

BANNING HANDGUNS: *QUILICI v. VILLAGE OF MORTON GROVE* AND THE SECOND AMENDMENT

On June 8, 1981, the Village of Morton Grove, Illinois¹ enacted Ordinance No. 81-11,² entitled "An Ordinance Regulating the Possession of Firearms and Other Dangerous Weapons."³ To some, this ordinance was the most draconian firearms legislation in the nation's history. To others, it was a courageous first step in a bold social experiment.⁴ Morton Grove became the nation's first community to ban, with certain exceptions, the possession of handguns within its borders.⁵

1. Morton Grove is a suburb of Chicago, 25 miles northwest of the city, with a population of approximately 27,000.

2. Morton Grove, Ill, Ordinance 81-11 (June 8, 1981). The Morton Grove Village Board of Trustees consists of six members. The vote in favor of Ordinance No. 81-11 was four to two.

Morton Grove's crime rate is relatively low. In 1980, there were 189 burglaries. The most recent homicides occurred in 1979 when two teen-age girls were murdered with a handgun in a village forest preserve. Ordinance No. 81-11 was the response to a business license application to open a gun shop. There are presently no gun shops in Morton Grove. *In Morton Grove, Illinois, They're Up in Arms Over Handgun Ban*, Wall St. J., Jan. 20, 1982, at 1, col. 4 [hereinafter cited as *Handgun Ban*]. While not specifically banning the sale of handguns, the ordinance clearly criminalizes possession of such a weapon by members of the general public. *See infra* note 5 and Appendix.

3. The complete text of Morton Grove, Ill., Ordinance No. 81-11 (June 8, 1981) is included in the Appendix.

4. *See infra* note 13. The legislation enacted by Morton Grove, like the subject matter of this Note, falls under the rubric of gun control. This term has become so nebulous and amorphous, however, that it is nearly meaningless. *See RESTRICTING HANDGUNS—THE LIBERAL SKEPTICS SPEAK OUT* 2-3 (D. Kates ed. 1979). Gun control refers to laws which provide only for weapon registration, as well as to laws which prohibit the possession of firearms by persons considered dangerous, such as convicted felons. *Id.* at 3. Proposals by organizations such as the United States Conference of Mayors and the National Coalition to Ban Handguns that advocate a federal ban on the possession of handguns except for the military, police, and civilians with special authorization, are an anathema to most handgun owners. *Id.* *See also* N. LOVING, *ORGANIZING FOR HANDGUN CONTROL* (1977); M. YEAGER, *2 HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY?* (1976). *See generally* LIBRARY OF CONGRESS, *GUN CONTROL LAWS IN FOREIGN COUNTRIES* (1976).

5. *See* Appendix. Ordinance No. 81-11 provides, in part, that "[n]o person shall possess, in the Village of Morton Grove . . . [a]ny handgun, unless the same has been rendered permanently inoperative." Morton Grove, Ill., Ordinance 81-11, § 2(B)(3) (June 8, 1981). The ordinance provides exceptions: peace officers, prison officials, members of the armed forces and national guard, and security guards are specifically exempted so long as such possession is in the performance of their official duties. Licensed gun collectors are also exempted. *Id.* § 2(E)(1)-(6). The ordinance also does not apply to antique firearms. In addition, it allows residents to keep their operative

Ordinance No. 81-11 was enacted with the view that outlawing handguns within the Village would best serve the public health, safety and welfare.⁶ The trustees of Morton Grove legislatively determined that prohibiting handgun ownership would reduce the number of handgun-related accidents. In addition, they regarded the ban as a first step toward reducing the number of handgun-related crimes such as homicide, aggravated assault, and armed robbery.⁷ Whether this ordinance will achieve these ends is a debatable question,⁸ separate from

handguns in licensed gun clubs. *Id.* § 2(E)(7)-(10). Violation of § 2(B)(3), relating to handguns, is punishable by fines of up to \$500 and imprisonment for up to six months for repeat offenders. *Id.* § 2(F)(2). See *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1171 (N.D. Ill. 1981). The ordinance does not prohibit the possession of long guns, i.e., rifles and shotguns, provided the former are not automatic and the latter have barrel lengths of 18 inches or more. Morton Grove, Ill., Ordinance 81-11, § 2(B)(2) (June 8, 1981). As such, this ordinance is not a ban on the possession of all firearms; a total prohibition would be unconstitutional under article I, section 22 of the Illinois Constitution. See *infra* note 106 and accompanying text.

6. See Morton Grove, Ill., Ordinance 81-11, preamble (June 8, 1981). See also *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1179, 1182, 1184 (N.D. Ill. 1981).

7. *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1179, 1182, 1184 (N.D. Ill. 1981).

8. In reference to the Village's interest in preventing handgun related accidents, the district court in *Quilici v. Village of Morton Grove* stated that "[a] ban on possession of handguns in the home cannot be considered an unreasonable response to that problem, and may in fact be the only method of attaining [that] goal . . ." 532 F. Supp. at 1179. See *infra* note 116. The question of whether such a ban, however, or any firearms regulations for that matter, actually results in a decrease in crimes involving firearms, is much more troublesome. Answers are elusive, statistics often conflict, and the controversy continues.

In 1980, 50% of all murders were committed with handguns. Of all law enforcement officers killed that year, 66.3% were felled by bullets from handguns. U.S. DEPARTMENT OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1980 13,339 (1981). Someone is murdered in this country an average of every 23 minutes. *Id.* at 6. Clearly, the fact that we live in a violent society has given rise to the perceived need for the protection, whether real or psychological, that a handgun affords. In 1978, 43% of gun owners polled gave protection as their reason for owning a handgun or pistol. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1980, at 204 (1981). One poll indicated that in 1979, on the average, nearly one of every two homes (45%) had at least one kind of gun. The incidence of gun ownership was 53% in the South and 70% in small communities and rural areas. This statistic is not surprising considering a 1979 Gallup survey which found that nearly one household in every five polled had been affected by crime within the previous 12 months, resulting in either theft of property or the physical assault of a member of the household. *The Gallup Opinion Index 20*, in *THE ISSUE OF GUN CONTROL* 61, 63 (T. Draper ed. 1981).

The question remains, however, whether firearms in the home really protect the residents. A comprehensive study of accidental firearm fatalities in Cuyahoga County, Ohio (which includes Cleveland) conducted by the School of Medicine at Case Western Reserve University indicated that only 23 burglars, robbers, or intruders were killed between 1958-1973 by persons defending their homes with firearms. During the same period, six times as many accidental fatalities were caused by firearms kept in the home. Rushforth, Ford & Adleson, *Accidental Firearm Fatalities in a Metropolitan County*, 504 AM. J. EPIDEMIOLOGY 100 (1975), quoted in M. YEAGER, *supra* note 4,

the legal issue of whether it will withstand constitutional scrutiny.

The second amendment to the United States Constitution provides:

at 4. Yeager contends that firearms ultimately prove to be an ineffective means of self protection because they are more likely to kill or injure the user or a member of his family than to be used successfully against a burglar or robber. He concludes that "[t]he probability of being robbed, raped, or assaulted is low enough to seriously call into question the need for Americans to keep loaded guns on their persons or about their homes." *Id.* at 1. Yeager is a member of the Handgun Control Staff of the U.S. Conference of Mayors which advocates a national ban on the possession, importation, sale, and manufacture of handguns except in certain instances. *Id.* at preface.

Legislation banning the possession of handguns obviously entails confiscation of such weapons. One argument against such drastic legislation as that enacted by Morton Grove is that many otherwise law-abiding citizens who possess handguns, and fervently believe they have both a constitutional right and an urgent need to do so, will defy such a ban. If this kind of legislation is enacted on a federal level, those most affected will likely be minorities and underprivileged people living in high crime areas of the nation who feel that possession of a firearm is absolutely necessary to protect themselves. Kates, *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS—THE LIBERAL SKEPTICS SPEAK OUT 5 (D. Kates ed. 1979). In Kates, *Against Civil Disarmament; On the Futility of Prohibiting Guns*, HARPER'S, Sept., 1978 at 28, quoted in THE ISSUE OF GUN CONTROL 185 (T. Draper ed. 1981), Professor Kates stated:

Liberals advocate severely punishing those who will defy confiscation only because the liberal image of a gun owner is a criminal or right-wing fanatic rather than a poor black woman in Chicago defending herself against a rapist or a murderer. . . . If only liberals knew it, handgun ownership is disproportionately high among the underprivileged for whom liberals traditionally have had most sympathy. . . . The average liberal has no understanding of why people have guns because he has no idea what it is like to live in a ghetto where police have given up on crime control.

Id. See L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 253-54 (1975), in which the authors state, "[t]he ultimate fear [of gunowners] is not that government will tyrannize, but that it will fail to protect . . . [T]he gun remains the hedge instinctively sought against that fear." *Id.*

Aside from the problem of enforcement (Ordinance No. 81-11 provides no means of enforcement, but relies primarily on voluntary relinquishment of weapons, see § 2(F), (G) in Appendix); the question remains whether a ban on handgun possession such as Morton Grove's will actually have a marked effect on the number of handgun crimes committed. For a discussion of the proposition that England's tough firearms laws, which make it virtually impossible for the average citizen to legally obtain a firearm, are not responsible for that country's low crime rates, see C. GREENWOOD, FIREARMS CONTROLS—A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES (1972); Greenwood & Magaddino, *Crime, Suicide, and Accidents: Some Cross-national and Cross-cultural Comparisons*, in RESTRICTING HANDGUNS—THE LIBERAL SKEPTICS SPEAK OUT 31-68 (D. Kates ed. 1979). "Fifty years of very strict controls on pistols have left a vast pool of illegal weapons." C. GREENWOOD, *supra*, at 242. Rather, it is the social milieu that determines the incidence of violent crimes. For an impassioned defense of the need to protect one's self with firearms in an increasingly violent society, see Elliot, *Letter From an Angry Reader*, ESQUIRE, Sept., 1981, at 33. See generally LIBRARY OF CONGRESS, GUN CONTROL LAWS IN FOREIGN COUNTRIES (1976); Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915); Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968); Note, *Constitutional Limitations on Firearms Regulation*, 1969 DUKE L.J. 773.

