

## Roger Williams University Law Review

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Volume 11 | Issue 3

Article 2

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Spring 2006

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### Recommended Citation

Matzko, Claudia J. (2006) "The Obfuscation of Rhode Island's Clearly Expressed Constitutional Right to Bear Arms: *Mosby v. Devine*," *Roger Williams University Law Review*: Vol. 11: Iss. 3, Article 2.  
Available at: [http://docs.rwu.edu/rwu\\_LR/vol11/iss3/2](http://docs.rwu.edu/rwu_LR/vol11/iss3/2)

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# The Obfuscation of Rhode Island's Clearly Expressed Constitutional Right to Bear Arms: *Mosby v. Devine*

Claudia J. Matzko\*

## I. INTRODUCTION

Like most other states, the Rhode Island Constitution contains a “right to bear arms” provision.<sup>1</sup> The text of the Rhode Island Constitution has been preserved unchanged since the framers drafted the first version of the Constitution in 1842: “the right of the people to keep and bear arms shall not be infringed.” For over one hundred fifty years, the scope and nature of the Rhode Island Constitution’s article I, section 22 Declaration of Rights provision remained unquestioned, until 2004, when the Rhode Island Supreme Court decided *Mosby v. Devine*.<sup>2</sup>

Courts and scholars interpreting state constitutional right to bear arms provisions or the Second Amendment of the U.S. Constitution generally espouse one of three models.<sup>3</sup> The first model involves a “states’ rights” or “collective rights” focus and posits that the right to bear arms does not apply to individuals.<sup>4</sup> Rather, the provision was drafted to guarantee a general right of a state’s people to have a militia. The purpose of the local militia

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1. R.I. CONST. art. I, § 22.

2. 851 A.2d 1031 (R.I. 2004).

3. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003-04 (1995) (book review).

4. This approach has also been referred to as civic republicanism. David B. Kopel, Clayton E. Cramer, & Scott G. Hatrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1187 (1995). Supporters of gun control generally advocate this theory.

was to protect a state from the possibility of a potentially oppressive, national standing army. The second model, referred to as the “sophisticated collective rights” model, purports to recognize a limited individual right.<sup>5</sup> Under this approach, an individual has a right to bear arms only through participation in militia activities. The right to keep arms applies solely to members of the militia, and only if the government does not provide the necessary arms.<sup>6</sup> Thus, although the right to keep arms and the right to bear arms are considered separately, both the individual right to keep and to bear arms are limited to the militia context. This view has the potential on a theoretical level to completely disarm the entire civilian population, or alternatively, to render the individual right obsolete because the concept of the militia has disappeared.<sup>7</sup> The third model is the individual rights model. Under this view, the intent of the framers was to create an individual right to keep and bear arms. Notably, all three models arose from constitutional originalists,<sup>8</sup> and the comparison of the concepts is largely a matter of whose version of history to believe.

The objective of this Article is to supplement Rhode Island’s right to bear arms discourse with arguments and research that advance the view that Rhode Island’s right to bear arms provision is clearly an individual right, entitled to full constitutional protection. This Article agrees with the dissent’s position in *Mosby v. Devine*. However, this Article does not attempt a comprehensive recap or analysis of the myriad issues at stake. Rather it presents arguments and research which complement or amplify the thorough investigation of the *Mosby* court into Rhode Island’s right to bear arms provision. First, Part II of this Article will present the *Mosby* case. In Part III, state constitutional analysis in Rhode Island will be introduced, both in general and as applied to *Mosby*. This section contends that the majority’s constitutional analysis in *Mosby* is based on research that is too narrow in scope. Part IV will discuss the word “people” as used in article I, section

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5. *Id.*

6. *See* United States v. Emerson, 270 F.3d 203, 219 (5th Cir. 2001).

7. *See* Cottrol & Diamond, *supra* note 3. Militia would be unnecessary if there was no longer a need to counter an oppressive standing army.

8. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1362 (1998).

22. By means of textual and doctrinal analysis, this Article will argue that the *Mosby* majority's own broad definition of the word undermines its own argument restricting the people's right to bear arms to a militia context. Part V will discuss the meaning of "bear arms" from both a textual and historical vantage, using an expanded comparative approach. Part V will also explore Rhode Island's 1790 Bill of Rights. Next, Part VI will compare other extant state constitutions to Rhode Island's right to keep and bear arms provision, using both textual and structural modalities. Finally, this Article concludes with the argument that the right to bear arms is an individual fundamental right, entitled to full constitutional protection.

