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Second Amendment Right to Bear Arms, Quilici v. Village of Morton Grove

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CONSTITUTIONAL LAW

Second Amendment Right to Bear Arms

Quilici v. Village of Morton Grove 532 F. Supp. 1169 (N.D. Ill. 1981)

FROM THE COLONIAL firelock to today's inexpensive handgun, the United States has toiled over the right to keep and bear arms.[1] In 1981, the United States District Court for the Northern District of Illinois addressed this recurring issue in *Quilici v. Village of Morton Grove*[2] The arguments espoused in *Quilici* consisted of both traditional and novel hypotheses on this uncertain subject. Delivered within an atmosphere of renewed concern over the use and possession of firearms, the arguments in *Quilici* provide insight into the reasoning on both sides of the gun-control issue.[3]

I. REVIEW OF THE FACTS AND RATIONAL

In *Quilici,* the Village of Morton Grove, Illinois, enacted a municipal ordinance which mandated that no person may possess a handgun, unless such handgun had been made permanently inoperative.[4] Certain exceptions existed in the regulation that permitted the individual ownership of functioning handguns when their use was recreational.[5] These provisions were qualified by stating that the handgun's use and storage were limited to the premises of a licensed gun club.[6] An action was brought by the local residents challenging the constitutionality of this regulation. After careful review, the court held that the gun-control ordinance did not violate either the Illinois State Constitution or the United States Constitution.[7]

In reference to state constitutional considerations, Judge Decker stated that the municipality's interest in public health and safety was a valid state police

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[1]Numerous hypotheses have been set forth concerning whether there exists an individual right to keep and bear arms. Although *Quilici* discussed many of these viewpoints, it is not a conclusive examination of this area of the law. Instead the scope of the case is limited to those principles expressly examined within the opinion's text. For further elaboration *see generally* W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1766); and J. Levin, *The Right to Bear Arms: The Development of the American Experience,* 48 CHICAGO-KENT L. REV. 148 (1971).

[2]532 F. Supp. 1169 (N.D. Ill. 1981).

[3]In 1980 approximately 340,000 Americans were assaulted with handguns. Add to this figure the murder of 10,000 more persons by handguns. The Washington Post, Dec. 21, 1980, at 8. col. 1.

[4]532 F. Supp. at 1171. Exceptions were given to peace officers, prison officials, members of the armed forces and national guard. VILLAGE OF MORTEN GROVE, ILL., CODE OF ORDINANCES § 132.102 (B)(2)(D)(1)(2)(3) (1981).

[5]*Id.* at § 132.102(B)(E)(7).

[6]*Id.*

[7]*Id.* at 1185.

power objective. Moreover, the statutory means of accomplishing this goal were neither arbitrary nor unreasonable, and therefore, were within the realm of the municipality's police power.[8] Turning its attention to possible violations of the United States Constitution, the court next considered arguments based on the second, fifth, and ninth amendments. However, plaintiffs failed to sustain their contention that an individual's possession and use of firearms are personal rights guaranteed under the above mentioned constitutional provisions.[9] Hence, the court found no merit in the plaintiffs' claims, upholding the city ordinance as valid.[10] *Quilici* examines considerations crucial to determining the regulation of firearms by city and state government. The following note reviews the potential ramifications of the decision.

A. *The Second Amendment Issue*

In an effort to establish the invalidity of the statute, the residents of Morton Grove argued that the second amendment of the United States Constitution,[11] made applicable to the states by the fourteenth amendment, confers on an individual the right to keep and bear arms.[12] In advancing such a position, the plaintiffs contended that the second amendment was meant to be an individual right as opposed to a collective right.[13] The history surrounding the creation of the second amendment provides some insight into this inquiry. The original draft of the provision, proposed by James Madison, reads: "The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[14] Implicit within the draft is the concept that the citizens of the United States could prevent the potential imposition of federal government totalitarianism upon the states because of the protection afforded by armed state militias. The thrust of the provision was to protect the citizenry from an all powerful central government rather than to create an individual right to keep and bear arms.[15] Although this draft was later revised, the same pen was put to both the original and modified versions. James Madison's own comments illustrate support for this interpretation.[16]

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[8] *Id.* at 1177-79.