In any event, determinations of the difficult questions posed above are the responsibility of legislatures. The job of the courts is to determine only whether the legislative responses are reasonable. 532 F. Supp. at 1178.

"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."⁹ This Note deals primarily with the question of whether Morton Grove's ordinance violates that amendment.¹⁰ The vehicle for analysis is *Quilici v. Village of Morton Grove*,¹¹ the first judicial pronouncement on the validity of the Morton Grove ordinance.¹² In an atmosphere of emotional public debate and controversy, the United States District Court for the Northern District of Illinois upheld the validity of the Morton Grove ordinance.¹³ The court held that the ordinance was properly enacted pursuant to the police power of the Village, and infringes neither upon rights granted under the Illinois Constitution nor upon rights guaranteed by the United States Constitution.¹⁴

The average citizen has only a vague conception of what rights are guaranteed under the Constitution, aside from the more difficult question of the scope of protection offered by those rights. The public has

9. U.S. CONST. amend. II.

10. Whether the Morton Grove ordinance also violates the Illinois Constitution is discussed *infra* notes 102-20 and accompanying text. The focus of this Note, however, will be on the federal constitutional questions.

11. 532 F. Supp. 1169 (N.D. Ill. 1981). This case was a civil action challenging the constitutionality of Morton Grove, Ill., Ordinance 81-11 (June 8, 1981). The action consolidated three suits filed by four Morton Grove residents shortly after the enactment of the ordinance. Each of the plaintiffs professed to be the owner of a handgun and thus subject to the prohibitions of the ordinance. 532 F. Supp. at 1171 n.1.

The effect of Ordinance No. 81-11 has reached far beyond Morton Grove. Because of the importance of the issues involved, the National Rifle Association and the Second Amendment Foundation, two organizations advocating minimal regulation of private possession of firearms, financed the plaintiffs' efforts in the district court and also will provide funds for appeal to the Seventh Circuit. Morton Grove's legal fees were paid by the National Coalition to Ban Handguns, a Washington-based lobbying organization. *Handgun Ban*, *supra* note 2, at 1, col. 4. Since its victory in the United States District Court, Morton Grove has been inundated with requests for copies of Ordinance No. 81-11 as municipalities across the country plan similar legislation. *Morton Grove Ordinance Inspires Gun-Control Drive*, *St. Louis Globe-Democrat*, March 2, 1982, at 1, col. 4.

12. U.S. District Judge Bernard Decker, who delivered the *Morton Grove* opinion on December 29, 1981, noted that he had not seen so much public interest in a case since his decision in *Collin v. Smith*, 447 F. Supp. 676, *aff'd*, 578 F.2d 1197, *cert. denied*, 439 U.S. 916 (1978), in which he ruled that a small band of Nazis could not constitutionally be prevented from staging a rally in predominantly Jewish Skokie, Illinois, just east of Morton Grove. *U.S. Judge Upholds Ordinance Banning Sale, Possession of Handguns*, *NAT'L L.J.*, Jan. 11, 1982, at 3, col. 1.

13. For an illuminating presentation of public opinion in the wake of the *Quilici v. Village of Morton Grove* decision, see the articles and editorials in the *Morton Grove Champion*, Jan. 7, 14, 21, 1982, and in *Handgun Ban*, *supra* note 2, at 1, col. 4.

14. 532 F. Supp. at 1184-85.

linked the second amendment with the emotional exhortations of powerful lobbying organizations that seek to champion the rights it guarantees. The result is a pervasive public misunderstanding of the law. This Note will attempt to dispel some of the confusion surrounding the nature of the right to bear arms.¹⁵

In *Quilici v. Village of Morton Grove*, the plaintiffs argued that the second amendment grants an individual the right to keep and bear arms, rather than a collective right to keep and bear arms as a member of a well-regulated militia separate from the federal standing army.¹⁶ This argument presents the central issue in the controversy over the meaning and scope of the second amendment; yet, the district court in

15. In *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting), a fourth amendment search and seizure case, Justice Douglas lamented on the ease with which one can acquire a pistol and stated:

[a] powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.

Id.

Undoubtedly, Justice Douglas was referring to the National Rifle Association (N.R.A.), one of the richest and most effective lobbying organizations in the country. With a membership of close to 1,000,000 and about 12,000 affiliated local gun clubs, the N.R.A. certainly is the most vociferous and influential voice for those opposed to legislation restricting handgun ownership for the average citizen. The N.R.A. has taken the responsibility "to educate public-spirited citizens in the safe and efficient use of small arms for pleasure and protection . . . and, to further the public welfare, law and order, and the United States defense." N. LOVING, *supra* note 4, at 37. Yet the N.R.A. has greatly contributed to the perpetuation of the myth that the second amendment, contrary to a consistent line of Supreme Court and lower federal court cases interpreting it, guarantees an inviolable constitutional right to each individual citizen to bear arms. *Id.* at 4, 5. See *infra* notes 21-101 and accompanying text.

16. 532 F. Supp. at 1180-83. See also Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 963 (1975).

One commentator suggested that in order to avoid the metaphysical difficulty of ascertaining how something "can exist in a whole without existing in any of its parts" the better question is for what purposes citizens can keep and bear arms. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53, 55 n.10 (1966). This question leads to an examination of whether self defense or recreation, for example, are constitutionally protected purposes. If so, then the right would extend to persons reasonably fearing for their safety, and to hunters or other sportsmen, provided they are keeping and bearing arms for those protected purposes. If, however, the second amendment permits keeping and bearing arms only for the purpose of providing for the collective security of the people, "then the keeping and bearing may properly be limited to those individuals exercising that function," i.e., members of the national guard or the federal army. *Id.* The collective-individual right distinction, however, does provide a useful framework for analysis.

Morton Grove did not address this question. In *Presser v. Illinois*,¹⁷ the United States Supreme Court held that the prohibitions of the second amendment do not limit the power of the individual states, but only the power of the United States Congress.¹⁸ The decision in *Presser*, therefore, required the *Morton Grove* court to find *Morton Grove's* ordinance not in violation of the second amendment.¹⁹

Nevertheless, the individual-collective right controversy must be examined to understand what rights the second amendment guarantees. The intent of the framers is a reliable indicator of the substantive meaning of the Constitution and must be ascertained by analyzing the political and social exigencies existing at the time it was written.²⁰

I. HISTORICAL BACKGROUND OF THE SECOND AMENDMENT

Resentment toward oppression of military rule was the most serious grievance the colonists voiced at the Continental Congress in Philadelphia in 1776. By the Revolution, the colonists were living under martial law and subject to the arbitrary exercise of power by the British standing army.²¹ The hostile British troops posed a continual threat to

17. 116 U.S. 252 (1886).

18. *Id.* at 265. See 532 F. Supp. at 1180-81; *infra* notes 56-85 and accompanying text.

19. 532 F. Supp. at 1182; *infra* notes 55-56 and accompanying text.

20. This approach is especially necessary when dealing with the second amendment because of the paucity of Supreme Court decisions interpreting it. See the decisions in *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) and *Presser v. Illinois*, 116 U.S. 252, 265 (1886), both of which held that the second amendment operates only as a limitation upon the power of Congress, and not the states. In *United States v. Miller*, 307 U.S. 174 (1939), the Court, in its only decision discussing the scope of the second amendment, held that courts must interpret the amendment with the ultimate goal of maintaining a well-regulated militia. See also *Miller v. Texas*, 153 U.S. 535, 538 (1894) (a Texas statute prohibiting the carrying of weapons on the person held valid because the second amendment does not apply to the states).

21. Feller & Gotting, *The Second Amendment: A Second Look*, 61 *Nw. U.L. Rev.* 46 (1966). The idea of a hostile standing army in their midst was repugnant to the colonists. From this source sprang the grievances that fueled the revolutionary fervor: (1) the peacetime quartering of troops in private homes, (2) the unaccountability and superiority of the military power to the civilian authorities, (3) the court-martialing of civilians, (4) the presence of mercenary soldiers, and (5) the seizure of arms belonging to the militia. *Id.* at 49. In the recital of grievances against King George III, the Declaration of Independence of July 4, 1776, stated:

He has kept among us, in time of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of and superior to the civil power

. . . .

He has . . . quarter[ed] large bodies of troops among us;

He has . . . protect[ed] them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States.

individual liberty.²² The message sent by King George III was clear: his large standing army would enforce his claim of absolute and unrestricted sovereignty.²³

The individual colonies, however, had always conceived of their own militia as their true defenders and protectors of their best interest.²⁴ The colonists viewed any attempt by Parliament or the Crown to emasculate their militia as an encroachment upon their liberties.²⁵ The preservation of the militia was an interest so vital to the colonists' sense of security, that when a company of British soldiers marched on Lexington to destroy a cache of militia arms, the alarm that followed resulted in the first major battle of the Revolution.²⁶

In all the writings on the Revolutionary War and the turbulent times preceding it, there is no evidence showing that the colonists or their revolutionary leaders believed that they had a personal right to carry firearms, nor that the British were violating a personal right to carry firearms.²⁷ The grievances of the colonists related to the presence of a

1 Stat. 1 (1776). See SOURCES OF OUR LIBERTIES 319, 320 (R. Perry & J. Cooper eds. 1959). See generally Feller & Gotting, *supra*; Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Rohner, *supra* note 16; Weatherup, *supra* note 16; Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1977); Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185 (1970).

22. Adam Smith observed that "[m]en of republican principles have been jealous of a standing army as dangerous to liberty." 2 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 706 (R. Campbell & A. Skinner eds. 1976). See *United States v. Miller*, 307 U.S. 174, 179 (1939); *supra* note 21 and accompanying text.

23. Weatherup, *supra* note 16, at 977. The author noted that George III was doing in the colonies what he could not do in England. The English Bill of Rights, enacted in 1689 as a response to the oppression of James II, forbade the Crown from maintaining a standing army within the kingdom during peacetime. *Id.* at 973.

24. Feller & Gotting, *supra* note 21, at 51. See Note, *The Right to Keep and Bear Arms*, *supra* note 21, at 429.

25. Feller & Gotting, *supra* note 21, at 51. James Lovell, a preeminent political orator of the time, noted that "[t]he true strength and safety of every commonwealth or limited monarchy, is the bravery of its freeholders, its militia. By brave militia they rise to grandeur; and they come to ruin by a mercenary army." C. ROSSITER, SEEDTIME OF THE REPUBLIC 387 (1953). See Feller & Gotting, *supra* note 21, at 52.

