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NOTES

QUILICI V. VILLAGE OF MORTON GROVE: **AMMUNITION FOR A NATIONAL HANDGUN BAN**

Geoffrey La Gioia never expected his simple request for a business license to result in this nation's first ban on the possession and sale of handguns. La Gioia, a twenty-four year old resident of Morton Grove, Illinois, attended the monthly meeting of the Morton Grove Trustees on May 11, 1981, to request a business license for a gun shop.¹ La Gioia was met by a large group of his fellow residents protesting the issuance of the business license,² primarily on the ground that the gun shop would be located in a residential area shopping center where junior high and high school students often congregated.³ Fearing that the thin inner walls of the shopping center would aid criminals in stealing guns,⁴ his fellow residents believed that once a thief had gained access to an adjoining store, a sledge hammer would provide a quick and easy entrance to La Gioia's gun shop.⁵ These concerns led the Morton Grove Trustees to deny La Gioia's request.⁶

Trustee Neil Cashman, however, went even further and, in a completely unexpected move, proposed an ordinance banning the sale of handguns,⁷ and an additional ordinance prohibiting the possession of handguns.⁸ When the smoke cleared, the Morton Grove Trustees adopted the ordinance banning the sale of handguns by a five to one margin,⁹ but tabled the ordinance prohibiting handgun possession until their next meeting on June 8, 1981.¹⁰

During the next four weeks the battle lines were drawn. The Illinois State Rifle Association circulated a flyer throughout Morton Grove encouraging residents to come to the June 8th meeting and oppose the handgun ordinance.¹¹ The recently formed Skokie-Morton Grove Chapter of the Committee for Handgun Control staged a rally on June 7th, encouraging people to attend the June 8th meeting and support the ordinance.¹² The stage was set. The entire country focused its attention on the Morton Grove Trustees'

1. Chicago Tribune, June 10, 1981, § 1, at 12, col. 1.

2. According to one account, approximately 200 people attended the May 11th meeting. Morton Grove Champion, May 14, 1981, at 3, col. 1.

3. Morton Grove Life, May 14, 1981, at 1, col. 1.

4. *Id.*

5. *See id.*

6. *Id.*

7. Morton Grove Life, June 1, 1981, at 1, col. 1.

8. *Id.*

9. *Id.*; *see also* Morton Grove News, May 14, 1981, at 3, col. 1.

10. Morton Grove Life, May 14, 1981, at 1, col. 1.

11. Morton Grove Life, May 28, 1981, at 3, col. 1.

12. *Id.*

June 8th meeting,¹³ where the fate of the most restrictive gun control proposal in this nation's history would be decided.¹⁴

Attempting to discourage nonresidents from attending, the trustees decided to hold the June 8th meeting at the village hall rather than in a larger facility, such as a school auditorium.¹⁵ Nevertheless, when the meeting convened, the village hall meeting room was filled to capacity with approximately eighty people.¹⁶ An additional crowd of 200 stood outside in a light rain listening to the meeting over loudspeakers.¹⁷ As the majority of them opposed the ordinance banning handgun possession,¹⁸ they were understandably distressed when they heard over the loudspeakers that the trustees had adopted the ordinance by a four to two margin.¹⁹ In response to a resident's simple request for a business license, Morton Grove had banned both the sale and possession of handguns.

The reaction to the adopted ordinance was widespread. Both the national, and even international, electronic and print media devoted extensive coverage to Morton Grove's gun control efforts.²⁰ Within three weeks of enacting the handgun ban, the village had received over 300 letters commenting on the ordinance; the response was overwhelmingly favorable.²¹ Several letters enclosed personal checks to help defray legal costs if the ordinance was challenged in court,²² and many letters came from state and local legislators

13. See Morton Grove Life, June 4, 1981, at 1, col. 1.

14. Although several jurisdictions had previously banned the sale of handguns, prior to Morton Grove's ordinance, no jurisdiction had banned both the sale *and possession* of handguns. See N.Y. Times, June 13, 1981, at 22, col. 1; see also Morton Grove Life, June 25, 1981, at 1, col. 1; Chicago Sun-Times, June 11, 1981, at 61, col. 1; Morton Grove Champion, June 11, 1981, at 3, col.1.

15. Morton Grove Life, June 11, 1981, at 1, col. 1.

16. Morton Grove Champion, June 11, 1981, at 3, col. 1.

17. *Id.* Another report estimated a crowd of only 150 outside village hall. Morton Grove Life, June 11, 1981, at 1, col. 1.

18. Morton Grove Life, June 11, 1981, at 1, col. 1. Many wore black "NRA Freedom" T-shirts and several carried signs reading "Free Men Own Handguns—Slaves Don't" and "Mess With My Second Amendment—I'll Mess With Your First." *Id.*

19. Chicago Sun-Times, June 11, 1981, at 61, col. 1; see also Morton Grove Life, June 11, 1981, at 1, col. 1.

20. The three major networks televised reports on the ordinance and distributed to their affiliates taped reports that were broadcast around the country. Morton Grove Bugle, June 25, 1981, at 3, col. 1. The story also was carried by the nation's three major wire services and reported by newspapers throughout the country. *Id.* Several major newspapers printed editorials praising Morton Grove's actions. See, e.g., N.Y. Times, June 13, 1981, at 22, col. 1; Chicago Tribune, June 12, 1981, § 1, at 21, col. 1; Chicago Sun-Times, June 11, 1981, at 61, col. 1. On the international level, the Canadian, European and Australian news media all reported on Morton Grove's gun control efforts. See Morton Grove Bugle, June 25, 1981, at 3, col. 1.

21. As of June 30, 1981, Morton Grove Village Hall had received 312 letters commenting on the June 8th ordinance; 213 supported the handgun ban and 99 opposed it. Morton Grove Bugle, July 2, 1981, at 3, col. 1. Furthermore, Citizen's Lobby, a Chicago-based polling organization, reported that almost 74.5% of Morton Grove residents polled approved of banning the *sale* of handguns, while only 48.5% approved of banning handgun *possession*. Morton Grove News, June 18, 1982, at 3, col. 1.

22. Within one week of adopting its handgun ban, the Morton Grove Trustees received

around the country requesting copies of the new ordinance.²³

Not all of the reaction, however, was positive. There were unsuccessful attempts to repeal the ordinance²⁴ and to enact legislation nullifying municipal handgun bans.²⁵ Moreover, on March 15, 1982, the town of Kennesaw, Georgia responded to Morton Grove's law by enacting an ordinance requiring the head of every household to own a firearm.²⁶

Although the reaction to Morton Grove's ordinance was mixed, it was never doubted that its constitutionality would eventually be tested in court.²⁷ Several national organizations offered financial assistance to anyone challenging the ordinance,²⁸ while others pledged aid to Morton Grove.²⁹ Less than twenty-four hours after the ordinance was adopted, Victor Quilici, a Morton Grove resident and registered firearms owner, filed suit in an Illinois circuit court challenging the constitutionality of the ordinance.³⁰ Morton Grove removed the action to federal court where it was consolidated with two similar actions in *Quilici v. Village of Morton Grove*.³¹ The district court

six personal checks to help defray legal expenses. Morton Grove Bugle, June 25, 1981, at 3, col. 1. They even received letters of support from a class of elementary school students in California. *Id.*

23. Within two weeks of its adoption, nearly 40 requests for copies of the Morton Grove ordinance were received from state and local legislators around the nation. Morton Grove Bugle, June 25, 1981, at 47, col. 1.

24. See Morton Grove Champion, October 14, 1982, at 3, col. 1.

25. On June 22, 1981, a zoning bill, passed by the Illinois Senate, was amended by the Illinois House of Representatives to preclude municipalities from regulating firearms. The bill, as amended, ultimately was defeated on April 14, 1982, when it failed to receive the required three-fifths vote for passage. See Legislative Synopsis and Digest of the 1982 Session of the Eighty-Second General Assembly State of Illinois (No. 15) Vol. I, at 40 (1982).

26. Morton Grove Life, March 18, 1982, at 3, col. 1.

27. Richard Flickinger, Mayor of Morton Grove, stated: "We know we are going to court if the legislation passes, but we think it is time to get the ball rolling on better control of handguns." Morton Grove Champion, June 4, 1981, at 3, col. 1. Several of the Morton Grove Trustees shared this belief. Trustee Neil Cashman, sponsor of the ordinance, maintained that it was time to "get into court" and determine the permissible scope of municipal handgun control. Morton Grove Life, May 28, 1981, at 1, col. 1. Another trustee, Gregg Youstra, voted for the ordinance hoping to force the United States Supreme Court to determine whether municipalities could constitutionally prohibit handgun possession. Morton Grove Champion, June 11, 1981, at 3, col. 1. Furthermore, a New York Times editorial also was certain that the ordinance would be challenged in court. See N.Y. Times, June 13, 1981, at 22, col. 1.

28. James Valentino, a representative of the Illinois Rifle Association, said that the National Rifle Association would give financial aid to any individual who challenged the ordinance in court. Morton Grove Champion, June 11, 1981, at 3, col. 1. Furthermore, the Second Amendment Foundation contributed \$2,000 to Victor Quilici's legal attack on the handgun ban. Morton Grove Champion, June 25, 1981, at 8, col. 1.

29. The National Coalition to Ban Handguns offered to pay all of Morton Grove's costs, except attorney fees, related to defending the constitutionality of its handgun ban. Morton Grove Champion, June 25, 1981, at 8, col. 1. Additionally, an unnamed, prestigious Washington, D.C., law firm reportedly offered free legal assistance to Morton Grove. Morton Grove Bugle, June 11, 1981, at 38, col. 1.

30. See *Quilici v. Village of Morton Grove*, No. 81 CH 4439 (1st Cir. Ct. Ill. filed June 9, 1981).

31. 532 F. Supp. 1169, 1171 (N.D. Ill. 1981).

held that the ordinance was constitutional³² and upon appeal, the Seventh Circuit affirmed in a two to one decision.³³

A careful analysis of *Quilici v. Village of Morton Grove* requires a thorough examination of the right to bear arms as guaranteed by both the second amendment to the United States Constitution and by article I, section 22 of the Illinois Constitution. The authority of an Illinois municipality to enact a handgun ban also must be carefully scrutinized, as must the question of the existence of a fundamental right under the ninth amendment to the United States Constitution to possess a handgun for purposes of self-defense. Finally, an analysis of *Quilici* would be incomplete without an assessment of the decision's impact on future gun control efforts.

BACKGROUND

The Federal Right to Bear Arms

The historical foundation of the federal right to bear arms was laid in seventeenth century England. After James II disarmed the Protestants in 1688, Parliament enacted the English Bill of Rights which included a provision enabling Protestants to possess arms.³⁴ Intending to ensure the preservation of the Protestant religion against the King's huge standing army, comprised principally of Catholics,³⁵ the provision guaranteed a *collective* right to bear arms. This provision protected the right of Protestants to serve in the royal army, but did not confer upon them an *individual* right to possess arms in self-defense.³⁶ It was this collective concept of the right to bear arms that the British colonists brought with them to America.³⁷

During the colonial period in America, the right to bear arms acquired new importance. A primary grievance of the colonists concerned the oppression by British military rule³⁸ through its standing army. This army was viewed as the greatest threat to the colonists' individual liberty.³⁹ Consequently, each colony established a militia to protect itself against the British

32. *Id.* at 1184-85.

33. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 271 (7th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3236 (U.S. Oct. 4, 1983) (No. 82-1822).

34. The provision read: "subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." Bill of Rights, 1 W. & M., ch. 2 (1689), reprinted in *SOURCES OF OUR LIBERTIES* 246 (R. Perry ed. 1959).

35. For a general discussion of the historical events which led to the adoption of the English right to bear arms, see Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 474 (1915); Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46, 48 (1966) [hereinafter cited as Feller & Gotting]; Comment, *Shooting to Kill the Handgun: Time to Martyr Another American "Hero,"* 51 J. URB. L. 491, 515-16 (1974) [hereinafter cited as Comment, *Shooting to Kill*].

36. See Feller & Gotting, *supra* note 35, at 48; Comment, *Shooting to Kill*, *supra* note 35, at 516.

37. Comment, *Shooting to Kill*, *supra* note 35, at 516.

38. Feller & Gotting, *supra* note 35, at 49. For a detailed discussion of the particular objections the colonists had to Great Britain's military rule, see *id.* at 49-53.

39. *Id.* at 49-53.

forces.⁴⁰ Since the colonies generally were unable to afford to arm these militias, colonial statutes imposed a duty on each colonist to keep and bear arms.⁴¹

During the Revolutionary War period, many of the states framed constitutions which included specific bills of rights. All of these constitutions contained provisions reflecting the colonial fear of British standing armies.⁴² These provisions guaranteed the right to bear arms in an attempt to replace colonial standing armies with popular militias and, thereby, to ensure individual liberties.⁴³

When the Constitutional Convention convened in 1787, a new concern arose regarding the right to bear arms. In addition to the historical fear that standing armies threatened individual liberties, many of the framers were concerned about the balance of military power between the states and the new federal government.⁴⁴ Although attempts were made to secure states' rights to establish militias,⁴⁵ these attempts were unsuccessful because of the countervailing necessity to establish an effective and centralized military.⁴⁶ During the struggle for ratification, the concern over the balance of military power resurfaced.⁴⁷ Although the Constitution was ratified in 1787, the issue of state militias was not resolved until two years later.

Among the proposed constitutional amendments introduced by James Madison to the House of Representatives on June 8, 1789, was the initial draft of the second amendment.⁴⁸ Madison proposed that the right to keep

40. *Id.* In establishing these militias, the colonists were unconcerned with guaranteeing a personal right to possess firearms. By contrast, their goal was to protect their colonies against the military rule of Great Britain's standing army and to protect the colonies in case Great Britain's standing army failed to defend them if attacked. *Id.* at 52-53 (citing MILLER, *THE CASE FOR LIBERTY* 68 (1965)).

41. Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI[-] KENT L. REV. 148, 148-49 (1971) [hereinafter cited as Levin].

42. For an examination of these various state constitutional provisions, see Feller & Gotting, *supra* note 35, at 53-56; Levin, *supra* note 41, at 152-54.

43. By replacing standing armies with popular militias, it was believed that a source of arbitrary military power would be removed from the control of state governments. Levin, *supra* note 41, at 153. Consequently, the right to bear arms, conferred by state constitutions during the Revolutionary War period, was not intended to guarantee an individual right to possess arms; rather, it was aimed at preserving the existence of popular militias. *Id.*

44. *Id.* at 151.

45. For a discussion of these attempts, see Feller & Gotting, *supra* note 35, at 56-58; Levin, *supra* note 41, at 154-56.

46. Levin, *supra* note 41, at 155.

47. *Id.* at 156-58; Feller & Gotting, *supra* note 35, at 58-60.

48. As originally proposed, the amendment provided that "[t]he right of the people to keep and bear arms shall not be infringed; a well-armed and 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." 1 ANNALS OF CONG. 434 (J. Gales ed. 1789). When it was first reported out of committee, the proposal had been modified to state: "A well-regulated Militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." *Id.* at 749. When it was finally adopted by Congress, the second amendment read as it does presently: "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

and bear arms be guaranteed to the people so that the federal government could not destroy the state militias on its own authority.⁴⁹ The amendment was aimed at preserving both individual liberties and states' rights by balancing military power between the federal and state governments.⁵⁰ Accordingly, the framers of the second amendment intended to guarantee a *collective* right to bear arms—a right possessed by the people as a corporate body so the state could maintain militias as a check against the prowess of the federal standing army.⁵¹ Thus, the second amendment was not intended to guarantee an *individual* right to bear arms except, perhaps, to individual militia members.⁵²

On those rare occasions when the United States Supreme Court has construed the second amendment, it has consistently emphasized the collective nature of the federal right to bear arms. The first time the Court considered the second amendment was in *United States v. Cruikshank*,⁵³ an 1875 civil rights case, in which the Court only indirectly touched upon the right to bear arms.⁵⁴ Noting that the second amendment applies only to the federal government, the Court found that it presents no obstacle to state firearms regulations.⁵⁵ Eleven years later, in *Presser v. Illinois*,⁵⁶ the Court addressed the second amendment directly for the first time.⁵⁷ Relying on *Cruikshank*, the Court held that the second amendment only limits the power of Congress, and not the power of the states, to regulate firearms.⁵⁸ Nevertheless,

infringed." U.S. CONST. amend II. For a discussion of the debates surrounding the various drafts of the second amendment, see Feller & Gotting, *supra* note 35, at 61-62.

49. See Feller & Gotting, *supra* note 35, at 61-62; Levin, *supra* note 41, at 159; Comment, *Shooting to Kill*, *supra* note 35, at 516.

50. Levin, *supra* note 41, at 160.

51. See *id.* at 159; Comment, *Shooting to Kill*, *supra* note 35, at 517. Two commentators contend that the presence of the conscientious objector provision in early drafts indicates that the second amendment right to bear arms was intended to protect a collective, and not an individual, right. Feller & Gotting, *supra* note 35, at 61.

52. *But see* Weiss, *A Reply to Advocates of Gun-Control Law*, 52 J. URB. L. 577 (1974). Weiss contends that under the second amendment, individuals have an absolute right to possess arms. Arguing that the second amendment was intended to secure individual liberty, Weiss contends that it aids in the exercise of first amendment freedoms. *Id.* at 581-83.

53. 92 U.S. 542 (1875) (reversing a conviction for conspiracy to deprive blacks of their constitutional rights).

54. *Cruikshank* involved a 16 count indictment under the Enforcement Act of May 31, 1870, § 6, 16 Stat. 140, 141. The government alleged a conspiracy to deprive blacks of several constitutional rights; the right to bear arms was merely one of them. 92 U.S. at 548.

55. The *Cruikshank* Court found the second amendment to grant no individual right to bear arms. 92 U.S. at 553. Noting that the existence of an individual's right to bear arms does not depend on the second amendment, the *Cruikshank* Court declared that the amendment simply precludes Congress from infringing whatever state right individuals might have to bear arms. *Id.* Moreover, the Court classified the second amendment as "one of the amendments that has no other effect than to restrict the powers of the national government. . . ." *Id.*

56. 116 U.S. 252 (1886).

57. *Presser* involved the constitutionality of an Illinois statute which prohibited groups from associating together as military organizations, or from drilling or parading with arms in cities and towns, unless authorized to do so by law. *Id.* at 253-54.

58. *Id.* at 265.

the *Presser* Court noted that the states' power to regulate firearms was not absolute.⁵⁹ The Court found that all citizens capable of bearing arms constitute the *reserve militias* of the United States and of the states individually.⁶⁰ The *Presser* Court, therefore, concluded that the states could not constitutionally prohibit citizens from keeping and bearing arms when such prohibitions inhibit the maintenance of well-regulated militias.⁶¹

After *Presser*, more than fifty years passed before the Court again focused its attention on the second amendment.⁶² At issue in *United States v. Miller*⁶³ was the constitutionality of the National Firearms Act,⁶⁴ a scheme of congressional firearms regulations. In addition to reaffirming the collective right concept, the *Miller* Court established a standard to determine the extent to which arms could be constitutionally regulated. The *Miller* Court held that the second amendment guarantees the right to keep and bear only those arms which have "some reasonable relationship to the preservation or efficiency of a well-regulated militia."⁶⁵

Miller represents the last time in which the Supreme Court considered the second amendment. Several lower federal courts, however, have since commented on the federal right to bear arms.⁶⁶ For example, in *Cases v. United*

59. *Id.*

60. *Id.*

61. *Id.* Noting that the appellant in *Presser* was not a member of an organized state militia, the Court concluded that the challenged statute did not prevent the maintenance of a well-regulated militia. *Id.* at 266. Based upon this reasoning, it appears that if the appellant was a militia member he would have had an individual right to possess arms. *Cf. Levin, supra* note 41, at 165; Comment, *Shooting to Kill, supra* note 35, at 518.

62. In 1894, the Court indirectly considered the second amendment. In *Miller v. Texas*, 153 U.S. 535 (1894), the Court dismissed an appeal from a state court of last resort for failure to raise a federal question prior to appeal. In his motion for rehearing, Miller claimed that his conviction under a Texas statute, prohibiting the carrying of weapons, violated the second amendment. *Id.* at 538. Although the Court dismissed the appeal on the grounds that it was not properly presented on the record, the Court reaffirmed *Cruikshank* and *Presser* by declaring that the restrictions imposed by the second amendment operate only on the federal government. *Id.* (dictum); see also *Robertson v. Baldwin*, 165 U.S. 275 (1897) (recognizing, in dicta, that the second amendment is not violated by laws prohibiting the carrying of concealed weapons).

63. 307 U.S. 174 (1939).

64. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801-5872 (1976)). The defendant in *United States v. Miller* was indicted for violating a provision of this act which regulated the interstate transportation of shotguns with barrels less than 18 inches long. The district court, however, sustained the defendant's demurrer on the grounds that this provision violated the second amendment. *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939). In reversing the district court's decision, the Supreme Court affirmed the collective right concept by recognizing that the purpose of the second amendment was to assure the preservation of well-regulated militias. *Miller*, 307 U.S. at 178.

65. 307 U.S. at 178. The *Miller* Court concluded that sawed-off shotguns failed to meet this reasonable relationship requirement and, therefore, are outside the scope of the second amendment protection. *Id.*

66. Most of these decisions involved challenges to federal firearms regulations. In 1934, Congress enacted the National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801-5872 (1976)). Among other things, the Act required the registration of certain firearms, such as sawed-off shotguns and machine guns. Lower federal courts have consistently upheld the constitutionality of this requirement when challenged on second amend-

States,⁶⁷ decided only three years after *Miller*, the Court of Appeals for the First Circuit criticized the *Miller* holding and found that it applied only to the facts presented therein.⁶⁸ Concluding that the extent to which the second

ment grounds. *See, e.g.*, *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Birmley*, 529 F.2d 103, 107 (6th Cir. 1976); *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971); *United States v. McCutcheon*, 446 F.2d 133, 135-36 (7th Cir. 1971); *United States v. Casson*, 288 F. Supp. 86, 88 (D. Del. 1968); *United States v. Adams*, 11 F. Supp. 216, 219 (S.D. Fla. 1935).