[9] *Id.* at 1180-85.

[10] *Id.* at 1185.

[11] U.S. CONST. amend. II, states, "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."

[12] 532 F. Supp. at 1180.

[13] *Id.*

[14] 1 ANNALS OF CONG. 34 (1789), *construed in* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment,* 2 HASTING CONSTITUTIONAL L. Q., 961, 994 (1975).

[15] *See* Elliot, *The Right To Keep And Bear Arms,* WIS. B. BULL. May 1980, at 34. *But see* Cantrell, *The Right to Bear Arms: A Reply,* WIS. B. BULL. Oct. 1980, at 21.

[16] James Madison implicitly argues this point stating:

> But were the people to possess the additional advantage of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out

As mentioned earlier, the intentions of the Constitutional Convention are important in understanding the second amendment's effect upon the nation, state, and individual. For as illustrated in *Quilici,* neither the acceptance nor the rejection of the above historial analysis has eased the debate in defining the scope of the amendment. Our Founding Fathers formulated the Constitution as a document with enough flexibility to be adaptable to the changes of time. Over the Nation's lifetime, many of the original provisions have been enlarged in their scope and applicability.[17] Since *Marbury v. Madison,*[18] the judiciary has possessed the authority to interpret the United States' Constitution. Consequently, the second amendment's impact upon the area of gun control must be measured in accordance with prior case law.

In *United States v. Cruikshank,*[19] the Court laid the initial foundation for interpreting the second amendment. In *Cruikshank,* a conspiracy had allegedly occurred which deprived two black citizens of rights and privileges granted to them as defined by the Civil Rights Enforcement Act of 1870[20] and secured by the Constitution. In deciding whether the municipality's efforts to prevent plaintiffs' possession and use of firearms was a violation of an individual's right, the Court declared that the second amendment was a limitation only upon Congress.[21] *Presser v. Illinois,*[22] decided eleven years later, dealt with a paramilitary association incorporated under the State of Illinois. Citing *Cruikshank,* the Court reiterated the second amendment's limited scope, noting: "[A] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States."[23] The constitutional provision was viewed as being applicable only to prevent the federal government from disarming the states, thus having no bearing upon the states' conduct toward individuals.[24]

In 1938, *United States v. Miller*[25] dealt with the National Firearms Act of 1934[26] which, in part, required the registration of certain arms. Allegedly,

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of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.

THE FEDERALIST NO. 46, at 335 (J. Madison).

[17]Many of the amendments to the United States Constitution have been enlarged in their application to the individual American. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment).

[18]5 U.S. (1 Cranch) 137 (1803).

[19]92 U.S. 542 (1875).

[20]Civil Rights Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 14 (1970) current version at 18 U.S.C. § 241-45 (1977).

[21]92 U.S. at 553.

[22]116 U.S. 252 (1886).

[23]*Id.* at 265.

[24]*Id.*

[25]307 U.S. 174 (1939).

[26]National Firearms Act of 1934, ch. 757, 48 Stat. 1236-1240 (1934) (current version at 26 U.S.C. § 5802 (1977).

defendant's transportation of an unregistered shotgun, with a barrel under eighteen inches in length, violated this Act. In rejecting defendant's second amendment argument, the Court implicitly defined the scope of the amendment.[27] It indicated that the right to bear arms exists in the collective sense.[28] This means a state is constitutionally guaranteed that its militia may keep and bear arms. Yet the right does not attach to the individual. It is exercisable solely by the state, as a collective entity, to preserve the local militia. Further, when elaborating on this point, the Court emphasized, possibly by mistake,[29] that it is the purpose of possessing the weapon which determines whether the second amendment is controlling:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[30]

Miller, however, fails to give a satisfactory explanation of whether all arms are sufficiently related to militia service. These gaps were the object of scrutiny three years later in *Cases v. United States.*[31] Attempting to clarify the Supreme Court's decision, the lower court concentrated on the types of arms that may be considered to be related to militia service. Noting that, "some sort of military use seems to have been found for almost any modern lethal weapon,"[32] the court was forced to focus its attention on the purpose of possession, and not on the individual, to determine when the right to bear arms attaches. To do otherwise would, in effect, grant an across-the-board right to all Americans. Although *Cases* avoided any definite guidelines, it did encourage an ad hoc approach based upon a case-by-case evaluation of the firearm in question.[33]