## II. *MOSBY V. DEVINE*

In a case of first impression, the *Mosby* court ruled that a licensing statute under Rhode Island's Firearms Act did not impinge on the state's constitutional right to keep and bear arms. While the court did not specifically adopt the sophisticated collective rights model, its reasoning was closest to the collective rights approach.<sup>9</sup> However, the holding in *Mosby* is unclear and, ultimately, the court did not decide the scope or limits of the right to bear arms provision.<sup>10</sup> Instead, the court recognized an individual right to keep and bear arms and simultaneously concluded that the "bear arms" language should be read in the collective, military context.<sup>11</sup> The court reached this conclusion by grouping the right to keep arms and the right to bear arms concepts on one hand, and separately analyzing the concept of right to bear arms on the other. The ensuing results are conflicting and implausible.

The two plaintiffs in *Mosby* applied individually to the State of Rhode Island Department of the Attorney General ("Attorney General") for a permit to carry a concealed weapon under Rhode Island's Firearms Act. This act contains two separate licensing

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9. The *Mosby* court only recognized the "collective" and "individual" rights models. Also, in the sophisticated collective rights model both the right to keep and bear arms are understood in the militia context. In *Mosby*, the right to keep arms is retained as an individual right and the right to bear arms pertains to the militia.

10. See *Mosby*, 851 A.2d at 1043.

11. See *id.* at 1039, 1043.

statutes: § 11-47-18 provides for a discretionary grant by the Attorney General of a firearms permit “upon a proper showing of need” and § 11-47-11 provides mandatory licensing by municipalities, for a “suitable person.”<sup>12</sup> Thus, one provision was a discretionary “*may grant*” provision and one was a mandatory “*shall grant*” provision. Apparently, the Attorney General had instructed municipalities to consider an applicant suitable only if they had first been granted a permit under § 11-47-18, in effect circumventing the “*shall grant*” statute.<sup>13</sup> Thus, the plaintiffs applied under the discretionary “*may grant*” statute and only the issue of the constitutionality of § 11-47-18 was before the court.<sup>14</sup>

Mosby was an avid gun collector and requested a permit because he sometimes traveled with large sums of money.<sup>15</sup> Co-plaintiff Gollotto was a storeowner, who also traveled with large amounts of cash, and feared for his safety because a number of robberies had occurred in his store’s neighborhood.<sup>16</sup> Each applicant was apparently a “suitable person,” applying to license a handgun, which, unlike a sawed-off shotgun, for example, is not categorically associated with unlawful behavior. In fact, as the dissent points out, a handgun is just the type of weapon that one would expect a citizen would lawfully carry to protect himself.<sup>17</sup> Nonetheless, using its discretion under the licensing statute, the Attorney General denied each application, citing an insufficient showing of need.<sup>18</sup> There was no hearing or appeal procedure within the application process at the time.<sup>19</sup> In fact, the Attorney General followed no written departmental policy for deciding permit applications.

The dissent vigorously argued that the Attorney General conducted an arbitrary licensing scheme in violation of the Rhode Island Constitution.<sup>20</sup> Furthermore, the dissent considered the right to bear arms provision an individual right, entitled to full

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12. R.I. GEN. LAWS §§ 11-47-18, 11-47-11 (2002 & Supp. 2005).

13. *See Mosby*, 851 A.2d at 1078 n.61 (Flanders, J., dissenting).

14. Rhode Island General Laws § 11-47-11 was not before the court, although the court did decide other related matters.

15. *Mosby*, 851 A.2d at 1035.

16. *Id.*

17. *Id.* at 1054 (Flanders, J., dissenting).

18. *Id.* at 1035.

19. *Id.*

20. *See id.* at 1052-83 (Flanders, J., dissenting).

constitutional protection, which would necessarily include due process protection.<sup>21</sup> This Article posits that the dissent is correct.

### III. RHODE ISLAND STATE CONSTITUTIONAL ANALYSIS

The Rhode Island Supreme Court has stated that its function in construing the constitution is to ascertain and effectuate framers' intent.<sup>22</sup> State constitutions derive their force from the people who ratify them and, thus, the intent that the court seeks to determine is that of the people.<sup>23</sup> The court interprets the words of the constitution according to their plain, ordinary, and generally accepted meaning, assuming that each word was carefully chosen.<sup>24</sup> The *Mosby* majority failed to address several underlying questions concerning plain meaning construction. To which rights did the ratifiers of the 1842 constitution and the re-adapters of the constitution in 1986<sup>25</sup> think they were entitled when they ratified the Rhode Island Constitution? What did the people think "the right of the people to keep and bear arms shall not be infringed" plainly meant? Could the ratifiers have understood the right to extend to only a subset of people, such as the militia? Could they have voted for an individual right to keep arms, with a right to bear arms restricted to the militia, as the *Mosby* court held? The clear answers can be avoided only by evading the questions; the plain meaning of the provision grants an unqualified right to people to keep and bear arms.

The Rhode Island Supreme Court properly considers extrinsic sources in interpreting the Rhode Island Constitution, including proceedings of constitutional conventions, the history of the times, changes to a constitutional provision, and other extant constitutions.<sup>26</sup> In the Debates and Proceedings in the 1842 Constitutional Convention at Newport, the framers frequently

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21. See *id.* (Flanders, J., dissenting).