In 1938, Congress enacted another statute regulating firearms, the Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938), amended by Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 226-35 (codified as amended at 18 U.S.C. §§ 921-928 (1976)). This act prohibited, among other things, the possession of firearms by persons previously convicted of a felony. The constitutionality of this prohibition also has been consistently upheld under second amendment challenges. *See, e.g.*, *United States v. Turcotte*, 558 F.2d 893, 895 (8th Cir. 1977); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Cody v. United States*, 460 F.2d 34, 36-37 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972); *United States v. Lauchli*, 444 F.2d 1037, 1041 (7th Cir. 1971), *cert. denied*, 404 U.S. 868 (1972); *United States v. Tot*, 131 F.2d 261, 266-67 (3d Cir. 1942), *aff'g*, 42 F. Supp. 252 (D.N.J. 1941), *rev'd on other grounds*, 319 U.S. 463 (1943); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981); *United States v. Tot*, 28 F. Supp. 900, 903 (D.N.J. 1939).

The possession of firearms by previously convicted felons is also prohibited under the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, 236-37, 18 U.S.C. app. §§ 1201-1203 (1976). The constitutionality of this act has been similarly upheld on second amendment grounds. *See, e.g.*, *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 363 F. Supp. 322, 323 (E.D. Wis. 1973), *aff'd*, 504 F.2d 1288 (7th Cir. 1974); *United States v. Wiley*, 309 F. Supp. 141, 144-45 (D. Minn. 1970), *aff'd*, 438 F.2d 773 (8th Cir. 1971). The constitutionality of a federal statute prohibiting any person, other than a licensed dealer, from engaging in the business of dealing in firearms has also been upheld. *See United States v. Gross*, 313 F. Supp. 1330, 1334 (S.D. Ind. 1970) (declaring that required licensing of firearms dealers does not impair the efficiency of a well-regulated militia), *aff'd*, 451 F.2d 1355 (7th Cir. 1971). Similarly, the constitutionality of a federal statute regulating the exportation of certain ammunition has been sustained. *See United States v. Gurrola-Garcia*, 547 F.2d 1075, 1079 (9th Cir. 1976) (noting that the second amendment does not protect efforts to export munitions). Moreover, in *Eckert v. City of Philadelphia*, 329 F. Supp. 845 (E.D. Pa. 1971), *aff'd*, 477 F.2d 610 (3d Cir. 1973), *cert. denied*, 414 U.S. 839 (1973), a district court upheld the constitutionality of a city ordinance which regulated the purchase and transfer of firearms. The *Eckert* court held that the federal right to bear arms is not conferred on the people; the sole function of the second amendment is to limit the power of the federal government. 329 F. Supp. at 845.

67. 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom. Velasquez v. United States*, 319 U.S. 770 (1943). In *Cases*, the First Circuit examined the constitutionality of the Federal Firearms Act, another scheme of congressional firearms regulation. *See Federal Firearms Act*, ch. 850, 52 Stat. 1250 (1938) (current version at 18 U.S.C. §§ 921-928 (1976)). The *Cases* court held that the second amendment conferred no right to bear arms upon the people; its only function was to prevent the federal government from infringing upon any individual right to bear arms conferred by "local legislation." 131 F.2d at 921.

68. The *Cases* court read the *United States v. Miller* standard to permit federal prohibitions of the possession of any weapon not reasonably related to militia preservation. 131 F.2d at 922. The court noted that if this standard was intended to have general applicability, it was already obsolete (despite being formulated less than four years prior to *Cases*), because almost all modern lethal weapons have "some sort of military use." *Id.* Thus, the *Cases* court con-

amendment limits the federal government must be determined on a case-by-case basis,⁶⁹ the *Cases* court declared that federal regulations violate the second amendment only when they actually inhibit the efficiency of a well-regulated militia.⁷⁰ Other lower federal courts have consistently adhered to *Presser* and its progeny by concluding that the second amendment poses no barrier to state firearms regulations.⁷¹ Following *Miller*, these lower courts have confirmed that the federal right to bear arms embodies a collective, rather than an individual, right. The second amendment, however, is not the sole protector of the right to bear arms. Most state constitutions also have provisions which secure this right.

The Illinois Constitutional Right to Bear Arms

Because the second amendment applies only to the federal government and confers no individual right to bear arms, many state constitutions guarantee this right to their citizens. Some constitutions follow the second amendment by securing only a collective right;⁷² others protect the individual's right to bear arms.⁷³ Several confer the individual right, but subject it to varying degrees of the state's police power,⁷⁴ while a number of state constitutions fail to provide any right whatsoever to bear arms.⁷⁵

cluded that if the *Miller* standard had general applicability, the federal government could only prohibit the possession of such weapons as a "flintlock musket or a matchlock harquebus . . . [because] almost any other [weapon] might bear some reasonable relationship to the preservation or efficiency of a well-regulated militia unit of the present day. . . ." *Id.* Consequently, the *Cases* court limited the standard announced in *Miller* to the facts in that case.

69. *Id.* The *Cases* court stated that the existence of many variables made it impossible to formulate any general test for determining the limitations imposed by the second amendment. *Id.*

70. Based on the facts presented in *Cases*, the court found no evidence that the defendant had ever been a militia member, or possessed firearms in preparation for a military career. *Id.* at 923. Although the court noted that the defendant's firearm was capable of military use, the defendant had no "intention of contributing to the efficiency of the well-regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state." *Id.* Hence, the court concluded that the federal regulation, as applied to the facts presented, did not violate the second amendment. *Id.*

71. See *supra* note 66.

72. See ALASKA CONST. art. I, § 19; ARK. CONST. art. II, § 5; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1; HAWAII CONST. art. I, § 15; IDAHO CONST. art. I, § 11; IND. CONST. art. I, § 32; KAN. BILL OF RIGHTS, § 4; KY. BILL OF RIGHTS, § 1, para. 7; MASS. DECLARATION OF RIGHTS, pt. I, art. XVII; N.C. CONST. art. I, § 30; OHIO CONST. art. I, § 4; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; VA. CONST. art. I, § 13; WYO. CONST. art. I, § 24.

73. See ALA. CONST. art. I, § 26; ARIZ. CONST. art. II § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; ILL. CONST. art. I, § 22; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; OKLA. CONST. art. II, § 26; TEX. CONST. art. I, § 23; WASH. CONST. art. I, § 24.

74. See FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1; ILL. CONST. art. I, § 22; UTAH CONST. art. I, § 6.

75. Presently only 13 state constitutions lack provisions guaranteeing a right to bear arms. These states are California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Dakota, West Virginia and Wisconsin.

Under the Illinois state constitution in effect prior to 1970, Illinois citizens possessed the right to bear arms only to the extent that the right was guaranteed by the second amendment.⁷⁶ Accordingly, the Illinois Supreme Court upheld an ordinance requiring the licensing of concealable weapons dealers,⁷⁷ a statute prohibiting the carrying of concealed weapons,⁷⁸ and ordinances regulating the possession of and requiring the registration of firearms.⁷⁹ In so doing, the Illinois Supreme Court relied on the premise that a "regulation which does not impair the maintenance of the *State's active, organized militia* is not in violation of . . . the second amendment."⁸⁰ Thus, prior to 1970, the right of Illinois citizens to bear arms was essentially coextensive with the right preserved by the second amendment.

In 1970, however, Illinois ratified a new constitution which specifically contained a right to bear arms provision. Article I, section 22 states: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."⁸¹ The extent to which section 22 alters the second amendment right of Illinois citizens to bear arms has yet to be examined by the Illinois Supreme Court. Four Illinois appellate court decisions,* however, have shed some light on this question.

In both *People v. Graves*⁸² and *People v. Wilkes*,⁸³ the Illinois appellate court for the First District upheld a statute which prohibited the possession of loaded firearms under certain circumstances.⁸⁴ The *Wilkes* court noted that under section 22, the state retains its power to control crime by imposing restrictions on the right to carry or possess arms.⁸⁵ In *People v. Williams*,⁸⁶ the First District again upheld the constitutionality of this statute.

76. Illinois constitutions prior to 1970 guaranteed no state right to bear arms.

77. *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917) (ordinance declared to be a valid exercise of the city's police power, and pursuant to their police power, municipalities are free to regulate or prohibit the sale or advertising of deadly weapons without violating the second amendment).

78. *People v. Saltis*, 328 Ill. 494, 160 N.E. 86 (1927) (holding statute to be a valid exercise of the state's police power); cf. *People v. Liss*, 406 Ill. 419, 424, 94 N.E.2d 320, 323 (1950) (reversing conviction for carrying a concealed weapon where individual had no knowledge of weapon's presence).

79. *Brown v. City of Chicago*, 42 Ill. 2d 501, 250 N.E.2d 129 (1969) (ordinances found to be valid exercises of the city's police powers and not violative of the second amendment since they did not impair maintenance of state's militia).

80. *Id.* at 504, 250 N.E.2d at 131 (emphasis added).

81. ILL. CONST. art. I, § 22.

* Subsequent to submission of this Note for publication, the Illinois appellate court in *Kalodimos v. Village of Morton Grove*, 113 Ill. App. 3d 448, 447 N.E.2d 849 (1st Dist. 1983) (petition for leave to appeal filed June 2, 1983), adopted the Seventh Circuit's reasoning in *Quilici* and upheld Morton Grove's handgun ban.—*Ed.*

82. 23 Ill. App. 3d 762, 320 N.E.2d 95 (1st Dist. 1974).

83. 31 Ill. App. 3d 902, 334 N.E.2d 910 (1st Dist. 1975).

84. See ILL. REV. STAT. ch. 38, § 24-1(a)(10) (1973). This statute did not apply to the possession of such weapons within one's home or fixed place of business. *Id.*

85. 31 Ill. App. 3d at 905, 334 N.E.2d at 912.

86. 60 Ill. App. 3d 726, 377 N.E.2d 285 (1st Dist. 1978).

