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ATTENTION GUN-RIGHTS ADVOCATES! DON'T FORGET THE ILLINOIS CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

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I. INTRODUCTION

Does the Constitution guarantee a right to keep and bear arms? If yes, can you identify the constitutional provision that protects this right? The correct answers, of course, are found in the Second Amendment to the United States Constitution.[1] But wait a minute; the Second Amendment is not the exclusive source of constitutional wisdom. Most lawyers, judges, and motivated laypersons mistakenly search no further than the Second Amendment in their quest to comprehend the nature and scope of firearms rights protection. This limited inquiry is insufficient because state constitutional provisions in effect in forty-four of the American states also guarantee a right to keep and bear arms.[2] Illinois, as one of these forty-four states, enacted a state constitutional arms right provision for the first time in its history in 1970.[3] Illinoisans should understand that the Illinois

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1. U.S. CONST. amend. II.

2. Most states have enacted provisions in their state constitutions safeguarding a right to possess arms. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL., 191, 193–205 (2006) (cataloguing, quoting and providing a summary analysis of all state constitutional arms right provisions). The only states with no arms right provision in their state constitutions are California, Iowa, Maryland, Minnesota, New Jersey and New York. *Id*. at 194, 196, 197, 198, 200; *see also* Stephen R. McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 U. KAN. L. REV. 867, 888–96 (2011) [hereinafter "McAllister"] (also providing a summary explanation of state constitutional arms right provisions).

3. ILL. CONST. art. I, § 22 (1970); S.H.A. CONST. art. I, § 22 at 499 (1970) (Constitutional Commentary) ("Section 22 is new."). This newly minted provision has no prototype from the prior 1870 Illinois Constitution. The inclusion of an Illinois constitutional right to keep and bear arms was so vitally important to downstate southern Illinoisans that the 1970 Illinois Constitution itself may have been rejected by the Illinois voters without the

constitutional provision may be a more effective bulwark against unduly restrictive Illinois gun control legislation than even the lofty Second Amendment.

A constructive starting point for learning about the Illinois arms right is to simply read the wording of the provision. Deriving the plain meaning of the constitutional text is an essential building block for informed analysis.[4] The Illinois constitutional right to keep and bear arms is codified in a short, one-sentence provision in article I, section 22 of the 1970 Illinois Constitution:

> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.[5]

As reflected in the provision's text, individual citizens in Illinois enjoy an express, enumerated state constitutional right to arms limited only by the state and local governments' police power. Though the purposes underlying the Illinois right are not expressly stated in the constitutional text, the framers clarified in the historical record that these purposes are twofold: first, to confer upon individual citizens the right to arms as support for protecting themselves, their families and property against unlawful and dangerous confrontations, and second, to grant individual citizens the right to arms for recreational pursuits such as hunting and target practice.[6]

The Second Amendment employs much of the same wording as the Illinois provision, albeit with a few crucial differences. The Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms,

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provision. *See* JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818–1970 156 (1972) ("[T]he completed bill of rights assured that the individual's right to keep and bear arms could be infringed only by the state's police power. Gun control was such a pressing issue in many downstate areas that ignoring it might have been a fatal blow to the proposed constitution's chances.").

4. *See*, *e.g.*, Coal. for Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 143 (Ill. 1976) (interpreting Illinois constitutional provision requires examination of the constitutional language for its plain and commonly understood meaning as comprehended by the voters who ratified the Illinois Constitution).

5. ILL. CONST. art. I, § 22 (1970).

6. *See* Committee Proposals, *in* 1 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970 [hereinafter "RECORD OF PROCEEDINGS"], § 27 at 4 ("The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of *recreation* or of *protection of person and property*.") (emphasis added).

shall not be infringed.[7]

This language distinguishes the Amendment from the parallel Illinois provision, which has no analogous militia preservation counterpart. Moreover, the Second Amendment's use of the term "people" in the operative clause to denote who is entitled to exercise the right differs from the Illinois provision's identification of the "individual citizen" as the holder of the right.

The principal purpose of this Article is to explore the nature, scope, and meaning of the Illinois constitutional right to keep and bear arms and to discuss suitable analytical tools that enable intelligent understanding.[8] The Illinois judiciary should embark on a thorough study of article I, section 22—its text, substantive nature, history, purposes, values, and scope—as a means of resolving particular constitutional right to arms claims.

