QUILICI AND *SKLAR*: ALTERNATIVE MODELS FOR HANDGUN CONTROL ORDINANCES

I. INTRODUCTION

The issue of gun control provokes emotional reaction from both pro-gun and gun control organizations. Gun owners believe that they have a constitutional right to possess firearms. In contrast, gun control proponents emphasize the proliferation of handguns[1] and the role that handguns play in violent crimes[2] and accidental deaths[3] as rationales

1. According to information compiled by the United States Department of Justice, federally licensed firearms manufacturers produced 18,527,323 handguns between 1973 and 1981. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1983, at 174 (1984). In his report to the United States Senate, Gary Kleck of the Florida State School of Criminology wrote that the cumulated stock of handguns was 46,994,951 as of 1978, and that 215 persons out of every 1,000 possessed a handgun. *Handgun Control Legislation, 1982: Hearings Before the Subcom. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong. 2d Sess. 281 (1982) (statistical table by Gary Kleck).

2. Firearms, especially handguns, play an important role in violent crime.

MURDER VICTIMS

YEAR	MURDER VICTIMS, TOTAL	GUNS		
		Total	Percent of Total	Percent Handguns
1980	21,860	13,650	62	46
1981	20,053	12,523	62	46
1982	19,485	11,721	60	43
1983	18,673	10,895	58	44
1984	16,689	9,819	59	44

for regulating firearm possession.

Recently, Congress dealt gun control advocates a loss when amendments to the Gun Control Act of 1968[4] liberalized restrictions on the sale and transportation of firearms.[5] In addition, courts have refused, with one exception,[6] to hold firearm manufacturers strictly liable for injuries caused by their products.[7]

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NATIONAL DATA BOOK & GUIDE TO SOURCES: STATISTICAL ABSTRACT OF THE UNITED STATES 1986, at 17 No. 290 (106th ed. 1986).

FIREARM USAGE IN SELECTED CRIMES

YEAR	MURDER	AGGRAVATED ASSAULT	ROBBERY
1981	62.4	23.6	40.1
1982	60.2	22.4	39.9
1983	58.3	21.2	36.7
1984	58.8	21.1	35.8

Id. at 172 No. 292.

Firearms are tied with motor vehicles as the leading cause of death for persons aged 30-54 and the second leading cause of death, behind motor vehicles, for persons aged 15-34. Kotulak, *Guns Closing in on Autos as No. 1 Cause of Death*, Chicago Tribune, June 9, 1985, § 6, at 4.

3. Firearms were responsible for 1756 accidental deaths in 1982, according to the National Center for Health Statistics. Chicago Tribune, June 9, 1985, § 6, at 4. Every day five persons are killed accidentally by guns. *Id.*

4. 18 U.S.C. §§ 921-28 (1982). *See generally* Annotation, *Validity, Construction, and Application of Provisions of Gun Control Act of 1968 and Implementing Regulations Relating to Firearms Registration and Recording Requirements Imposed Upon Federally Licensed Firearms Dealers*, 33 A.L.R. FED. 824 (1977).

5. *See* Federal Firearms Law Reform Act of 1986 (amending 18 U.S.C. §§ 921-28 (1982). *See also* H.R. REP. No. 495, 99th Cong., 2d Sess. (1986).

6. *See* Kelley v. R.G. Industries, 304 Md. 124, 497 A.2d 1143 (1985). The Maryland Court of Appeals held that manufacturers and sellers of "Saturday Night Special" handguns are strictly liable to innocent victims shot during crimes. *See also* Reskin, *"Saturday Night Special" Sellers and Makers are Liable*, 71 A.B.A. J. 98 (Dec. 1985); West, *Maryland's Highest Court Shoots Down Suppliers of Saturday Night Specials*, 11 LITIGATION NEWS 4 (Spring 1986); Comment, *Kelley v. R.G. Industries: Gun Control Fires Back*, 21 TORT & INS. L.J. 493 (1986); Middleton, *Court Finds Strict Liability for Handgun*, Nat'l L.J., Oct. 14, 1985, at 6, col. 4.

7. *See, e.g.*, Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984) (held that under Illinois law, sale of handguns to the public is not an ultrahazardous activity giving rise to strict liability); Linton v. Smith & Wesson, 127 Ill. App. 3d 676, 469 N.E.2d 339 (1984) (manufacturer of a nondefective firearm has no duty to prevent its sale to persons likely to cause harm to the public); *see also* Note, *Handguns and Products Liability*, 97 HARV. L. REV., 1912-28 (1984) (use of products liability against firearm manufacturers is inappropriate).

Unsuccessful in efforts to reduce firearm possession through federal legislation or judicial action, many gun control groups are directing their energies toward the passage of municipal gun control ordinances. Not all efforts to enact local gun control ordinances have been successful.[8] Local governments in Illinois, however, have enacted two distinct gun control models. One model is a Chicago ordinance[9] that regulates handgun possession through registration requirements. The city hopes to reduce the number of handgun deaths and injuries by restricting the availability of handguns to a limited number of residents.[10]

Ordinances enacted by the Villages of Morton Grove[11] and Oak Park[12] and the City of Evanston[13] that ban handgun possession evidence the second gun control model. These municipalities also hope to reduce handgun deaths and injuries by enacting the statutes.[14]

The purpose of this Note is not to advocate one position in the gun control debate. Rather, the Note will analyze the validity of both models in the context of two Seventh Circuit Court of Appeals cases, *Quilici v. Village of Morton Grove*[15] and *Sklar v. Byrne*,[16] which upheld

8. Massachusetts voters rejected efforts to ban handguns in their state. N.Y. Times, Nov. 4, 1976, at 23, col. 3. The citizens of California rejected legislation that would have frozen the number of firearms at its current level. Washington Post, Nov. 9, 1982, at A6, col. 1. San Francisco successfully enacted a ban on handgun possession. SAN FRANCISCO, CAL., POLICE CODE art. 35, § 3503 (1982). In Doe v. City of San Francisco, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1982), however, the California Court of Appeals found that the California Penal Code preempted the municipal ordinance, and therefore declared the ordinance invalid. *See infra* notes 114-23 and accompanying text (discussing preemption). *See generally* Mann, *Handgun Prohibition: A Comparison of the San Francisco and the Morton Grove Ordinances*, 6 CRIM. JUS. J. 21 (1982); Comment, *Of Lawyers, Guns, and Money: Preemption and Handgun Control*, 16 U.C. DAVIS L. REV. 137 (1982) (identifies obstacles facing California city ordinances banning handguns).

Other communities have enacted ordinances *requiring* homeowners to possess a handgun. *See* Goreville, Ill., Ordinance 82-2 (Dec. 7, 1982) and Pittsburgh, Ill., Ordinance 83-3 (June 6, 1983) (both ordinances require all resident heads of households, with certain enumerated exceptions, to own a firearm with ammunition).

9. CHICAGO, ILL., CODE §§ 11.1-1 to -24 (1983).

10. *Id.* (preamble).

11. Morton Grove, Ill., Ordinance 81-11, § 2 (1981).

12. Oak Park, Ill., Ordinance Regulating the Possession of Firearms Commonly Known as Handguns, § 2 (Apr. 16, 1984).

13. Evanston, Ill., Ordinance 22-0-82, § 1 (Oct. 4, 1982).

14. In Oak Park only one murder from 1982-85 involved a handgun. In Evanston armed robbery has gradually decreased since 1982 when the ordinance was enacted. Chicago Tribune, May 12, 1985, § 1, at 14, 16.

15. 695 F.2d 261 (7th Cir. 1982).

the Morton Grove and Chicago ordinances. In Parts II and III, the Note reviews the right to bear arms clauses in both the United States and the Illinois Constitutions. Part IV discusses Illinois home rule power principles and state preemption. Next, the Note analyzes, in Parts V-VII, gun control ordinances in the context of the Federal Constitution's fifth, ninth and fourteenth amendments. Finally, Parts VIII-IX discuss the significance of *Quilici* and *Sklar* and present a model handgun ordinance that will pass judicial scrutiny.

II. FEDERAL RIGHT TO BEAR ARMS

In 1689, Parliament enacted the English Bill of Rights.[17] One provision stated that "the subjects which are protestants may have arms for their defense . . . and as allowed by law."[18] In enacting this provision, Parliament intended to guarantee Protestants a collective right to bear arms to protect themselves should a later monarch maintain a large Catholic army as James II had during the 1680s.[19] Although this provision ensured Protestants the right to serve in the army, it did not guarantee them an individual right to possess firearms.[20] Therefore, when the colonists arrived in America, they brought with them merely a collective right to bear arms.

A major political theme of the American Revolutionary era was mistrust of large standing national armies.[21] One cause of the Revolutionary War was the oppressive nature of British military rule, carried out through its standing army.[22] During this period, state constitutions contained provisions guaranteeing the right to bear arms.[23] These pro-

16. 727 F.2d 633 (7th Cir. 1984).

17. 7 W. & M., Sess. 2 (1689).

18. *Id.*

19. *See* Feller & Gotting, *The Second Amendment, A Second Look*, 61 NW. U.L. REV. 46, 48 (1966).

20. *Id. See also* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 974 (1972) (detailed study of right to bear arms in England and United States colonial period).

Feller and Gotting note that the phrase "as allowed by law" qualified the Protestants' right to bear arms. Feller & Gotting, *supra* note 19, at 49. Parliament reserved power to limit ownership of arms, which it did in the Firearms Act of 1937. Feller & Gotting, *supra* note 19, at 49.

21. Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.[-] KENT L. REV. 148, 151 (1971).