The *Williams* court relied on a 1902 decision of the Idaho Supreme Court⁸⁷ to distinguish between the *constitutional regulation* and the *unconstitutional prohibition* of firearms.⁸⁸ According great weight to the numerous exceptions contained within the statute, the *Williams* court concluded that it was merely a regulation and not a prohibition; therefore, the statute was a valid exercise of the state's police power and did not violate section 22.⁸⁹

The most recent construction of section 22 occurred in *Rawlings v. Department of Law Enforcement*,⁹⁰ a case involving the constitutionality of a statute that conditioned legal possession of a firearm on obtaining a firearm owner's identification card.⁹¹ In *Rawlings*, the appellate court for the Third District determined that the identification card requirement was a reasonable exercise of the state's police power enacted pursuant to section 22.⁹² The court noted that although section 22 "grants to the individual the right to keep and bear arms . . . infringement is expressly allowed in the exercise of the police power."⁹³ Therefore, the *Rawlings* court held the statute valid under both section 22 and the second amendment.⁹⁴

In view of the construction given to section 22 by these appellate decisions, it appears that the right of Illinois citizens to bear arms was broadened under the ratified 1970 state constitution. Under the second amendment, Illinois citizens possess only a collective right to bear arms, reasonably related to the preservation of a well-regulated militia. Under section 22, however, Illinois citizens possess an individual right to bear arms which is

87. *In re Brickley*, 8 Idaho 597, 70 P. 609 (1902) (statute prohibiting the carrying of concealed deadly weapons within city limits held to violate federal and state constitutional rights to bear arms).

88. Under this distinction, statutory *prohibition* of firearm possession would be unconstitutional, while mere statutory *regulation* of such possession would not be. *Williams*, 60 Ill. App. 3d at 728, 377 N.E.2d at 286.

89. *Id.* at 728, 377 N.E.2d at 287. Among the various exceptions were those for individual possession in one's home or place of business and for hunters and fishermen engaged in their pursuits. *Id.* at 727, 377 N.E.2d at 286.

90. 73 Ill. App. 3d 267, 391 N.E.2d 758 (3d Dist. 1979).

91. See ILL. REV. STAT. ch. 38, § 83-2 (1977). The plaintiff in *Rawlings* was denied an identification card because she had voluntarily committed herself to a mental hospital for a period of 10 days. The Illinois Department of Law Enforcement, acting pursuant to statutory authority, denied the plaintiff's request for an identification card on the grounds that she had been a patient in a mental institution within five years of applying for the identification card. See ILL. REV. STAT. ch. 38, §§ 83-4, 83-8 (1977).

92. 73 Ill. App. 3d at 274, 391 N.E.2d at 762-63.

93. *Id.* at 274, 391 N.E.2d at 763. To support this conclusion, the *Rawlings* court quoted a portion of the official commentary accompanying § 22, which indicates that the framers did not intend for § 22 to invalidate licensing and registration requirements or prohibit the carrying of concealed weapons. *Id.* at 275, 391 N.E.2d at 763; see also ILL. ANN. STAT. CONST. of 1970, art. I, § 22 (Smith-Hurd 1971).

94. Relying on *United States v. Miller*, 307 U.S. 174 (1939), and *Brown v. Chicago*, 42 Ill. 2d 501, 250 N.E.2d 120 (1969), the *Rawlings* court found the second amendment right to bear arms limited to those arms which were reasonably related to militia preservation. 73 Ill. App. 3d at 274, 391 N.E.2d at 763. Furthermore, the court noted that the right of an individual to own or possess firearms is not protected by the federal constitution. *Id.*

wholly unrelated to militia preservation. Nevertheless, the right secured by section 22 has been held to be a conditional right, expressly subject to the police power. Whether Morton Grove's ordinance banning the possession of handguns falls within the purview of this police power is the central issue presented in *Quilici v. Village of Morton Grove*.

THE *QUILICI* DECISION

Plaintiffs alleged that Morton Grove's handgun ban⁹⁵ violated article I, section 22 of the Illinois Constitution and the second, ninth and fourteenth amendments of the United States Constitution.⁹⁶ Their arguments rested on the grounds that both the second amendment, applicable to Morton Grove through the fourteenth amendment, and section 22 guarantee an individual right to possess handguns,⁹⁷ that the ninth amendment ensures a fundamental right to possess handguns for purposes of self-defense,⁹⁸ and that Morton Grove lacked the authority to enact firearms regulations.⁹⁹ The district court held that the ordinance was a valid exercise of Morton Grove's police power and, therefore, it did not violate section 22.¹⁰⁰ In a decision authored by Judge Bauer and joined by Judge Wood, the Seventh Circuit affirmed the district court's ruling over Judge Coffey's dissent.

Initially, the Seventh Circuit examined the constitutionality of Morton Grove's handgun ban under section 22. The court determined that although individual handgun possession is protected by section 22,¹⁰¹ such protection is so limited by the police power that a handgun ban fails to violate section 22's right to bear arms.¹⁰² Relying heavily on the constitutional history of section 22, the court reasoned that the Illinois right to bear arms only pro-

95. Morton Grove's ordinance banning the possession of handguns is reprinted in *Quilici*, 695 F.2d at 263-64.

96. *Id.* at 264-65.

97. *Id.* at 266, 269.

98. *Id.* at 271.

99. *Id.* at 267-68. The plaintiffs sought to have the ordinance declared unconstitutional and its enforcement permanently enjoined. *Id.* at 265. Upon filing cross-motions for summary judgment, the district court granted Morton Grove's motion and denied plaintiff's motion. *Id.*

100. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1179 (N.D. Ill. 1981). The district court further held that the second amendment was inapplicable to Morton Grove's ordinance, and that no right to possess handguns was guaranteed by the ninth amendment. *Id.* at 1182-83. Accordingly, the district court upheld the constitutionality of the ordinance and the Seventh Circuit granted review.

101. 695 F.2d at 266-67. Relying on the constitutional history of § 22, the court noted: The [constitutional] debates indicate that the category of arms protected by section 22 is not limited to military weapons; the framers also intended to include those arms that "law-abiding persons commonly employ[ed]" for "recreation or the protection of person and property." Handguns are undisputedly the type of arms commonly used for "recreation or the protection of person and property."

Id. at 266 (citations omitted).

102. *Id.* at 267. In reaching this conclusion the court found it significant that the terms of § 22 grant the right to keep and bear "arms"—not handguns. *Id.* Furthermore, the *Quilici* majority noted that the framers of § 22 contemplated the existence of municipal handgun bans. *Id.*

hibits a complete ban of all arms.¹⁰³ Accordingly, the *Quilici* court found that section 22 permits bans on certain categories of guns, such as handguns, even though such weapons are within the conditional protection of section 22's right to bear arms.¹⁰⁴ The *Quilici* majority then concluded that Morton Grove, under its home rule authority, had the power to enact the ordinance pursuant to its police power under section 22.¹⁰⁵

Next, the *Quilici* court considered the second amendment issue. Relying on *Presser v. Illinois*,¹⁰⁶ the Seventh Circuit held that the second amendment applies only to the federal government and, therefore, poses no obstacle to Morton Grove's ordinance.¹⁰⁷ The *Quilici* majority noted that *Presser* is still good law, despite having been decided ninety-six years ago.¹⁰⁸ Although the court determined that the second amendment was inapplicable, the majority briefly commented on the scope of its protection. Relying on *United States v. Miller*,¹⁰⁹ the *Quilici* court concluded that "the right to bear arms is inextricably connected to the preservation of a militia."¹¹⁰ Therefore, the court found that the second amendment guarantees no individual right to possess handguns.¹¹¹ For the foregoing reasons, the *Quilici* court held that Morton Grove's ordinance does not violate the second amendment.¹¹²

103. *Id.* at 267-68.

104. *Id.* at 268.

105. *Id.* at 267-69. The majority's entire home rule analysis consisted of this statement:

Home rule government is based on the theory that local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns. Illinois home rule units have expansive powers to govern as they deem proper, including the authority to impose greater restrictions on particular rights than those imposed by the states. The only limits on their autonomy are those imposed by the Illinois Constitution or by the Illinois General Assembly exercising its authority to preempt home rule in specific instances.

Id. at 267-68 (citations & footnotes omitted).

106. 116 U.S. 252 (1886). For a discussion of *Presser*, see *supra* notes 56-61 and accompanying text.

107. 695 F.2d at 270.

108. *Id.* The *Quilici* court noted that "the Supreme Court continues to cite to *Presser* . . . it is the law of the land and we are bound by it." *Id.* The court further noted that the "Supreme Court has specifically rejected the proposition that the entire Bill of Rights applies to the states through the fourteenth amendment." *Id.* (citing *Adamson v. California*, 332 U.S. 46 (1947), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908)).

109. 307 U.S. 174 (1939). For a discussion of *Miller*, see *supra* notes 63-65 and accompanying text.

110. *Quilici*, 695 F.2d at 270. The *Quilici* court stated:

Construing [the second amendment's] language according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of militia. This is precisely the manner in which the Supreme Court interpreted the second amendment in *United States v. Miller*, the only Supreme Court case specifically addressing that amendment's scope.

Id. (citations omitted).

111. *Id.*

112. *Id.* at 271.

Finally, the *Quilici* court considered the ninth amendment, and concluded that it does not protect an individual's right to own or possess firearms for self-defense.¹¹³ Essentially, the *Quilici* majority held that because the United States Supreme Court has failed to recognize such a right, that right does not exist.¹¹⁴ Consequently, the court affirmed the district court's decision and upheld the constitutionality of Morton Grove's ordinance.¹¹⁵

ANALYSIS AND CRITICISM

The *Quilici* court's analysis is legitimate as far as it goes; the problem is that it fails to go far enough. The *Quilici* majority adequately examines the claims involving the right to bear arms, as guaranteed by the second amendment to the United States Constitution and article I, section 22 of the Illinois Constitution. In fact, the court unnecessarily analyzes the scope of the inapplicable second amendment. The central question the *Quilici* court should have addressed is whether Morton Grove possessed the authority, under the Illinois home rule, to enact its handgun ban. The court also dismissed the ninth amendment without sufficient analysis. Thus, although the *Quilici* decision is essentially valid, its analytical scope is too narrow.

The Second Amendment

The *Quilici* court correctly analyzed both the applicability and the scope of the second amendment. Although second amendment decisions are scarce, they uniformly agree that the federal right to bear arms applies only to the federal government and not to the states.¹¹⁶ Furthermore, because the Supreme Court has never reconsidered *Presser v. Illinois*,¹¹⁷ it survives as the Court's most recent pronouncement on the applicability of the second amendment to the states.¹¹⁸ This position is also consistent with the legislative history surrounding the second amendment.¹¹⁹ Additionally, the Court repeatedly has rejected the proposition that the entire Bill of Rights has been implicitly incorporated to apply to the states through the fourteenth amendment.¹²⁰ Thus, the *Quilici* court correctly held that the second amendment presents no barrier to Morton Grove's handgun ban.

113. *Id.*

114. *Id.* The *Quilici* court reasoned that although the "[a]ppellants may believe [that] the ninth amendment should be read to recognize an unwritten, fundamental, individual right to own or possess firearms; the fact remains that the Supreme Court has never embraced this theory." *Id.* (footnote omitted).

115. *Id.*

116. See *supra* notes 53-71 and accompanying text.

117. 116 U.S. 252 (1886). For a discussion of *Presser*, see *supra* notes 56-61 and accompanying text.

118. *Quilici*, 532 F. Supp. at 1181; see also *Malloy v. Hogan*, 378 U.S. 1, 4 n.2 (1964) (citing *Presser* with approval).