In summary, these cases recognize the second amendment as a limitation upon the federal government by creating a collective right in the states. As noted, this refers to the states' right to create and maintain a militia for the purpose of protecting their sovereignty from encroachment by the federal government. Yet, the individual is not granted any such guarantee to keep and bear arms. As mentioned earlier, ample justification exists for this approach. Herein is the inadequacy of *Quilici.* The court relied solely on the decision in *Presser* and did not discuss the collectivism line of reasoning.[34]

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[27]307 U.S. at 178.

[28]*Id.* Citing the militia clauses of the constitution, Justice McReynolds said: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."

[29]Weatherup, *supra* note 14, at 999.

[30]307 U.S. at 178.

[31]131 F.2d 916 (1st Cir. 1942).

[32]*Id.* at 922.

[33]*Id.*

[34]532 F. Supp. at 1183-84.

In *Quilici,* the plaintiffs' argued that the second amendment had been incorporated into the fourteenth amendment,[35] thus making the second amendment guarantees available to the individuals of each state. However, the court recognized *Presser* as a good law stating, "the Second Amendment does not apply to the states and localities and so is not infringed by the city ordinance."[36] Through this holding, the court limited any use of the fourteenth amendment to the more narrow reading of the second amendment found in *Cruikshank* and *Miller.*

The *Quilici* decision repudiates plaintiffs' anti-gun control approach to the second amendment without a thorough discussion of the issue. No mention is made of an alternative reading of *Presser,* which suggests that the right to bear arms be incorporated into the fourteenth amendment.[37] Commentators supporting this view rely on the following dicta of the Court:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.[38]

In light of this explanation, the Court in *Presser* does not directly grant an individual the right to keep and bear arms under the second amendment. Instead, the amendment confers upon the federal government the access to a well armed militia, beyond the national standing army.[39] The militia clauses of the Constitution authorize this federal access to the unorganized militia existing within the states.[40] It is arguable that these provisions create a federal guarantee co-existing with the states' right to organize a militia to protect against the intrusion of the federal government by the states. Just as the states' sovereignty is entitled to protection from the federal government, so is the federal government afforded protection against any efforts by the states to obstruct federal access to the local militias. Consequently, the state is limited in the regulation it may impose upon the individual use and possession of arms. Otherwise, uncontrolled local regulation could subvert the federal government's constitutional guarantee to a well armed militia. Therefore, the effect of the second amendment is to provide an individual the right to keep and bear arms.

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[35] *Id.*

[36] *Id.* at 1182.

[37] Weatherup, *supra* note 14, at 997.

[38] 116 U.S. at 265.

[39] *Id.* In order to maintain the public security the federal government may draw from both the standing national army and the state militias. This is the position of *Presser.*

[40] U.S. CONST. art. I, § 8, cl.15, "To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions"; art. I, § 8, cl.18, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Judge Decker's opinion, in *Quilici,* rejected this second amendment argument. As noted, the court viewed the second amendment strictly as a limitation on the federal government.

B. *The Fifth Amendment Issue*

One of the earliest limitations on the government was the fifth amendment's prohibition of the public taking of private property without compensation.[41] In *Quilici,* plaintiffs alleged Morton Grove's gun control statute was invalid because it constituted a taking by the city without just compensation.[42] The United States District Court of the Northern District of Illinois responded in turn:

> In order for a regulatory taking to require compensation, however, the exercise of the police power must result in the destruction of the use and enjoyment of a legitimate private property right [citation omitted]. The Morton Grove ordinance does not go that far. The geographic reach is limited; gun owners who wish to may sell or otherwise dispose of their handguns outside of Morton Grove.[43]

The regulation at bar evoked a direct and immediate interference with the use and value of the handguns.[44] Once this concession was made, however, the court went no further, declaring the regulation constituted a noncompensable taking.[45]