22. Feller & Gotting, *supra* note 19, at 49-53. *See also* Weatherup, *supra* note 20, at 977.

23. Feller & Gotting, *supra* note 19, at 53-56; Levin, *supra* note 21, at 152-54.

visions, however, were intended to preserve the existence of citizen militias, not to guarantee an individual right to bear arms.[24]

The Constitutional Convention of 1787 discussed the right to bear arms issue in the context of whether the proposed national government could maintain a standing army and what role state militias would have in the new federalist system.[25] The delegates, however, did not discuss at length the individual's right to possess firearms.[26] Although the states ratified the Constitution in 1789, the issue of state militias remained unresolved. Therefore, as part of the Bill of Rights, James Madison drafted the second amendment.[27] Madison intended the second amendment to guarantee states the right to maintain a well-armed militia, not to provide individuals the right to bear arms.[28] Accordingly, the second amendment only established a collective right of the people to bear arms so that the states, through their militias, could check the national standing army.[29]

The Supreme Court has considered the second amendment in three cases. In *United States v. Cruikshank*[30] the Court did not address the

24. Feller & Gotting, *supra* note 19, at 52-53; Levin, *supra* note 21, at 153-54. *But see* Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J. PUB. POL'Y 559 (1986). The author contends that by the Eighteenth Century, the English tradition of individual armament had solidified into a concept of individual ownership of arms as a specific political right. *Id.* at 587. This perception of individual armament became linked to individual freedom in America during the period leading to the Revolutionary War. *Id.* at 588-92. The American colonists, as an extension of individual freedom, asserted a right of individual armament and self-defense that they believed the British Declaration of Rights guaranteed. *Id.* at 589.

25. Ashman, *Handgun Control by Local Government*, 10 N. KY. L. REV. 97, 108 (1982) (author was attorney for Morton Grove, Ill.).

26. *Id.*

27. The second amendment states: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II. *See generally* Annotation, *Federal Constitution Right to Bear Arms*, 37 A.L.R. FED. 696 (1978).

28. Ashman, *supra* note 25, at 109; Feller & Gotting, *supra* note 19, at 61.

29. Ashman, *supra* note 25, at 109; Feller & Gotting, *supra* note 19, at 61; Caplan, *Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789 (second amendment guarantees an individual right to possess firearms); *but see* Hardy, *supra* note 24 (second amendment intended to protect the individual right to bear arms previously recognized by the British Declaration of Rights); Weiss, *A Reply to Advocates of Gun Control Law*, 52 J. URB. L. 577 (1974) (second amendment guarantees individuals absolute right to bear arms as a means to protect first amendment rights).

30. 92 U.S. 542 (1875).

second amendment directly.[31] The Court stated, however, that the second amendment applied only to the federal government.[32]

The Court later confronted the right to bear arms issue in *Presser v. Illinois*.[33] In *Presser* the Court ruled that an Illinois law prohibiting fraternal military groups drilling with firearms did not violate the second amendment.[34] The Court, reaffirming its *Cruikshank* position, asserted that the second amendment limited only federal firearm regulations, not state regulations.[35] The Court also held, however, that the states could not prohibit citizens from possessing firearms if the prohibition prevented the maintenance of the state's militia.[36]

Finally, fifty years later, in *United States v. Miller*,[37] the Supreme Court again addressed the scope of the second amendment. In *Miller* the Court held that the National Firearms Act[38] was constitutional.[39] The Court reaffirmed that the purpose of the second amendment was to assure the continuation of state militias.[40] In addition, the Court established a standard to determine which firearms the second amend-

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31. The government alleged that defendants conspired to deprive two blacks of several constitutional rights, including the right to bear arms. *Id.* at 548.

32. *Id.* at 553. The Court stated that the second amendment "is one of the amendments that has no other effect than to restrict the powers of the national government . . . ." *Id.*

Gun proponents have argued, however, that the fourteenth amendment due process clause incorporates all rights protected by the first ten amendments of the Constitution and makes them applicable to the states. The Supreme Court, in Adamson v. California, 332 U.S. 46 (1947), rejected this theory. The Court stated that the framers of the fourteenth amendment due process clause did not intend it to draw within its scope the earlier amendments to the Constitution. *Id.* at 54. *See* Watson v. Jago, 588 F.2d 330 (6th Cir. 1977) (fifth amendment right to an indictment by a grand jury not applicable to the states through fourteenth amendment).

33. 116 U.S. 252 (1886).

34. *See id.* at 253-54.

35. *See id.* at 265.

36. *Id.* Because the petitioner in *Presser* was not a member of the state militia, the Court concluded that the law did not prevent maintenance of the militia. *Id.* at 266.

37. 307 U.S. 174 (1939).

38. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801-72 (1982)) [hereinafter NFA].

39. 307 U.S. at 183. The government claimed that the two defendants violated the NFA by transporting a sawed-off shotgun across state lines without registering the weapon. The defendants demurred, claiming that the NFA violated the second amendment. The district court sustained the demurrer. *See* United States v. Miller, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939).

40. 307 U.S. at 178.

ment protects. The Court stated that the second amendment does not apply unless a weapon "has some reasonable relationship to the preservation or efficiency of a well-regulated militia."[41] Lower federal courts have subsequently followed the *Miller* court's standard.[42]

In *Quilici v. Village of Morton Grove*[43] the Seventh Circuit Court of Appeals cited *Presser*[44] and *Miller*[45] in holding the second amendment inapplicable to Morton Grove's handgun ordinance.[46] The court emphasized that the second amendment applied only to federal regulations.[47] The court concluded that the amendment did not guarantee an individual right to bear arms.[48]

In *Sklar v. Byrne*[49] the Seventh Circuit discounted the petitioner's second amendment argument in one paragraph.[50] The court relied on its *Quilici* opinion to hold the second amendment inapplicable to state and local governments.[51] Because the asserted right to bear arms was not integral to the exercise of other constitutionally protected rights,[52] the court concluded that the registration ordinance did not violate any federal right to bear arms.[53]

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41. *Id.*

42. *See, e.g.*, Thomas v. Members of City Council, 730 F.2d 41 (1st Cir. 1984) (city officials did not violate applicant's constitutional rights in denying him a permit to carry a concealed weapon); Sklar v. Bryne, 727 F.2d 633 (7th Cir. 1984) (handgun registration ordinance violated neither the second amendment nor the fourteenth amendment equal protection clause); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (ordinance banning possession of handguns upheld as constitutional), *cert. denied*, 464 U.S. 863 (1984); United States v. Oaks, 564 F.2d 384 (10th Cir. 1977) (possession of unregistered machine gun not protected by second amendment purpose of maintaining effectiveness of state militia), *cert. denied*, 435 U.S. 926 (1978); United States v. Warin, 530 F.2d 103 (6th cir. 1976), *cert. denied*, 426 U.S. 948 (1976).

43. 695 F.2d 261 (7th cir. 1982).

44. *See supra* notes 33-36 and accompanying text for discussion of *Presser*.

45. *See supra* notes 37-42 and accompanying text for discussion of *Miller*.

46. 695 F.2d at 270.

47. *Id.*

48. *Id.*

49. 727 F.2d 633 (7th Cir. 1984).

50. *Id.* at 637.

51. *Id.*

52. *Id.* (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting)).

53. 727 F.2d at 637.

III. RIGHT TO BEAR ARMS UNDER THE ILLINOIS CONSTITUTION

Although the second amendment does not guarantee individuals the right to own and possess a gun, a majority of states have right to bear arms provisions in their constitutions.[54] Prior to 1970 the Illinois Constitution did not guarantee an individual the right to own and possess handguns. Illinois courts, however, interpreted the state constitution as conferring a right to bear arms that was coextensive with that provided by the second amendment.[55] In 1970 Illinois adopted a new constitution and added a right to bear arms provisions. Article I, section 22 provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[56]

Section 22 facially seems to guarantee an individual right to bear arms. The Illinois Supreme Court, however, in *Kalodimos v. Village of Morton Grove*,[57] upheld Morton Grove's ordinance banning handgun possession.[58] After studying proceedings from the Illinois Constitutional Convention of 1970, the supreme court concluded that section

54. *See* ALASKA CONST. art. I, § 19; ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. I, § 13; CONN. CONST art. I, § 15; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 15; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. BILL OF RIGHTS § 4; KY. BILL OF RIGHTS § 1, para. 7; LA. CONST. art. I, § 11; MD. CONST. art. I, § 16; MASS. DECLARATION OF RIGHTS pt. 1 art. XVIII; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; VA. CONST. art. I, § 13; WASH. CONST. art. I, § 24; WYO. CONST. art. I, § 24.

The following states do not recognize a constitutional right to bear arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Dakota, West Virginia, and Wisconsin.

55. In Brown v. City of Chicago, 42 Ill. 2d 501, 250 N.E.2d 129 (1969), the Illinois Supreme Court stated that a "regulation which does not impair the maintenance of the state's active organized militia is not in violation of either the terms or the purposes of the second amendment." *Id.* at 504, 250 N.E.2d at 131. *See also* Biffer v. City of Chicago, 278 Ill. 562, 570, 116 N.E. 182, 183 (1917) (city ordinance regulating the sale and ownership of firearms did not violate second amendment or state constitution).

56. ILL. CONST. art. I, § 22.

57. 103 Ill. 2d 483, 470 N.E.2d 266 (1984).

58. Both the circuit court and court of appeals, 113 Ill. App. 3d 488, 447 N.E.2d 849 (1983), entered summary judgment in favor of the village. The appellants, residents of Morton Grove, called upon the supreme court to define the scope of § 22 and determine whether the village violated state home rule provisions. *See infra* notes 82-128 and accompanying text (discussing Illinois home rule power).

22 does not mirror the second amendment of the Federal Constitution.[59] Instead, the framers of section 22 meant to expand the right to bear arms from a collective right to maintain a militia to an individual right to bear certain firearms.[60]

The framers of section 22, however, explicitly subjected the right to bear arms to police power regulation.[61] The convention delegates determined that section 22 would not prevent the state or any municipality from banning handguns.[62] The supreme court concluded that section 22 prohibited only a ban on *all* firearms that an individual citizen might use; a ban on certain categories of weapons such as handguns was permissible.[63]

Decisions by Illinois appellate courts also support the qualified individual right to bear arms. The Appellate Court of Illinois for the First District twice upheld the validity of a state statute prohibiting the possession of a loaded firearm in public.[64] In *People v. Wilkes*[65] the court declared that the state may limit the right to carry or possess arms in order to control crime.[66] Three years later, in *People v. Williams*,[67] the court asserted that paragraph 24-1(a)(10)[68] did not violate section 22 of

59. 103 Ill. 2d at 491, 470 N.E.2d at 209.