119. See *supra* notes 48-52 and accompanying text.

120. See *Adamson v. California*, 332 U.S. 46, 52-53 (1947), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567-69 (1978) (discussing the Court's selective incorporation of the Bill of Rights). The concept of

Having found the second amendment to be inapplicable, it was unnecessary for the *Quilici* court to consider the scope of the amendment's right to bear arms. Nevertheless, the majority offered its opinion on the scope of the second amendment right.¹²¹ Once again, the court's analysis, although superfluous, was correct. The historical development of the right to bear arms,¹²² as well as the legislative history¹²³ and language of the second amendment,¹²⁴ all support the conclusion that the federal right to bear arms "is inextricably connected to the preservation of a militia."¹²⁵ This conclusion also is supported by *United States v. Miller*,¹²⁶ the only Supreme Court decision to specifically examine the scope of the federal right to bear arms.¹²⁷ Consequently, the second amendment right to bear arms is properly construed as a collective right, guaranteeing no individual right to possess arms.¹²⁸ The *Quilici* court, therefore, correctly concluded that the second amendment guarantees no individual right to keep and bear handguns.

The State Right to Bear Arms

The *Quilici* court was also correct in concluding that article I, section 22 of the Illinois Constitution does not forbid the prohibition of handgun possession. Section 22, unlike the second amendment, clearly protects an individual right; section 22 concerns "the right of the *individual citizen* to keep and bear arms,"¹²⁹ and makes no reference to preserving a well-regulated militia.¹³⁰

implicit incorporation is further refuted by the reluctance of courts to apply other provisions of the Bill of Rights to the states. *See, e.g.,* *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) (holding that the fifth amendment right to indictment by a grand jury does not apply to the states). *But cf.* *Adamson v. California*, 332 U.S. 46 (1947) (5-4 decision) (Black, J., dissenting) (advocating that the entire Bill of Rights should be incorporated to apply to the states).

121. The *Quilici* court analyzed the scope of the second amendment "[f]or the sake of completeness . . . and because [the] appellants devote[d] a large portion of their briefs to this issue. . . ." *Quilici*, 695 F.2d at 270. Consequently, this entire analysis is merely dicta. Nevertheless, one court's dicta, especially when highly persuasive and well-reasoned, often emerges subsequently as another court's ratio decidendi. History has demonstrated the significant effect dicta often has on future constitutional analysis. *See, e.g.,* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that a higher level of judicial scrutiny may be appropriate when regulations adversely affect "discrete and insular minorities"). Therefore, it would be unwise to discount the effect of the *Quilici* court's analysis of the second amendment's scope merely because it is dicta.

122. *See supra* notes 34-47 and accompanying text.

123. *See supra* notes 48-52 and accompanying text.

124. "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." U.S. CONST. amend. II (emphasis added).

125. *Quilici*, 695 F.2d at 270.

126. 307 U.S. 174 (1939). For a discussion of *Miller*, see *supra* notes 63-65 and accompanying text.

127. *Quilici*, 695 F.2d at 270.

128. *See supra* notes 34-71 and accompanying text.

129. ILL. CONST. art. I, § 22 (emphasis added).

130. The majority report of the Illinois constitutional convention's Bill of Rights Committee makes it clear that § 22 was intended to guarantee an *individual* right to bear arms, rather than a *collective* right to possess only those weapons related to militia preservation. *See* 6 RECORD

Furthermore, the constitutional history of section 22 indicates that handgun possession was intended to be within the scope of its protection.¹³¹ Thus, the majority correctly analyzed section 22 in terms of the individual's right to possess handguns. Nevertheless, as previously noted, section 22's right to keep and bear arms is a conditional right subject to the police power. Both the majority report of the Illinois constitutional convention's Bill of Rights Committee, and the convention debates, indicate that this police power was intended to be very broad.¹³² The framers intended this power to extend up to, but not to include, a total prohibition of all firearms.¹³³ Therefore, a prohibition of a certain type of firearm, such as handguns, would not offend the framers' intent.¹³⁴ Consequently, the *Quilici* court correctly concluded that the scope of section 22 police power encompasses handgun bans.

The *Quilici* court was similarly correct in concluding that section 22 police power could be exercised by local government units. The constitutional history of section 22 provides conclusive support for local exercise of section 22 police power. As originally proposed in the majority report of the Illinois constitutional convention's Bill of Rights Committee, the right to keep and bear arms was subject to "the police powers of the State."¹³⁵ Despite

OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 87 (1970) [hereinafter cited as PROCEEDINGS].

131. The majority report of the Illinois constitutional convention's Bill of Rights Committee indicates that the "substance of the right [to keep and bear arms] is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property." *Id.* Handguns are undeniably a type of arms commonly employed for recreational and protective purposes. Additional support for this conclusion is found in the cases cited by the majority report to clarify the scope of the term "arms." See *People v. Brown*, 253 Mich. 537, 541-42, 235 N.W. 245, 246-47 (1931) (limiting the state police power under a state constitutional provision protecting the right to bear arms to the prohibition of arms not commonly used for self-protection); *State v. Duke*, 42 Tex. 455, 458 (1875) (construing the state constitutional right to bear arms as including commonly possessed weapons which are appropriate for self-defense); see also *State v. Kerner*, 181 N.C. 574, 576-77, 107 S.E. 222, 224-25 (1921) (declaring pistols to fall within the meaning of arms as used in a state constitutional provision).

132. The majority report notes that because arms pose an extraordinary threat to public safety, their possession must be subject to an extraordinary degree of control under the police power. 6 PROCEEDINGS 88. The debates indicate that the only limitation on the police power is that some right to bear arms must remain. See 3 *id.* at 1688 (remarks of Delegate Foster).

133. The majority report of the Illinois constitutional convention's Bill of Rights Committee enumerated five examples, not intended to be exclusive, of what the framers foresaw as constitutional gun control under § 22. See 6 *id.* at 89-90. The report also noted that laws attempting to ban all possession of arms would be invalid. *Id.* at 87. The debates also indicated that the framers intended § 22 simply to restrict the state's power to impose an absolute ban on all firearms. See 3 *id.* at 1688, 1693, 1718; see also Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 202 (1970) (interpreting § 22 to forbid only prohibitions of *all* arms) [hereinafter cited as Comment, *State Constitutional Right to Bear Arms*].

134. Numerous statements made during the debates support this position. It was noted that § 22 would prevent a complete ban on all guns but allow bans on certain categories of firearms. 3 PROCEEDINGS 1687, 1693. Moreover, the framers expressly stated that handgun bans would not violate § 22. *Id.* at 1687, 1689, 1718.

135. 6 *id.* at 84 (emphasis added).

assurances in the majority report that this police power included exercises of "police power by cities and villages or other instrumentalities of government to whom state power has been validly delegated,"¹³⁶ the framers feared that the term "of the state" might subsequently be interpreted to preclude municipal gun control efforts.¹³⁷ Therefore, by a voice vote, they amended the provision by deleting the term "of the state."¹³⁸ Accordingly, the framers of the Illinois Constitution left little doubt that section 22 police power extends to municipalities as well as to the state legislature. Hence, the *Quilici* majority correctly determined that section 22 presents no obstacle to municipal handgun bans.

Home Rule Authority

After determining that neither the second amendment nor section 22 bars a municipality from banning handguns, the *Quilici* court concluded, in a cursory manner, that the ordinance is a valid exercise of police power under Morton Grove's home rule authority. In so doing, however, the majority failed to adequately consider several aspects of home rule authority as it exists under the Illinois Constitution. Although the *Quilici* majority correctly analyzed the scope of police powers possessed by Illinois home rule units, it failed to consider whether the ordinance is within the purview of Morton Grove's local affairs, concurrent with related state legislation, or preempted by existing statutory regulation.

Under the Illinois Constitution, a home rule unit's police power is equivalent to the state's police power unless it has been restricted by the constitution or by the legislature expressly acting pursuant to constitutional authority.¹³⁹ Furthermore, pursuant to article VII, section 6(m) of the Illinois Constitution, courts have liberally construed home rule powers,¹⁴⁰ which the constitution left purposely broad and without specific definition.¹⁴¹ For example, article VII, section 6(a) of the Illinois Constitution expressly provides that "a home rule unit may exercise any power and perform any function *pertaining to its government and affairs* including, but not limited to,

136. *Id.* at 91-92.

137. *See* 3 *id.* at 1687-88, 1702.

138. *Id.* at 1702-03.

139. *See* *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 115, 421 N.E.2d 196, 198-99 (1981). Except as limited by other sections of the constitution, or by the General Assembly pursuant to constitutional authority, an Illinois home rule unit is free to govern itself. *Id.*; *see also* *City of Urbana v. Houser*, 67 Ill. 2d 268, 273, 367 N.E.2d 692, 694 (1977); S. COLE, *HOME RULE HANDBOOK FOR ILLINOIS LOCAL OFFICIALS* 8 (1975) [hereinafter cited as COLE].

140. ILL. CONST. art. VII. § 6(m); *see also* *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 59, 284 N.E.2d 257, 260 (1972).

141. *See* *City of Carbondale ex rel. Ham v. Eckert*, 76 Ill. App. 3d 881, 888-89, 395 N.E.2d 607, 612 (5th Dist. 1979). Several commentators have noted that Illinois municipalities may have the broadest powers of any home rule units in the nation. *See* Parkhurst, *Two Years Later: The Status of Home Rule in Illinois*, in *HOME RULE IN ILLINOIS: FINAL REPORT, BACKGROUND PAPERS AND SPEECHES, ASSEMBLY ON HOME RULE IN ILLINOIS* 22 (S. Cole & S. Grove eds. 1973) [hereinafter cited as Parkhurst]; *see also* Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 141.

the power to regulate for the protection of the public health, safety, morals and welfare. . . ."¹⁴² Although this provision is a broad grant of power, the phrase "pertaining to its government and affairs" seems to limit home rule authority to matters of local, as opposed to statewide concern. Consequently, the validity of Morton Grove's handgun ban depends upon whether firearm regulation is within the local affairs of a home rule unit.

The constitutional history of section 22 demonstrates that its framers contemplated the existence of local handgun control.¹⁴³ Additionally, unlike other areas of regulation, handgun control has not been recognized by the Illinois Supreme Court as requiring a unified system of statewide regulation.¹⁴⁴ More importantly, prior to the adoption of the 1970 constitution, the Illinois Supreme Court repeatedly had recognized that firearms regulation was within the scope of municipal police powers.¹⁴⁵ Because the scope of Illinois home rule police power exceeds that of municipal police power, it appears that firearms regulation is within the purview of home rule authority.¹⁴⁶ It is illogical to suggest, therefore, that firearms regulation in Illinois is exclusively

142. ILL. CONST. art. VII, § 6(a) (emphasis added).

143. See *supra* notes 132-38 and accompanying text.

144. In *City of Des Plaines v. Chicago & N.W.R.R.*, 65 Ill. 2d 1, 7, 357 N.E.2d 433, 436 (1976), the Illinois Supreme Court recognized that regulation of regional or statewide environmental problems requires a "unified statewide program" and, therefore, is beyond the authority of home rule units. Similarly, in *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 542, 338 N.E.2d 15, 18-19 (1975), the Illinois Supreme Court recognized that regulation of the state judicial system is a matter of statewide concern and consequently, outside the scope of home rule authority.

