any person twenty-one (21) years of age or over having a bona fide residence within the United States and a license or permit to carry a pistol or revolver concealed upon his or her person issued by the authorities of any other state or subdivision of the United States, issue a license or permit to the person to carry concealed upon his or her person a pistol or revolver everywhere within this state for four (4) years from date of issue, if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver, and that he or she is a suitable person to be so licensed.[91]

Under this statute, the applicant must have "good reason to fear an injury to his or her person or property or [have] any other proper reason for carrying a pistol or revolver."[92] Lawful self-defense and security would obviously be a "proper" reason—as opposed to an improper reason such as wanting to impress fellow gang members.

The applicant must also be "a suitable person." This provision parallels the provisions in some other state Shall Issue laws which allow the authorities to deny a person a carry permit, even an applicant that has a clear record, if the authorities have reason to believe the applicant is mentally unstable, a member of a gang, and so on. The requirement that the Rhode Island applicant must have a carry permit "issued by the authorities of any other state or subdivision of the United States" is straightforward. Neighboring Connecticut and nearby Maine and New Hampshire are Shall Issue states which issue permits to non-residents. Massachusetts also issues non-resident permits on a more discretionary basis. Another Shall Issue state, Florida, issues non-resident permits.

Interestingly, thanks to reciprocity agreements among various states, permits from one state are increasingly accepted as a permit

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[91] R.I. GEN. LAWS § 11-47-11(a) (2004) (emphasis added).
[92] *Id.*

to carry in another state. For example, a non-resident can obtain a Florida permit which allows her to carry a concealed handgun in Florida and twenty four other states. No permit is needed in Alaska and Vermont, so an American adult with a clean record and a safety training class can now obtain a single permit and carry a handgun for lawful protection in twenty seven states.

Besides the Shall Issue statute for permits issued by cities and towns, Rhode Island also has a May Issue statute for licenses issued by the Attorney General. The Attorney General may issue the permit "upon a proper showing of need."[93]

The *Mosby* case was a suit brought by two plaintiffs after the Attorney General denied them a permit under the May Issue statute.[94] "Mosby sought a permit because he is a gun collector who sometimes travels with large amounts of money."[95] The reader is no doubt wondering why Mosby did not just apply for a Shall Issue permit from his town. The answer is that the Rhode Island Attorney General had asked municipal governments to refuse to process the municipal Shall Issue permit applications unless the applicant was approved by the separate May Issue permitting process.[96] There is undoubtedly a good argument to be made that the Attorney General's instructions are illegal, and townships do not have the legal power to refuse to process permit applications filed according to state law. However, the licensing process by the towns was not at issue in the *Mosby* case. At the time Mosby filed suit,

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[93] *Id.* § 11-47-18.

[94] Mosby v. Devine, 851 A.2d 1031 (R.I. 2004).

[95] *Id.* at 1035. There was a second plaintiff, but he was dropped from the case after failing to pay the appellate filing fee. *Id.* at 1036–37.

[96] The dissent explained:

> In its amicus curiae brief, the Citizens Rights Action League has suggested to this Court that local licensing authorities, to whom one seeking a permit pursuant to § 11-47-11 must apply, effectively have circumvented the requirement of § 11-47-11(a) by interpreting the term 'suitable' to require that an applicant for a license under this local licensing law first must seek and obtain a permit from the department pursuant to § 11-47-18(a) *before* the local authority will even consider a permit applicant to be 'suitable' under § 11-47-11. Local licensing authorities adopted this stance, we are told by this amicus, at the urging of the department on the theory that each local licensing authority could take the position with gun-permit applicants that no applicant could or would be considered 'suitable' until and unless the department first granted him or her a license under § 11-47-18. Thus, far from allowing § 11-47-11(a) to constitute an alternative method of obtaining a gun permit, the department, with the assistance of local law-enforcement and licensing authorities, effectively can shut down the gun-permit pipeline completely by excluding all applicants that the department arbitrarily deems to be 'unsuitable.' Surely, such an administrative scheme allows government regulation to sink to its most Kafkaesque and insidious depths of arbitrariness.

Id. at 1079 n.61 (Flanders, J., dissenting).

applications to the Attorney General:

> [W]ere judged based on an unpublicized standard, under which individual applications were considered on a case-by-case basis. Decisions of the department were made based upon whether the applicant had demonstrated 'an articulable risk' to his life or property and whether the applicant could change his lifestyle to prevent the need for a permit.[97]

After Mosby sued, "the department first promulgated a document setting forth its guidelines for reviewing applications to obtain a permit under the Firearms Act."[98] Mosby argued that the State Department's actions violated the Rhode Island Constitution's right to keep and bear arms, which states: "The right of the people to keep and bear arms shall not be infringed."[99] The majority of the Rhode Island Supreme Court ruled that Mosby had a constitutional right to possess firearms, but not to carry them.