60. REPORT OF THE BILL OF RIGHTS COMMITTEE ON THE PREAMBLE AND BILL OF RIGHTS [hereinafter COMM. REPORT], 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 87 (1970) [hereinafter PROCEEDINGS]. *See also Kalodimos*, 103 Ill. 2d at 491, 470 N.E.2d at 269. The court emphasized that § 22 created a right to possess a weapon for recreation or self-defense, regardless of its adaptability for use in a state militia. 103 Ill. 2d at 499-500, 470 N.E.2d at 273.

61. *See* COMM. REPORT, 6 PROCEEDINGS, *supra* note 60, at 88-89. *See also Kalodimos*, 103 Ill. 2d at 491-92, 470 N.E.2d at 269.

62. Delegate Foster, who introduced section 22 to the convention, stated that "the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category." 3 PROCEEDINGS, *supra* note 60, at 1687 (statement of Delegate Foster). *See also Kalodimos*, 103 Ill. 2d at 494, 470 N.E.2d at 270-71.

63. 103 Ill. 2d at 498, 470 N.E.2d at 272-73.

64. ILL. REV. STAT. ch. 38, ¶ 24-1(a)(10) (1985). The statute states: "(a) A person commits the offense of unlawful use of weapons when he knowingly: . . . (10) Carries or possesses on or about his person, upon any public street, alley, or other public lands . . . any pistol, revolver, stungun or teaser or other firearm."

65. 31 Ill. App. 3d 902, 334 N.E.2d 910 (1975).

66. *Id.* at 905, 334 N.E.2d at 912. *See also* People v. Graves, 23 Ill. App. 3d 762, 320 N.E.2d 95 (1974) (¶ 24-1(a)(10) does not violate the fourteenth amendment equal protection clause of the federal constitution or article IV, § 13 of the Illinois Constitution).

67. 60 Ill. App. 3d 726, 377 N.E.2d 285 (1978).

68. *See supra* note 64 for text of this paragraph.

the Illinois Constitution because the statute was a mere regulation and not a total prohibition against the use and possession of firearms.[69]

In *Rawlings v. Department of Law Enforcement*[70] the Illinois Appellate Court for the Third District addressed the constitutionality of a state statute requiring owners to obtain an identification card for their weapons.[71] The court determined that promulgation of the statute was a valid infringement on the individual right to bear arms.[72]

In *Quilici v. Village of Morton Grove*[73] the Seventh Circuit held that section 22 recognized an individual right to possess firearms.[74] The court found, however, that the police power of the state limited the right to bear arms so that a total ban on handgun possession did not violate section 22.[75] The court held that section 22 merely prohibited a

69. 60 Ill. App. 3d at 728, 377 N.E.2d at 286-87. The court interpreted the numerous exceptions to ¶ 24-1(a)(10) as evidence of legislative intent to merely regulate, but not prohibit, firearm possession. For example, ¶ 24-1(a)(10) allows a person to possess a firearm in his home or place of business, and authorizes licensed hunters to carry weapons while hunting. 60 Ill. App. 3d at 728, 377 N.E.2d at 287. In addition, the court found that the statutory restrictions imposed by ¶ 24-1(a)(10) were a reasonable and necessary exercise of state police power as permitted by § 22. *Id.*

70. 73 Ill. App. 3d 267, 391 N.E. 2d 758 (1979).

71. ILL. REV. STAT. ch. 38, ¶ 83-2(a) (1985). The statute states: "(a) No person may acquire or possess any firearm or any firearm ammunition within this State without having in his possession a Firearm Owner's Identification Card previously issued in his name by the Department of State Police under the provisions of this Act." Paragraph 83-2(b) sets forth exceptions to the above requirements for law enforcement personnel, members of the armed forces and Illinois National Guard, and certain groups of nonresidents.

72. 73 Ill. App. 3d at 274, 391 N.E.2d at 763. The court cited United States v. Miller, 307 U.S. 174 (1939), and Brown v. Chicago, 42 Ill. 2d 501, 250 N.E.2d 129 (1969), in noting that the second amendment also did not guarantee a right to bear arms. 73 Ill. App. 3d at 274, 391 N.E.2d at 763. The court held that the second amendment protected arms that had a reasonable relationship to maintaining a well-regulated militia. *Id.*

73. 695 F.2d 261 (7th Cir. 1982).

74. *Id.* at 266. Because the court felt the plain meaning of § 22 was not clear, it relied on the constitutional debates for guidance. *Id.* The court stated:

> The debates indicate that the category of arms protected by section 22 is not limited to military weapons; the framers also intended to include those arms that "law-abiding persons commonly employ[ed]" for "recreation or the protection of persons and property." Handguns are undisputedly the type of arms commonly used for "recreation or the protection of person and property."

Id. (citation omitted).

75. *Id.* at 267. In reaching this conclusion, the court relied on two factors: (1) § 22 grants the right to bear firearms, not handguns; and (2) the framers of § 22 intended handguns to be one of the arms conditionally protected under the section, but they also

total ban of all firearms.[76] Thus, although the court determined that handguns were among the class of "arms" protected by section 22, it concluded that section 22 permitted a municipality to ban a certain category of "arms" such as handguns.[77]

Two years later, in *Sklar v. Byrne*,[78] the Seventh Circuit relied on its *Quilici* opinion to dismiss the petitioner's argument that section 22 guaranteed a right to bear arms.[79] The court asserted that the right to bear arms was "narrow and subject to extensive regulation."[80] As a result, the court concluded that Chicago's registration ordinance was valid.[81]

IV. HOME RULE AND PREEMPTION IN ILLINOIS

Neither the Constitution's second amendment nor section 22 of the Illinois Constitution bar local governments from enacting gun control ordinances. Such an ordinance, however, must be a valid exercise of the local government's home rule authority.[82] This section of the Note will discuss both the powers of and the limitations on Illinois home rule units.

Prior to July 1, 1971,[83] Illinois courts limited the statutory powers of

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envisioned municipalities exercising their police power to restrict, or even prohibit, the right to possess arms. *Id.*

76. *Id.* The court again relied on the constitutional debates surrounding § 22. The court quoted one delegate as stating that § 22 "would prevent a complete ban on all guns, but there could be a ban on certain categories." *Id.* (quoting Delgate Foster, 3 PROCEEDINGS, *supra* note 60, at 1693).

77. *Id.* at 266-67.

78. 727 F.2d 633 (7th Cir. 1984).

79. *Id.* at 637.

80. *Id.*

81. *Id.* The plaintiff in *Sklar* contended that the law violated the equal protection clause of the fourteenth amendment by discriminating against persons who own handguns and have moved to Chicago after the effective date of the ordinance. *Id.* at 635. *See infra* notes 157-61 and accompanying text.

Chicago's gun registration ordinance provides in pertinent part: "(a) All firearms located in the City of Chicago shall be registered in accordance with the provisions of this Chapter.... No person shall within the City of Chicago, shall [sic] possess, harbor, have under his control . . . any firearm unless such person is the holder of a valid registration certificate for such firearm." CHICAGO, ILL., CODE § 11.1-2 (1983).

82. *See generally* Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978, U. ILL. L.F. 559 (studies regulatory power of home rule units).

83. July 1, 1971, was the effective date of the 1970 Illinois Constitution.

local governments by applying Dillon's Rule.[84] Courts interpreted home rule charters as a grant, rather than a limit, of power.[85] The state legislature controlled nearly all local government affairs.[86] Non-home rule units are still subject to this policy;[87] they need an express state statutory grant of power before taking certain local actions.[88]

Article VII, section 6(a) of the 1970 Illinois Constitution[89] was designed to give home rule units broad power to act on matters of local concern.[90] Section 6(a) provides that home rule powers will be granted to communities with a population of more than 25,000 and to cities with a lesser population that elect by referendum to become home rule units.[91] Section 6(a) also provides that a home rule community can

84. *See* 1 DILLON, MUNICIPAL CORPORATIONS 448 (5th ed. 1911). *See also* Marshall Field & Co. v. Village of South Barrington, 92 Ill. App. 3d 360, 415 N.E.2d 1277 (1981) (under Dillon's Rule, legislative grants of authority are to be strictly construed). *See generally* D. MANDELKER, D. NETSCH & P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM, 83-85 (2d ed. 1983) [hereinafter D. MANDELKER].

85. *See* City of Evanston v. Create, Inc., 85 Ill. 2d 101, 112-13, 421 N.E.2d 196, 201-02 (1981); D. MANDELKER, *supra* note 84, at 83-84.

86. *See* ILL. CONST. of 1870, art. IV, § 34 and art. IX, § 9. *See also* Village of Westville v. Rainwater, 294 Ill. 409, 128 N.E. 492 (1920) (city lacked authority to require licensing of softdrink wholesalers).

87. ILL. CONST. art. VII, § 7. The section reads in part: "Counties and municipalities which are not home rule units shall have only powers granted to them by law and the powers," to make local improvements, change their form of government and provide for their officers manner of selection and terms of office. *Id. See* Jacobsen v. State Liquor Control Comm'n, 97 Ill. App. 3d 700, 423 N.E.2d 531 (1981).

88. *See* Geneva Residential Ass'n, Ltd. v. City of Geneva, 100 Ill. App. 3d 413, 426 N.E.2d 564 (1981) (state legislation limits local use of "special use" zoning permits); Village of Cherry Valley v. Schuelke, 46 Ill. App. 3d 91, 360 N.E.2d 158 (1977) (state legislation does not preempt field of traffic regulations).