22. *Id.* at 1038; *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995).

23. 16 AM. JUR. 2D *Constitutional Law* § 58 (1998).

24. *Mosby*, 851 A.2d at 1038; *Sundlun*, 662 A.2d at 45.

25. Rhode Island held a constitutional convention in 1986. As noted, art. I, § 22 was unchanged.

26. See *Mosby*, 851 A.2d at 1038 (using all four sources). See Appendix I for the text of each state's right to bear arms provision. See also Appendix II for the placement of the right to bear arms provision in each state's constitution.

referred to the constitutions and policies of other states.<sup>27</sup> There were twenty-seven state constitutions<sup>28</sup> in 1842; to which other states were they referring? The writings of Elisha R. Potter<sup>29</sup> provide an answer. Potter was an influential and prominent leader from South Kingston, and a leading drafter of the 1842 Constitution.<sup>30</sup> Potter's notes from the period referenced twenty-four of the twenty-seven extant state constitutions.<sup>31</sup> Because

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27. See, e.g., State of R.I., DEBATES AND PROCEEDINGS IN THE STATE CONVENTION HELD AT NEWPORT, SEPTEMBER 12<sup>TH</sup>, 1842, FOR THE ADOPTION OF A CONSTITUTION OF THE STATE OF RHODE ISLAND 34 (1842) (This source quoted Mr. Jackson as stating that "In forming a Constitution, we should consider this as a new State, and the models of other republics should be considered.").

28. The state constitutions in effect at the time the Rhode Island Constitution was drafted were: Alabama (1819), Arkansas (1836), Connecticut (1818), Delaware (1831), Florida (1838), Georgia (1798), Illinois (1818), Indiana (1816), Kentucky (1799), Louisiana (1812), Maine (1820), Maryland (1776), Massachusetts (1780), Michigan (1835), Mississippi (1832), Missouri (1820), New Hampshire (1792), New Jersey (1776), New York (1821), North Carolina (1776), Ohio (1802), Pennsylvania (1838), South Carolina (1790), Tennessee (1834), Texas (1836), Vermont (1793), and Virginia (1830). See generally SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler, ed., 1992).

29. One publication listed Elisha Potter's credentials:

POTTER, Elisha Reynolds, (son of Elisha Reynolds Potter [1764-1835]), a Representative from Rhode Island; born in Little Rest (now Kingston), R.I., June 20, 1811; attended the Kingston Academy and was graduated from Harvard University in 1830; studied law; was admitted to the bar in 1832 and practiced in South Kingstown Township, R.I.; adjutant general of the State, 1835-1836; member of the State house of representatives, 1838-1840; elected as a Law and Order Party candidate to the Twenty-eighth Congress (March 4, 1843-March 3, 1845); chairman, Committee on Revisal and Unfinished Business (Twenty-eighth Congress); unsuccessful candidate for reelection in 1844 to the Twenty-ninth Congress; served in the State senate, 1847-1852 and 1861-1863; State commissioner of public schools from 1849 to 1854, when he resigned; associate justice of the Rhode Island Supreme Court from March 16, 1868, until his death in Kingston, Washington County, R.I., April 10, 1882; interment in the family burial ground, Washington County, R.I.

BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1771-2005 1756 (United States Government Printing Office, 2005).

30. *Id.* He chaired a number of committees at the convention. *Id.*

31. The states referenced were Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, and Virginia. Elisha Reynolds Potter, Jr. Papers, Rhode Island Historical

readily available<sup>32</sup> historical documents indicate that at least one highly influential framer, Elisha Potter, considered nearly all, if not all, the state constitutions, and because in the debates and proceedings, other framers referred numerous times to other states, this Article argues that if textual comparisons are made, they must be made to all extant constitutions. Part V will explore these comparisons.

In large part, the Rhode Island Supreme Court adopted the meaning of “bear arms” from *Aymette v. State*,<sup>33</sup> an 1840 Supreme Court of Tennessee case, which determined that the phrase was restricted to the military context. However, the Rhode Island Supreme Court failed to provide an actual link between the *Aymette* court and the Rhode Island framers. Thus, the *Mosby* court’s analysis is built on an arbitrary assumption, either that the framers were aware of and in accord with *Aymette* or that they independently held the *Aymette* view. The court also neglected to consider alternative early constitutional decisions where the right to bear arms clearly applied to civilians,<sup>34</sup> which will be further discussed in Part IV.