A. "The Right of the People"

The court began by examining the text and history of the Rhode Island Constitution, which was ratified in 1842.[100] First, "[t]he right of the people" was a right that belonged to the people, not to the state government.[101] "[T]he people" who had a right to keep and bear arms were the same as "the people" who had established the constitution, for whose benefit the government was created, who were protected from unreasonable searches and seizures, and who enjoyed the "rights of fishery, and the privileges of the shore."[102] As the court had previously stated, "the term 'people,' as used in the Constitution, is broad and comprehensive, comprising in most instances all the inhabitants of the State."[103] Thus, the court rejected the argument that: "The right of the people to keep and bear arms" belongs to the state government, or is a so-called "collective right" which—like "collective property" in Communist

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[97] *Id.* at 1035.
[98] *Id.*
[99] R.I. CONST. art. I, § 22.
[100] *Mosby,* 851 A.2d at 1038.
[101] *Id.* at 1040.
[102] R.I. CONST. Preamble, art. I, § 2 ("All free governments are instituted for the protection, safety, and happiness of the people."); art. I, § 6 ("the people" are protected from unreasonable searches and seizures); art. I, § 17 ("the people" have the "rights of fishery, and the privileges of the shore.")
[103] *Mosby,* 851 A.2d at 1040 (citing *In re* Incurring of State Debts, 37 A. 14, 15 (R.I. 1896)).

countries—is a euphemism for saying that the right belongs to no person, but only to the government.

B. "Bear Arms"

The majority adopted the theory of some gun control advocates that the phrase "bear arms" has an exclusively military meaning. Thus a person serving in the state militia would "bear arms," but a person carrying a gun for personal protection or for hunting was not "bearing arms." Recognizing the federal court interpretation of the same phrase in the Second Amendment was mixed, the Rhode Island court focused on Rhode Island history.[104] At the Rhode Island convention to consider ratifying the United States Constitution, the delegates proposed several amendments to the Constitution. The precursor of the Second Amendment included the proposed clause: "any person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead."[105] Because the use of "bearing arms" in the clause of the proposed 1791 amendment had obviously military meaning, the court concluded that the phrase "bear arms" in the 1842 Rhode Island Constitution "relates exclusively to military service."[106]

The lengthy dissent argued vigorously against the narrow interpretation of "bear arms." First, the:

> military straitjacket [negated] all the other legitimate and traditional purposes for arms bearing, including, without limitation, self defense, personal security, hunting, and serving as a republican check on the power of arbitrary rulers to usurp individual rights. So construed and constricted, the 'individual right' of the people to bear arms shrinks and shrivels to a much-diminished and paltry thing—more a one-trick toy pony than a palladium of republican liberty.[107]

Further, both modern dictionaries and Noah Webster's seminal 1828 *An American Dictionary of the English Language* all defined "bear" to include ordinary carrying.[108] Many state constitutions preceding the 1842 Rhode Island Constitution had a right to "bear

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[104] *Id.* at 1040–42.
[105] *Id.* at 1041.
[106] *Id.*
[107] *Id.* at 1057 (Flanders, J., dissenting).
[108] *Id.* at 1058–59.

arms" that was to be exercised "in defense of themselves and the state."[109] While defense of "the state" could have a military-only connotation, defense "of themselves" strongly implied personal defense.[110] Notably, the state supreme courts of Kentucky (1823) and Alabama (1840), had been called on to interpret "bear arms" and had found that it included bearing arms for self-defense.[111]

The majority had placed great weight on a different southern decision from 1840, the Tennessee case of *Aymette v. State*.[112] The Tennessee constitution stated that "the free white men of this State, have a right to keep and bear arms for their common defence."[113] *Aymette* had ruled that free white men in Tennessee had an unrestricted right to keep arms, but could only bear arms in the military context of "the common defence."[114]

The dissent fired back that *Aymette* was decided "in the aftermath of the Nat Turner slave rebellion of 1831."[115] It seemed doubtful to the dissent that *Aymette* was considered a precedent by the Rhode Island framers. In light of the distances between the states, they may not have even known about the Tennessee decision, and if they had known, would not have been inclined to follow a pro-slavery southern court.[116]

> This is especially so when one recalls that Rhode Island had abolished slavery many years before adopting its first constitution. Also, if the framers had wished to follow the 1840 *Aymette* decision when they drafted the language of art. 1, sec. 22, why would they not have included the 'for the common defence' language found in the Tennessee constitution. . .?[117]

Perhaps most tellingly, the *Aymette* decision hinged on "for the common defense":

> Significantly, our constitution never has included such limiting 'common defense' language. Moreover, if the

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[109] *Id.* at 1059.