Josiah Quincy, Jr., a contemporary of Lovell, commented that, "[t]he sword should never be in the hands of any, but those who have an interest in the safety of the community . . . [such] [as] a well regulated militia composed of freeholders, citizens and husbandmen" C. ROSSITER, *supra*, at 387; Feller & Gotting, *supra* note 21, at 52.

26. Feller & Gotting, *supra* note 21, at 52.

27. *Id.* at 52-53; Rohner, *supra* note 16, at 57-61. See also Weatherup, *supra* note 16, at 994-95; *infra* note 33.

hostile standing army. By attempting to disarm the various militia, the British sought to extinguish the last potential source of colonial opposition and self-respect. The battles of Lexington and Concord were the immediate result.²⁸

This was the political climate that spawned the Constitution and the Bill of Rights. The English Bill of Rights of 1689 provided the philosophical basis for its colonial counterparts, and ultimately for the Bill of Rights of the United States Constitution.²⁹ Fearful of military oppression and cognizant of the events of 17th century England, each state included provisions regarding militia and standing armies in their

28. Feller & Gotting, *supra* note 21, at 53. See also Note, *The Right to Keep and Bear Arms*, *supra* note 21, at 429.

29. Feller & Gotting, *supra* note 21, at 48. The English Bill of Rights of 1689, 1 Will. and Mary, sess. 2, ch. 2, was the outcome of centuries of conflict surrounding the question of the relationship between sovereignty and armed force. Weatherup, *supra* note 16, at 974. In England, as in the colonies, a militia composed of armed citizens had always been the preferred method of providing for the common defense. Yet James II, intent on maintaining absolute rule and advancing Catholicism, systematically replaced it with a powerful standing army led by Catholics. Feller & Gotting, *supra* note 21, at 48; Weatherup, *supra* note 16, at 973. In addition, he frequently exercised the royal prerogative to summarily suspend and dispense with laws. SOURCES OF OUR LIBERTIES 224 (R. Perry & J. Cooper eds. 1959). See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 316-17 (J. Elliot 2d ed. 1836) [hereinafter cited as CONVENTION DEBATES]. James II's oppressive rule led to the Glorious Revolution of 1688 (an exaggerated term for the king's humiliating exile) and the reign of William and Mary. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 40 (1971); Weatherup, *supra* note 16, at 973. Parliament then promulgated a declaration of rights which was later codified into the English Bill of Rights of 1689, 1 Will. and Mary, sess. 2, ch. 2. Feller & Gotting, *supra* note 21, at 48. The 1689 English Bill of Rights provided in part:

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against law.

7. That the subjects which are protestants, may have arms for their defense suitable to their conditions, and as allowed by law.

1 Will. and Mary, sess. 2, ch. 2, cited in SOURCES OF OUR LIBERTIES 246 (R. Perry & J. Cooper eds. 1959).

When considered in its historical context, it is clear that the English Bill of Rights granted no personal right to bear arms. In fact, existing laws prohibited possession of firearms by anyone other than nobility and heirs of wealthy landowners. The right granted to protestants was participation in the militia in order to provide for the defense of the realm. Weatherup, *supra* note 16, at 974; Feller & Gotting, *supra* note 21, at 48. Its insertion in the English Bill of Rights served as Parliament's notice to any future monarch that an abandonment of the militia in favor of a standing army would not be tolerated absent its consent. Weatherup, *supra* note 16, at 974. Individual self-defense was not the motivating purpose behind this right. Feller & Gotting, *supra* note 21, at 48. See Weatherup, *supra* note 16, at 964-74. See generally R. POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 179-82 (1957); C. ROSSITER, *supra* note 25, at 32-33; B. SCHWARTZ, *supra*, at 40-46; Levin, *supra* note 21, at 151-52; Rohner, *supra* note 16, at 58-59.

bills of rights.³⁰ An examination of the proposals submitted to the state ratifying conventions for a federal Bill of Rights, and the provisions relating to arms in each state's bill of rights, persuasively suggests the framers' intent to ensure retention of state power by maintaining an effective militia as an instrument of defense.³¹ The primary concern of the framers was to avoid a recurrence of the grievances which led to the

30. Levin, *supra* note 21, at 148-50. Virginia's declaration of rights served as a model for several state constitutions. The Virginia declaration provided:

[t]hat a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a Free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to and, governed by the civil power.

Id. at 152. See SOURCES OF OUR LIBERTIES 312 (R. Perry & J. Cooper eds. 1959); 1 B. SCHWARTZ, *supra* note 29, at 239; Feller & Gotting, *supra* note 21, at 53. The provisions of other states were similar to that of Maryland:

XXV. That a well-regulated militia is the proper and natural defense of a free government.

XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.

XXVIII. That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the Legislature directs.

XXIX. That no person, except regular soldiers, mariners, and Marines in the service of this State, or militia when in actual service, ought in any case to be subject to or punishable by martial law.

Cited in SOURCES OF OUR LIBERTIES, *supra*, at 348. Levin, *supra* note 21, at 152.

Only four states make any reference in their bills of rights to a right to bear arms. North Carolina limits the right to "defense of the state," while Massachusetts provides the right for the "common defense." Only Pennsylvania and Vermont grant the people the right to bear arms for "themselves and the state." 1 B. SCHWARTZ, *supra* note 29, at 266, 287, 324, 342-43. New York's constitution, adopted in 1777, makes no mention of a right to bear arms, but provides that war material be maintained throughout the state. *Id.* at 312.

31. See *supra* note 30. The Virginia Ratifying Convention of June, 1788, was especially concerned with what kind of power Congress would have over the state's militia. Feller & Gotting, *supra* note 21, at 59-60. George Mason, who almost exclusively drafted Virginia's bill of rights, stated:

There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them

CONVENTION DEBATES, *supra* note 29, at 379; Weatherup, *supra* note 16, at 991. All eyes were on the Virginia Convention. With its wealth, prestige, and large population, it was inconceivable that there could be a union of the states without Virginia. Feller & Gotting, *supra* note 21, at 59. There is no evidence that the delegates to the Virginia Convention were concerned with an individual right to carry arms. *Id.* at 60. See also Rohner, *supra* note 16, at 57.

Revolutionary War.³² The new nation would not tolerate a federal standing army. The second amendment was a constitutional mandate to guarantee the preservation of the local militia, the citizen-army, as the guardian of the country's liberty.³³ History clearly supports this collective right interpretation of the second amendment.³⁴

II. FEDERAL CONSTITUTIONAL ISSUES

In *United States v. Miller*³⁵ the Supreme Court addressed the issue of the substantive meaning of its decision in *Presser v. Illinois*,³⁶ namely, that the second amendment does not apply to the states. Although the district court in *Morton Grove* failed to consider Morton Grove's Ordinance No. 81-11 in light of the *Presser* holding,³⁷ any discussion of the meaning of the second amendment must examine the controversial language of *Miller*.

Miller involved a prosecution under the National Firearms Act of 1934.³⁸ The Court rejected Mr. Miller's claim that his conviction for interstate transportation of an unregistered sawed-off shotgun violated

32. Rohner, *supra* note 16, at 56-57.

33. *Id.* Rohner noted that colonists undoubtedly were concerned with protection against wild animals, robbers, and Indian attacks. These considerations, however, had no real influence on Congress or the various state ratifying conventions in formulating and adopting the second amendment. *Id.* at 57. Rohner concluded that there is no "respectable authority for the proposition that, as of 1791, the Constitution's guaranty of the right to bear arms extended generally to personal self-defense as that concept was applied in the common law." *Id.* at 60. Rather, the right to keep and bear arms as contemplated by the second amendment

is a political right of the populace generally to maintain a state of military preparedness against the possibility of domestic or foreign military impositions. The only obstacle to crossing the threshold and embracing this conclusion is the faint echo and uncertain language of courts, commentators, and legislatures, suggesting that the "right" long antedates any constitutional recognition of it, and, includes purposes broader than collective security.

Id. at 60-61. See also Weatherup, *supra* note 16, at 994-95; Cf. Levin, *supra* note 21, at 166 (right to bear arms is "anachronistic"). See generally C. BAKAL, THE RIGHT TO BEAR ARMS (1966); E. DUMBAULD, *supra* note 29; CONVENTION DEBATES, *supra* note 29; C. ROSSITER, *supra* note 25; I. B. SCHWARTZ, *supra* note 29.

34. See *supra* note 16 and accompanying text.

35. 307 U.S. 174 (1939). The *Miller* case is the first and only Supreme Court opinion providing guidance on the meaning and scope of protection granted by the second amendment.

36. 116 U.S. 252, 265 (1886). See *infra* notes 52-76 and accompanying text. See also *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

37. 532 F. Supp. at 1171.

38. 26 U.S.C. §§ 1132-1132q (1934) (current version at 26 U.S.C. §§ 5801-5872 (1976)). Section 1132 defined "firearm" as "a shotgun or rifle having a barrel of less than eighteen inches in length . . ." 307 U.S. at 175 n.1. The National Firearms Act of 1934 was actually part of the Internal Revenue Code and imposed a heavy tax on importers, manufacturers, dealers, and trans-

his rights under the second amendment.³⁹ The Court stated that the obvious purpose of the second amendment was to maintain the effectiveness of the militia. Because the defendant could not show how the possession or use of a sawed-off shotgun bore a "reasonable relationship to the preservation or efficiency of a well regulated militia," the Court held that the second amendment did not guarantee the defendant a right to keep such a weapon.⁴⁰

By noting that a sawed-off shotgun is not "part of the ordinary military equipment" and its use could not "contribute to the common defense,"⁴¹ the Court arguably established a test for determining a person's right to bear arms. According to this language in *Miller*, if an individual could prove that his weapon is one normally used by the

ferers of sawed-off shotguns, machine guns, and similar weapons. *Id.* See Rohner, *supra* note 16, at 64.