#### IV. THE PEOPLE

The Rhode Island Supreme Court acknowledged that the meaning of the word “people” is key to interpreting article I, section 22.<sup>35</sup> The court looked to its own precedent, citing an 1896 Supreme Court advisory opinion.<sup>36</sup> This opinion, *In re Incurring State Debts*, considered article 4, section 13 of the Rhode Island Constitution, which provided in pertinent part, “the general assembly shall have no power, hereafter without express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars. . . .”<sup>37</sup> The governor had asked the court whether the word “people” referred to the entire electorate or only to the

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Society, MSS 629 SG3 (on file with author).

32. See Rhode Island Historical Society, [www.rihs.org/muscollections/research.html](http://www.rihs.org/muscollections/research.html).

33. 21 Tenn. (2 Hum.) 154 (1840).

34. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

35. *United States v. Mosby*, 851 A.2d 1031, 1040 (R.I. 1896).

36. *In re Incurring of State Debts*, 37 A. 14 (R.I. 1896).

37. *Id.* at 14.



taxpayers.<sup>38</sup> The advisory opinion compared the use of the word “people” in article 4, section 13 to its meaning in other parts of the constitution and found “nothing to warrant its restriction.”<sup>39</sup> The court stated that, “the term ‘people,’ as used in the constitution, is broad and comprehensive, comprising in most instances all the inhabitants of the state.”<sup>40</sup> Thus, “people” could not be restricted to include only a subset of the electorate, the taxpayers.

Based on precedent and its own comparative analysis of the use of the word “people” in the Rhode Island Constitution, the *Mosby* court clearly concluded that “the people” includes all the inhabitants of the state.<sup>41</sup> Furthermore, the court noted that constitutional rights flow to the people individually.<sup>42</sup> The court held that article I, section 22 “provides individuals with a right to keep and bear arms, subject . . . to reasonable regulation by the state.”<sup>43</sup>

However, later in its opinion, the *Mosby* court contradicted itself by stating that the right to “bear arms” did not apply to all individuals, but rather was limited to arms-bearing in a militia context. The court applied this restriction only to the “bear arms” prong of the right, and stated that all individuals did have a right to “keep arms.”<sup>44</sup> Unfortunately, the court did not explain in what context all individuals could enjoy a right to keep arms, but that only some of those individuals could bear the arms. As noted earlier, the *Mosby* court comes closest to a sophisticated collective rights model of analysis. In that view, both the right to keep and the right to bear arms are limited to a militia context. However, *Mosby* differs from the collective rights model because, in this part of the opinion, the court held that the individual retained the right to keep arms, with only the right to bear arms relegated to the collective, militia context.

In *U.S. v. Miller*, a federal Second Amendment case, the U.S. Supreme Court explained that the term “militia” generally referred to able-bodied males between the ages of eighteen and

38. *Id.* at 14.

39. *Id.* at 15.

40. *Id.*

41. See *Mosby v. Devine*, 851 A.2d 1031, 1040-41 (R.I. 2004).

42. *Id.*

43. *Id.* at 1039.

44. *Id.* at 1042.

forty-five.<sup>45</sup> Obviously, the right to bear arms cannot at once apply to all the people who inhabit the state, and only those males between the ages of eighteen and forty-five in the militia. The *Mosby* holding is questionable because it contradicts its own conclusion as to the meaning of "people," as well as its *In Re State Debt* precedent. The court had clearly established that "people" includes all inhabitants, not a subset such as taxpayers or militia.

#### IV. THE RIGHT TO BEAR ARMS

Advocates of a states' rights or a sophisticated collective rights model of constitutional right to bear arms theory believe that only members of a militia can bear arms, and can do so only during militia duty. The sophisticated collective rights theorists alternatively argue that the individual right has disappeared because the concept of militia is obsolete. Proponents of the individual rights theory advance the position that "bearing arms" can refer to any individual, civilian or military. Although the Rhode Island Supreme Court initially held that individuals have a constitutional right to both keep and bear arms, subject only to reasonable governmental restriction (an individual right), the court then proceeded to separately analyze "to keep" and "to bear," concluding that individuals have a right to keep arms but they can bear arms only in the militia context.<sup>46</sup> Thus, *Mosby* does not fall into any of the existing models of right to bear arms analysis. Unlike scholars and courts who advocate either the individual right to bear arms or gun control, it is difficult to imagine what the Rhode Island Supreme Court intended by retaining the individual right to keep arms, and restricting the right to bear arms to the militia.

The *Mosby* court relied heavily on *Aymette v. State* to support its view that "bear arms" was primarily used in a militia context. Indeed, *Aymette* has been recognized as the best historical case to support the collective rights or the sophisticated collective rights model for this proposition.<sup>47</sup> In *Aymette*, the Supreme Court of

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45. 307 U.S. 174, 180-81 (1939). See also Uniform Militia Act of 1792, CHAP. XXXIII §1, 1 Stat. 271 (1792).

46. *Mosby*, 851 A.2d at 1042.