[110] *Id.* (citing various state constitutions, all of which include the phrase "bear arms" along with some variants of "in defence of themselves and the State").

[111] *Id.* at 1060 (*discussing* Bliss v. Commonwealth, 12 Ky. 90, 90–92 (1822) ("that the right of the citizens to bear arms in defence of themselves and the state, shall not be questioned" includes the right to carry concealed guns for personal protection); State v. Reid, 1 Ala. 612, 621 (1840) (a person may carry arms openly for self-defense, but not concealed)).

[112] *Mosby,* 851 A.2d at 1041; Aymette v. State, 21 Tenn. 154 (1840)

[113] *Aymette,* 21 Tenn. at 156.

[114] *Id.* at 161.

[115] *Mosby,* 851 A.2d at 1061 n.46 (Flanders, J., dissenting).

[116] *Id.* (Flanders, J., dissenting).

[117] *Id.* (Flanders, J., dissenting).

> meaning of 'bear arms' by itself meant that the free white men of Tennessee could bear arms only for a military-related purpose, then there would have been no need for the framers of the Tennessee constitution to qualify it by also including the phrase 'for their common defence' in this clause of the constitution, because such language would have been redundant of what it meant for the people to 'bear arms.' [citation omitted] Thus, even the Aymette court did not suggest that the words 'bear arms' could not have a non-military meaning when used in another context, such as in the Rhode Island Constitution, that does not include any limiting 'for the common defense' language after its 'bear arms' clause.[118]

The dissent also pointed out that the Rhode Island Supreme Court, in two recent criminal cases, had used the phrase "bearing arms" and "arms-bearing" to refer to gun-carrying in a non-military context.[119] The majority retorted, accurately, that the recent cases did not involve interpretation of constitutional language.[120] Nevertheless, the recent cases showed that "bearing arms" in modern usage includes more than just bearing arms in military service.[121] If the modern usage is not restricted to the military, however, the majority ought to have produced some evidence

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[118] *Id*. at 1061.

> Although the framers of our constitution certainly were aware of the wording of the Second Amendment to United States Constitution when they drafted the language of art. 1, sec. 22, and omitted the Second Amendment's prefatory militia clause from our constitution, the historical evidence suggests that they also were aware of the various constitutions of the other states, some of which included limiting language in their analogous arms-bearing clauses. Nevertheless, the framers of our constitution chose to omit such potentially limiting language from the unqualified phrasing set forth in art. 1, sec. 22. Thus, they failed to include any reference to a limited purpose for which the right of the people to bear arms could be exercised. It is appropriate to consider the omission of any qualifying language from such an enactment, when the framers clearly had the opportunity to adopt the potentially limiting phraseology used in analogous provisions of other extant constitutions, yet they failed to do so. For example, in *State v. Feng,* 421 A.2d 1258, 1264 (R.I.1980), this Court held '[w]e shall not interpret a statute to include a matter omitted unless the clear purpose of the legislation would fail without the implication.'

Id. at 1066.

[119] *Id.* at 1058; State v. McGuy, 841 A.2d 1109, 1114 (R.I. 2003) ("People who fear *those bearing arms* are not adequately provoked to shoot and kill them merely because the latter become verbally abusive and draw too close for comfort.") (emphasis added); Volpe v. Gallagher, 821 A.2d 699, 704 (R.I. 2003) ("defendant breached no duty that she owed to her next-door neighbors when she failed to disarm her son or otherwise control his *arms-bearing* activity.") (emphasis added).

[120] *Mosby,* 851 A.2d at 1042–43.

[121] *Id*. at 1043.

showing that the meaning of the phrase had changed between 1842 and today.

Given the abundant evidence from the early nineteenth and twenty-first centuries that Americans use the phrase "bear arms" to mean the carrying of guns in many situations, not just in military service, the majority's constricted interpretation of "bear arms" was implausible.