The National Firearms Act of 1934 was the first federal statute dealing with the control of firearms. It was followed in 1938 by the Federal Firearms Act, 15 U.S.C. §§ 901-909 (1938) (repealed 1968). The Federal Firearms Act was enacted under the Commerce Clause and prohibited the interstate shipment or receipt of firearms to or by felons or fugitives from justice. Rohner, *supra* note 16, at 64. It also prohibited the shipment of stolen firearms and mandated that dealers and manufacturers obtain licenses for their regular shipment of weapons. *Id.*

While the above two statutes emerged from the prohibition era, the political assassinations of the 1960's provided the impetus for the Gun Control Act of 1968, consisting of 18 U.S.C. §§ 921-28 (1976) and 18 U.S.C. app. § 1202 (1976). The former is designed to punish any material misrepresentation concerning an otherwise legal weapons purchase. Specifically, failure to indicate that one is a convicted felon on a registration form during the purchase of a weapon violates 18 U.S.C. § 922(g) and (h), which prohibit such persons from receiving or transporting weapons. 18 U.S.C. app. § 1202(a) proscribes the possession, receipt, or transportation in interstate commerce of firearms by persons Congress has deemed likely to misuse them, including convicted felons, mental incompetents, dishonorably discharged servicemen, persons renouncing their citizenship, and illegal aliens. See, e.g., *Barrett v. United States*, 423 U.S. 212, 217, 219-20 (1976); *Huddleston v. United States*, 415 U.S. 814, 824-29 (1974); *United States v. Graves*, 554 F.2d 65, 69-70 (3d Cir. 1977); J. ALVIANI & W. DRAKE, *HANDGUN CONTROL—ISSUES AND ALTERNATIVES* 24 (1975). For a critical analysis of the Gun Control Act of 1968, see Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 197 (1975), in which the author concluded that "Congress is unprepared to make intelligent policy choices concerning the federal role in firearms legislation." *Id.*

39. 307 U.S. at 178.

40. *Id.* In upholding the validity of the National Firearms Act of 1934, see *supra* note 38, the Court held:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

307 U.S. at 178.

41. 307 U.S. at 178.

military, he would have an absolute right under the second amendment to keep the weapon.⁴² Justice McReynolds, writing for a unanimous Court, undermined individual right interpretations of the second amendment, however, by declaring that the amendment must be interpreted with the "end in view" of maintaining and preserving the militia.⁴³ Manifestly, the second amendment appears to have been

42. *Id.* This language has been the source of much confusion and uncertainty. In *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom. Velazquez v. United States*, 319 U.S. 770 (1943), the First Circuit grappled with the ambiguity created by the *Miller* decision. Against a second amendment challenge, the court upheld a conviction for the receipt of firearms in violation of the National Firearms Act and stated "that the Supreme Court [in *Miller*] was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go." 131 F.2d at 922. The court in *Cases* noted that if the *Miller* case provides the general rule, then the second amendment would prevent Congress from regulating the private possession or use of "distinctly military arms, such as machine guns, trench mortars and anti-tank or anti-aircraft guns" because those weapons are used in the maintenance of a militia. The Court noted that it was unlikely that the framers of the Constitution intended any such result. *Id.* See *Weatherup*, *supra* note 16, at 999. In finding that Mr. Cases had discharged his weapon into a night club and at one of the club's patrons, the court sardonically concluded that such use of a weapon was in no way intended to further Mr. Cases' military training nor contribute to the efficiency of a well-regulated militia. 131 F.2d at 922-23. See *Rohner*, *supra* note 16, at 65.

In *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976), the court upheld a conviction under the National Firearms Act. Referring to the disputed language in *United States v. Miller*, 307 U.S. 174, 178 (1939), the *Warin* court stated:

In *Miller*, the Supreme Court did not reach the question of the extent to which a weapon which is "part of the ordinary military equipment" or whose "use could contribute to the common defense" may be regulated. In holding that the absence of evidence placing the weapon involved in the charges against Miller [a sawed-off shotgun] in one of these categories precluded the indictment on Second Amendment grounds, the Court did not hold the converse—that the Second Amendment is an absolute prohibition against all regulation of the manufacture, transfer and possession of any instrument capable of being used in military action.

530 F.2d at 105-06.

43. *Weatherup*, *supra* note 16, at 999. Justice McReynolds stated:

The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia . . ." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

307 U.S. at 178. In *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943), the court upheld the Federal Firearms Act of 1938, 18 U.S.C. App. § 1202 (1938), and stated: "[w]eapon bearing was never treated as anything like an absolute right under the common law." 131 F.2d at 266. The court also noted that the second amendment "was not adopted with individual rights in mind, but as protection for the States in the maintenance of their Militia organizations against possible encroachments by the federal power." *Id.* See also *United States v. Adams*, 11 F. Supp. 216, 218 (S.D. Fla. 1935). In *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971), a case upholding the constitutionality of 18 U.S.C. app. § 1202(a)(1) (1938), which

designed to protect the state militia from destruction by the federal government. It did not create a personal right, inviolable by either state or federal authorities.⁴⁴

In *Morton Grove*, the Village contended that even if the second amendment did apply to the rights of states, Morton Grove's ban on the possession of handguns did not interfere with preservation of the militia in Illinois.⁴⁵ The Village noted that the Illinois National Guard is the military force of Illinois,⁴⁶ and pointed out that the federal government has taken responsibility for the funding and arming of the Na-

prohibits the possession of firearms by convicted felons, the court stated: "[s]ince the Second Amendment right 'to keep and bear arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of the individual to possess a firearm." *Id.* at 149.

44. Weatherup, *supra* note 16, at 1000-01. Numerous federal court decisions have adopted the collective right interpretation of the second amendment as expounded in *United States v. Miller*, 37 U.S. 174 (1939). Narrowly construing the second amendment to guarantee only the right to bear arms as a member of a militia, these cases have consistently found no conflict between federal gun laws and the second amendment. *See, e.g.*, *Lewis v. United States*, 445 U.S. 55 (1980); *United States v. Miller*, 307 U.S. 174 (1939); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Graves*, 554 F.2d 65 (3d Cir. 1977); *United States v. King*, 532 F.2d 505 (5th Cir.), *cert. denied*, 429 U.S. 960 (1976); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3d Cir.), *cert. denied*, 414 U.S. 839 (1973); *United States v. Day*, 476 F.2d 562 (6th Cir. 1973); *Cody v. United States*, 460 F.2d 34 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972); *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971); *United States v. Decker*, 446 F.2d 164 (8th Cir. 1971); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971); *Castellano v. United States*, 350 F.2d 852 (10th Cir.), *cert. denied*, 383 U.S. 949 (1968); *United States v. Tot*, 131 F.2d 852 (10th Cir.), *rev'd on other grounds*, 319 U.S. 463 (1943); *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935). *See also Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting). *See generally Note, Prior Convictions and the Gun Control Act of 1968*, 76 COLUM. L. REV. 326 (1976).

45. Brief for Defendant at 15, *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981). The plaintiffs had argued that "since the handgun has been for hundreds of years, and continues to be . . . a part of the ordinary military equipment . . . its possession has a direct relationship to the preservation and efficiency of a well-regulated militia." Reply Brief for Plaintiff at 6.

46. Brief for Defendant at 16; ILL. REV. STAT. ch. 129, § 220.05 (1979). ILL. REV. STAT. ch. 129, §§ 220.04, 220.09 (1979), subject the Illinois National Guard to all applicable federal regulations and legislation. *See also* The Act of January 21, 1903, ch.196, § 1, 32 Stat. 775 (1903) (current version at 10 U.S.C. § 311 (1976)), in which Congress, pursuant to its authority under article I, section 8, of the Constitution, provided that, "the organized militia [is] to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories." *Id.* In 10 U.S.C. § 311 (1976), Congress amended the above provision and stated that, "the unorganized militia, which consists of the members of the militia who are not members of the National Guard . . ." is given no recognized status. *See generally Feller & Gotting, supra* note 21, at 64.

tional Guard.⁴⁷ The Guard does not rely upon an armed citizenry for its supply of weapons, nor for the training of its soldiers.⁴⁸ Certainly, these facts render meaningless any suggestion that Morton Grove's ban on handguns interferes with the maintenance of the militia under the decision in *Miller*.⁴⁹

The critical inquiry in disposing of the federal constitutional issues in *Morton Grove* was whether the second amendment applies to the states.⁵⁰ The plaintiffs argued that the drafters of the fourteenth amendment intended the second amendment to apply to states as well as to the federal government.⁵¹ The primary response of the Village simply pointed to the Supreme Court's decision in *Presser* which held that the second amendment was solely a limitation upon Congress, not the states.⁵²

In *Presser*, the defendant was convicted of marching his armed paramilitary organization, the *Lehr and Wehr Verein*, through the streets of Chicago. At issue was the constitutionality of an Illinois statute forbidding private organizations from parading with arms without a license from the Governor.⁵³ The Court rejected Mr. Presser's argument that the Illinois statute violated the second amendment and stated

47. Brief for Defendant at 16; 32 U.S.C. §§ 106, 701 (1976).

48. Brief for Defendant at 16. ILL. REV. STAT., ch. 129, § 220.57 (1979) forbids the removal of national guard weapons from their authorized storage places except for use in service. 32 U.S.C. §§ 501, 502 (1976) and ILL. REV. STAT., ch. 129, §§ 220.29, 220.31 (1979) provides for the training of all members of the national guard.

49. The Village noted in its brief that even if the Illinois National Guard did employ handguns supplied by members of the citizenry, and even if the Guard required its members to train themselves in the use of their weapons, the Morton Grove ordinance would still not hamper the Guard's operations. Brief for Defendant at 17. Morton Grove, Ill., Ordinance 81-11 § 132.102(E)(7), (10) (June 8, 1981), permits the possession and use of handguns at licensed gun clubs. Consequently, members of the Illinois National Guard residing in Morton Grove would be able to train with their privately owned pistols simply by joining or forming a gun club. Brief for Defendant at 17. The obvious conclusion was that Ordinance No. 81-11 has no bearing on the effectiveness of the Illinois National Guard. The Village noted that the suggestion that the maintenance of the militia (as contemplated by *United States v. Miller*, 307 U.S. 174, 178 (1930)) depends upon the continuation or creation of a citizenry armed with military weapons, is frighteningly anachronistic. Brief for Defendant at 18.