This inquiry is not dependent on the Second Amendment to bear full fruit. The Illinois constitutional provision stands independent and apart from its federal analogue. Each provision has its own unique power and significance. The 1970 Illinois Constitution and the U.S. Constitution were each drafted and ratified by different people at different points in American history, almost 200 years apart, with the Illinois Supreme Court and U.S. Supreme Court constitutionally selected respectively as the final arbiter of each. The job of the Illinois courts distilled to its bare essentials is quite simply to determine what the Illinois arms right means and how it applies to a given issue independently of what the U.S. Supreme Court says about the Second Amendment.[9]

The reality of dual constitutional guarantees secures the potential for a two-pronged attack on the constitutional validity of overly restrictive gun control laws. The Illinois judiciary is duty-bound to limit the reach of or to strike down laws passed by the Illinois legislature or local municipalities or to invalidate improper police conduct that violate Illinois constitutional commands, including those that infringe on gun-owner freedoms protected by article I, section 22.[10] The Illinois Supreme Court, as the highest court in the Illinois hierarchical court system, possesses the ultimate judicial power to require other Illinois courts to follow its judgment on the meaning of the Illinois Constitution.[11] This article

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7. U.S. CONST. amend. II.

8. The analytical tools explored in this Article for interpreting the Illinois right to bear arms should also be considered for other individual liberties guaranteed in the Illinois Bill of Rights, or, for that matter, other state constitutional arms right guarantees. It is beyond the scope of this article, however, to extensively discuss particular state constitutional rights other than the Illinois right to bear arms.

9. *See infra* Parts III and IV.

10. *See, e.g.*, MARK E. WOJCIK, ILLINOIS LEGAL RESEARCH 19 (2009) ("[L]aws enacted in violation of the [Illinois] constitution cannot be enforced.").

11. Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 99 N.E. 920, 924 (Ill.

will fully explore the wide array of analytical tools available to the Illinois Supreme Court to effectively discharge its responsibility for definitively adjudicating issues arising under article I, section 22.

Limiting the scope of the Illinois arms right in article I, section 22 is a countervailing principle known as the "police power." The police power broadly defined consists of the exercise of state and local control though laws designed to promote the general welfare and protect the health and safety of the people, provided that such power is exercised within constitutional limits.[12] Government regulation under the police power cannot be so all-encompassing that it effectively nullifies or substantially infringes upon the individual arms right protections afforded by article I, section 22.[13] The function of the Illinois courts in this context is to balance these conflicting principles so that both survive reasonably well-intact.[14] Under no interpretive framework should any Illinois court grant itself the power to extinguish or materially impair the Illinois constitutional right of citizens to keep and bear arms, just as the court does not abandon other Illinois constitutional rights such as freedom of speech, freedom from unreasonable searches and seizures, due process or equal protection of the laws.[15] For a court to coherently interpret article I, section 22, it must reconcile the competing demands of a regulatory framework for firearms under the police power. This power often clashes with an individual citizen's aspirations for broad freedom from governmentally imposed restrictions, which

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1912) ("In respect to questions of general law, the state courts are required to follow the decisions of the highest court of the state, and are not bound by the authority of the Supreme Court of the United States."); Rollins v. Ellwood, 565 N.E.2d 1302, 1316 (Ill. 1990) (holding that "the final conclusions on how the [] Illinois Constitution should be construed are for [the Illinois Supreme Court] to draw").

12. *See*, *e.g.*, LaSalle Nat. Bank of Chicago v. City of Chicago, 125 N.E.2d 609, 612 (Ill. 1955).

13. *See*, *e.g.*, Haller Sign Works v. Physical Cultural Training School, 94 N.E. 920, 922 (Ill. 1911) (determining that police power legislation that supersedes constitutional rights is forbidden: "Necessarily there are limits beyond which legislation cannot constitutionally go in depriving individuals of their natural rights and liberties."); People v. Warren, 143 N.E. 28, 31 (Ill. 1957) (finding impermissible any legislation under the guise of the police power that "violate[s] some positive mandate of the constitution").