C. Keeping Arms

Although the right to bear arms was interpreted to apply quite narrowly, the right to "keep" arms received a broad interpretation. This implied relationship between the bearing of arms and military service, however, does not undermine the "individual right to 'keep' arms in one's home or in his or her place of business. It is the keeping of arms that is the *sine qua non* of the individual right under art. 1, sec. 22."[122] Indeed, one has an absolute "right to 'keep' arms in one's home or in his or her place of business."[123]

1. Reasonableness Test

To determine whether a particular law violates the Rhode Island right to arms, the majority adopted "a reasonableness test—the proper question is whether the statute is a reasonable exercise of police power."[124] As in Wisconsin, the test was explained as "whether the statute is a reasonable limitation of the right to bear arms, rather than a reasonable means of promoting the public welfare."[125] As with all constitutional challenges in Rhode Island, "the party challenging its constitutionality bears the burden of convincing this Court beyond a reasonable doubt that the enactment violates the state or federal constitution."[126]

2. Rhode Island's Gun Permit System

The majority briefly discussed the mandatory statute for carry licenses issued by cities and towns. The court emphasized that the statute was a Shall Issue law, and while municipal authorities could reject an applicant who was not "a suitable person," the "suitable

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[122] *Id.* at 1057.
[123] *Id.*
[124] *Id.* at 1044.
[125] *Id.*
[126] *Id.* at 1045.

person" language could not be misused to deny carry permits to persons just because a municipal employee did not want people to carry guns:

> Mosby, a resident of Massachusetts who holds several gun licenses from other states, was entitled to a carrying permit from the licensing authority of any city or town. An avid gun collector, plaintiff has a proper reason for carrying a pistol or revolver and there is no suggestion that he is an unsuitable person. . . .§ 11-47-11 is mandatory—an applicant who meets the criteria set forth in § 11-47-11 is entitled to a gun permit. . . . Although we are mindful that the 'suitable person' provision in § 11-47-11 vests the local licensing authority with discretion to reject an application filed by an unsuitable person, this leeway does not affect the requirement that the licensing authority *shall* issue a permit to a suitable person who meets the requirements set forth in the statute. The finding that an applicant is a suitable person involves an exercise of discretion, but certain individuals are unsuitable as a matter of law, including convicted felons, habitual drunkards, mental incompetents, illegal aliens, and anyone who has failed to meet the minimum firing qualification score. Moreover, if a license is refused on the ground that a person is not suitable, this determination is subject to review by this Court on certiorari. . . . Because anyone who meets the conditions of § 11-47-11 is entitled to a gun permit, this mandatory requirement supplies the necessary safeguards to the right to bear arms in this state and vindicates the rights set forth in art. 1, sec. 22, of the Rhode Island Constitution.[127]

The majority's reading of the statute was persuasive, but the constitutional reference was odd. According to the majority, there is no constitutional right in Rhode Island to carry guns, except in a military context. Mosby was not seeking to carry a handgun in a militia; he was seeking to carry a handgun for personal protection. Nevertheless, the court stated that the Shall Issue statute for handgun carry licensing was constitutionally required.

The court then turned to the discretionary statute for May Issue license by the State Police Department. The court emphasized that "the inclusion of the word 'may' in § 11-47-18(a) expressly confers broad discretion upon the department to issue or decline to issue

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[127] *Id.* at 1048.

gun permits. This does not, however, have an impact upon 'the right of the people to keep and bear arms.'"[128] The May Issue statute could not be applied arbitrarily and applicants had a right to judicial review:

> As a matter of policy, this Court will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency. Although the court's authority to review the decision is limited, it is not nonexistent. One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme. Such review is available through a common-law writ of certiorari.[129]

Certiorari was, however, the only remedy. The Attorney General Department had denied Mosby a hearing and Mosby had appealed under the state Administrative Procedures Act ("APA"). But the court held that the APA was not applicable.[130]

The result of the case did not give Mosby the permit from the Attorney General, nor did the court review the reasonableness of the Attorney General's decision. But the *Mosby* decision makes it clear that Mosby can petition the Supreme Court of Rhode Island for certiorari to review the Attorney General's denial. More significantly, the majority affirmed that the other carry licensing statute, for municipal permits, is a Shall Issue statute. The majority strongly suggested that Mosby is "a suitable person" to receive a carry permit. As of early 2005, the Attorney General has not withdrawn his instructions to Rhode Island municipalities to refuse municipal Shall Issue permits to persons who do not already have state May Issue licenses. It is impossible to believe that such refusal is lawful under the *Mosby* decision. *Mosby* instructs that municipalities must issue carry permits to every "suitable person," and that failure to issue such a permit would infringe the state constitutional right to keep and bear arms.