Municipalities may exercise their police powers concurrently with the state, as long as their statutes are consistent with state legislation. *See* Brown v. City of Chicago, 42 Ill. 2d 501, 250 N.E.2d 129 (1969) (city gun regulation ordinances upheld); Kizer v. City of Mattoon, 332 Ill. 545, 164 N.E. 20 (1928) (city ordinance regulating storage and sale of petroleum held invalid). *See also* 1970 Op. Att'y Gen. S-1186 (municipalities may enact ordinances regulating conduct also regulated by the state criminal code). Ordinances, however, that directly or indirectly prohibit actions authorized by state legislation are invalid. *See* Arrington v. City of Chicago, 45 Ill. 2d 316, 259 N.E.2d 22 (1970) (to the extent that a municipal ordinance regulating firearms conflicted with state statutes, ordinance held invalid).

89. ILL. CONST. art. VII, § 6(a).

90. *See* 3 PROCEEDINGS, *supra* note 60, at 1621.

91. ILL. CONST. art. VII, § 6(a). *See also* Wes Ward Enter., Ltd. v. Andrews, 42 Ill. App. 3d 458, 355 N.E.2d 131 (1975) (Illinois constitutional provision that grants home rule powers does not violate equal protection clause).

exercise any power pertaining to its government and affairs, including, but not limited to, the power to regulate for the public health, safety and welfare.[92]

In addition, section 6(i) permits home rule units to exercise concurrently with the state[93] any power, unless the state legislature specifically preempts local government action.[94] The Illinois Supreme Court has interpreted section 6(i) to require an explicit limitation by the state legislature.[95] Finally, section 6(m) provides that home rule unit powers should be construed liberally.[96]

Although home rule units generally have broad powers, section 6

92. ILL. CONST. art. VII, § 6(a).

93. *See* Easter Enter., Inc. v. Illinois Liquor Control Comm'n, 114 Ill. App. 3d 885, 449 N.E.2d 1013 (1983) (liquor control subject to concurrent jurisdiction between state and local governments).

94. ILL. CONST. art. VII, § 6(i).

95. A state statute must contain an express statement of preemption, otherwise home rule units retain all their police powers. In Rozner v. Korshak, 55 Ill. 2d 430, 303 N.E.2d 389 (1973), the Illinois Supreme Court upheld a Chicago wheel tax as a constitutional exercise of home rule powers. *Id.* at 436, 303 N.E.2d at 392. The court created an "express statement" requirement for legislative restriction of home rule authority. *Id.* at 435, 303 N.E.2d at 392. Because the court found no express language in the statute indicating a legislative intent to limit or deny home rule authority, it held that the statute had no restrictive effect on home rule units. The Illinois Supreme Court later maintained *Rozner's* express statement requirement. *See, e.g.*, Leck v. Michaelson, 129 Ill. App. 3d 593, 472 N.E.2d 1166 (1984); City of Evanston v. Create, Inc., 85 Ill. 2d 101, 108, 421 N.E.2d 196, 199 (1981) ("The enactment of a statute after the effective date of the 1970 Constitution does not automatically render the area one of exclusive control by the state . . . or deny home rule units the power to act . . . . The statute must contain an express statement to that effect."); Stryker v. Village of Oak Park, 62 Ill. 2d 523, 528, 343 N.E.2d 919, 923 (1976) (statute intended to limit or deny home rule powers must contain an express statement to that effect); Peters v. City of Springfield, 57 Ill. 2d 142, 311 N.E.2d 107 (1974).

In Prudential Insurance Co. v. Chicago, 66 Ill. 2d 437, 439, 362 N.E.2d 1021, 1022 (1977), the Illinois Supreme Court held that the following statute expressly preempted home rule authority for insurance company regulations:

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

ILL. REV. STAT. ch. 73, ¶ 2.1 (1985).

96. ILL. CONST. art. VII, § 6(m). *See* 3 PROCEEDINGS, *supra* note 60, at 1621. *See also* Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (§ 6 establishes presumption in favor of municipal home role).

limits these powers in three ways.[97] First, section 6(a) permits home rule units to exercise only those powers related to their "government and affairs."[98] Second, section 6(d) restricts the power of home rule units to incur debt or to provide for punishment of a felony.[99] Third, section 6(i) permits the state legislature to preempt concurrent local governmental power.[100] If the home rule power is granted to the local government under section 6, however, and if the state does not exercise this power, then section 6(g) requires a three-fifths majority vote of the state legislature to limit the home rule unit's power.[101]

Section 6(a) prohibits home rule municipalities from acting on matters of exclusive state concern. In *Ampersand, Inc. v. Finley*[102] the county required the collection of a county law library fee when filing a civil action.[103] The Illinois Supreme Court found the fee unconstitutional because it infringed on the administration of justice, which was a matter of state wide concern and did not pertain to local government affairs.[104] The Illinois Supreme Court has also struck down local ordinances regulating state wide matters such as the environment,[105] branch banking,[106] private detectives,[107] and public utilities.[108]

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97. *See* Michael & Norton, *supra* note 82, at 564.

98. ILL. CONST. art. VII, § 6(a). *See* Board of Educ. v. City of Peoria, 76 Ill. 2d 469, 394 N.E.2d 399 (1979) (construction of phrase "pertaining to its government and affairs" is a matter for courts to determine).

99. ILL. CONST. art. VII, § 6(d).

100. *Id.* § 6(i). *See supra* notes 94-95 and accompanying text. ILL. CONST. art. VII, § 6(j), (k) permit the Illinois legislature to limit the amount of debt a home rule unit may incur. *See generally* Helman & Whaten, *Constitutional Commentary*, ILL. ANN. STAT. CONST. art. VII (Smith-Hurd 1981); *see, e.g.*, ILL. REV. STAT. ch. 95 ½ ¶ 11-208.2 (1985).

101. ILL. CONST. art. VII, § 6(g). *See* City of Rockford v. Gill, 75 Ill. 2d 334, 388 N.E.2d 384 (1979).

102. 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

103. *Id.* at 538, 338 N.E.2d at 16.

104. *Id.* at 542, 338 N.E.2d at 18.

105. *See* City of Des Plaines v. Chicago & N.W. Ry., 65 Ill. 2d 1, 357 N.E.2d 433 (1976) (home rule units are not authorized to regulate regional or state-wide environmental problems). *But see* Cook County v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (home rule units may legislate concurrently with state if local legislation not preempted), *aff'd on remand*, 86 Ill. App. 3d 673, 408 N.E.2d 236 (1979).

106. People *ex rel.* Lignoul v. City of Chicago, 67 Ill. 2d 480, 368 N.E.2d 100 (1977) (banking held to be predominantly a state and national government matter).

107. United Private Detective & Sec. Ass'n v. City of Chicago, 62 Ill. 2d 506, 343 N.E.2d 453 (1976) (state statute preempted home rule regulation of private detectives).

108. Peoples Gas, Light & Coke Co. v. City of Chicago, 125 Ill. App. 3d 95, 465

Gun control legislation, however, is not a matter of exclusive state concern. When writing the 1970 constitution, section 22's framers contemplated local governments enacting gun control ordinances for public safety and welfare reasons.[109] In addition, Illinois courts have recognized the authority of home rule units to pass legislation superseding related state statutes enacted prior to the 1970 Constitution.[110] The Illinois Supreme Court determined in *Brown v. City of Chicago* that local governments possess the requisite police powers to enact handgun legislation.[111] Finally, in *Kalodimos v. Village of Morton Grove* the supreme court held that weapons control and crime prevention were not matters of strictly state wide concern.[112] The court found that local governments had important interests in regulating weapon possession to reduce premeditated crime, domestic violence, and accidental firearm deaths within their boundaries.[113]

Because local governments possess sufficient home rule power to enact gun control ordinances, the only other limit to passage of these ordinances is preemption by state law. Section 6(a) grants home rule units the same police power to regulate for protection of the public health, safety, and welfare as the state, except when the state legislature specifically limits[114] local government powers.[115] In *Rozner v. Korshak*[116] the Illinois Supreme Court established an express statement

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N.E.2d 603 (1984) (long standing statewide interest in public utilities, manifested by state commerce commission's exclusive regulation, precludes local regulations).

109. *See supra* notes 55-63 and accompanying text (discussing state constitutional history of right to bear arms).

110. *See* Stryker v. Village of Oak Park, 62 Ill. 2d 523, 527, 343 N.E.2d 919, 922, *cert. denied*, 429 U.S. 832 (1976); Resman v. Personnel Bd., 96 Ill. App. 3d 919, 422 N.E.2d 120 (1981) (personnel ordinance upheld); Springfield v. Ushman, 71 Ill. App. 3d 112, 388 N.E.2d 1357 (1979) (tax ordinance for sale of fireworks upheld).

The Illinois Supreme Court has also validated home rule ordinances that conflict with state statutes enacted prior to the 1970 constitution. *See, e.g.*, City of Evanston v. Create, Inc., 85 Ill. 2d 101, 421 N.E.2d 196 (1981) (local ordinance regulating landlord-tenant relations upheld); Mulligan v. Dunne, 61 Ill. 2d 544, 338 N.E.2d 6 (1975) (county liquor tax sustained).

111. 42 Ill. 2d 501, 250 N.E.2d 129 (1969). *See supra* note 55 and accompanying text.

112. 103 Ill. 2d 483, 503, 470 N.E.2d 266, 275 (1984).

113. *Id.*

114. ILL. CONST. art. VII, § 6(g)-(i). *See supra* notes 94-95 and accompanying text.

115. *See* City of Evanston v. Create, Inc., 85 Ill. 2d 101, 115, 421 N.E.2d 196, 201 (1981); City of Urbana v. Houser, 67 Ill. 2d 268, 273, 367 N.E.2d 692, 694 (1977).