50. 532 F. Supp. at 1169.

51. *Id.* at 1180. See Reply Brief for Plaintiff at 11-16.

52. 116 U.S. 252-65 (1886). In *United States v. Cruikshank*, 92 U.S. 542 (1875), a case not directly concerned with the right to bear arms or the militia but with civil rights legislation, the Court stated that the second amendment "has no other effect than to restrict the powers of the National Government." *Id.* at 553. The *Cruikshank* decision was found controlling by the Court in *Presser*. See *infra* note 54. See also Levin, *supra* note 21, at 163. .

53. 116 U.S. at 253-54. See 532 F. Supp. at 1180.

that the second amendment limits “only the power of Congress and the national government.”⁵⁴

The district court in *Morton Grove* was bound by the holding of *Presser* that the second amendment was not incorporated into the fourteenth, and therefore did not serve as a check on the power of the state legislature or municipal councils in Illinois.⁵⁵ As the Supreme Court’s most recent pronouncement on this issue, the *Presser* decision is controlling.⁵⁶

The plaintiffs in *Morton Grove*, however, advanced two principal arguments in favor of ignoring the holding in *Presser*.⁵⁷ First, the plaintiffs contended that a proper reading of *Presser* supports their position that Morton Grove’s ordinance violates the second amendment. Second, they argued that whatever the interpretation of *Presser*, it is no

54. 116 U.S. at 265. The *Presser* Court stated:

[A] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. It was so held by this court in the case of *United States v. Cruikshank*, 92 U.S. 542, 553, in which the Chief Justice, in delivering the judgment of the court, said, that the right of the people to keep and bear arms “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to what is called in *The City of New York v. Miln*, 11 Pet. [102] 139, the ‘powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,’ ‘not surrendered or restrained’ by the constitution of the United States.”

Id.

55. 532 F. Supp. at 1182.

56. See *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766, 769 (7th Cir. 1980) (“decisions of the Supreme Court of the United States and their clear implications [are] absolutely binding on inferior federal courts . . .”), *rev’d on other grounds*, 50 U.S.L.W. 4037 (1981); *Ahern v. Murphy*, 457 F.2d 363, 365 (7th Cir. 1972) (Supreme Court’s opinion on a subject is dispositive as a matter of stare decisis); *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 262 n.3 (2d Cir. 1967) (“inferior federal courts had best adhere to the view” that the Supreme Court’s pronouncement on a subject is the law); *United States v. Chase*, 281 F.2d 225, 230 (7th Cir. 1960) (appellate court believed it was obligated to follow a frequently criticized, dated Supreme Court holding because of its applicability to the situation before it).

57. 532 F. Supp. at 1181-82. The plaintiffs also argued that the history of the fourteenth amendment, the Supreme Court’s changing views on the subject of incorporation, and early state cases discussing the right to bear arms required the district court to find that Morton Grove’s ordinance infringed the second amendment. *Id.* at 1181 n.5. The district court stated, however, that to reach such a conclusion would flagrantly disregard the Supreme Court’s holding in *Presser*. It therefore found these arguments irrelevant. *Id.* Should *Morton Grove* reach the Supreme Court, however, those arguments by the plaintiffs become quite relevant. See *infra* notes 67-74 and accompanying text.

longer good law. In effect, the plaintiffs contended that subsequent Supreme Court cases incorporating many of the first ten amendments into the fourteenth amendment have overruled *Presser* sub silentio.⁵⁸ The district court found neither argument persuasive.⁵⁹

In arguing that the Village had misread *Presser*, the plaintiffs pointed to a phrase in the *Presser* decision which provided that "the States cannot . . . prohibit the people from keeping and bearing arms."⁶⁰ The district court in *Morton Grove* noted that this language, when read in context, actually supported the position of the Village, and not the plaintiffs.⁶¹ According to the court in *Morton Grove*, the Supreme Court's position in *Presser* was that an individual has the right to keep and bear arms whenever the federal government requires him to do so as a member of the armed forces, or in the absence of any regulation.⁶²

Relying on language of the Supreme Court in *Mayor of New York v. Miln*,⁶³ quoted by the Court in *Presser*, the *Morton Grove* court indi-

58. 532 F. Supp. at 1182.

59. *Id.*

60. *Id.* at 1181. See *Presser*, 116 U.S. at 265.

61. 532 F. Supp. at 1181-82. The entire phrase from *Presser* reads as follows:

The States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

116 U.S. at 265.

62. 532 F. Supp. at 1182. One wonders, however, how it can be said that an individual has a "right" to do that which the federal government may compel him to do. In this context, perhaps the right to bear arms can more accurately be described as a duty.

One commentator noted that the Supreme Court's concern in 1886, only twenty years after the Civil War, with state attempts to weaken the central government by withholding arms and troops from national service, was quite understandable. Such a position, however, is a complete reversal from the aims of the framers of the Constitution and the Bill of Rights. The concern at that time was with limiting the military power of the central government vis-a-vis the states. Through the mid-19th century to the present, the United States has maintained and relied upon a large national standing army. Levin, *supra* note 21, at 163. See 532 F. Supp. at 1181-82; *supra* note 54.

Another commentator noted that the language referred to in *Presser*, see *supra* note 54, "implies that the federal responsibility for military operations is sufficient in and of itself to preclude state interference with militia readiness." Rohner, *supra* note 16, at 68. But as already discussed, today the federal government supplies the weapons to the militia (national guard). It is therefore erroneous to suggest that any state regulation of privately owned firearms would interfere with militia readiness, and thus with the ability of the United States to maintain public security. 532 F. Supp. at 1181. See *supra* notes 47-48 and accompanying text.

63. 36 U.S. (11 Pet.) 102 (1837). The Supreme Court in *Miln* stated:

[A] state has the same undeniable and unlimited jurisdiction over all persons and things . . . where that jurisdiction is not surrendered or restrained by the constitution of the United States [A]ll those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or

cated that under the proper circumstances, the right to keep and bear arms may be circumscribed by a state through the valid exercise of its police power.⁶⁴ The court in *Morton Grove* held that the ordinance in question was a valid exercise of the police power.⁶⁵ *Presser* and *Miln* require nothing more.⁶⁶

The plaintiffs next argued that subsequent Supreme Court decisions had overruled *Presser* sub silentio.⁶⁷ The argument did not, however, persuade the *Morton Grove* court.⁶⁸ Although many rights enumerated in the Bill of Rights have been incorporated into the fourteenth amendment and thus apply to the states,⁶⁹ the second amendment has not had that distinction.⁷⁰ In *Adamson v. California*,⁷¹ the Supreme Court held nearly the entire Bill of Rights applicable to the states. The plaintiffs in *Morton Grove* relied heavily on Justice Black's dissent in *Adamson*

restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

Id. at 138 (emphasis in original). See also 116 U.S. at 265 (1886).

64. 532 F. Supp. at 1182.

65. See *infra* notes 102-20 and accompanying text.

66. 532 F. Supp. at 1182.

67. *Id.*

68. *Id.*

69. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (1978). Professor Tribe noted that the due process clause of the fourteenth amendment has been held to protect the rights to just compensation, see *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897); to freedom of speech, see *Fiske v. Kansas*, 274 U.S. 380 (1927); the press, see *Near v. Minnesota*, 283 U.S. 697 (1931); assembly, see *DeJonge v. Oregon*, 299 U.S. 353 (1937); petition, see *Hague v. CIO*, 307 U.S. 496 (1939); free exercise of religion, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and nonestablishment of religion, see *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); the fourth amendment rights to be free from unreasonable searches and seizures, see *Wolf v. Colorado*, 338 U.S. 25 (1949), and to exclude from criminal trials evidence illegally seized, see *Mapp v. Ohio*, 367 U.S. 643 (1961); the fifth amendment rights to be free of compelled self-incrimination, see *Malloy v. Hogan*, 378 U.S. 1 (1964), and double jeopardy, see *Benton v. Maryland*, 395 U.S. 784 (1969); the sixth amendment right to counsel, see *Gideon v. Wainwright*, 372 U.S. 335 (1963); to a speedy trial, see *Klopfer v. North Carolina*, 386 U.S. 213 (1967); to a public trial, see *In re Oliver*, 333 U.S. 257 (1948); trial before a jury, see *Duncan v. Louisiana*, 391 U.S. 145 (1968); to an opportunity to confront opposing witnesses, see *Pointer v. Texas*, 380 U.S. 400 (1965), and to compulsory process for the purpose of obtaining favorable witnesses, see *Washington v. Texas*, 388 U.S. 14 (1967); and the eighth amendment right to be free from cruel and unusual punishments, see *Robinson v. California*, 370 U.S. 660 (1962). TRIBE, *supra*, at § 11-2.

Courts have sometimes held that some Bill of Rights provisions, along with the second amendment, do not apply to the states. See, e.g., *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) (fifth amendment right to indictment by a grand jury); *Iacaponi v. New Amsterdam Casualty Co.*, 258 F. Supp. 880 (W.D. Pa. 1966) (seventh amendment right to a jury trial in civil cases), *aff'd*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968). See also 532 F. Supp. at 1182.

70. 532 F. Supp. at 1182.

71. 332 U.S. 46 (1947).

which advocated total incorporation of the Bill of Rights into the fourteenth amendment.⁷² As Justice Harlan noted in *Poe v. Ullman*,⁷³ however, the Supreme Court has consistently resisted the idea that the fourteenth amendment serves only as a shorthand reference to the explicit terms of the Bill of Rights.⁷⁴

The district court in *Morton Grove* concluded that because *Presser* is still good law, that decision required the *Morton Grove* court to hold that the second amendment does not apply to the states or their political subdivisions.⁷⁵ Consequently, Morton Grove's ordinance banning the possession of handguns does not infringe upon the second amendment.⁷⁶

The plaintiffs also argued that the ninth amendment to the Constitution⁷⁷ protects a right to bear arms for the purpose of self-defense.⁷⁸

72. 532 F. Supp. at 1182. See 332 U.S. at 71-72 (Black, J., dissenting). Justice Black believed that the intent of the fourteenth amendment was "to make the Bill of Rights, applicable to the states." *Id.* Justices Murphy, Rutledge, and Douglas concurred with Justice Black on this point, and the Court thus "came within one vote of holding that the fourteenth amendment guaranteed that 'no state could deprive its citizens of the privileges and protections of the Bill of Rights.'" L. TRIBE, *supra* note 69, at § 11-2. The notion of full incorporation, however, has never commanded a majority of the Court. Nor has this idea won scholarly approval. *Id.* See, e.g., Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

73. 367 U.S. 497 (1961) (Harlan, J., dissenting).