14. *See*, *e.g.*, *Haller Sign Works*, 94 N.E. at 922 (finding that Illinois courts are responsible for vindicating constitutional rights trampled by unduly broad exercises of the police power).

15. *Cf.* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values."); *see also* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1219 (2010) [hereinafter "Kopel & Cramer, *State Standards of Review*"] (applying *Valley Forge Christian Coll.* to conclude that no fundamental, constitutional liberty should be preferred over the Second Amendment right to keep and bear arms).

the right to arms provision guarantees.

Thus far in Illinois history, there has been a dearth of case law addressing the Illinois Constitution's article I, section 22. The Illinois Supreme Court's only substantive analysis with regard to this neglected state constitutional provision is its more than 30-year old, closely divided 4–3 decision in *Kalodimos v. Village of Morton Grove.*[16] The majority held that a Chicago suburban (Morton Grove) ordinance banning outright the possession of handguns passed constitutional muster under article I, section 22. As this Article shall thoroughly explore, the *Kalodimos* majority reached a flawed result that cannot be squared with traditional Illinois constitutional principles.

In comparing the Illinois right to arms to its U.S. constitutional analogue, the Second Amendment, it should be readily concluded that prior to 2008, the Second Amendment had little practical significance. The U.S. Supreme Court abruptly changed the stagnant status quo in 2008 with its watershed decision in *District of Columbia v. Heller,*[17] holding that the Second Amendment provides individuals with a constitutional right to possess firearms within the home for traditionally lawful purposes such as self-defense of persons and property.[18] *Heller* was a closely divided 5–4 decision.[19] Two years subsequent to *Heller*, in 2010, the Court in *McDonald v. City of Chicago, Ill.*,[20] also by a 5–4 decision, held that the federal constitutional right recognized in *Heller* applies against the States under the Fourteenth Amendment.[21] As a result of *Heller* and *McDonald*, the Second

16. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984). For a more detailed discussion of the Illinois Supreme Court's reasoning behind *Kalodimos*, see *infra* Part II.

17. Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

18. *Heller*, 554 U.S. at 635 (holding that "the District[of Columbia's] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense").

19. Justice Scalia authored the majority opinion. *Id.* at 572. Justice Stevens and Justice Breyer each wrote dissents. Justice Stevens's dissent was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 635. Justice Breyer's dissent was joined by Justices Stevens, Souter and Ginsburg. *Id.* at 681.

20. McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010).

21. Justice Alito wrote the plurality opinion in *McDonald* for himself and Justices Scalia, Kennedy and Chief Justice Roberts. The plurality incorporated the Second Amendment right to bear arms identified in *Heller* into the Due Process Clause of the Fourteenth Amendment as fundamental to an orderly scheme of liberty. *McDonald*, 561 U.S. at 748–50**.** Justice Scalia delivered a concurring opinion that responded to Justice Stevens's critique of the plurality. *Id.* at 791. Justice Thomas authored a concurrence, relying not on the Due Process Clause as a means to incorporate the Second Amendment but instead finding that the right to keep and bear arms is a privilege or immunity of federal citizenship protected by the Fourteenth Amendment Privileges and Immunities Clause. *Id.* at 805–06. Justice Stevens authored a dissent, which included a discussion criticizing the plurality's usage of a

Amendment is binding on Illinois government conduct and that of its municipalities, such as the city of Chicago, the principal defendant in *McDonald*. Illinois, like all other states, is forbidden from passing laws that impermissibly infringe on an individual's federal constitutional right to keep and bear arms as interpreted by the U.S. Supreme Court.

The pragmatic practitioner, judge and scholar, however, wants to know whether, and if so how, article I, section 22 can provide an alternative vision for addressing the scope of firearms rights protection conferred on individual Illinois citizens. As noted, the U.S. Supreme Court's *Heller* and *McDonald* decisions were the results of thinly supported 5–4 votes. If just one member of the five-justice majority retires or stakes out a narrow reading of *Heller* and *McDonald* in future Second Amendment cases, then the Illinois Constitution (or other state constitutions for other states) can fill any breach. The Illinois courts are empowered to invoke the Illinois Constitution to achieve a broader vision of gun rights protection than the U.S. Supreme Court, regardless of whether there is a change in the composition of the Court or its ideological proclivities.[22]

Although the Illinois Constitution abounds in strategic possibilities, the Illinois judiciary, of course, is not required to implement a firearms advocate's tactical blueprint. Rather, Illinois judges are focused on deciding cases correctly based on an accurate reading of the Illinois Constitution's meaning. This Article will provide a roadmap to courts for selecting among the many methodological alternatives for interpreting article I, section 22.