47. *United States v. Emerson*, 270 F.3d 203, 229 (5th Cir. 2001). The United States Supreme Court cited to *Aymette* in *Miller*, 307 U.S. at 178, 182.

Tennessee construed Section 26 of its Declaration of Rights, which provided that “the free white men of the State, have a right to keep and bear arms for the their common defence.”<sup>48</sup> It determined that the words “for their common defence” meant to secure the public defense.<sup>49</sup> Thus, the *Aymette* court held that the right was related to the military context, precisely because the objective of the right was for “common defence.” Because the Rhode Island provision contains neither “common defence” nor “common defense” language, the comparison to *Aymette* does little, if anything, to support the *Mosby* majority’s argument that “bear arms” pertained only to a military context.

The *Mosby* court noted that *Aymette* was decided a mere two years before the Rhode Island Constitution was ratified in 1842. It is not clear if the Rhode Island Supreme Court assumed that the *Aymette* court’s ideas about “bearing arms” influenced the Rhode Island framers or if it assumed that the framers would have independently agreed with the Tennessee Supreme Court. In its opinion, the *Mosby* majority subsequently briefly discussed a 2002 Ninth Circuit case<sup>50</sup> that held “bear arms” as referring to military use only and a 1991 Fifth Circuit case<sup>51</sup> that held “bear arms” as referring to both military and civilian use. The court found noteworthy that both circuits looked to the Rhode Island ratification of the U.S. Constitution for evidence that “bearing arms” is a military concept.<sup>52</sup> This paper suggests, *infra*, an opposite conclusion and argues that the Rhode Island ratification of the U.S. Constitution supports the position that the Rhode Island constitutional right to bear arms is an individual right.

When the delegates of Rhode Island ratified the U.S. Constitution in 1790, they included in the document certain fundamental tenets known as Rhode Island’s Bill of Rights.<sup>53</sup> The *Mosby* court cited to the eighteenth part, which permitted conscientious objectors to avoid military service.<sup>54</sup> While “bearing arms” was indeed used in the military context in this provision,

48. 21 Tenn. (2 Hum.) 154, 156 (1840).

49. *Id.* at 160-62.

50. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

51. *Emerson*, 270 F.3d 203.

52. *Mosby v. Devine*, 851 A.2d 1031, 1041 (R.I. 2004).

53. *See generally*, Kevin D. Leitao, *Rhode Island’s Forgotten Bill of Rights*, 1 ROGER WILLIAMS U. L. REV. 31 (1996).

54. *Mosby*, 851 A.2d at 1041.

the issue is not whether bearing arms applies to the military context; it does. Rather, the true issue is whether “bearing arms” can also apply to the civilian context.

The *Mosby* majority did not discuss the seventeenth part of the 1790 Bill of Rights, which was the right to bear arms provision of its day. The provision was embedded in a military context and stated:

That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state; that the militia shall not be subject to martial law except in time of war, rebellion or insurrection; that standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power; that in time of peace no soldier ought to be quartered in any house, without consent of the owner, and in time of war, only by the civil magistrate, in such manner as the law directs.<sup>55</sup>

Fifty years later, in the 1842 Declaration of Rights, article I, section 22, the framers of the Rhode Island Constitution reduced the right to bear arms provision to “the right of the people to keep and bear arms shall not be infringed.” They removed any and all military context, plainly granting a right to keep and bear arms to the people. The framers did retain the “martial law,”<sup>56</sup> the “subordination of military to civil authority,”<sup>57</sup> and the “quartering of soldiers”<sup>58</sup> provisions in the 1842 constitution. Notably, in this 1842 constitution, the military provisions were adjacent to each other, but apart from the right to bear arms. Instead, the right to bear arms was placed between the “freedom of press” and the “rights not enumerated” provisions. Thus, the military provisions were grouped, and did not include the right to bear arms provision. This structural placement further supports the view

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55. THE COMPLETE BILL OF RIGHTS 182 (Neil H. Cogan, ed., Oxford University Press 1997) (R.I. Ratification of the U.S. Constitution, pt. 17.).

56. R.I. CONST. art. I, § 18.

57. *Id.*

58. R.I. CONST. art. I, § 19.

that the right to bear arms was an individual right, separate from and not to be read within the military context.