74. *Id.* at 541. See *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting). See also 532 F. Supp. at 1182.

75. 532 F. Supp. at 1182.

76. *Id.* The principle of *Presser* has never been specifically challenged. In fact, the Supreme Court has not heard a case presenting a second amendment challenge to a state statute regulating firearms since *Miller v. Texas*, 153 U.S. 535 (1894), in which the Court upheld the state regulation on the basis of *United States v. Cruikshank*, 92 U.S. 542 (1875). See *supra* notes 52 & 54.

Numerous state and lower federal courts have followed the principle of *Cruikshank* and *Presser*. See, e.g., *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770; *State v. Swanton*, 129 Ariz. 131, 629 P.2d 98 (Ct. App. 1981); *Fife v. State*, 31 Ark. 455 (1876); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976); *In re Atkinson*, 291 N.W.2d 396 (Minn. 1980); *State v. Keet*, 269 Mo. 206, 190 S.W. 573 (1916); *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886); *Harris v. State*, 83 Nev. 404, 432 P.2d 929 (1967); *State v. Sanne*, 116 N.H. 583, 364 A.2d 630 (1976); *People v. Persce*, 204 N.Y. 397, 97 N.E. 877 (1912); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *McCullum v. City of Cincinnati*, 51 Ohio App. 67, 199 N.E. 603 (1935); *Ex parte Thomas*, 21 Okla. 770, 97 Pac. 260 (1908); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871); *Carwell & Smith v. State*, 148 S.W. 1159 (Tex. Civ. App. 1912). See generally Rohner, *supra* note 16, at 66; *supra* note 44.

77. The ninth amendment to the United States Constitution states: "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. See B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 19 (1955), in which the author noted that "[t]he Ninth Amendment to the Constitution is a basic

The plaintiffs suggested that this inherent right was expounded by several famous natural law philosophers, including Aristotle, Cicero, and John Locke.⁷⁹ They also cited several early English common-law decisions that recognized the right of individuals to bear arms for the defense of their persons and homes.⁸⁰

The court in *Morton Grove* rejected this argument, despite its obvious appeal, and noted that the Supreme Court has never explicitly held that the ninth amendment protects any particular right.⁸¹ Quoting *Griswold v. Connecticut*,⁸² the district court noted that the only individual rights warranting constitutional protection without explicit enumeration in the Bill of Rights are the truly personal rights to privacy in matters relating to the family and procreation.⁸³ The court in *Morton Grove* concluded that the Supreme Court has never recognized a right of self-defense or to carry handguns, either under penumbra theory or directly under the ninth amendment.⁸⁴ Consequently, the Morton

statement of the inherent natural rights of the individual." *Id.* See also Reply Brief for Plaintiff at 17-27.

78. 532 F. Supp. at 1183.

79. *Id.* The plaintiffs, in their reply brief, quoted Cicero from IN DEFENSE OF TITUS ANNIUS MILO, SELECTED POLITICAL SPEECHES 222 (M. Grant trans. 1969):

[I]f our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too—and meanwhile they must suffer injustice first.

Id. See Reply Brief for Plaintiff at 19.

80. See, e.g., *Rex v. Thompson*, 100 Eng. Rep. 10 (K.B. 1787) (it "is not an offense to keep or use a gun"); *Wingfield v. Stratford*, 96 Eng. Rep. 787 (K.B. 1752) (a gun may be kept for defense of one's home); *Rex v. Gardner*, 87 Eng. Rep. 1240 (K.B. 1739) (game law did not prohibit a man from carrying a gun for self defense).

81. 532 F. Supp. at 1183.

82. 381 U.S. 479 (1965).

83. 532 F. Supp. at 1183. In *Griswold*, the Supreme Court held that the "zone of privacy created by several fundamental constitutional guarantees" forbade the enforcement against a married couple of a Connecticut statute prohibiting the use of contraceptives. 381 U.S. at 485. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (ordinance regulating the occupancy of housing by selecting certain categories of relatives who may live together and declaring that others may not held a violation of the strong constitutional protection of the sanctity of the family); *Roe v. Wade*, 410 U.S. 113 (1973) (state criminal abortion law held to violate the due process clause of the fourteenth amendment, which protects the right to privacy against state action, including a woman's qualified right to terminate her pregnancy).

84. 532 F. Supp. at 1183. The district court in *Morton Grove* noted that the Supreme Court explicitly discussed the reach of the ninth amendment in only one case. In a concurring opinion in *Griswold*, Justice Goldberg argued that the ninth amendment protects those fundamental rights which derive from the "traditions and [collective] conscience of our people." 381 U.S. at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). See also N. DORSEN, THE RIGHTS OF

Grove ordinance is not unconstitutional under the ninth amendment.⁸⁵

Two of the three plaintiffs alleged in their complaints that the Morton Grove ordinance constituted an illegal taking of private property and thus violated the fifth amendment to the Constitution.⁸⁶ Although the two plaintiffs abandoned this argument in the memoranda submitted to the district court, the court briefly addressed the issue.⁸⁷

The court first stated the well-settled principle that a government taking of private property can occur under the fifth amendment through a valid exercise of the police power.⁸⁸ Only when such taking results in destruction of use and enjoyment of a person's legitimate private property rights must the government provide compensation.⁸⁹ The district court noted that the Morton Grove ordinance does not have such a drastic effect.⁹⁰ According to the ordinance, Morton Grove residents not wishing to surrender their handguns to the police⁹¹ may either sell or otherwise dispose of them outside Morton Grove.⁹² In addition, the ordinance allows handgun owners not wishing to sell their weapons to simply register and store them at a licensed gun club.⁹³ Licensed gun collectors are exempted from the ordinance altogether.⁹⁴

Finally, the court rejected plaintiff Quilici's argument that Ordinance No. 81-11 is unconstitutionally vague.⁹⁵ The ordinance defines "handgun" as "a firearm of a size which may be concealed upon the person."⁹⁶ Mr. Quilici suggested that this definition may apply to

AMERICANS 153 (1970). The court in *Morton Grove* concluded, however, that "whatever the appeal of such an analysis, Justice Goldberg's thesis has never been accepted by a majority of the Supreme Court. Consequently, the ninth amendment furnishes no support for the plaintiffs' fundamental right argument." 532 F. Supp. at 1183.

85. 532 F. Supp. at 1183.

86. *Id.* at 1183-84. The fifth amendment to the Constitution provides, in part, that no person shall "be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

87. 532 F. Supp. at 1183.

88. *Id.*

89. *Id.* See *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981). See generally E. DUMBAULD, *supra* note 29, at 98-103.

90. 532 F. Supp. at 1183.

91. See *Fesjian v. Jefferson*, 399 A.2d 861, 865-66 (D.C. App. 1979) (statute rendering new handguns and new machine guns unregistrable held not to be a taking requiring compensation, but a proper exercise of the police power to prevent a perceived public harm).

92. See *Morton Grove, Ill., Ordinance 81-11*, § 2(G)(1) (June 8, 1981).

93. 532 F. Supp. at 1184; *Morton Grove, Ill., Ordinance 81-11*, § 2(E)(7) (June 8, 1981).

94. 532 F. Supp. at 1184; *Morton Grove, Ill., Ordinance 81-11*, § 2(E)(6) (June 8, 1981).

95. 532 F. Supp. at 1184.

96. *Morton Grove, Ill., Ordinance 81-11*, § 2(A)(5) (June 8, 1981).

shotguns and rifles.⁹⁷ As the district court noted, however, the Supreme Court had already defined the criteria for determining constitutional vagueness.⁹⁸ In cases not involving the first amendment, courts have determined whether a statute is unconstitutionally vague by examining the facts of the case.⁹⁹ The *Morton Grove* court noted that Mr. Quilici failed to allege that the definition of handgun in the ordinance is vague with regard to any weapon he possesses. On the contrary, Mr. Quilici alleged in his complaint that he owns handguns.¹⁰⁰ The inescapable conclusion is that the handgun definition in the ordinance provided Mr. Quilici with clear notice that such possession would be illegal.¹⁰¹

III. ILLINOIS CONSTITUTIONAL ISSUES

In 1970, the Illinois Constitution included a right to bear arms provision for the first time in the state's history.¹⁰² Article I, section 22 appeared to have established two competing notions. On the one hand, the provision granted citizens the right to keep and bear arms; on the other, this right was subject to curtailment by an exercise of the police power.¹⁰³ The plaintiffs in *Morton Grove* argued that Ordinance No. 81-11 impermissibly infringes on the right to keep and bear arms. The Village contended that the ordinance is a valid exercise of its police power.¹⁰⁴

After an extensive examination of the constitutional history of section 22, and in particular the debates among the members of the consti-

97. 532 F. Supp. at 1184.

98. *Id.* See *Winters v. New York*, 333 U.S. 507, 515 (1948).

99. See *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. McCauley*, 601 F.2d 336, 340 (8th Cir. 1979); *United States v. Howard*, 569 F.2d 1331 (5th Cir.), *cert. denied*, 439 U.S. 834 (1978).

100. See 532 F. Supp. at 1184.

101. *Id.* See *United States v. Powell*, 423 U.S. 87, 93 (1975); *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33 (1963); *United States v. Harris*, 347 U.S. 612, 617 (1954).

102. See 532 F. Supp. at 1171-72. Article I, section 22 of the Illinois Constitution provides, "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. 1, § 22.

The district court in *Morton Grove* noted that the draftsmen purposely deleted the words "of the State" from the clause "[s]ubject to the police power" in order to allow local governments to exercise their police power as Morton Grove did. In any event, Morton Grove's ability as a local government to exercise that power has not been challenged in this case. 532 F. Supp. at 1172.