No previous law review article has comprehensively addressed the Illinois constitutional right to keep and bear arms as its principal subject, despite its state constitutional codification in 1970 more than 40 years ago. This lack of a complete scholarly analysis, coupled with only one solitary case from the Illinois

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purely historically-based mode of analysis. *Id*. at 858–59; *see also infra* notes 310–12 and accompanying text. Also authoring a dissent was Justice Breyer, whom Justices Ginsburg and Sotomayor joined. *Id*. at 912–13.

22. *See*, *e.g.*, McAllister, *supra* note 2, at 880 ("[I]t is entirely possible that some state supreme courts either already have or in the future will interpret their state constitutions to provide greater protection of an individual's right to keep and bear arms than the U.S. Supreme Court ultimately decides that the Second Amendment requires."). For an informative article exploring whether and how state constitutional firearms provisions might be specifically amended to more clearly define rights or to provide greater protection than the federal constitution, see Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L.J. 1449 (2012). While the state constitutional text may indeed justify a broader interpretation than the Second Amendment, each state court within its sovereign sphere may provide greater individual rights protection than what a U.S. Supreme Court majority decrees, even for generally framed abstract state constitutional provisions.

Supreme Court in the provision's long history,[23] leaves a gaping hole in the available authorities interpreting article I, section 22. Moreover, no law review article in a post *Heller-McDonald* world has advocated for state constitutional interpretive methodologies that assert judicial independence from the U.S. Supreme Court on gun rights issues. The methodologies explored here may have useful applications for state constitutional interpretation of arms rights provisions in states other than Illinois.

Neither proponents nor critics of gun control laws should forget that individual citizens, residing in or visiting Illinois, possess a state constitutional right to keep and bear arms that cannot be casually disregarded from any comprehensive debate about arms right protections.[24] The Illinois constitutional right to arms should be restored to a position of prominence in the Illinois Bill of Rights. One of the primary objectives of this Article is to articulate methodologies or analytical tools that should be employed for interpreting article I, section 22 with less emphasis placed on analyzing whether particular gun control laws violate Illinois constitutional guarantees.

This article shall be divided into six parts. Part II will discuss *Kalodimos v. Village of Morton Grove* in depth.[25] The remaining Parts of this Article will show that *Kalodimos's* reasoning is deeply flawed and also that developments in the law following that decision demonstrate that it is no longer viable.

Part III will show that the correct methodology for interpreting article I, section 22 must be faithful to Illinois judicial sovereignty on state constitutional gun rights issues and that the Illinois Supreme Court must avoid binding itself or presumptively binding itself to U.S. Supreme Court decisions interpreting the Second Amendment in the context of deciding state constitutional claims.[26] Article I, section 22 issues must be analyzed distinctly and separately from Second Amendment jurisprudence.

Part IV shall argue that Illinois courts should apply what courts and commentators have dubbed the primacy approach to state constitutional interpretation for Illinois constitutional firearms issues.[27] Under a primacy approach, the Illinois court can access the entire body of case law and scholarly literature at its disposal, including Illinois precedent, non-Illinois case law, including U.S. Supreme Court opinions, as well as concurring and dissenting opinions from those other jurisdictions to arrive at a

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23. *See supra* note 16.

24. *See* WOJCIK, *supra* note 10, at 20 ("Despite its importance, the [Illinois] constitution is often overlooked in legal research classes and even in constitutional law classes.").