Additionally, the *Mosby* majority ignored pre-1842 case law, which upheld the right to bear arms as an individual right. The Tennessee case upon which the *Mosby* court relied discussed a Court of Appeals of Kentucky case, *Bliss v. Commonwealth*.<sup>59</sup> The *Bliss* court found a law prohibiting a person from carrying a concealed weapon to be unconstitutional because the plain meaning of the pertinent provision granted an individual right to bear arms.<sup>60</sup> The Kentucky right to bear arms provision stated "that the right of the citizens to bear arms in defence of themselves and the state, shall not be questioned."<sup>61</sup> The Kentucky court held that *Bliss* had a constitutional right to bear arms, in this case a nonmilitary, concealed sword in a cane.<sup>62</sup>

In 1840, the same year *Aymette* was decided, the Supreme Court of Alabama, in *State v. Reid*,<sup>63</sup> afforded constitutional protection to the right of individuals to openly bear arms. The *Reid* court also cited *Bliss* for support of the idea that the right to bear arms applied to individuals.<sup>64</sup> Like Kentucky, Alabama's constitution contained language granting a citizen's "right to bear arms in defence of himself and the State."<sup>65</sup> Both courts characterized this language as pertaining to civilian arms-bearing activity.<sup>66</sup> Additionally, eleven other early state constitutional right to bear arms provisions contained the same phrase, describing civilian arms-bearing activity.<sup>67</sup> Thus, the *Mosby*

59. 12 Ky. (2 Litt.) 90 (1822).

60. *Id.* at 90-93.

61. *Id.* at 90.

62. *Id.* at 90, 93.

63. 1 Ala. 612 (1840).

64. *Id.* at 614.

65. *Id.* at 614-15.

66. *Id.* at 615; *Bliss*, 12 Ky. at 91-92.

67. Alabama, Connecticut, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, Texas, and Vermont have some sort of "in defense of himself" language. See 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 33 (William F. Swindler ed., Oceana Publications, Inc. 1973) (Alabama); 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 145 (William F. Swindler ed., Oceana Publications, Inc. 1973) (Connecticut); 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 366 (William F. Swindler ed., Oceana Publications, Inc. 1974) (Indiana); 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 163 (William F. Swindler ed., Oceana Publications, Inc. 1975) (Kentucky); 5 SOURCES AND

majority's argument that "bear arms" applied only to the military context is untenable.

V. COMPARISONS TO OTHER STATE  
"RIGHT TO KEEP AND BEAR ARMS" PROVISIONS

Given that the framers indicated that they looked to other state constitutions and that Elisha Potter's notes reflected upon at least twenty-four of the twenty-seven extant constitutions,<sup>68</sup> it is prudent to compare the text of the Rhode Island Constitution's right to bear arms provision with right to bear arms provisions in other states' constitutions.

Nine states had either no bill of rights in their constitution or no right to bear arms provision.<sup>69</sup> Of the remaining nineteen states (twenty including Rhode Island), the Rhode Island provision was unique for several reasons. With the exception of Missouri, Rhode Island is the only state whose provision is not imbedded in a military provision, or located next to a military-

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DOCUMENTS OF UNITED STATES CONSTITUTIONS 205, 362, 487 (William F. Swindler ed., Oceana Publications, Inc. 1975) (Michigan, Mississippi, Missouri); 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 555 (William F. Swindler ed., Oceana Publications, Inc. 1978) (Ohio); 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 304 (William F. Swindler ed., Oceana Publications, Inc. 1979) (Pennsylvania); 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 258, 509 (William F. Swindler ed., Oceana Publications, Inc. 1979) (Texas, Vermont).

68. See *Mosby v. Devine*, 851 A.2d 1031, 1038 (R.I. 2004); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995).

69. In 1842, the Georgia and New Jersey constitutions had no Bill of Rights. See 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 458 (Georgia); 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 367, 449 (William F. Swindler ed., Oceana Publications, Inc. 1976) (New Jersey). Delaware, Illinois, Louisiana, Maryland, New Hampshire, South Carolina, and Virginia had no right to bear arms provisions at that time. See 4 THE FEDERAL AND STATE CONSTITUTIONS 2471 (Francis Newton Thrope, ed., 1993) (New Hampshire); 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 217 (Delaware); 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 214, 237 (Illinois); 4-A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 4, 84 (William F. Swindler ed., Oceana Publications, Inc. 1975) (Louisiana); 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 340, 372 (Maryland); 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 447, 476 (South Carolina); 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 3, 57 (William F. Swindler ed., Oceana Publications, Inc. 1979) (Virginia).

related right.<sup>70</sup> In 1842, Rhode Island was the only state whose right to bear arms provision did not include “the common defense” or “defense of the state” language, which the *Aymette* court relied on to determine that the Tennessee right to bear arms applied only to the military context.<sup>71</sup> As discussed *supra*, the *Mosby* court incorrectly relied on *Aymette* for the same proposition.

Additionally, the Rhode Island right to bear arms provision is the only one bound by the strong, unequivocal language, “shall not be infringed.”<sup>72</sup> This is of course, the same unambiguous, qualifying clause in the Second Amendment of the U.S. Constitution.<sup>73</sup> Fifteen state constitutions had no such language, and simply granted citizens a right to keep and bear arms. Four states’ constitutions provided that the right “shall not be questioned.”<sup>74</sup>

It follows from the foregoing analysis that both the clear text and the structural placement of the text in article I, when compared to other constitutions, strongly supports the theory that Rhode Island’s unique right to bear arms provision was intended to be an individual right.