A state or local government may take private property for public use under the state's police power if it promotes public health, morals, safety, or welfare.[46] This is justified as a reasonable exercise of police power. But, as *Quilici* demonstrates, some takings require compensation while others do not.[47] This is important since Morton Grove's taking was not compensated, and therefore, would be invalid if deemed to be a taking requiring compensation. Justice Brennan's remarks in *Penn Central Transportation Co. v. New York City*[48] illustrate the underlying rationale for the *Quilici* court's adjudication that the statutory taking was noncompensable. "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants [the owners] opportunities further to enhance not only the Terminal site proper but

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[41]U.S. CONST. amend. V reads in part: "[N]or shall private property be taken for public use without just compensation." This restriction is applicable only for limiting other constitutional provisions which authorize the taking of private property for public use. It is not an authorization, in itself, for such taking.

[42]532 F. Supp. at 1183-84.

[43]*Id.*

[44]*Id.* at 1185-88. The purpose of the municipal regulation was to place a burden upon the use and possession of handguns. This is obvious from the statute's language. Therein, an individual was severely limited in the use and possession of a handgun.

[45]*Id.* at 1183-84.

[46]*See, e.g.,* Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[47]National Board of YMCA v. United States, 395 U.S. 85 (1969); *But see* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[48]438 U.S. 104 (1978).

also other properties."[49] Moreover, the interference with an owner's property does not constitute a compensable exercise of the local government's police power if it allows the owner to make some reasonable use of his property.[50] Relying upon the statute's named exception,[51] the court in *Quilici* held that the burden imposed upon the plaintiffs did not prohibit a reasonable use of the handguns.[52] Consequently, no compensation was due to the handgun owner.

Justice Rehnquist's dissent in *Penn Central Transportation Co.* reveals the conflict existing between compensated and noncompensated takings. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed. . . . [A] taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property."[53] Seemingly, Jusitce Rehnquist would require compensation in takings where any burden has been placed on the property. This conflict between Justice Brennan's and Justice Rehnquist's positions has been reiterated in other fifth amendment cases.[54] *Quilici* does not adequately refute Rehnquist's position, rather it merely concentrates upon bolstering the Brennan approach. The text of the *Quilici* opinion fails to show the court acknowledged the existence of the Rehnquist line of reasoning. This conclusion is inappropriate in lieu of the division of authority in fifth amendment cases over the Brennan and Rehnquist positions.[55]

C. *The Ninth Amendment Issue*

Utilizing an ad hoc approach, the judiciary, by way of the fourteenth amendment, has made certain guarantees found within the first ten amendments of the United States Constitution, applicable to the states.[56] Plaintiffs, in *Quilici,* argued that there exists an unenumerated right to self-defense which was recognized by the likes of Aristotle, Cicero and John Locke.[57] Plaintiffs argued that the right to hold arms for the purpose of self-defense is such a fundamental right protected by the ninth amendment.[58]

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[49] *Id.* at 138.

[50] *Id.* at 137.

[51] VILLAGE OF MORTEN GROVE, ILL. CODE OF ORDINANCES § 132.102(E)(7), provides in part that handguns may be used at "[l]icensed gun clubs provided the given club . . . maintains possession and control of handguns used by its members and has procedures and facilities for keeping such handguns in a same place. . . ."

[52] *Id.* at 1184. Allegedly the carved out exceptions within the statute, in addition to its limited geographical reach, provide the affected handgun owner with enough alternatives as to allow the reasonable use and possession of the firearm.

[53] 438 U.S. at 147, 149.

[54] "The question of when a taking requires compensation has appeared before the United States Supreme Court in many areas. *See* Griggs v. Allegheny County, 369 U.S. 84 (1962), low flying aircraft; United States v. Caltex, 344 U.S. 149 (1952), wartime distruction of private property. For general comments *see* J. COSTONIS, C. BERGER & S. SCOTT, REGULATION V. COMPENSATION IN LAND USE CONTROL: A RECOMMENDED ACCOMMODATION, A CRITIQUE, AND AN INTERPRETATION (1977).

[55] *See supra* note 54.

[56] Cantrell, *supra* note 15, at 26.

[57] 532 F. Supp. at 1183.

[58] *Id.* U.S. CONST. amend. IX, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Within its opinion, the *Quilici* court set forth a commentary delineating the weaknesses present in a ninth amendment argument to prohibit gun control. However, the court's rejection of the ninth amendment rationale was premature since the underlying reasons were not fully considered.