116. 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

requirement to preempt home rule authority by state statute.[117] It has been argued that the state legislature, through enactment of numerous statutes, has preempted home rule power to regulate firearms.[118] The Illinois Supreme Court in *Brown*, however, specifically stated that "the legislature has not preempted the field of gun control."[119]

The supreme court, in *Kalodimos*, determined that state firearm regulations did not preempt stricter legislation by municipalities.[120] Rather, state statutes expressly permit more stringent local regulations.[121] Chapter 38, paragraph 83-13.1 of the Firearms and Ammunition Act provides that any local controls more stringent than regulations imposed by the Act are unaffected by the Act.[122] The court, therefore, concluded that Morton Grove properly exercised its home rule powers in enacting its ordinance.[123]

The *Quilici* court stated that Illinois home rule units have expansive powers, "including the authority to impose greater restrictions on particular rights than those imposed by the state."[124] The court concluded that because the Illinois Constitution permitted a ban on certain categories of arms,[125] home rule units could enact gun control legislation differing from, or even inconsistent with, state statutory restrictions.[126] The Seventh Circuit, in *Sklar v. Byrne*,[127] determined that

117. *Id.* at 435, 303 N.E.2d at 392. *See supra* note 95 for a discussion of *Rozner.*

118. Judge Coffey, in his *Quilici* dissent, stated that home rule gun control ordinances were "impliedly preempted" by an "extensive scheme" of firearm statutes. 695 F.2d 261, 271-73 (1982) (Coffey, J., dissenting).

Judge Coffey cited five statutes as evidence of legislative intent to preempt the gun control field. The first was ILL. REV. STAT., ch. 38, ¶ 24-3.1, which prohibits possession of a firearm by a minor, a felon, a drug addict, or a mentally ill or retarded person. The second statute, ILL. REV. STAT., ch. 38, ¶ 24-1(a)(10), forbids possession of a handgun by a person on a public street, alley, or other public lands. The third statute, ILL. REV. STAT., ch. 38, ¶ 24-1(a)(4), proscribes carrying a concealed handgun. The fourth statute, ILL. REV. STAT., ch. 38, ¶ 24-1(a)(8) prohibits firearm possession in an establishment licensed to sell liquor. In the last statute Judge Coffey referred to, ILL. REV. STAT., ch. 38, ¶ 24-1(a)(7), the legislature expressly banned possession of firearms such as machine guns and sawed-off shotguns, but did not categorically limit possession of handguns. *Id.*

119. 42 Ill. 2d 501, 504, 250 N.E.2d 129, 131 (1969).

120. *Kalodimos*, 103 Ill. 2d at 506, 470 N.E.2d at 276.

121. *Id.*

122. ILL. REV. STAT. ch. 38, ¶ 83-13.1.

123. 103 Ill. 2d at 508, 470 N.E.2d at 277.

124. 695 F.2d 261, 268 (7th Cir. 1982).

125. *See supra* notes 61-63 and accompanying text.

126. 695 F.2d at 268.

because the section 22 right to bear arms was a qualified right, subject to police power regulation, a home rule unit could restrict the availability of firearms.[128]

V. FIFTH AMENDMENT

The fifth amendment of the Federal Constitution prohibits governmental taking of private property without just compensation.[129] States can regulate private property for the public good without paying compensation if they do not unreasonably infringe on property rights.[130] Should a state regulation interfere with a property owner's rights to the extent that a court considers the regulation a taking, the fifth amendment will apply.[131] Gun owners have argued that gun control legislation is a regulatory "taking" of private property.[132] Courts, however, disagree.

Although one commentator has noted that no general rule exists describing what constitutes a taking,[133] courts predominantly use the

127. 727 F.2d 633 (7th Cir. 1984).

128. *Id.* at 637.

129. The fifth amendment states in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *See generally* F. BOSSELMAN, D. CALLIES & G. BANTA, THE TAKING ISSUE (1973); D. MANDELKER, LAND USE LAW (1982).

130. A state may use its police power to restrict private property uses for the protection of public health, safety, and welfare. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (local zoning ordinance forbidding industry in a residential area upheld as a valid exercise of the police power); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (state statute restricting mining that caused subsidence of surface dwellings upheld). *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (reviews regulations that courts have considered takings); Comment, *State Regulation of Substandard Housing and the Fifth Amendment Taking Clause: Devines v. Maier*, 20 WASH. U. J. URB. & CONTEMP. L. 263 (1985) (reviews history of taking clause in context of tenants' leasehold interests).

131. The fifth amendment taking clause applies to states through the fourteenth amendment. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

Courts no longer require an actual physical invasion of private property by the state to invoke fifth amendment protections. *Compare* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (taking occurred when state-built public dam flooded claimant's land) *with* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

132. Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1183-84 (N.D. Ill. 1981).

133. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 483 (2d ed. 1982) [hereinafter J. NOWAK].

"continuum theory"[134] established by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[135] Justice Holmes stated that courts should use a balancing test to determine whether a government regulation is a taking.[136] Justice Holmes compared the public need and the diminution in value of the property owner's land.[137] The property owner receives no compensation if the public benefit outweighs his injuries.[138]

While following Justice Holmes' continuum theory, many courts use criteria other than the diminution formula to determine whether a taking exists.[139] For example, the district court in *Quilici v. Village of Morton Grove* analyzed the availability of alternative uses after enactment of the regulation.[140] As long as the regulation leaves the property owner some reasonable use of his land, courts following this approach will not find a taking.[141]

The petitioner in *Sklar* did not raise the fifth amendment issue. Such a claim would have been unsuccessful because the Seventh Circuit determined that Chicago's ordinance was a reasonable exercise of police powers.[142] In addition, the ordinance did not destroy the owner's use of his weapons. He could store and enjoy them outside of Chicago, or sell them to a non-Chicago resident. The ordinance merely prohibited ownership of a gun within the Chicago city limits.

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134. *See* Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211, 214 (1984); Comment, *supra* note 130, at 267-68.

135. 260 U.S. 393 (1922).

136. *Id.* at 415-16. A court should weigh the regulation's public benefit against the property owner's injury. *Id. See also* Agins v. City of Tiburon, 447 U.S. 255 (1980) (Court used balancing test to uphold zoning ordinance).

137. Justice Holmes applied a "diminution in value" test to measure the property owner's injury. 260 U.S. at 413. *See* D. MANDELKER, *supra* note 129, at 21-22. Comment, *supra* note 130, at 260 and n.36.

138. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (city ordinance prohibiting the building of a high-rise office building upheld; aesthetic benefit outweighed injury).

139. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1183-84 (discusses tests courts use to find a taking; describes four factors critical to finding of a taking).

140. 532 F. Supp. at 1183-84. "In order for a regulatory taking to require compensation . . . the exercise of the police power must result in the destruction of the use and enjoyment of a legitimate private property right." *Id. See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance restricting land to residential use upheld even though it reduced value of land by 75%).

141. *See Penn Central*, 438 U.S. at 138 (zoning ordinance permitted "reasonable beneficial use" of the landmark site).

142. 727 F.2d 633, 637 (7th Cir. 1984).

VI. NINTH AMENDMENT

The Supreme Court has recognized certain rights as "fundamental."[143] The Court has determined that these rights are so necessary to the exercise of individual liberty that the ninth amendment[144] protects them, even though the Bill of Rights does not expressly list them in the first eight amendments.[145] The Court has never clearly delineated the scope of the ninth amendment. The Court, however, has limited the scope of fundamental rights to those concerning interstate travel, the family, and procreation.[146]

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143. *See, e.g.*, Roe v. Wade, 140 U.S. 113 (1973) (abortion); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (child rearing and education).

144. The ninth amendment states: "The 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.

145. *See Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

146. *See generally* Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

Since Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court has protected values that a majority of the Court believes are essential to an ordered society, although such rights are not expressly enumerated in the Constitution. The Justices often advocate natural law principles as support for their position. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Marshall and Johnson opinions). In Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court declared that a state labor law violated the Constitution by overly interfering with employer-employee contract rights. *Id.* at 64. During the 30 years subsequent to the *Lochner* decision, the Court invalidated on substantive due process grounds a number of economic-related laws. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923) (law prescribing minimum wages for women held to violate due process); Coppage v. Kansas, 236 U.S. 1 (1915) (law prohibiting nonunion membership clauses in contracts held to violate due process clause); *but see* Muller v. Oregon, 208 U.S. 412 (1908) (law prescribing maximum work hours for women upheld).

In West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Supreme Court rejected its interventionist approach to substantive due process. The Court overturned *Adkins v. Children's Hospital* and sustained a state law establishing minimum wages for women. The Court emphasized that the freedom of contract is not an absolute right. The Court stated that the Constitution prohibited the deprivation of liberty but "does not recognize an absolute and uncontrollable liberty . . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *Id.* at 391. Later, the Court, in Williamson v. Lee Optical Co., 348 U.S. 483 (1955), expressly stated that it would no longer intervene in cases concerning economic legislation. *Id.* at 488. By rejecting the *Lochner* approach to substantive due process, however, the Supreme Court limited the

In *Griswold v. Connecticut*[147] the Supreme Court reversed the conviction of planned parenthood clinic personnel who had violated a state statute prohibiting distribution of contraceptives to any person. The Court found a fundamental right to marital privacy.[148] In his concurrence, Justice Goldberg established a standard to determine which rights not expressed explicitly in the first eight amendments were fundamental rights protected by the ninth amendment.[149] He found only those rights "so rooted' in the "traditions and [collective] conscience" of American citizens to be fundamental.[150]

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ability of justices to use natural law and subjective factors to define and protect unenumerated constitutional rights.