## VI. CONCLUSION

“[Those] who are trying to read the Second Amendment out of the Constitution by claiming it’s not an individual right. . . [are] courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don’t like.”<sup>75</sup>

In *Mosby v. Devine*, the majority delivered conflicting and

70. 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 388.

71. *Id.*; see *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840).

72. 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 67, at 388.

73. U.S. CONST. amend. II (1791).

74. Kentucky, Maine, Missouri, Pennsylvania. See 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 163, 316 (William F. Swindler ed., Oceana Publications, Inc. 1975) (Kentucky, Maine); 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 487 (William F. Swindler ed., Oceana Publications, Inc. 1975) (Missouri); 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 304 (William F. Swindler ed., Oceana Publications, Inc. 1979) (Pennsylvania).

75. Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 788-89 (1994) (quoting Alan Dershowitz).

contradictory holdings, which obfuscate and threaten one of Rhode Island's fundamental rights.<sup>76</sup> As outlined in the previous sections of this Article, the court stated that article I, section 22, (1) "provides individuals with a right to keep and bear arms," subject to reasonable state regulation,<sup>77</sup> (2) that an individual right exists to keep but not to bear arms, because "bear arms" language is employed exclusively in the collective military context,<sup>78</sup> (3) that *Mosby* did not define the extent or limits of the right to bear arms provision,<sup>79</sup> and (4) that the rights of the "people" refers to all inhabitants of the state, yet the rights are also restricted to the militia.<sup>80</sup>

This Article determined the intended scope and meaning of Rhode Island's right to bear arms provision, not whether the provision is "wise." Rhode Island's right to bear arms provision is unique among states for numerous reasons, not the least of which is that it clearly expresses an individual right. In this senselessly violent world, perhaps the need for this right should be re-addressed.<sup>81</sup> Constitutional amendment was designed to be a slow and cumbersome process, replete with checks and balances, so that changes to the constitution could not be hastily adopted. If the right to bear arms has indeed become an "embarrassing"<sup>82</sup> fundamental right, the amendment process should be considered. This is far superior to outcome-determinative judicial decision-making, which cannot withstand scrutiny.

Additionally, even if the Rhode Island Supreme Court had clearly and consistently articulated an individual right to keep and bear arms, this Article does not suggest that the right is

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76. This assumes that the rights articulated in the constitutional Declaration of Rights are fundamental rights.

77. *Mosby v. Devine*, 851 A.2d 1031, 1039 (R.I. 2004).

78. *Id.* at 1043.

79. *Id.*

80. *Id.* at 1040-42.

81. In the aftermath of the *Bliss v. Commonwealth* decision upholding the right to carry concealed weapons, the Kentucky constitutional right to bear arms provision was amended, to allow prohibitions on the carrying of concealed weapons. *State v. Hirsch*, 114 P.3d 1104, 1118 (Or. 2005).

82. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (referring to the author's statement that "For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members.").



beyond reasonable state regulation. However, in *Mosby v. Devine*, a state executive denied two apparently law-abiding, "suitable" persons a weapons permit, absent internal departmental procedural and due process rights to a hearing, in effect disabling a constitutional fundamental right. If the court upholds a legislative measure restricting the right to bear arms, it must at a minimum comport with basic procedural due process. All rights articulated in the Rhode Island Declaration of Rights are entitled to constitutional protection. If a right has become useless, offensive, or harmful to the people, the Rhode Island Constitution should be amended to reflect this sentiment. Until that time comes, it is important to remember that the last constitutional convention in 1986 *retained* the right to keep and bear arms provision in exactly its original form.<sup>83</sup>

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83. CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 11 (The Office of Secretary of State 1988) (commenting that section 22, "the right of the people to keep and bear arms shall not be infringed," remained unchanged from the 1843 Rhode Island Constitution).

APPENDIX I			
RIGHT TO BEAR ARMS			
STATE	DATE	SECTION	TEXT
English Bill of Rights	1689		That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.
Rhode Island Ratification	1790	17th	That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state; that the militia shall not be subject to martial law except in time of war, rebellion or insurrection; that standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power; that in time of peace no soldier ought to be quartered in any house, without the consent of the owner, and in time of war, only by the civil magistrate, in such manner as the law directs.

Rhode Island	1842	Art. I § 22	The right of the people to keep and bear arms shall not be infringed.
<b>United States</b>	1791	Amend. II	A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
Alabama	1819	Art. I § 23	Every citizen has a right to bear arms in defence of himself and the state.
Arkansas	1836	Art. II § 21	That the free white men of this State shall have a right to keep and to bear arms for their common defence.
Connecticut	1818	Art. I § 17	Every citizen has a right to bear arms in defence of himself and the State.
Delaware	1831	No provision	
Florida	1838	Art. I § 21	That the free white men of this State shall have a right to keep and to bear arms for their common defence.
Georgia	1798	No Bill of Rights	
Illinois	1818	No provision	
Indiana	1816	Art. I § 20	That the people have a right to bear arms for the defence of themselves and the State; and that the military shall be kept in strict subordination to the civil power.