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

well-reasoned opinion.[28] The Illinois court may follow a court decision outside of Illinois's jurisdiction, including U.S. Supreme Court opinions, if the Illinois court finds that it is persuasively reasoned.[29] U.S. Supreme Court decisions, however, do not function as mandatory precedent on any Illinois constitutional issues or more specifically issues arising under the Illinois constitutional right to keep and bear arms.[30]

The primacy approach also requires state constitutional issues to be reached and decided first, thus prominently placing them front and center, before the adjudication of federal constitutional claims.[31] If the state constitutional provision provides complete relief to the individual claimant in the initial inquiry, courts should avoid addressing federal constitutional issues, because the resolution of the state constitutional issue has rendered them moot.[32]

Part V will argue that the correct vision for interpreting article I, section 22 should be faithful to the intent of the framers of the 1970 Illinois Constitution and the electorate who approved of the document, as well as Illinois traditions expressed in case law.[33] This vision entails that the 1970 Illinois Constitution be understood as a dynamic document capable of adaptability to contemporary circumstances, untied to any fixed interpretation stuck in the past.[34] As such, the views of the framing delegates expressed during the floor debates as to how article I, section 22 should be interpreted and applied to specific issues can be helpful as an aid to understanding.[35] These sources, however, should not be viewed as dispositive to the constitutional outcome on any particular issue to the exclusion of other authorities.[36]

Part VI will show that the Illinois right to keep and bear arms should be accorded status as a fundamental right.[37] It will also survey various standards of scrutiny, including the strict, intermediate and rational basis standards, which could be used to test the constitutionality of gun control measures.[38] A historically-driven model that avoids traditional tiers of scrutiny will also be explored.

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28. *See id*.
29. *See id*.
30. *See id*.
31. *See id*.
32. *See id*.
33. *See infra* Part V.
34. *See id*.
35. *See id*.
36. *See id*.
37. *See infra* Part VI.
38. *See id*.

II. *KALODIMOS V. VILLAGE OF MORTON GROVE*

This Part of the Article focuses on an in-depth, objective examination of *Kalodimos v. Village of Morton Grove*.[39] At issue in *Kalodimos* was whether a Morton Grove ordinance banning the possession of all operable handguns (except certain exemptions not generally available to the public such as those for police officers and other listed groups) violated the Illinois constitutional right to keep and bear arms under article I, section 22 of the Illinois Constitution. The 4–3 majority opinion authored by Justice Simon upheld the Illinois constitutional validity of the ordinance.[40] In rejecting the plaintiffs' state constitutional claim, the majority found that the Morton Grove ordinance prohibiting a distinct category of firearms, such as handguns, is constitutionally permissible, even if a flat ban on all firearms would not withstand constitutional scrutiny.[41] Under the majority view, the Illinois constitutional right to arms is not violated, provided that citizens are permitted to possess some type of firearm other than a handgun.

The majority first examined the Illinois constitutional debates to ascertain whether the delegates would have approved of laws that prohibited possession and use of an entire category of firearms, such as handguns.[42] Based on its examination of select views of certain delegates, particularly the views of Delegate Leonard Foster, the majority concluded that the 1970 Illinois Constitutional Convention would have endorsed the constitutionality of a flat ban on handguns, as long as citizens are entitled to keep another category of weaponry for self-defense or recreation.[43] Turning to the text of article I, section 22, the majority determined that the Illinois constitutional arms right did not preclude enforcement of any particular regulatory measures, even a complete ban on handguns.[44] The majority found that the official explanation of the proposed Illinois Constitution endorsed broad regulatory authority over firearms, noting that the "right of the citizen to keep and bear arms cannot be infringed, except as the exercise of this right may be regulated by appropriate laws to

39. *See generally Kalodimos*, 470 N.E.2d 266.

40. *Id.* at 272–73. Chief Justice Ryan authored a dissent joined by Justices Moran and Underwood. *Id.* at 279 (Ryan C.J., dissenting). Justice Moran filed a separate dissent, joined by Chief Justice Ryan and Justice Underwood. *Id.* at 282. (Moran J., dissenting).

41. *Id.* at 272–73. The court also ruled that the Morton Grove ordinance was a proper exercise of the village's home rule power. *Id.* at 273–77. That part of the opinion is outside the scope of this Article.

42. *Id.* at 270–72.