145. See *Brown v. City of Chicago*, 42 Ill. 2d 501, 250 N.E.2d 129 (1969) (upholding Chicago ordinances regulating possession, and requiring registration of firearms); *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917) (Chicago ordinance requiring dealers of concealable weapons to be licensed declared valid); see also *City of Chicago v. Franklin*, 126 Ill. App. 2d 43, 261 N.E.2d 506 (1st Dist. 1970) (Chicago ordinance requiring registration of firearms upheld).

146. Prior to 1970, Illinois municipalities had only those police powers expressly granted, or necessarily implied, by statute. *Village of Westville v. Rainwater*, 294 Ill. 409, 128 N.E. 492 (1920) (city lacked power to require licensing of soft drink wholesalers); *Clark Teachers' Agency v. City of Chicago*, 220 Ill. App. 319 (1st Dist. 1920) (city lacked power to require licensing of private employment agencies); *Hotelling v. City of Chicago*, 66 Ill. App. 289 (1st Dist. 1896) (city lacked power to require separate licenses for each type of article sold in second-hand stores). The municipal police power was limited to those enactments aimed at preserving the public health, morals, safety, or welfare. *Hannilin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 35, 115 N.E.2d 315, 319 (1953); *Schneider v. Board of Appeals*, 402 Ill. 536, 542, 84 N.E. 2d 428, 432 (1949). Furthermore, municipalities could exercise their police powers concurrently with the state, provided that their ordinances were not inconsistent with existing statutes. *Kizer v. City of Mattoon*, 332 Ill. 545, 164 N.E. 20 (1928) (ordinance regulating petroleum held invalid); *City of Clinton v. Wilson*, 257 Ill. 580, 101 N.E. 192 (1913) (ordinance requiring "places of amusement" to be closed on Sunday declared invalid). Thus, ordinances which directly or indirectly prohibited acts permitted by statute were invalid. *City of Chicago v. Jenson*, 331 Ill. 129, 162 N.E. 115 (1928) (ordinance regulating and licensing beauty parlors found invalid); *Wilke v. City of Chicago*, 188 Ill. 444, 58 N.E. 1004 (1900) (ordinance imposing an additional license fee on plumbers held invalid). Since the adoption of the 1970 constitution, however, Illinois home rule units have possessed significantly broader powers than did municipalities prior to its adoption. See *supra* notes 139-41 and accompanying text.

a matter of statewide concern.¹⁴⁷ Hence, the *Quilici* majority would have been correct to have held that the handgun ban is within the scope of Morton Grove's local affairs.

Contrary to the dissent's assertion, the *Quilici* court would have been similarly accurate in finding Morton Grove's ordinance valid despite the fact that it actually prohibits what the state statutes merely regulate. The Illinois Supreme Court has held consistently that ordinances enacted pursuant to a municipality's home rule authority can supersede related state legislation,¹⁴⁸

147. Nevertheless, the *Quilici* dissent concluded that handgun control is exclusively a matter of statewide concern and, therefore, beyond Morton Grove's home rule authority. Judge Coffey's dissent principally relied upon *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 338 N.E.2d 15 (1975), and *City of Des Plaines v. Chicago & N.W.R.R.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976). Because the ordinances in *Ampersand* and *City of Des Plaines* are distinguishable from Morton Grove's handgun ban, the dissent's reliance on these cases is anomalous.

The ordinances in *Ampersand* and *City of Des Plaines* attempted to regulate areas which require a unified system of statewide regulation. In *Ampersand*, the Illinois Supreme Court held an ordinance imposing a litigation filing fee to be an invalid exercise of home rule authority. *Ampersand*, 61 Ill. 2d at 542, 338 N.E.2d at 18-19. As noted by the Illinois Supreme Court, the Illinois Constitution contemplates only one unified judicial system operating statewide. *Town of Cicero v. Fox Valley Trotting Club*, 65 Ill. 2d 10, 21, 357 N.E.2d 1118, 1122 (1976) (dictum). Since local regulation would subvert this constitutional objective, the administration of justice is exclusively a matter of statewide concern. Municipal handgun bans, however, subvert no similar constitutional objective. It is, therefore, illogical to suggest that the constitution intended only one unified system of firearms regulation.

In *City of Des Plaines*, the Illinois Supreme Court invalidated an ordinance designed to regulate noise pollution originating within or outside the municipality. *City of Des Plaines*, 65 Ill. 2d at 5, 357 N.E.2d at 435-36. The *City of Des Plaines* court noted that the Illinois Environmental Protection Act states as its purpose the establishment of "a unified statewide program." *Id.* at 7, 357 N.E.2d at 436. Furthermore, the Illinois Supreme Court has consistently held that regulation of regional environmental problems is beyond the authority of home rule units. *See, e.g., Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976) (home rule ordinance regulating regional sewage treatment plant did not pertain to municipality's local affairs). The area of handgun control, unlike the area of environmental control, has not been recognized by either the Illinois courts or legislature as demanding a unified system of statewide regulation. Moreover, the constitutional history of § 22 indicates that the framers contemplated the existence of municipal handgun bans. *See* 3 PROCEEDINGS 1687, 1689, 1718; *see also supra* notes 132-38 and accompanying text.

148. Prior to the effective date of the 1970 constitution, the Illinois Supreme Court adhered to the principle that an ordinance is invalid if it prohibits what a statute expressly permits. *See, e.g., Arrington v. City of Chicago*, 45 Ill. 2d 316, 259 N.E.2d 22 (1970) (declaring a municipal ordinance regulating the carrying of firearms invalid to the extent that it conflicted with statutes). Since the adoption of the 1970 constitution, however, the Illinois Supreme Court has uniformly rejected this principle and upheld ordinances actually conflicting with statutes. *See City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 421 N.E.2d 196 (1981) (upholding a landlord-tenant ordinance); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975) (upholding a Cook County liquor tax); *Paglini v. Police Bd.*, 61 Ill. 2d 233, 335 N.E.2d 480 (1975) (upholding a personnel ordinance); *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974) (same); *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50, 309 N.E.2d 576 (1974) (upholding a governmental reorganization ordinance); *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561, 301 N.E.2d 281 (1973) (same). More recently, the Illinois appellate courts have steadfastly recognized the ability of municipal ordinances to supersede conflicting state statutes. *See Resman v. Personnel Bd.*, 96 Ill. App. 3d 919, 422 N.E.2d 120 (1st Dist. 1981) (upholding a personnel ordinance);

even if an extensive scheme of statutory regulation exists.¹⁴⁹ For example, in *Mulligan v. Dunne*,¹⁵⁰ the Illinois Supreme Court upheld the Cook County liquor tax as a valid exercise of home rule authority, despite the existence of extensive state regulation of liquor which did not tax its sale. The *Mulligan* court recognized that when an ordinance enacted pursuant to home rule authority conflicts with a state statute, the ordinance will prevail unless the statute specifically limits home rule powers and was enacted subsequent to the adoption of the 1970 Illinois Constitution.¹⁵¹ The *Mulligan* court concluded that because the Illinois General Assembly had failed to enact legislation specifically restricting the power of home rule units to tax liquor, the ordinance did not exceed Cook County's home rule authority.¹⁵²

Therefore, Morton Grove's handgun ban prevails over conflicting state statutes regulating firearms, unless such statutes were enacted or amended subsequent to the adoption of the 1970 Illinois Constitution and specifically limit home rule powers. Although several sections of the Illinois Criminal Code regulate handgun possession,¹⁵³ they were enacted prior to the adoption of the 1970 constitution.¹⁵⁴ Furthermore, despite various amendments enacted subsequent to 1970, none of these provisions directly purports to restrict home rule powers.¹⁵⁵ Consequently, the mere non-concurrence of the handgun ban with the related statutory scheme does not invalidate Morton Grove's ordinance.¹⁵⁶

Hoffman v. Board of Fire & Police Comm'rs, 86 Ill. App. 3d 505, 408 N.E.2d 98 (3d Dist. 1980) (same); *City of Springfield v. Ushman*, 71 Ill. App. 3d 112, 388 N.E.2d 1357 (4th Dist. 1979) (upholding an ordinance taxing the sale of fireworks); *Scott v. Rochford*, 66 Ill. App. 3d 338, 384 N.E.2d 19 (1st Dist. 1978) (upholding a personnel ordinance), *aff'd*, 77 Ill. 2d 507, 397 N.E.2d 801 (1979); *Landry v. Smith*, 66 Ill. App. 3d 616, 384 N.E.2d 430 (1st Dist. 1978) (upholding a landlord-tenant ordinance); *see also* COLE, *supra* note 139, at 5.

149. *Mulligan v. Dunne*, 61 Ill. 2d 544, 549, 338 N.E.2d 6, 10 (1975) (extensive state statutory scheme evidenced by Dram Shop Act).

150. *Id.*

151. The *Mulligan* court stated:

We have held on several occasions that even an exercise of a home rule power under section 6(a) which actually conflicts with a statute enacted prior to the adoption of the 1970 Constitution is nonetheless valid unless the power is restricted by a constitutional provision or appropriate legislation enacted subsequent to the 1970 Constitution. . . . Moreover, we have held that even if enacted subsequent to the Constitution, a statute which purports to restrict home rule powers must be specific. . . .

Id. at 549, 338 N.E.2d at 10-11.

152. *Id.* at 550, 338 N.E.2d at 11.

153. *See* ILL. REV. STAT. ch. 38, §§ 24-3.1 (prohibiting only certain classes of persons from possessing firearms), 24-1(a)(10) (prohibiting handgun possession by a person on a public street, alley or public lands), 24-1(a)(4) (prohibiting the carrying of certain handguns), 24-1(a)(8) (prohibiting firearm possession in establishments licensed to sell alcoholic beverages), 24-1(a)(7) (prohibiting the possession of certain types of firearms), 83-13.13 (authorizing municipalities to impose greater restrictions or limitations on firearms possession) (1982).

154. Most of chapter 38 was adopted as the criminal code of 1961.

155. *See* ILL. ANN. STAT. ch. 38, §§ 24-1, 24-3.1, 83-13.1 (Smith-Hurd 1977 & Supp. 1982).

156. Nevertheless, the *Quilici* dissent contends that by prohibiting what numerous sections

Similarly, the *Quilici* majority would have been correct to hold that Morton Grove's handgun ban is not preempted by existing statutory regulations. Since the adoption of the Illinois Constitution in 1970, the Illinois Supreme Court has uniformly rejected any notion of *implied* preemption.¹⁵⁷ Instead, the court requires preemptive legislation to contain explicit statements reflecting a clear intent to preempt home rule powers.¹⁵⁸ A careful examination of existing state firearm regulations discloses no express statements of preempt-

of the Illinois Criminal Code merely regulate, Morton Grove's handgun ban is invalid because it is not concurrent with related state legislation. *Quilici*, 695 F.2d at 277-78 (Coffey, J., dissenting). This contention fails to consider that under the *Mulligan* standard, none of these statutes precludes a home rule unit from enacting ordinances which conflict with the statutes. See *supra* notes 151, 153-55 and accompanying text. Hence, though it prohibits what related state legislation merely regulates, Morton Grove's handgun ban is, nonetheless, a valid exercise of its home rule authority.