Kentucky	1799	Art. X § 23	That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.
Louisiana	1812	No provision	
Maine	1819	Art. I § 16	Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.
Maryland	1776	No provision	
Massachusetts	1780	Pt. I Art. XVII	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 exact subordination to the civil authority and be governed by it.
Michigan	1835	Art. I § 13	Every person has the right to bear arms for the defence of himself and the State.
Mississippi	1832	Art. I § 23	Every citizen has the right to bear arms for the defence of himself and the State.
Missouri	1820	Art. XIII § 3	That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of

			government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned.
New Hampshire	1792	Pt. I Art. XIII	No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.  <i>NOTE:</i> <i>New Hampshire has only this right not to bear arms. Other states have a similar provision in addition to their right to bear arms provisions.</i>
New Jersey	1776	No Bill of Rights	
New York	1821	Art. VII § 5	The militia of this State shall at all times hereafter be armed and disciplined and in the readiness of service; but all such inhabitants of this State, of any religious denomination whatever, as from scruples of conscience may be adverse to bearing arms, shall be excused therefrom by paying to the State an

			equivalent in money; and the legislature shall provide by law for the collection of such equivalent, to be estimated according to the expense, in time and money, of an ordinary able-bodied militia-man.
North Carolina	1776	DR Art. XVII	That the people have a right to bear arms, for the defence of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept; and that the military should be kept under strict subordination to, and governed by the civil power.
Ohio	1802	Art. VIII § 20	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, and they shall be kept up, and that the military shall be kept under strict subordination to the civil power.
Pennsylvania	1838	Art. IX § 21	That the right of the citizens to bear arms, in defense of themselves and the State, shall not be questioned.
South Carolina	1790	No provision	

Tennessee	1834	Art. I § 26	That the free white men of this State have a right to keep and bear arms for their common defence.
Texas	1836	DR § 14th	Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power.
Vermont	1793	Ch. I Art. 16	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.
Virginia	1830	No provision	

APPENDIX II			
RIGHT TO BEAR ARMS – LOCATION IN DOCUMENT			
STATE	DATE	SECTION	TEXT LOCATION
English Bill of Rights	1689		Between raising or keeping a standing army and free elections
Rhode Island Ratification of the U.S. Constitution	1790	17th	Between freedom of speech and press and right to conscientious objector status
Rhode Island	1842	Art. I § 22	Between right to assemble and enumeration of rights shall not impair or deny other rights retained by the people
<b>United States</b>	1791	Amend. II	Between freedom of religion, press, expression and soldier quartered in house
Alabama	1819	Art. I § 23	Between right to assemble and military provision
Arkansas	1836	Art. II § 21	Between right to assemble and soldier quartered in house
Connecticut	1818	Art. I § 17	Between right to assemble and military subordination to civil power
Delaware	1831	No provision	
Florida	1838	Art. I § 21	Between right to assemble and soldier quartered in house
Georgia	1798	No Bill of Rights	
Illinois	1818	No provision	
Indiana	1816	Art. I § 20	Between right to assemble and soldier quartered in house
Kentucky	1799	Art. X § 23	Between right to assemble and military subordination to civil power



Louisiana	1812	No provision	
Maine	1819	Art. I § 16	Between right to assemble and military subordination to civil power
Maryland	1776	No provision	
Massachusetts	1780	Pt. I Art. XVII	Between freedom of the press and principles of behavior necessary to preserve liberty
Michigan	1835	Art. I § 13	Between habeas corpus and military subordination to civil power
Mississippi	1832	Art. I § 23	Between right to assemble and military subordination to civil power
Missouri	1820	Art. XIII § 3	Between the power of the people to control government and alter the constitution and freedom of religion
New Hampshire	1792	Pt. I Art. XIII	Between protection of life, liberty and property rights and remedies
New Jersey	1776	No Bill of Rights	
New York	1821	Art. VII § 5	Between no office holding by religious persons and habeas corpus
North Carolina	1776	DR Art. XVII	Between tax and right to assemble
Ohio	1802	Art. VIII § 20	Between right to assemble and corporal punishment under military law
Pennsylvania	1838	Art. IX § 21	Between right to assemble and military subordination to civil power
South Carolina	1790	No provision	
Tennessee	1834	Art. I § 26	Between corporal punishment of militia and citizens under martial law

			and soldier quartered in house
Texas	1836	DR § 14th	Between property rights and well-regulated militia
Vermont	1793	Ch. I Art. 16	Between power of legislature and martial law
Virginia	1830	No provision	