Notwithstanding the Court's noninterventionist policy concerning economic legislation cases, the Court today continues to protect privileges that fall under the general category of "right to privacy." *See* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1898) (argued that every individual has a cognizable legal interest in physical and emotional privacy). The Constitution, however, does not explicitly guarantee a right to privacy. In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas, writing for the majority, found that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees . . . . Various guarantees create zones of privacy." *Id.* at 484. Justice Douglas stated that the "penumbras" of the first, third, fourth, fifth and ninth amendments create a right of privacy. *Id.*

Justice Goldberg, in his concurrence, found a fundamental right to privacy without relying on any specific guarantee of the Bill of Rights. *Id.* at 486-87. He looked to the ninth amendment as a source from which other liberties besides those not enumerated in the first eight amendments could be found. *Id.* at 490. Justice Goldberg believed that the ninth amendment did not create these additional rights, but rather authorized the court to identify and protect them. *Id.* at 492-93. Justice Goldberg also established a standard to identify fundamental rights, stating that a court should look to the "traditions and [collective] conscience" of America to determine whether such rights are "so rooted" as to be "ranked as fundamental." *Id.* at 493. Applying this standard, Justice Goldberg found a fundamental right to privacy. *See* 381 U.S. at 494. *See generally* J. NOWAK, *supra* note 133, at 737-39.

The Court has never defined the scope of the right to privacy. The Court indicated, however, in Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977), that the right to privacy includes matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. *See* Loving v. Virginia, 388 U.S. 1 (statute prohibiting interracial marriages held unconstitutional); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (zoning ordinance so narrowly drawn as to disallow grandchildren to live with their grandmother held unconstitutional); Eisenstadt v. Baird, 405 U.S. 438 (1972) (conviction under a statute banning the distribution of contraceptives held unconstitutional); Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute providing for compulsory sterilization after third conviction of a felony involving moral turpitude held unconstitutional).

147. 381 U.S. 479 (1965).

148. *Id.* at 484.

149. *Id.* at 493 (Goldberg, J., concurring). *See supra* note 146.

150. *Id.*

Gun proponents argue that ancient scholars[151] and the Framers of the Bill of Rights acknowledged that a right to bear arms existed.[152] In *Quilici* the petitioner cited Justice Goldberg's fundamental rights standard in asserting that the ninth amendment protected an unenumerated right to possess handguns.[153] The district court rejected this argument, emphasizing that a majority of the Supreme Court has never adopted Justice Goldberg's thesis.[154] The Seventh Circuit dismissed the petitioner's ninth amendment argument for lacking "legal significance,"[155] pointing out that the Supreme Court had never held that the ninth amendment protected any specific right.[156] The petitioner in *Sklar* did not raise the ninth amendment issue.

VII. EQUAL PROTECTION

The Chicago handgun registration ordinance presented an additional constitutional hurdle. Unlike Morton Grove's statute, the Chicago statute classified residents differently—only some could keep their handguns. The petitioner in *Sklar* argued that the Chicago ordinance violated the fourteenth amendment's equal protection clause.[157] The

151. Cicero wrote, "if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right." Cicero, *In Defense of Titus Annius Milo*, SELECTED POLITICAL SPEECHES 222 (M. Grant trans. 1969) (quoted in *Quilici*, 532 F. Supp. at 1183).

152. *But see supra* notes 27-29 and accompanying text.

153. 532 F. Supp. at 1183.

154. *Id.*

155. 695 F.2d 261, 271 (7th Cir. 1982). The *Quilici* dissent concluded that the ninth amendment protected the right to possess handguns. *Id.* at 278-80. Judge Coffey argued that the Morton Grove ordinance violated two fundamental rights: the fundamental right to privacy and the fundamental right to defend the home against unlawful intrusion. *Id.* at 279. Judge Coffey relied on Stanley v. Georgia, 394 U.S. 557 (1969). In *Stanley* the Supreme Court held that the first and fourteenth amendments prevent states from criminalizing possession of obscene materials within the confines of a private home. *Stanley* does not, however, create a general right of privacy in one's own home, as the Court expressly limited the holding by declaring that the state had the power to make possession of other items such as narcotics, firearms, or stolen goods a crime. *Id.* at 568 n.11. *Stanley*, therefore, offers little support for the position that one's privacy right guarantees possession of handguns.

In addition, the Supreme Court has not yet recognized a fundamental right to defend one's home. *See supra* note 146 for a discussion of recognized fundamental rights. Thus, Judge Coffey's argument that the ninth amendment guarantees such a right is incorrect.

156. 695 F.2d at 271.

157. 727 F.2d 633, 636 (7th Cir. 1984). The fourteenth amendment equal protection clause states in part: "No state shall make or enforce any law which shall . . . deny

petitioner argued that the classification was suspect because it discrimi-

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to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See generally* Tussman & Tenbroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (statutes that are either underinclusive or overinclusive are unconstitutional).

The equal protection clause guarantees that those similarly situated are similarly treated. Legislative classifications are not per se unconstitutional, "but the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." F.S. Royster Co. v. Virginia, 253 U.S. 412, 415 (1920). *See generally* J. NOWAK, *supra* note 133, at 586-90.

The Supreme Court uses a two-tier analysis to decide equal protection claims. *See* J. NOWAK, *supra* note 133, at 590-92. *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). The Court uses a deferential rational relation test in cases involving economic legislation. The Court upholds the classification unless no reasonable set of facts could establish a "rational relation" between a "legitimate" governmental goal and the classification. *See* Hodel v. Indiana, 452 U.S. 314, 331 (1981) (Surface Mining and Reclamation Control Act of 1977 upheld against claims that land use restrictions were arbitrary); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (congressional elimination of dual pension payments upheld); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (state law charging nonresident hunters higher fee for license than residents upheld). Professor Gunther describes "old" equal protection as having "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

The Court's second standard of review is the strict scrutiny test. The Court will not defer to other branches of government, but will determine independently whether the legislative means are "necessary" to attain a "compelling" state interest. Gunther stated that this standard of review "was 'strict' in theory and fatal in fact." *Id.*

A court invokes strict scrutiny when it reviews legislative classifications that create a "suspect" classification. Classifications based on race, national origin and, sometimes, alienage are "suspect." *See* Graham v. Richardson, 403 U.S. 365 (1971) (statute conditioning distribution of welfare benefits on possession of United States citizenship held to violate equal protection clause: "classifications based on alienage, like those passed on nationality or race, are inherently suspect and subject to close judicial scrutiny"); Loving v. Virginia, 388 U.S. 1 (1967) (statute prohibiting interracial marriages held to violate equal protection clause); Korematsu v. United States, 323 U.S. 214, 216 (1944) (World War II incarceration of Japanese-Americans; originated phrase "suspect"). *But see* Foley v. Connelie, 435 U.S. 291 (1978) (statute excluding aliens from state police force upheld: "right to govern is reserved to citizens").

Justice Stone's *Carolene Products* footnote 4 provides guidance for when a classification is suspect, thereby invoking heightened scrutiny. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Although the case did not raise the issue of strict scrutiny review, Justice Stone stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation to those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* Courts have an important function to protect "discrete and insular minorities" because they often cannot protect themselves through the political process. J. NOWAK, *supra* note 133, at 592.

The Supreme Court also has invoked the strict scrutiny standard of review for classifications interfering with the exercise of a fundamental constitutional right. *See supra*

nated against new residents.[158] Petitioner claimed that the ordinance classified people unconstitutionally on the basis of durational residence requirements[159] that penalize the exercise of the right to travel.[160] The

note 146 and accompanying text. For example, the Court has applied strict scrutiny to laws limiting access to the political process and those interfering with the right to travel. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (statute restricting vote in school district elections to persons either owning or leasing taxable property or parents of school children held unconstitutional); Shapiro v. Thompson, 394 U.S. 618 (1969) (statute conditioning receipt of state medical benefits upon a one-year residency requirement held unconstitutional); *see infra* note 160 and accompanying text (discussing right to travel).

Although the Burger Court maintained the two-tier analysis, it expressed dissatisfaction over the sharp differences between the rational basis test and the strict scrutiny test. G. GUNTHER, CONSTITUTIONAL LAW 589 (11th ed. 1985). As a result, the Court developed an intermediate standard of review, applicable to classifications based on gender. *See* Craig v. Boren, 429 U.S. 190 (1976) (state statute that permitted sale of beer to 18 year old women but not to males under 21 years old held unconstitutional). The classification must be "substantially related" to an "important" state objective. *Id.* at 197. Occasionally, the Supreme Court has applied heightened scrutiny to illegitimacy classifications. *See* Mills v. Habluetzel, 456 U.S. 91 (1982) (statute requiring illegitimate children to bring a paternity suit to identify their natural father before the age of one or lose right to obtain child support held unconstitutional). *But see* Lalli v. Lalli, 439 U.S. 259 (1978) (statute prohibiting inheritance by illegitimate children from their natural father unless a court made a finding of paternity during the father's lifetime upheld).

158. 727 F.2d at 636.

159. *Id.* at 638. Durational residence requirements premise governmental services and benefits on length of citizenship. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974) (state statute requiring one year residence in county before public hospital must provide free medical care held to burden right to travel). *See generally* Comment, *Durational Residence Requirements and the Equal Protection Clause: Zobel v. Williams*, 25 WASH. U.J. URB. & CONTEMP. L. 329 (1983).

160. A fundamental right to travel has been recognized since the founding of the United States. The Articles of Confederation explicitly recognized the right to travel. They stated that every citizen had the right of "Free ingress and regress to and from any other State." ARTICLES OF CONFEDERATION art. IV (1778), *reprinted in* 1 U.S.C. XXXIX-XLVII (1982). The Constitution, however, contains no similar provision. The Constitution provides only that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. It is unclear why both the Constitution and Bill of Rights excluded a right to travel provision. One theory is that the Framers felt other provisions of the Constitution protected the right, namely Congress' commerce power and the article IV privileges and immunities clause. *See* J. NOWAK, *supra* note 133, at 807; Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION of 1787, at 185 (1956).

Courts initially relied on the privileges and immunities clause to protect the right to travel. In Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), the Court interpreted the privileges and immunities clause as a protection of "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id.* at 552. *But see* New York v. Miln,

Seventh Circuit disagreed, holding that Chicago's ordinance was not a durational residence requirement and only indirectly affected the right to travel.[161]

In *Shapiro v. Thompson*[162] the Supreme Court invalidated two District of Columbia statutes that denied welfare benefits to persons who had resided less than a year in the District.[163] The Court found that because the residency requirement deterred transients from entering the district, the statutes violated the equal protection clause by unduly limiting the right to interstate travel.[164] Because the Court held the

36 U.S. 102 (1837) (law prohibiting unwanted aliens from entering the state upheld). *See generally* Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853 (1981).