43. *Id.*

44. *Id.* at 270.

safeguard the welfare of the community."[45]

In construing the reach of the police power, the majority rejected the plaintiffs' argument that the police power permits regulation, but not a prohibition of an entire category of weapons.[46] The majority also found that newspaper articles and editorials cited by the plaintiffs were ambiguous as evidence of voter understanding on the question whether the legislature or a local municipality could ban an entire class of weaponry under the newly-minted constitutional provision.[47] Considering also whether the Illinois right to bear arms could be properly analogized to the First Amendment, the majority found such a comparison unwarranted because the First Amendment's purpose—namely, to encourage the dissemination of views and ideas—differs from the neutral objective of the Illinois constitutional right to arms. Elaborating, the majority determined that the right to bear arms intended neither to encourage nor discourage firearms possession.[48]

The majority suggested that the plaintiffs missed the mark by arguing that the ordinance was over-inclusive, insofar as its avowed public safety objectives could be achieved by less burdensome means than a total ban on handguns.[49] Finding that the right to arms is not fundamental because "it does not lie at the heart of the relationship between individuals and their government,"[50] the majority determined that the strict scrutiny standard of review was inapplicable.[51] Thus, according to the *Kalodimos* court, article I, section 22 does not require the courts to examine less onerous alternatives to a complete prohibition on

45. *Id*. at 270 (quoting 7 REPORT OF PROCEEDINGS, at 2689).

46. *Id*. (citing People v. Warren, 143 N.E.2d 28, 32 (Ill. 1957) for the proposition that the police power authority includes laws "restraining or prohibiting anything harmful to the welfare of the people").

47. *Id*. at 272.

48. *Id*. at 273.

49. *Id*. at 277–78.

50. *Id*. at 278 (relying on the home-grown Illinois test for ascertaining whether a right is fundamental set out in *People* ex rel. *Tucker v. Kotsos*, 368 N.E.2d 903, 907 (Ill. 1977)). The Illinois Supreme Court in *Kotsos* staked out its own unique standard for determining whether an Illinois right is fundamental without citing or relying on any U.S. Supreme Court created standard, thus implicitly distancing itself from an approach to Illinois constitutional interpretation that binds itself to the requirements of federal law. According to *Kotsos*, "[f]undamental interests [under the Illinois Constitution] generally are those that lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *Id*. at 907. Aside from *Kalodimos*, the Illinois Supreme Court cited the Illinois fundamental rights test originating in *Kotsos* in its subsequent decision in *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1194 (Ill. 1996).

51. *Kalodimos*, 470 N.E.2d at 278.

possession of handguns.[52]

The majority gave two reasons why the right to bear arms was not fundamental, thus justifying exclusion of strict scrutiny as the proper standard of review. First, the right to bear arms under the national Second Amendment provision was never understood as an individual right, as opposed to a collective right designed to promote or preserve local militias.[53] Second, the Illinois right to arms is subject to substantial limitation by regulations or prohibitions under the police power.[54] Selecting the minimally rigorous rational basis test as the appropriate level of scrutiny instead of strict scrutiny, the majority found that the ordinance passed constitutional muster because it bore a rational relationship to the ordinance's objective in reducing handgun-related deaths and injuries.[55] After examining the committee reports and the debates, the nature of the state's police power, and the rational basis standard of review, among other things, the majority concluded that Morton Grove's complete ban on handguns was a proper application of the village's police power authority, which did not infringe on the individual citizen's Illinois constitutional right to keep and bear arms.[56]

As shall be later explored in this Article, the scope of the *Kalodimos* majority opinion should be significantly curtailed or the decision altogether jettisoned. Before embarking on that analysis, though, the role of precedent as a guiding influence on Illinois court adjudication should be placed in its proper contextual setting. A fundamental rule of *stare decisis* in Illinois holds that "the precedential scope of a decision is limited to the facts before the court."[57] *Kalodimos* is thus authoritative only on the single question before it: whether an Illinois village possesses state constitutional authority to enact a flat ban on handguns.

Kalodimos did not foreclose a myriad of other Illinois state constitutional issues too numerous to briefly list here, though they may have been addressed as a matter of Second Amendment law. A small sampling includes place and manner limitations on where a firearm may be brought or how it is to be transported such as

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52. *Id*.

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*. at 279. Two years prior to *Kalodimos* and many years before *Heller* and *McDonald*, the Seventh Circuit Court of Appeals upheld the Morton Grove handgun ban against a U.S. and Illinois constitutional challenge. *See* Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (finding that handguns are within the category of firearms protected by article I, section 22 of the Illinois Constitution but that the police power allowed a total prohibition of such firearms); *see also* Sklar v. Byrne, 727 F.2d 633 (7th Cir. 1984) (upholding Illinois constitutional validity of a Chicago ordinance requiring registration of handguns).