103. See 532 F. Supp. at 1171.

104. See Brief for Defendant at 22-37.

tutional convention,¹⁰⁵ the *Morton Grove* court concluded that the right to bear arms in Illinois could be limited by banning handguns as an exercise of the police power.¹⁰⁶ The court then addressed the question of whether the enactment of the Morton Grove ordinance was a proper exercise of its police power.¹⁰⁷ The Village of Morton Grove ban on the possession of handguns by private citizens surpasses the restrictions imposed by any other state or municipal firearm regulation in the country.¹⁰⁸ Consequently, the district court in *Morton Grove* carefully examined the permissible limits of the police power. The court relied on *City of Carbondale v. Brewster*,¹⁰⁹ a recent Illinois Supreme Court case, for guidelines in determining what constitutes a valid exercise of the police power.¹¹⁰ According to *Brewster*, Morton Grove's ordinance is a valid exercise of the Village's police power so long as the ordinance bears a reasonable relationship to the protection of public health, safety, morals, and general welfare or convenience. The district court concluded that the Village trustees, having the power to attempt to control crime and prevent handgun related accidents,¹¹¹ intended to achieve those goals by enacting Ordinance No. 81-11.¹¹²

105. 532 F. Supp. at 1173-74. See 3 RECORDS OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1686, 1688-89, 1692-93, 1704, 1706, 1718 (1970) [hereinafter PROCEEDINGS]; 6 PROCEEDINGS 87; 7 PROCEEDINGS 2689.

106. 532 F. Supp. at 1176. The court concluded that the delegates to the 1970 constitutional convention also intended that a law totally banning all firearms *would* violate article 1, section 22 of the Illinois Constitution. See *supra* note 105.

107. 532 F. Supp. at 1176.

108. See *id.*

109. 78 Ill. 2d 111, 398 N.E.2d 829 (1979), *appeal dismissed*, 446 U.S. 931 (1980).

110. *Id.* at 114. In *City of Carbondale v. Brewster*, the court stated:

[t]he police power may be exercised to protect the public health, safety, morals, and general welfare or convenience. To be a valid exercise of police power, the legislation must bear a reasonable relationship to one of the foregoing interests which is sought to be protected, and the means adopted must constitute a reasonable method to accomplish such objective. Although the determination of reasonableness is a matter for the court, the legislature has broad discretion to determine not only what the interests of the public welfare require but what measures are necessary to secure such interest. The court will not disturb a police regulation merely where there is room for a difference of opinion as to its wisdom, necessity and expediency.

Id. at 114-15, 398 N.E.2d at 831. See also *People v. Haron*, 85 Ill. 2d 261, 279-80, 422 N.E.2d 627, 635 (1981).

111. See Morton Grove, Ill., Ordinance 81-11, preamble (June 8, 1981).

112. 532 F. Supp. at 1179. See Morton Grove, Ill., Ordinance 81-11, preamble (June 8, 1981).

The district court pointed to a number of Illinois cases in which courts held that firearms control laws were within the purview of the police power. See *Brown v. City of Chicago*, 42 Ill. 2d 501, 250 N.E.2d 129 (1969) (upheld Chicago firearms registration ordinance); *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917) (Chicago ordinance restricting the sale and carrying or wearing of

The question remained, however, whether the ordinance was a reasonable means of promoting the legitimate interests of public health and safety.¹¹³ The court stated that, in making this determination, it could not consider whether the Morton Grove ordinance is an effective means of achieving its objectives.¹¹⁴ Rather, the proper test is whether the ordinance is an arbitrary means of achieving the legislative ends.¹¹⁵ The *Morton Grove* court held that although the ordinance may not be a panacea, this in itself does not render it arbitrary, and thus invalid.¹¹⁶

The plaintiffs in *Morton Grove* also claimed that Ordinance No. 81-11 was an invalid exercise of the police power because it prohibits rather than merely regulates.¹¹⁷ The district court, however, dismissed that contention as a misstatement of current Illinois law,¹¹⁸ and declared that Morton Grove's ordinance is not per se invalid because it

concealable weapons held valid); *Rawlings v. Dept. of Law Enforcement*, 73 Ill. App. 3d 267, 391 N.E.2d 758 (1979) (part of Illinois statute prohibiting former mental patients from obtaining registration card necessary to legally own a firearm held a valid exercise of the police power); *People v. Williams*, 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978) (Illinois concealed weapon statute held a valid exercise of State's police power).

113. See 532 F. Supp. at 1177.

114. The district court stated, "it is not the role of the court to test the factual validity of the findings which support an exercise of the police power. That is a uniquely legislative responsibility." *Id.* at 1178. See *Brown v. City of Chicago*, 42 Ill. 2d 501, 507, 250 N.E.2d 129, 132-33 (1969) (the job of courts is to determine the "validity" of legislation, not its "advisability"). The court in *Morton Grove* also noted that it was not within the judiciary's scope to determine whether the means chosen by the Village to ameliorate its perceived problems are the best, or whether more efficient alternatives exist. 532 F. Supp. at 1177.

115. 532 F. Supp. at 1178. See *supra* note 110.

116. 532 F. Supp. at 1178. The court stated: "If the present ordinance was adopted on the expectation . . . that it would serve to inch the Morton Grove community one step further to becoming peaceful and safe, this would justify the use of the police power. Many social experiments have only small beginnings." *Id.*

The effectiveness of firearms regulation in controlling crime is the subject of considerable debate. See *supra* notes 4 & 8 and accompanying text. See generally Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, *supra* note 21. The district court noted, however, that a ban on the possession of handguns in the home may in reality be the only method of reducing tragic home accidents involving handguns. 532 F. Supp. at 1178. See *supra* note 15 and accompanying text.

117. 532 F. Supp. at 1179.

118. *Id.* See *People v. Warren*, 11 Ill. 2d 420, 424-25, 143 N.E.2d 28, 31-32 (1957), in which the court stated: "In the exercise of its inherent police power the legislature may enact laws regulating, restraining or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint or prohibition interferes with the liberty or property of an individual." *Id.* Accord *Drysdale v. Prudden*, 195 N.C. 722, 734, 143 S.E. 530, 536 (1928). See also *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917); *Illinois Liquor Control Comm'n v. City of Calumet City*, 28 Ill. App. 3d 279, 328 N.E.2d 153 (1975).

prohibits the possession of handguns rather than regulates their use.¹¹⁹

In short, the district court concluded that Ordinance No. 81-11 reflected a proper and valid exercise of the police power; its drafters designed the Ordinance to protect the public health and safety. The court found that the ordinance does not ban the possession of all firearms, and is neither unreasonable, arbitrary, nor simplistic. Consequently, it did not deprive the plaintiffs of their rights under the Illinois Constitution.¹²⁰

IV. ANALYSIS AND CONCLUSION

The district court in *Morton Grove* concluded that the difficult political questions underlying the enactment of Ordinance No. 81-11 must ultimately be resolved by the citizens of Morton Grove.¹²¹ The case, however, raised the issue of whether the power to regulate the possession of handguns should be in the hands of local legislators. If the Supreme Court considers the *Morton Grove* decision, it must decide whether legislatures can constitutionally ban the possession of handguns under the second amendment. According to precedent,¹²² however, state and municipal governments have always been free to enact firearms control legislation consistent with their own constitutions. Congress never intended the enactment of the second amendment to restrict state action.¹²³

Even if the Court overturns its decision in *Presser*¹²⁴ and holds the second amendment applicable to the states,¹²⁵ the individual-collective right controversy concerning the substantive meaning of the second amendment remains. The only judicially recognized purpose behind

119. 532 F. Supp. at 1179.

120. *Id.*

121. *Id.* at 1184-85.

122. *See supra* notes 52-56 and accompanying text.

123. *See supra* notes 21-34 & 52-56 and accompanying text. The historical purpose of the second amendment was to prevent the federal government from disarming the various state militia.

124. *See supra* notes 17-18 and accompanying text.

125. *See Rohner, supra* note 16, at 66-70. Rohner suggested that, under the test enumerated in *Palko v. Connecticut*, 302 U.S. 319, 328 (1937), for whether a particular right granted in the Bill of Rights should apply to the states, it is very possible that the second amendment will eventually be incorporated into the fourteenth. Rohner, *supra* note 16, at 67 n.72. The test stated by Justice Cardozo in *Palko* was whether "it violate[s] those fundamental principles of liberty and justice which lie at the base of our civil and political institutions" for the right not to apply to the states. 302 U.S. at 328 (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

the second amendment is protection of the arguably obsolete¹²⁶ collective right to maintain a well-regulated state militia.¹²⁷ If the Supreme Court finds that an individual right to keep and bear arms is not protected by the second amendment, then an emboldened Congress could conceivably and constitutionally enact a nationwide ban on the possession of handguns.¹²⁸ The question is whether this solution is more desirable than allowing each community to evaluate its own particular needs and legislate accordingly.

Some commentators argue that certain segments of society have a greater need than others for the supposed protection a handgun affords. The question arises, for example, whether it would be morally justifiable to deprive the dwellers of crime-ridden areas of our nation's cities—areas in which the police are either unable or unwilling to provide adequate protection to the citizens of the community—of an arguably viable means of self-protection, the handgun.¹²⁹ The argument against a nationwide ban on handgun possession on this basis is troublesome,

126. "Irrespective of the Constitutional framers' fear of a national standing army, the United States currently has one and relies upon it, not upon armed private citizens, to maintain public security." 532 F. Supp. at 1181. See Levin, *supra* note 21, at 163-64; Feller & Gotting, *supra* note 21, at 69. See also *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 184 (1871). The *Andrews* court stated:

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

Id.

127. See *supra* notes 38-44 and accompanying text.

128. See *supra* Weatherup, note 16, at 1001. Weatherup noted that the second amendment has the same meaning today as it did at the time of its adoption, i.e., Congress can regulate the national guard, but not disarm it against the will of the state legislatures. *Id.* Weatherup also noted, however, that "there is nothing to stop an outright congressional ban on private ownership of all handguns and all rifles." *Id.* See *supra* note 15. Cf. Levin, *supra* note 21, at 166-67 (suggesting that in today's society, a right to bear arms is "anachronistic, . . . futile, meaningless and dangerous").