157. Furthermore, prior to 1970, the Illinois Supreme Court expressly held that existing state legislation did *not* preempt the field of local gun control. *Brown v. City of Chicago*, 47 Ill. 2d 501, 504, 250 N.E.2d 129, 131 (1969).

158. The seminal case in the area of Illinois home rule preemption is *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973). In *Rozner*, the Illinois Supreme Court upheld a Chicago wheel tax as a constitutional exercise of Chicago's home rule authority. *Id.* at 435, 303 N.E.2d at 391. The *Rozner* court noted that inadvertent restriction of home rule authority could be avoided if "statutes that are intended to limit or deny home rule powers contain an express statement to that effect." *Id.* Finding no express statutory statement indicating a restrictive purpose, the *Rozner* court held the relevant statute to have no restrictive effect on home rule powers. *Id.*

More recently, in *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 421 N.E.2d 196 (1981), the Illinois Supreme Court adhered to the express statement requirement announced in *Rozner*. In upholding an ordinance regulating landlord-tenant relations, the *Create* court noted that absent an explicit statutory statement restricting home rule authority, the powers of a home rule unit are not preempted. The *Create* court stated:

The enactment of a statute after the date of the 1970 constitution does not automatically render the area one of exclusive control by the State under section 6(h) or deny home rule units the power to act under 6(g). *The statute must contain an express statement to that effect.* In the absence of such express legislation . . . "[h]ome rule units may exercise and perform concurrently with the State any power or function of a home rule unit. . . ."

Id. at 108, 421 N.E.2d at 199 (emphasis added & citations omitted).

Accordingly, the Illinois Supreme Court has found home rule authority preempted only when the preemptive legislation contained explicit statements reflecting a clear intent to preempt home rule powers. For example, in 1977 the Illinois Supreme Court found that state regulation of real estate brokers had preempted local control in that area. See *Andruss v. City of Evanston*, 68 Ill. 2d 215, 369 N.E.2d 1258 (1977), *cert. denied*, 435 U.S. 952 (1978). The *Andruss* court found the following statutory language sufficient to express preemptive intent:

It is declared to be the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Art. VII of the Illinois Constitution of 1970, that any power or function set forth in this Act to be exercised by the State is an exclusive State power or function. Such power or function shall not be exercised concurrently, either directly or indirectly, by any unit of local government, including home rule units, except as otherwise provided in this Act.

ILL. REV. STAT. ch. 114½, § 124 (1975). For additional examples of sufficiently expressed preemptive intent, see *Prudential Ins. Co. v. Chicago*, 66 Ill. 2d 437, 362 N.E.2d 1021 (1977)

tive intent.¹⁵⁹ Hence, the Illinois General Assembly has not preempted home rule units from enacting gun control ordinances and, therefore, Morton Grove's handgun ban is a valid exercise of its home rule authority.¹⁶⁰

(insurance company regulation), and *United Private Detective & Sec. Ass'n v. Chicago*, 62 Ill. 2d 506, 343 N.E.2d 453 (1976) (regulation of private detectives).

159. See *supra* notes 153-55 and accompanying text. The closest any of these criminal code sections comes to expressing preemptive intent is the Deadly Weapons Act provision authorizing municipalities to enact greater restrictions or limitations on firearm possession. See ILL. REV. STAT. ch. 38, § 83-13.1 (1982). It is conceivable that, in some jurisdictions, this proviso would imply that municipal firearm regulation is limited to *restrictions and limitations*; therefore, municipal *prohibitions* would be invalid. In Illinois, however, when considering the statutory language present in *Andruss*, it becomes difficult to contend that the Deadly Weapons Act sufficiently expresses preemptive intent. Thus, under the *Rozner* line of decisions, it fails to preclude Morton Grove from banning handguns.

160. Nevertheless, the *Quilici* dissent concluded that through extensive and long-standing firearms regulation, the Illinois General Assembly had implicitly preempted the field of handgun possession. *Quilici*, 695 F.2d at 272-75 (Coffey, J., dissenting). In his dissent, Judge Coffey relied primarily on *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 338 N.E.2d 15 (1975), and *Hutchcraft Van Serv. v. City of Urbana*, 104 Ill. App. 3d 817, 433 N.E.2d 329 (4th Dist. 1982), to contend that various sections of the Illinois Criminal Code implicitly preempt Morton Grove's handgun ban. Reliance on *Ampersand* and *Hutchcraft*, however, is misplaced and fails to consider the overwhelming majority of Illinois Supreme Court decisions rejecting any notion of implied preemption. See, e.g., *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 421 N.E.2d 196 (1981) (ordinance regulating landlord-tenant relations held not preempted by existing statutory regulation); *City of Urbana v. Houser*, 67 Ill. 2d 268, 367 N.E.2d 692 (1977) (finding an amendatory act not intended to limit home rule authority); *Town of Cicero v. Fox Valley Trotting Club*, 65 Ill. 2d 10, 357 N.E.2d 1118 (1976) (despite comprehensive statutory regulation, home rule units are not preempted from taxing horse racing); *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (holding that the Illinois Municipal Code does not preempt home rule unit ordinances altering their governmental structure), *cert. denied*, 429 U.S. 832 (1976); *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974) (failure of Environmental Protection Act to express exclusivity permits home rule units to regulate environmental control); *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) (municipal wheel tax held not preempted).

The *Ampersand* court noted two examples of implied preemption; both were contained within the majority report of the Illinois constitutional convention's Local Government Committee. *Ampersand*, 61 Ill. 2d at 540-41, 338 N.E.2d at 17-18. This report declared that ordinances enacted under home rule authority, which regulate interest rates on loans, would be invalid due to extensive federal and state regulation of credit institutions. 7 PROCEEDINGS 1652. The report similarly declared that long-standing state regulation of utility rates precludes home rule units from regulating local telephone call rates. *Id.* These examples of implied preemption are extremely limited. A gun control ordinance enacted by a home rule unit is fundamentally different from both an ordinance limiting the rates that may be charged for local telephone calls, and an ordinance limiting the rates of interest that may be charged on loans. Unlike the regulation of interest rates and local telephone call rates, the regulation of firearms has traditionally been recognized to fall within the ambit of municipal police powers. See *Brown v. City of Chicago*, 47 Ill. 2d 501, 250 N.E.2d 120 (1969) (upholding gun control ordinance); *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917) (same). Moreover, the constitutional history of the home rule provisions expressly indicates that the framers did not intend to allow municipalities to enact ordinances regulating interest rates or local telephone call rates. See 7 PROCEEDINGS 1652. By contrast, the constitutional history of § 22 demonstrates that the framers intended to permit municipalities to enact handgun bans. See 3 *id.* at 1687, 1689, 1718; see

The Ninth Amendment

The *Quilici* majority properly rejected the contention that the ninth amendment guarantees a right to possess handguns, but it did so for the wrong reason. The court found that no such right exists, essentially because its existence has never been recognized by the United States Supreme Court.¹⁶¹ A sufficient analysis of whether a constitutional right exists, however, requires more than a mere observation of the Supreme Court's failure to recognize the alleged right. Were it otherwise, the existence of countless constitutional rights would never have been determined.¹⁶² The consequence of such an approach is exemplified by the scarcity of Supreme Court decisions interpreting the second amendment right to bear arms. Lower federal courts have both the authority and the duty to decide whether an alleged constitutional right exists when the Supreme Court has failed to consider its existence.¹⁶³ Accordingly, the *Quilici* majority should have examined more carefully whether the ninth amendment guarantees a fundamental right to possess handguns for purposes of self-defense.

Although a majority of the Court has never enunciated a standard to determine the scope of the ninth amendment, Justice Goldberg, in his concurring opinion in *Griswold v. Connecticut*,¹⁶⁴ outlined the following approach to

also supra notes 132-38 and accompanying text. Consequently, the examples of implied preemption noted in *Ampersand* are inapplicable to the facts presented in *Quilici*.

In *Hutchcraft*, an Illinois appellate court concluded that the Illinois Human Rights Act implicitly preempted Urbana from enacting an ordinance prohibiting discrimination. *Hutchcraft*, 104 Ill. App. 3d at 824, 433 N.E.2d at 334. Relying on a decision rendered by a California appellate court, the *Hutchcraft* court concluded that exclusivity could be revealed in ways other than by expressed preemption. *Id.* at 823, 433 N.E.2d at 333 (a legislative regulatory scheme implicitly preempts local control over the regulated subject) (citing *Alta-Dena Dairy v. County of San Diego*, 271 Cal. App. 2d 66, 75, 76 Cal. Rptr. 510, 516 (1969)). This conclusion may be valid under California home rule authority. *See, e.g., In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (city ordinance prohibiting sexual intercourse between persons not married to each other held to be preempted by state legislation); *Doe v. City of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1982) (ordinance banning handguns declared to be implicitly preempted by existing state statutes). In Illinois, however, this conclusion cannot be reconciled with the overwhelming majority of Illinois Supreme Court decisions rejecting any notion of implied preemption of home rule authority.

161. 695 F.2d at 271.

162. For example, prior to 1973, the Supreme Court had never recognized a constitutionally protected right to an abortion. Nevertheless, in 1970, a lower federal court declared that the ninth amendment protects a woman's right to decide whether to have children. *Roe v. Wade*, 314 F. Supp. 1217, 1221-22 (N.D. Tex. 1970) (invalidating a Texas statute prohibiting abortion), *aff'd*, 410 U.S. 113 (1973).

163. *See generally* S. EARLY, JR., CONSTITUTIONAL COURTS OF THE U.S. 5-7, 105-10 (1977); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 551-54 (1969). *See also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The *Marbury* Court declared that "[i]t is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.*

164. 381 U.S. 479 (1965) (statute forbidding the use of contraceptives unconstitutionally infringes the right of marital privacy).

determine which rights are fundamental and, therefore, within the protection of the ninth amendment:

[L]ook to the "traditions and (collective) conscience of our people" to determine whether a principle is "so rooted (there) . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ."¹⁶⁵

According to this approach, the right to possess handguns for purposes of self-defense will emerge as fundamental only if it cannot be denied without violating fundamental principles of liberty and justice. A Supreme Court decision, *Katz v. United States*,¹⁶⁶ recognizes that this right *can* be denied without violating such principles.