Submitting to *Griswold v. Connecticut,*[59] Judge Decker cited the opinion of the Court as delivered by Justice Douglas. Therein, the text reads: "[T]hat specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[60] Quite convincingly, *Quilici* proclaims that the "penumbras" and "emanations" arising from the ninth amendment and other provisions of the Bill of Rights, have manifested themselves solely in the areas of family and procreation.[61] Apart from these classifications, no other allegedly unenumerated rights have endured judicial scrutiny.[62] Clearly, if premised upon Justice Douglas' approach, the alleged unenumerated right to self-defense would be found deficient. Yet, in merely considering Douglas' opinion alone, the authority for the court's rationale totters.[63]

Little mention is made of Justice Goldberg's concurring opinion in *Griswold*[64] in which he, along with Chief Justice Warren and Justice Brennan, posited the ninth amendment as proof of certain fundamental rights existing outside of the first ten amendments to the Constitution. Goldberg's approach did not limit these guarantees to being within the "penumbras" of the first eight amendments, but he also alluded to separate and distinct rights:

> Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. . . . [T]his Court has held, often unanimously, that the Fifth and Fourteenth amendments protect certain fundamental personal liberties. . . . The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight Constitutional amendments.[65]

Furthermore, the court "[m]ust look to the 'traditions and collective conscience

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[59]381 U.S. 479 (1965).

[60]*Id.* at 484. It should be noted that Justice Douglas' opinion did not represent a majority of the Court. Rather it was one of several opinions offered by the Justices.

[61]532 F. Supp. at 1183. *See also* J. Ely, *Foreword: On Discovering Fundamental Values,* 92 HAR. L. REV. 5 (1978).

[62]*See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 630 (10th ed. 1980).

[63]532 F. Supp. at 1183-84. The *Quilici* opinion sets forth its particular interpretation of the fifth amendment but fails to elaborate on its reasons for rejecting plaintiffs' viewpoint. The court uses this dismissal by substitution when it rejected plaintiffs' ninth amendment argument.

[64]381 U.S. at 486.

[65]*Id.* at 492.

of our people' to determine whether a principle is 'so rooted there as to be ranked as fundamental.' "[66] Citing several famous natural law philosophers, in addition to certain English common law cases, plaintiffs endeavored to reveal the concept of possessing arms for defense of person and home as an accepted guarantee in the lives of our ancestors.[67] Hence, it may be argued that the right to bear and possess arms for individual use may be deemed to be so rooted within the traditions and the collective conscious of our people as to be ranked fundamental to the ordered liberty of our society. This would connote the existence of an unenumerated individual right to arms. Such an argument may potentially become a strong argument against gun control. Surely, it is an argument which merits future consideration by the judiciary.

D. *The State Constitutional Issue*

Quilici's judicial edict concerning whether the statute was a valid state police power has less precedential value than the federal constitutional issues previously discussed. By its very nature, the court's ascertations are limited to the boundaries of the State of Illinois. Consequently, its pronouncement is likely to be of value only as a point of reference in cases beyond the State's jurisdiction.

Succinctly, the decision viewed the gun control regulation as being based upon the valid state objective of public health and safety. Reviewing the means used to accomplish this goal, the court stated that the regulation was a reasonable exercise of police power being "neither arbitrary nor simplistic." The judgment was founded upon a historical review of article I, section 22 of the Illinois Constitution.[68]

II. CONCLUSION

As the foregoing illustrates, *Quilici*'s precendential value is twofold. It serves to further the pro-gun control positions found in *Cruikshank, Presser,* and *Miller.* Yet, at the same time, plaintiffs' fifth, ninth, and modified second amendment arguments provide arguments for the anti-gun position. Though *Quilici* upholds governmental gun control, the opinion is somewhat ambiguous in its rejection of plaintiff's proposals. Hence there is opportunity for the anti-gun control advocate to reintroduce the issues in upcoming litigation.

MARK BENEDICT

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[66] *Id.* at 493.

[67] 532 F. Supp. at 1183.

[68] ILL. CONST. art I, § 22, provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."