57. *See*, *e.g.*, People v. Palmer, 472 N.E.2d 795, 798 (Ill. 1984).

whether a firearm can be brought into public places or whether they must be cabined to the home, zoning restrictions on where guns may be sold, and restrictions imposed by licensing and registration measures. The purpose of this Article is not to thoroughly analyze the entire panoply of gun rights issues or even a limited subset of those issues, but rather to suggest techniques for legal analysis that should be applied to state constitutional issues that might arise under article I, section 22.

Moreover, practitioners should not myopically view the narrowly decided 4–3 majority opinion upholding the Morton Grove gun ban in *Kalodimos* as an unpliable decision firmly cemented into Illinois jurisprudence. Because *stare decisis* is not tantamount to an "inexorable command," the Illinois Supreme Court's authority to reexamine its precedents is preserved.[58] The meaning of *stare decisis* should be read in light of its policy objective: to secure the evolutionary nature of the progression of Illinois case law.

Numerous groundbreaking events in the arms-rights constitutional realm have occurred since *Kalodimos* was decided in 1984, not only the U.S. Supreme Court watershed decisions in *Heller* and *McDonald*. Precedents, such as *Kalodimos*, that have failed to consider persuasive arguments later raised against it may be vulnerable to being overturned.[59] As underscored by the Illinois Supreme Court, "[i]f it is clear that a court has made a mistake, it will not decline to correct it, even if the mistake has been reasserted and acquiesced in for many years."[60] Some commentators have subjected *Kalodimos* to sharp criticism.[61] For the reasons that shall be more fully developed below, *Kalodimos* is ripe for re-examination.

III. ILLINOIS JUDICIAL SOVEREIGNTY AND FEDERALISM

A. Illinois Constitutional Duty to Exercise Judicial Review on State Constitutional Issues

The Illinois courts must interpret and apply article I, section 22 of the Illinois Constitution when a party in a lawsuit asks the court to rule on her constitutional complaint that a particular Illinois law impairs her liberty to keep and bear arms as guaranteed under the Illinois Constitution.[62] The longstanding

58. *See*, *e.g.*, People v. Vincent, 871 N.E.2d 17, 27 (Ill. 2007).

59. *See* U.S. v. Hill, 48 F.3d 228, 232 (7th Cir. 1995).

60. People v. Colon, 866 N.E.2d 207, 219 (Ill. 2007).

61. *See*, *e.g.*, Kopel & Cramer, *State Standards of Review*, *supra* note 15, at 1120–21 & 1204–07 (finding that *Kalodimos* was wrongly decided in light of *Heller*).

62. *See*, *e.g.*, People *ex rel.* Billings v. Bissell, 19 Ill. 229, 231 (Ill. 1857) ("To the judiciary is confided the power and duty of interpreting the laws and the constitution whenever they are judicially presented for consideration.").

function of the Illinois courts to interpret the Illinois Constitution and determine if it has been violated is an essential component of the state's governing structure.[63] The Illinois Supreme Court, as the chief guardian of the rights secured by the Illinois Constitution, should adopt an analytically sound methodology for determining the meaning of article I, section 22 that comports with the provision's text, history and underlying values.[64]

The crafting of such an appropriate analytical framework for Illinois constitutional interpretation will ensure that the meaning of article I, section 22 is effectively implemented. The Illinois Supreme Court should provide clear guidance to the lower Illinois courts in their shared responsibility for enforcing state constitutional rights as well as to guide individuals and the other branches of state or local government on the nature and scope of the Illinois constitutional right to arms.

The Illinois Supreme Court must implement judicial review to invalidate regulations or prohibitions that improperly infringe on state constitutional guarantees.[65] This power likewise extends to acts that unconstitutionally deprive Illinois citizens of their right to arms under article I, section 22.[66] Aside from striking down acts of a legislative body, judicial review can also successfully challenge actions of law enforcement officers who improperly confiscate arms or who inappropriately limit the self-defense activities of law-abiding citizens that are found to be protected activity under the Illinois Constitution.

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63. *See*, *e.g.*, People *ex rel*. Bruce v. Dunne, 101 N.E. 560, 564 (Ill. 1913).