In *Katz*, the Court held that electronically recording conversations over a public telephone amounts to a search and seizure violating the speaker's privacy rights. The *Katz* Court noted that the protection of one's general privacy right, the right to be free from interference by others, is "*like the protection of his property and of his very life*, left largely to the law of the individual States."¹⁶⁷ Based upon this language, it appears that the right of self-defense is not fundamental. Instead, *Katz* allows state law to determine the right of individuals to protect themselves and their property. If this right were fundamental, it is doubtful that the Court would have left it to be protected solely by state law; rather, the Court would have recognized it to be protected by the Constitution. Consequently, it would be inaccurate to characterize the right of self-defense and its ancillary right to possess handguns as fundamental. As judged by Justice Goldberg's standard, therefore, the *Quilici* majority correctly concluded that these rights do not receive ninth amendment protection.¹⁶⁸

165. *Id.* at 493 (Goldberg, J., concurring) (citations omitted). It is critical to note that Justice Goldberg's approach has never been adopted by a majority of the Court. *Quilici*, 532 F. Supp. at 1183. Nevertheless, it exists as the only explicit discussion of an approach to determine the ninth amendment's reach in any Supreme Court decision. *Id.* Furthermore, it has been applied in at least one lower court decision. See *Petrey v. Flaughner*, 505 F. Supp. 1087, 1090 (E.D. Ky. 1981) (expulsion of student not violative of ninth amendment).

166. 389 U.S. 347 (1967).

167. *Id.* at 350 (emphasis added); see also *Navarra v. Bache Halsey Stuart Shields Inc.*, 510 F. Supp. 831, 835 (E.D. Mich. 1981) (relying on *Katz* to uphold a state wiretapping statute).

168. Nevertheless, the *Quilici* dissent concluded that private handgun possession is protected by the ninth amendment. 695 F.2d at 278-80 (Coffey, J., dissenting). In his dissent, Judge Coffey contended that by prohibiting the possession of handguns within the confines of the home, Morton Grove's ordinance impermissibly violates two fundamental rights: "the fundamental right to privacy and the fundamental right to defend the home against unlawful intrusion within the parameters of the criminal law." *Id.* at 279. A careful examination of these rights reveals that Judge Coffey's contention is apparently mistaken.

In analyzing the existence of the right to privacy, the Supreme Court has held that although it is not explicitly guaranteed within the Constitution, the right to privacy is accorded constitutional protection because it is indispensable to the enjoyment of those rights expressly granted. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (absent an overriding interest, a criminal trial must be open to the public). The Court further held that "only

BEYOND *QUILICI*

Since the *Quilici* decision was based on both state and federal constitutional grounds, its impact on future gun control cases must be determined through a bifurcated analysis. The *Quilici* court's conclusion that article I, section 22 of the Illinois Constitution only prohibits a total ban of all firearms, and therefore, permits bans on certain types of guns, is binding precedent on Illinois federal courts—unless the Illinois Supreme Court subsequently interprets section 22 differently.¹⁶⁹ Thus, federal district courts in Illinois are now precluded from invalidating handgun prohibitions alleged to violate the state constitutional right to bear arms. Yet, because Seventh Circuit constructions of state constitutional provisions are not binding on Illinois state courts, these courts remain free to interpret section 22 as prohibiting handgun bans.¹⁷⁰ Nevertheless, the *Quilici* court's declaration that

personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1973) (statutes prohibiting abortion declared unconstitutional). Although the outer limits of this right remain uncertain, the Court has indicated that its scope includes matters "relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977) (declaring unconstitutional a statute prohibiting distribution of non-medical contraceptives to persons over the age of 16, except through a licensed pharmacist) (citations omitted) (citing *Roe v. Wade* with approval). Nevertheless, relying principally upon *Stanley v. Georgia*, 394 U.S. 557 (1969), the *Quilici* dissent contends that the right to privacy of the home is fundamental and, therefore, within the protection of the ninth amendment.

The *Stanley* Court held that the first and fourteenth amendments prohibit states from criminalizing the private possession of obscene material in the confines of one's own home. *Id.* at 568. Although this holding may be read as recognizing a fundamental right of privacy in the home, the *Stanley* Court expressly limited this right by stating:

What we have said in no way infringes upon the power of the state or Federal Government to make possession of other items, such as narcotics, *firearms*, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendment. No First Amendment rights are involved in most statutes making mere possession criminal.

Id. at 568 n.11 (emphasis added). Consequently, *Stanley* offers little support for the contention that private handgun possession is protected by the fundamental right to privacy in the home.

Unlike the right to privacy, the right to defend one's home has yet to be recognized by the Supreme Court as a fundamental right protected by the ninth amendment. Furthermore, based upon *Katz* it appears that the right to defend one's home is not a fundamental right. *See supra* notes 165-66 and accompanying text. Consequently, Judge Coffey's contention that the ninth amendment protects the right to defend one's home seems to be mistaken.

169. *See Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (judgments of courts of appeals are binding on federal district courts within their circuit unless overruled by the Supreme Court); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (same).

170. *See, e.g., Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 926 (6th Cir. 1980) (a federal court's interpretation of state law is not binding on state courts), *vacated on other grounds*, 451 U.S. 1013 (1981); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) (a state court is not required to follow, as precedent, a decision of a lower federal court invalidating a city ordinance), *cert. denied*, 402 U.S. 983 (1971); *State v. Young*, 62 Ohio St. 2d 370, 375 n.2, 406 N.E.2d 499, 503 n.2 (1980) (noting that a federal court's interpretation of state law is persuasive but not binding upon state courts).

the second amendment to the United States Constitution does not prohibit handgun bans is binding precedent on all federal district courts within the Seventh Circuit.¹⁷¹ Additionally, this declaration is persuasive authority not only for Illinois state courts, but for other courts as well.¹⁷²

More significant than its judicial impact, however, is the effect that the *Quilici* decision might have on future gun control efforts. Morton Grove was the first American community to challenge the second amendment by

171. *Cf. Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) (state courts are not obligated to follow decisions by federal courts of appeal); *Corbett v. Devon Bank*, 12 Ill. App. 3d 559, 567, 299 N.E.2d 521, 525 (1st Dist. 1973) (the only federal decisions binding on Illinois state courts are those rendered by the United States Supreme Court). *But cf. Hannigan v. Elgin, J. & E. Ry. Co.*, 337 Ill. App. 538, 548, 86 N.E.2d 388, 392 (1st Dist. 1949) (federal courts of appeal interpretations of federal statutes are binding on state courts).

172. The impact that the *Quilici* decision will have on state or local handgun bans enacted outside Illinois is difficult to determine. Courts are not bound to adhere to decisions reached in other jurisdictions. *See, e.g., Occhino v. Illinois Liquor Control Comm'n*, 28 Ill. App. 3d 967, 971-72, 329 N.E.2d 353, 356-57 (1st Dist. 1975) (Illinois courts are not bound to follow decisions of courts in other states). Furthermore, though the majority of state constitutions include provisions protecting the right to bear arms, many of them are fundamentally different from § 22. *See Comment, State Constitutional Right to Bear Arms, supra* note 133; *see also supra* notes 72-75 and accompanying text. In those jurisdictions which either lack a constitutional arms provision, or have a constitutional right to bear arms provision sufficiently similar to § 22, the *Quilici* decision should carry considerable persuasive authority. Nevertheless, in those jurisdictions where the state right to bear arms differs fundamentally from § 22, it is unlikely that much weight will be attached to *Quilici* in determining the validity of state and local handgun bans.

Some authorities, however, contend that qualifying clauses which subject the right to bear arms to the police power, are merely "manifestations of superabundant causation." *Haile v. State*, 38 Ark. 564, 567 (1882); *Comment, State Constitutional Right to Bear Arms, supra* note 133, at 189. According to this view, all state constitutional arms provisions implicitly preserve the police power to regulate firearms. *Id.* at 188-89. If this contention is accepted, the *Quilici* decision will have a universally persuasive impact.

Similarly, it appears that Illinois home rule units have broader authority than do their counterparts in other states. *See Parkhurst, supra* note 141, at 22. Most other home rule units have the power to regulate, but not to prohibit activities. *See MCQUILLIN MUN. CORP.* § 10.26 (3d ed. 1979). *But see City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975) (upholding home rule prohibition of carrying concealed handguns). Furthermore, in most jurisdictions, a home rule unit's ordinance is void if it conflicts with a state statute. *See supra* *MCQUILLIN MUN. CORP.* § 4.107; *see also City of Canton v. Whitman*, 44 Ohio St. 2d 62, 66, 337 N.E.2d 766, 770 (1975); *City of Chickasha v. Arkansas La. Gas*, 625 P.2d 638, 640-41 (Okla. Ct. App. 1981). Also, in most jurisdictions, unlike in Illinois, home rule authority can be implicitly preempted by the enactment of state statutes. *See supra* *MCQUILLIN MUN. CORP.* § 4.87; *see also In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) (state legislation implicitly preempted a municipal ordinance prohibiting sexual intercourse between persons not married to each other); *Doe v. City of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1982) (state statutes implicitly preempted a city ordinance banning handguns); *City of Joplin v. Industrial Comm'n*, 329 S.W.2d 687 (Mo. 1959) (state prevailing wage act implicitly preempted a municipal charter provision); *Nagle v. City of Grand Island*, 144 Neb. 67, 12 N.W.2d 540 (1943) (state eminent domain statute implicitly preempted home rule enactments). Therefore, although *Quilici* may support handgun prohibition enacted by state legislatures outside Illinois, it is doubtful that it will offer much support to handgun bans adopted by home rule municipalities of other states.

prohibiting handgun possession. Amidst renewed interest in handgun control, stemming principally from the assassination attempt on President Ronald Reagan and the senseless shooting of John Lennon, the *Quilici* decision breathes new life into oft-forgotten second amendment doctrines. The *Quilici* decision destroys several fictions created and perpetuated by the pro-gun lobby by reminding state and local legislators that the second amendment poses no obstacle to their gun control efforts. More importantly, *Quilici* reminds members of Congress that, despite pro-gun lobbyists' assertions to the contrary,¹⁷³ the second amendment right to bear arms is a *collective* right aimed solely at the preservation of well-regulated state militias. By dismantling the fiction that the second amendment protects an *individual* right to possess handguns, *Quilici* lays the foundation for far-reaching congressional gun control. Ultimately, *Quilici v. Village of Morton Grove* might very well provide Congress with the additional firepower necessary to secure a national handgun ban.

CONCLUSION

The Seventh Circuit reached the appropriate decision by upholding this nation's first municipal ordinance banning the possession of handguns in *Quilici v. Village of Morton Grove*. The *Quilici* court correctly determined that the second amendment applies solely to the federal government and protects only a collective right to bear arms and that such right is inextricably related to the maintenance of a well-regulated militia. Furthermore, the court properly found that article I, section 22 of the Illinois Constitution presents no obstacle to the enactment of handgun bans. Nevertheless, despite its accurate analysis of issues, the majority failed to devote adequate attention to considerations of home rule authority and to the existence of fundamental rights protected by the ninth amendment. Hence, the *Quilici* majority should be applauded for reaching the correct decision, but can be criticized for failing to carefully examine issues central to determining the validity of Morton Grove's handgun ban.

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173. See generally J. WHISKER, *OUR VANISHING FREEDOM passim* (2d ed. 1974) (asserting that the Constitution secures an individual right to bear arms).