Rohner suggests an approach to delineating the nature of the rights granted under the second amendment. A proper analysis should examine the purposes for which firearms can conceivably be used. Rohner, *supra* note 16, at 78-79. Rohner suggests that sporting, hunting, or the protection of one's person or property could be considered protected purposes. He concedes, however, that such purposes will most likely be determined on the basis of history, in which case protection under the second amendment will probably not extend beyond military preparedness and self-defense. This purposes test, Rohner suggests, could be flexibly interpreted to allow courts to recognize more or fewer purposes as the exigencies of the times demand. Rohner, *supra* note 16, at 79 n.152.

129. See, e.g., Kates, *supra* note 8.

for its fundamental premise is that our society has failed to provide adequate security for all its citizens.

Yet it is a fact that we live in a violent society. Whether personal ownership of handguns is the cause of this evil or is merely an understandable and rational response to the realities of life is a question to which there are no clear answers. Indeed, the emotional response of many Americans to the climate of fear produced by our high crime rate has been the purchase of a handgun which has contributed to the problem. Handguns kept in the home are easy prey to burglars and provide a bountiful source of weapons for the black market in illegal firearms. Nevertheless, the onslaught of opposition¹³⁰ and publicity that has beset the Village of Morton Grove is evidence that many Americans do not want to surrender their handguns and the peace of mind these weapons provide.

Nevertheless we, as a nation, can no longer afford to indulge ourselves in behavior reminiscent of the frontier era, our national adolescence. The easy availability of handguns and their undeniable involvement in overwhelming numbers of violent crimes compel the conclusion that the proliferation of handguns in American society cannot be tolerated. Opponents of restrictive firearms legislation often say that when guns are outlawed, only outlaws will have guns. While this may be true, if the total supply of handguns available to the public is diminished by laws forbidding their possession, the inescapable conclusion is that the raw potential for the destruction of human life is thereby diminished. A ban on handgun possession coupled with very severe and certain criminal sanctions for their use in the commission of any crime appears to be the most rational way to legislatively combat handgun related crime.

As a nation, we must attempt to live without handguns. Ownership

130. Perhaps the most unusual, and certainly the most unexpected, response to Morton Grove's ordinance banning handguns came from the small, rural, Atlanta suburb of Kennesaw, Georgia. Proclaiming the Village of Morton Grove their philosophical adversary, the Kennesaw City Council unanimously adopted an ordinance requiring heads of households to own and maintain guns and ammunition. Some residents approved; others feared it would make the town the laughingstock of the nation.

In any event, the Kennesaw ordinance intentionally provides no method for enforcement and is intended to be nothing more than a symbolic roar of defiance against those who advocate stricter firearms legislation. Kennesaw's chief of police called upon the Morton Grove police department to forward all the guns turned in by residents of Morton Grove to the Kennesaw police department for distribution to unarmed citizens. Officials from Morton Grove balked at the suggestion. *N.Y. Times*, March 17, 1982, at 18, col. 1.

of such weapons can no longer be considered a national birthright, an incident of citizenship. The Village of Morton Grove has begun the first phase of an experiment that has piqued the national curiosity and captured the imagination of legislatures across the country. The enormity of the problem our society faces from handgun related crime requires the type of bold and innovative action that Morton Grove has taken.

Eric S. Freibrun

APPENDIX

AN ORDINANCE REGULATING THE POSSESSION OF FIREARMS AND OTHER DANGEROUS WEAPONS

WHEREAS, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and

WHEREAS, the Corporate Authorities of the Village of Morton Grove have found and determined that the easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearm related deaths and injuries; and

WHEREAS, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF MORTON GROVE, COOK COUNTY, ILLINOIS, AS FOLLOWS:

SECTION 1: The Corporate Authorities do hereby incorporate the foregoing WHEREAS clauses into this Ordinance, thereby making the findings as hereinabove set forth.

SECTION 2: That Chapter 12 of the Code of Ordinances of the Village of Morton Grove be and is hereby amended by the addition of the following section:

"Section 132.102. Weapons Control

(A) Definitions:

Firearm: "Firearm" means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas; excluding however;

(1) Any pneumatic gun, spring gun or B-B gun which expels a single globular projectile not exceeding .18 inches in diameter.

(2) Any device used exclusively for the signalling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission.

(3) Any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition.

(4) An antique firearm (other than a machine gun) which although designed as a weapon, the Department of Law Enforcement of the State of Illinois finds by reason of the date of its manufacture, value, design and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(5) Model rockets designed to propel a model vehicle in a vertical direction.

Handgun: Any firearm which (a) is designed or redesigned or made or remade, or intended to be fired while held in one hand or (b) having a barrel of less than 10 inches in length or (c) a firearm of a size which may be concealed upon the person.

Person: Any individual, corporation, company, association, firm, partnership, club, society or joint stock company.

Handgun dealer: Any person engaged in the business of (a) selling or renting handguns at wholesale or retail (b) manufacturers of handguns (c) repairing handguns or making or fitting special barrels or trigger mechanisms to handguns.

Licensed Firearm Collector: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of Title 18, United States Code, Section 923.

Licensed Gun Club: A club or organization, organized for the purpose of practicing shooting at targets, licensed by the Village of Morton Grove under Section 90.20 of the Code of Ordinance of the Village of Morton Grove.

(B) Possession:

No person shall possess, in the Village of Morton Grove the following:

(1) Any bludgeon, black-jack, slug shot, sand club, sand bag, metal knuckles or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife; or

(2) Any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed off shotgun or any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon, as modified or altered has an overall length of less than 26 inches, or a barrel length of less than 18 inches or any bomb, bombshell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to black powder bombs and Molotov cocktails or artillery projectiles; or

(3) Any handgun, unless the same has been rendered permanently inoperative.

(C) Subsection B(1) shall not apply to or affect any peace officer.

(D) Subsection B(2) shall not apply to or affect the following:

(1) Peace officers;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard, while in the performance of their official duties; and

(4) Transportation of machine guns to those persons authorized under Subparagraphs (1) and (2) of this subsection to possess machine guns, if the machine guns are broken down in a non-functioning state or not immediately accessible.

(E) Subsection B(3) does not apply to or affect the following:

(1) Peace officers or any person summoned by any peace officer to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer and if such handgun was provided by the peace officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or the Reserve Officers Training Corp while in the performance of their official duties.

(4) Special Agents employed by a railroad or a public utility to perform police functions; guards of armored car companies; watchmen and security guards actually and regularly employed in the commercial or industrial operation for the protection of persons employed and private property related to such commercial or industrial operation;

(5) Agents and investigators of the Illinois Legislative Investigating Commission authorized by the commission to carry such weapons;

(6) Licensed gun collectors;

(7) Licensed gun clubs provided the gun club has premises from which it operates and maintains possession and control of handguns used by its members, and has procedures and facilities for keeping such handguns in a safe place, under the control of the club's chief officer, at all times when they are not being used for target shooting or other recreational purposes at the premises of the gun club and gun club members, while such members are using their handguns at the gun club premises;

(8) A possession of an antique firearm;

(9) Transportation of handguns to those persons authorized under Subparagraph 1 through 8 of this subsection to possess handguns, if the handguns are broken down in a non-functioning state or not immediately accessible.

(10) Transportation of handguns by persons from a licensed gun club to another licensed gun club or transportation from a licensed gun club to a gun club outside the limits of Morton Grove; provided however that the

transportation is for the purpose of engaging in competitive target shooting or for the purpose of permanently keeping said handgun at such new gun club; and provided further that at all times during a transportation said handgun shall have trigger locks securely fastened to the handle.

(F) Penalty:

(1) Any person violating Section B(1) or B(2) of this Ordinance shall be fined not less than \$100.00 nor more than \$500.00 or incarcerated for up to six months for each such offense.

(2) Any person violating Section B(3) of this Ordinance shall be guilty of a petty offense and shall be fined no less than \$50.00 nor more than \$500.00 for such offense. Any person violating Section B(3) of this Ordinance more than one time shall be guilty of a misdemeanor and shall be fined no less than \$100.00 nor more than \$500.00 or incarcerated for up to six months for each such offense.

(3) Upon conviction of a violation of Section B(1) through B(3) of this Ordinance any weapon seized shall be confiscated by the trial court and when no longer needed for evidentiary purposes, the court may transfer such weapon to the Morton Grove Police Dept. who shall destroy them.

(G) Voluntary Delivery to Police

(1) If a person voluntarily and peaceably delivers and abandons to the Morton Grove Police Department any weapon mentioned in Sections B(1) through B(3), such delivery shall preclude the arrest and prosecution of such person on a charge of violating any provision of this Ordinance with respect to the weapon voluntarily delivered. Delivery under this section may be made at the headquarters of the police department or by summoning a police officer to the person's residence or place of business. Every weapon to be delivered or abandoned to the police department under this paragraph shall be unloaded and securely wrapped in a package and in the case of delivery to the police headquarters, the package shall be carried in open view. No person who delivers and abandons a weapon under this section shall be required to furnish identification, photographs or fingerprints. No amount of money shall be paid for any weapon delivered or abandoned under this paragraph.

(2) Whenever any weapon is surrendered under this section, the police department shall inquire of all law enforcement agencies whether such weapon is needed as evidence and if the same is not needed as evidence, it shall be destroyed.

(H) All weapons ordered confiscated by the court under the provision of Section F(3) and all weapons received by the Morton Grove Police Department under and by virtue of Section G shall be held and identified as to owner, where possible, by the Morton Grove Police Department for a period of five years prior to their being destroyed.

(I) Construction:

Nothing in this Ordinance shall be construed or applied to necessarily require or excuse non-compliance with any provision of the laws of the State of Illinois or to the laws of the United States. This Ordinance and the penalties proscribed for violation hereof, shall not supersede, but shall supplement all statutes of the State of Illinois or of the United States in which similar conduct may be prohibited or regulated.

(J) Severability:

If any provisions of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of this Ordinance and the applicability of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

(K) The provisions of this Ordinance shall take effect ninety (90) days from and after its passage, approval and application in pamphlet form according to law.”

Section 3: That this Ordinance shall be published in pamphlet form. Said pamphlet shall be received as evidence of the passage and legal publication of this Ordinance.