In Indiana, local officials who refused to obey a state mandatory

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[128] *Id.*
[129] *Id.* at 1050–51.
[130] *Id.* at 1051.

licensing system for handguns lost a suit brought under Section 1983 of the federal Civil Rights Act. The Indiana applicants had a right to keep and bear arms under the Indiana Constitution and this state constitutional right was part of their Fourteenth Amendment rights under the federal Constitution. The local government's blanket refusal to issue permits, as required by Indiana state law, was therefore held to be a violation of the Fourteenth Amendment, giving rise to money damages under Section 1983.[131] A similar claim based on the illegal denial of municipal carry permits in Rhode Island would appear to have a good chance of success. Alternatively, the Rhode Island state courts would seem an appropriate venue simply to compel municipalities to obey the state statute.

IV. CONCLUSION

Three-quarters of the states have already settled on the compromise Shall Issue legislation which has recently become law in New Mexico, Missouri and Ohio. The Wisconsin legislature fell only one vote short of over-riding the Governor's veto and enacting a similar law. It took a decade for proponents of Shall Issue laws in New Mexico and Ohio to prevail, and a decade-and-a-half for their counterparts in Missouri. Given the persistence of the advocates, it seems likely that Wisconsin will sooner or later have its own Shall Issue law. Rhode Island already does, although the law is, in practice, nullified for the time being, but such nullification seems untenable after the Rhode Island court's *Mosby* decision.

Shall Issue laws are criticized by absolutist Second Amendment rights groups, such as Gun Owners of America. They argue that a citizen should not need to obtain a government permit to exercise their constitutional rights. Shall Issue laws are also criticized by gun prohibition groups, such as the Brady Campaign. They argue that blood will run in the streets and disaster will follow the enactment of a Shall Issue law—although such predictions seem increasingly implausible now that most states already have such laws. Social scientists such as John Lott and Steven Donahue dispute whether Shall Issue laws result in a statistically significant drop in violent crime,[132] but there is little dispute that the people

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[131] *See* Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990).

[132] *See generally* JOHN R. LOTT, JR., MORE GUNS: LESS CRIME (2d ed. 2000); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003); Florenz Plassmann & John Whitley, *Confirming "More Guns, Less Crime,"*

who obtain concealed handgun permits almost never commit violent gun crimes while carrying their licensed gun.

As matter of pure reason, it is, of course, possible to argue that carrying an unconcealed guns is a constitutionally sufficient alternative to the licensed carrying of concealed guns. Indeed, many state courts in the nineteenth century upheld restrictions on concealed carry precisely because unconcealed carry remained entirely legal and unrestricted.[133] The majority of the Ohio Supreme Court, and Justice Abrahamson in Wisconsin, follow in this tradition.

But in practical terms, licensed concealed carry is the more reasonable alternative in most areas of the United States. If the gun is concealed, would-be criminals face the deterrent risk that almost any potential victim might be armed. A concealed gun is much harder for a thief to snatch away by surprise than is a gun in an open holster. And concealed guns are less likely to upset people who have emotional fears of guns.[134]

Courts are generally careful not to get too far out of step with social norms, particularly on controversial issues such as gun rights and gun control. The Shall Issue laws are not consistent with maximalist interpretations of the right to keep and bear arms, nor are they consistent with the views of people who wish that the right did not exist, and who propose interpretations to shrink the right to the vanishing point. But such laws are consistent with a broad American social consensus on firearms. Polling data suggest that the public does not object to fairly-administered licensing systems, particularly for gun carrying in public places; nor does the majority of the public object to law-abiding adults carrying concealed handguns for self-defense. Now that over three-quarters of the states have Shall Issue licensing laws, the claims of gun prohibition advocates that licensed gun carrying will lead to social chaos and massive impulsive gun violence seems very implausible.

Although the procedural postures and precise issues were different in New Mexico, Missouri, Ohio, Wisconsin and Rhode Island, the supreme courts of each of these states have all contributed to and deepened the emerging social consensus in the United States about the licensed carrying of concealed handguns for

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55 STAN. L. REV. 1313 (2003); Ian Ayres & John J. Donohue III, *The Latest Misfires in Support of the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1371 (2003).

[133] *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359.

[134] The precise term for such fears is "hoplophobia" (fear of armed citizens).

lawful protection.