The Supreme Court, however, limited *New York v. Miln* twelve years later in The Passenger Cases, 48 U.S. (2 How.) 283 (1849). There, the Court held that a state tax imposed on incoming aliens implicated the commerce clause and was therefore invalid. Since *The Passenger Cases*, the Supreme Court often has invoked the commerce clause to protect the right to travel. *See* Edwards v. California, 314 U.S. 160 (1941); Helson v. Kentucky, 279 U.S. 245 (1929); Henderson v. Mayor of New York, 92 U.S. 259 (1875).

The Supreme Court, however, never abandoned its theory of the right to travel. In Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), the Supreme Court held that there is an inherent right to travel. *Id.* at 44. Even when The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, limited the scope of the privileges and immunities clause, the Court continued to recognize the right to travel as one attribute of national citizenship. *Id.* at 79. *See also* United States v. Guest, 383 U.S. 745 (1966) (right to interstate travel incident to federal citizenship); United States v. Wheeler, 254 U.S. 281 (1920) (art. IV, § 2 of Articles of Confederation, guaranteeing right to travel, similar to the article IV privileges and immunities clause); Williams v. Fears, 179 U.S. 270 (1900) (right to travel is "an attribute of personal liberty" guaranteed by the Constitution and fourteenth amendment); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) (privileges and immunities clause is the source of the right to travel). *See generally* J. NOWAK, *supra* note 133, at 807.

Since the 1960s, the Supreme Court has relied on the fourteenth amendment equal protection clause to protect the right to travel. In Shapiro v. Thompson, 394 U.S. 617 (1969), the Supreme Court declared invalid a statute that conditioned receipt of state medical benefits upon a one year residence requirement. The statute's classification scheme violated the equal protection clause because it treated new residents dissimilarly, *id.* at 631, and the government lacked a compelling interest. *Id.* at 634. For a discussion of the equal protection clause, see *supra* note 157. For a discussion of *Shapiro* and similar cases, see *infra* notes 162-65 and accompanying text.

161. 727 F.2d at 638. Petitioner moved to Chicago from Skokie, Illinois. The court of appeals noted that petitioner premised his argument on the federal constitutional protection of intrastate movement. *Id.* at 638 n.7. In Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 & n.9, the Supreme Court expressly left unanswered the question of whether the federal constitution protected intrastate travel.

162. 394 U.S. 618 (1969). *See supra* note 160 for discussion of the right to travel.

163. *Id.* at 642.

164. *Id.* at 631.

right to interstate travel fundamental, it applied strict scrutiny to invalidate the statute.[165]

Later decisions have followed the *Shapiro* court's analysis of durational residence requirements.[166] The Court has indicated, however, that it will uphold a residence requirement that limits travel as long as it is not arbitrary.[167] In addition, one commentator has noted that the Court might uphold, under a deferential standard of review, a residence requirement that relates to activities *not* related to the exercise of other rights or the new resident's ability to function in the community.[168]

The Seventh Circuit Court of Appeals in *Sklar* properly dismissed petitioner's suspect classification argument. The Court noted that the Chicago ordinance did not single out new residence to Chicago.[169]

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165. *Id.* at 634. The court stated that "any classification which serves to penalize the exercise of . . . [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.* (emphasis in original).

166. *See* Zobel v. Williams, 457 U.S. 55 (1982) (Alaskan dividend distribution plan based on number of years citizen resided in the state held unconstitutional); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (Arizona statute that denied medical services to indigents residing in the state less than one year held unconstitutional as "penalizing" the right to travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee one-year residence requirement for voting held invalid as "penalizing" the right to travel).

167. *See* Jones v. Helms, 452 U.S. 412 (1981). Georgia law made a parent's willful abandonment of a child a misdemeanor. If the parents left the state, the abandonment was a felony. In *Jones* the Court recognized a fundamental right to travel. *Id.* at 418. The Court, however, found that a state may burden a citizen's right to travel if criminal conduct within the state has qualified that right. *Id.* at 419. *But cf.* Sosna v. Iowa, 419 U.S. 393 (1975) (one-year residence requirement for bringing divorce proceedings upheld because no deprivation of court access occurs, merely a delay).

The Supreme Court has also recognized the validity of bona fide residence requirements. *See* Martinez v. Bynum, 461 U.S. 321 (1983). The Court upheld a state statute that denied free education to a student who lived apart from his parents or legal guardian if the student's main reason was to attend school in a certain district. The Court stated: A bona fide residence requirement, appropriately defined and uniformly applied . . . does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. *Id.* at 328-29. *See also* Sturgis v. Washington, 368 F. Supp. 38 (W.D. Wash.) (bona fide residence requirement for resident tuition rates at the University of Washington upheld) *aff'd mem.*, 414 U.S. 1057 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) (bona fide residence requirement for resident tuition rates at the University of Minnesota upheld), *aff'd mem.*, 401 U.S. 985 (1971).

168. J. NOWAK, *supra* note 133, at 812. Professor Nowak cited Justice Douglas' concurring opinion in *Memorial Hosp. v. Maricopa County*. *Id.*

169. 727 F.2d at 638.

Rather, the ordinance prohibited three groups from possessing handguns: residents who moved to Chicago after the effective date of April 10, 1982; residents of Chicago on the effective date who did not own a handgun; and residents of Chicago who owned a handgun on the effective date, but who did not register it with the city.[170] The court concluded that the handgun provisions amounted to a "familiar grandfather clause"[171] that had only an indirect effect on the right to travel because new residents were merely one group among several who did not benefit from the ordinance.[172]

Governments use grandfather provisions to protect reliance interests of established residents or businesses.[173] Courts, however, must scrutinize such provisions to determine whether they substitute for invidious discrimination or interfere with a fundamental constitiutional right.[174] The Chicago ordinance did not contain a suspect classification or di-

170. *Id.* The court also noted that the ordinance limited the rights of gun owners who satisfied the ordinance's requirements. *Id.* The law prevented owners from selling or giving away their guns in Chicago, or replacing any handgun lost or destroyed. *Id.* The court stated that the "ordinance thus effectively freezes the current distribution of legal handguns in Chicago." *Id.*

171. *Id.* at 639. *See generally* Annotation, *Construction of "grandfather clause" of statute or ordinance regulating or licensing business or occupation*, 4 A.L.R.2d 667 (1949).

172. 727 F.2d at 639. *See also* Wine & Spirits Merchandisers, Inc. v. Illinois Liquor Control Comm'n, 104 Ill. App. 3d 377 (1982). The court sustained the Illinois Liquor Control Commission's decision not to renew certain distribution licenses held by the merchants because it did not meet the requirements of a state grandfather provision. In describing the function of grandfather provisions, the court stated that they permit the continuation of otherwise illegal activity in order to obviate unfairness to those who engaged in that activity before it was outlawed by the legislature. *Id.* at 379. The court also stated that because grandfather provisions create an exception to the general provisions of the statute, these clauses must be strictly construed. *Id.*

173. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976). New Orleans enacted an ordinance prohibiting pushcart vendors from selling foodstuffs in the French Quarter. The Court sustained an amendment to the ordinance exempting vendors who had continually operated the same business within the French Quarter for eight years prior to the law's enforcement. *Id.* at 304-05. *See also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). The *Clover Leaf* Court relied on *Dukes* to uphold the validity of a state grandfather provision that temporarily protected reliance interests of established businesses, but not the interest of more recent entries into the field. *Id.* at 467-68. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 809 (1978) (FCC grandfather provision permitting certain existing newspaper-broadcaster combinations to continue while requiring future diversification of ownership upheld); Trafelet v. Thompson, 594 F.2d 623, 630-31 & n.11 (7th Cir. 1979) (protection of reliance interests in judicial retirement benefits is a legitimate goal for a state grandfather provision).

174. *See* Lane v. Wilson, 307 U.S. 268, 275-77 (1939) (grandfather clause in state voter registration law violated fifteenth amendment); Guinn v. United States, 238 U.S.

rectly burden a fundamental right. The court of appeals, therefore, used the rational basis test rather than strict scrutiny to review the ordinance.[175] The court found the city council's purposes, as set forth in the ordinance's preamble, to be legitimate. In addition, the ordinance was rationally related to achieving the goal of reducing Chicago's handgun supply.[176]

VIII. SIGNIFICANCE OF *QUILICI* AND *SKLAR*

Both *Quilici v. Village of Morton Grove* and *Sklar v. Byrne* support the efforts of gun control lobbyists. The *Quilici* decision pointed out that the Constitution's second amendment does not apply to state or municipal governments. In addition, the court in *Quilici* asserted that the second amendment protects only a collective right to bear arms designed to maintain and preserve a well-regulated state militia. The court also determined that section 22 of the 1970 Illinois Constitution was no barrier to state regulation of firearms. Although section 22 guarantees an individual right to bear "arms," state police powers expressly limit this right, enabling local governments to regulate or ban certain categories of firearms. Furthermore, the court held that an ordinance banning handgun possession was not an unconstitutional taking of private property under the fifth amendment. The Seventh

347, 364-65 (1915) (grandfather clause in state constitutional amendment violated fifteenth amendment).

175. *Sklar*, 727 F.2d 633, 639-40. *See Dukes*, 427 U.S. at 303. *See supra* note 157 for discussion of differing "tiers" of equal protection review.

176. 727 F.2d at 640. Petitioner's final two arguments concerned the particular classification scheme that the city council chose to achieve its legitimate legislative goals. The petitioner asserted that the grandfather clause served no legitimate purpose. *Id.* at 641. Neither the ordinance nor the legislative record indicated the grandfather clause's purpose. *Id.* The court, however, found it "clear" that the purpose of the classification scheme was to protect the reliance interests of those who purchased handguns legally before the effective date of the ordinance. *Id.* Citing *Dukes* and *Clover Leaf*, the court held that protection of reliance interests was legitimate and that the grandfather clause was tailored to fit the extent of the reliance. 727 F.2d at 642.

Petitioner's second contention was that the classification scheme was arbitrary and irrational. *Id.* Petitioner argued that the scheme was inconsistent with the goal of the ordinance. *Id.* If the city's goal was prevention of deaths and injuries resulting from handguns, petitioner argued, it should classify people by their ability to handle guns. *Id.* The court rejected this argument by stating that the Constitution did not require Chicago to produce a "perfect law" and that the city council could proceed in eradicating a problem "step by step." *Id. See also Dukes*, 427 U.S. at 303; Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

Circuit also determined that the ninth amendment did not create a fundamental right to possess firearms.

In *Sklar* the Seventh Circuit relied on its *Quilici* decision to dismiss petitioner's second amendment and section 22 right to bear arms arguments. The Chicago registration ordinance, however, had an equal protection hurdle to clear that was not present in *Quilici*. In *Sklar* the court determined that the ordinance was not a durational residence requirement and that the ordinance's effect on travel was only indirect. The *Sklar* decision held that use of a "grandfather clause" by the city council to protect a citizen's reliance interests did not discriminate against new residents, as they were merely one group among many that did not benefit from the clause.

IX. ALTERNATIVE MODELS

The ordinances at issue in *Sklar* and *Quilici* provide alternative models for communities contemplating enactment of gun control legislation. Chicago's ordinance, upheld in *Sklar* froze the distribution of handguns in the city at the level existing on the statute's effective date. Alternatively, the ordinances of Morton Grove, Oak Park, and Evanston banned private possession of handguns to differing degrees. Both alternatives present viable means to reduce handgun-related accidents.

Before adopting either model ordinance, however, a local community must satisfy various procedural requirements. Regardless of a municipality's form of government,[177] meetings of the city legislative body discussing such an ordinance must be open to the public.[178] The municipality must give public notice of all regular and special meetings.[179] If a municipality does not comply with the open meeting requirement, a court may declare null and void any final action taken at such a meeting.[180]

Both model ordinances should contain certain provisions that will prevent facial invalidation of the statute. The ordinance should establish that the municipality has the requisite home rule authority.[181] In

177. *See* ILL. REV. STAT. ch. 24, ¶¶ 4-1-2, 4-2-1, 4-5-12 (1985); ILL. REV. STAT. ch. 24, ¶¶ 5-1-1, 5-3-2 (1985) ("managerial" form of government); ILL. REV. STAT. ch. 24, ¶¶ 6-1-1, 6-2-1, 6-4-2 (1985) ("strong mayor" form of government).

178. ILL. REV. STAT. ch. 102, ¶ 42 (1985); *see also* ILL. REV. STAT. ch. 24, ¶ 4-5-12.

179. ILL. REV. STAT. ch. 102, ¶ 42.02.

180. *Id.* ¶ 43(c).

181. *See supra* notes 82-128 and accompanying text (discussing municipal home

addition, the ordinance should clearly state that the municipality's actions pertain to its "government and affairs" such as public health, safety, and welfare.[182]

Both ordinance models should have a "construction" clause and a "severability" clause. The construction clause establishes that the ordinance supplements rather than supercedes state statutes.[183] Such a clause prevents invalidation of the ordinance on state preemption grounds.[184] The severability clause provides that any invalid provision in the ordinance shall not affect the remainder of the statute.[185]

In addition, both types of ordinances need to define terms and establish penalties. The Morton Grove and Evanston gun control ordinances have the most detailed definition of "firearm."[186] These ordinances define "handgun" by manner of use (one hand), length of barrel, and concealability of the weapon.[187] Other important terms that an ordinance must define include: "ammunition,"[188] "gun club,"[189] "gun dealer,"[190] and "firearm collector."[191] Finally, the municipality should establish penalties for violation of the ordinance. The Illinois Constitution prohibits home rule units from defining and providing for punishment of a felony.[192] Thus, a person violating a local

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rule powers). *See, e.g.*, Evanston, Ill., Ordinance 22-0-82 (Oct. 4, 1982) (preamble) [hereinafter Evanston].

182. *See supra* notes 89-92, 109 and accompanying texts (discussing municipal actions for the public welfare). *See, e.g.*, Oak Park, Ill., Ordinance Regulating the Possession of Firearms Commonly Known as Handguns (Apr. 16, 1984) (preamble) [hereinafter Oak Park]; Morton Grove, Ill., Ordinance 81-11 (1981) (preamble) [hereinafter Morton Grove].

183. *See, e.g.*, Evanston, *supra* note 181, § 1:9-8-13; Oak Park, *supra* note 182, § 2:27-5-1.

184. *See supra* notes 114-23 and accompanying text.

185. *See, e.g.*, CHICAGO, ILL., CODE § 11.1-24 (1983); Evanston, *supra* note 181, § 1:9-8-15; Oak Park, *supra* note 182, § 2:27-5-3.

186. *See, e.g.*, Evanston, *supra* note 181, § 1:9-8-1; Morton Grove, *supra* note 182, § 2:132:102(A).

187. *Id.*

188. *See, e.g.*, CHICAGO, ILL., CODE § 11:1-1(a); Evanston, *supra* note 181, § 1:9-8-1; Oak Park, *supra* note 182, § 2:27-1-1.

189. *See, e.g.*, Evanston, *supra* note 181, § 1:9-8-1; Morton Grove, *supra* note 182, § 2:132.102(A); Oak Park, *supra* note 182, § 2:27-1-1.

190. *See, e.g., id.*

191. *See, e.g., id.*

192. ILL. CONST. art. 7, § 6(d).

gun control ordinance can be guilty of only a misdemeanor[193] under local law, although he may be subject to felony prosecution under state law.[194]

Municipal enactment of either model creates difficulties. As stated previously, the Chicago ordinance in *Sklar* froze possession of handguns in the city to the level existing on the statute's effective date. A government that enacts such an ordinance states, in effect, "so much and no more."[195] This type of ordinance permits continued handgun possession by those residents conforming to statutory requirements. Consequently, enactment of this model creates less political controversy because present citizens may retain possession of their handguns.

This handgun regulation model, however, creates potential fourteenth amendment equal protection problems. If a government permits all municipal residents to own handguns on the effective date of the ordinance and disallows handgun possession by all persons moving to the municipality after the effective date, it is unlikely that the ordinance would survive a fourteenth amendment challenge. Drafters can avoid equal protection objections by formulating an ordinance that affects all residents of the municipality, including those residing in the city both before and after the effective date of the statute.[196] In this manner, the ordinance does not single out new residents for different treatment.

A municipality can also avoid equal protection challenges by banning private possession of handguns, like Morton Grove, Oak Park, and Evanston. The second amendment and section 22 present hurdles to this gun control model, but *Kalodimos* and *Quilici* decisions enable local governments to clear these constitutional obstacles. A municipality could face more difficulty, however, enacting an ordinance that bans all handgun possession. Such an ordinance polarizes a community more than a Chicago-type regulation because it prohibits both new and current residents from possessing handguns.

A local community that decides to ban private possession of handguns can lessen this polarization by formulating its ordinance to permit some continued use of private handguns. Both Morton Grove and Oak Park permit their citizens to store and use handguns at licensed gun

193. *Id.*

194. *See supra* note 118 (discussing Illinois state firearm statutes).

195. *Sklar v. Byrne*, 727 F.2d at 639.

196. *See, e.g.*, CHICAGO, ILL., CODE § 11.1-2.

clubs.[197] Evanston originally prohibited private possession of handguns,[198] but following an amendment to its ordinance, the city now permits registered members of the Chicago and Evanston Gun Clubs to possess handguns within their residences or places of employment.[199] If a municipality permits gun club members to retain handguns, it does not decrease the potentiality of handgun-related deaths and injuries to the extent that a total ban of home handgun possession would. To further reduce handgun-related accidents, a municipality could either prohibit firearm dealers[200] or issue licenses to qualified applicants.[201] With the latter, the ordinance then would require a dealer to report each sale or gun rental to the police.[202] To encourage persons to turn in their weapons voluntarily in a Morton Grove-type jurisdiction, the ordinance should permit delivery of a weapon to the police department without requiring those persons to provide identification, photographs, or fingerprints.[203] In addition, the ordinance could provide for a waiting period before destroying the guns.[204] If the ordinance is repealed, the municipality can then return the weapons.

X. CONCLUSION

Local gun control legislation is one of today's most controversial political issues. Both the Chicago and the Morton Grove-Oak Park-Evanston gun control models have strengths and weaknesses. After *Quilici* and *Sklar*, however, a state or federal court in Illinois should sustain a carefully drafted ordinance enacted by a municipality acting pursuant to its home rule police powers. In Illinois, gun control advo-

197. *See, e.g.*, Morton Grove, *supra* note 182, § 2:132.102(D)(7); Oak Park, *supra* note 182, § 2:27-2-1(G).

198. *See* Evanston, *supra* note 181, § 1:9-8-2(B).

199. *Id.* § 1:9-8-8(D)(7).

200. *See, e.g., id.* § 1:9-8-4.

201. *See, e.g.*, Oak Park, *supra* note 182, § 2:27-1-5.

202. *See, e.g., id.* § 2:27-1-6(A)-(G). This ordinance requires firearm dealers to report the name, address, and occupation of the buyer or renter; the date, price, and purpose of the purchase or rental; evidence of authorization to acquire a gun; and the kind, description, and serial number of the firearm. *Id.*

203. *See, e.g.*, Evanston, *supra* note 181, § 1:9-8-10; Oak Park, *supra* note 182, § 2:27-4-2.

204. *See, e.g.*, Oak Park, *supra* note 182, § 2:27-4-3.

cates have won the legal battle, but whether they will have continued success in the political arena remains unclear.

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