64. The 1970 Illinois Constitution designates ultimate judicial power to interpret Illinois law, including the Illinois Constitution, to the Illinois Supreme Court. *See* ILL. CONST. art. VI, § 1 ("The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."). As such, the Illinois Constitution requires the Illinois Supreme Court "to interpret laws and protect the rights of individuals against acts beyond the scope of the legislative power." People *ex rel*. Huempfner v. Benson, 128 N.E. 387, 388 (Ill. 1920).

65. *See* ILL. CONST. art. IV, § 13 (1970) ("[w]hether a general law is or can be made applicable shall be a matter for judicial determination."); Best v. Taylor Machine Works, 689 N.E.2d 1057, 1064–65 (Ill. 1997) ("If a statute is unconstitutional, this court is obligated to declare it invalid."). Expounding on its power and duty to employ judicial review to enforce the requirements of the Illinois Constitution, the Illinois Supreme Court has recognized "the judiciary['s] . . . right and duty to review all legislative acts in the light of the provisions and limitations of our basic charter." Donovan v. Holzman, 132 N.E.2d 501, 506 (Ill. 1956). As overseer of the entire Illinois court system, the Illinois Supreme Court has instructed Illinois courts not to retreat from striking down laws that violate Illinois constitutional guarantees. Wolfson v. Avery, 126 N.E.2d 701, 711 (Ill. 1955).

66. A judicial finding of Illinois unconstitutionality mirrors the exercise of judicial review by the U.S. Supreme Court to invalidate laws that violate the U.S. Constitution. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (recognizing the U.S. Supreme Court's general power of judicial review); *Heller*, 554 U.S. at 634–35 (applying judicial review to invalidate District of Columbia handgun ban).

B. U.S. Supreme Court Is Powerless to Control State Constitutional Interpretation

Because the Illinois Supreme Court has the final authority to interpret the Illinois Constitution,[67] the U.S. Supreme Court has no judicial authority to overturn the final judgment of the Illinois Supreme Court on a state constitutional issue.[68] Judicial federalism as a component of the U.S. constitutional structure requires that the U.S. Supreme Court be the sovereign interpreter of federal law, and that the respective state supreme courts are the ultimate arbiters of their own state constitutions.[69] Given the Illinois Supreme Court's independent judicial authority on matters of state constitutional law, U.S. Supreme Court majority opinions cannot control the meaning of article I, section 22.[70]

It is a well-established feature of several U.S. Supreme Court cases that state courts are not bound by U.S. Supreme Court majority opinions interpreting the U.S. Constitution when state courts adjudicate state constitutional issues.[71] As explained in *City of Mesquite v. Aladdin's Castle, Inc.*,[72] "a state court is entirely free to read its own State's constitution more broadly than this Court

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67. *See, e.g.*, People *ex rel.* Harrod v. Cts. Com., 372 N.E.2d 53, 59 (Ill. 1977) ("It is the function and duty of [the Illinois Supreme Court] to act as the final arbiter of the [Illinois] Constitution."); People v. Gersch, 553 N.E.2d 281, 287 (Ill. 1990) (noting that "the State constitution is supreme within the realm of state law").

68. *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000) [hereinafter "Friedman"] ("Regardless, then, of the U.S. Supreme Court's pronouncements concerning the breadth and scope of the federal constitution, the highest court of each state remains the final arbiter of the meaning of state law including the state constitution."); Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 710–11 (1997) ("[I]n a situation where a state supreme court interprets a state constitutional provision—even one textually indistinguishable from the federal provision—the [U.S.] Supreme Court, far from being final, has nothing at all to say."); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S. C. L. REV. 353, 381 (1984) ("A state court decision interpreting the state constitution is insulated from vertical, federal judicial review.").

69. *See* THE FEDERALIST NO. 46, at 262 (James Madison) (Clinton Rossiter ed., 1961) (noting that "[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes"); THE FEDERALIST NO. 39, at 213 (James Madison) (recognizing the states "residuary and inviolable sovereignty over all . . . objects" outside the scope of federal governmental power).

70. *See* Rollins v. Ellwood, 565 N.E.2d 1302, 1306 (Ill. 1990) (finding that final authority to interpret the Illinois Constitution rests with the Illinois Supreme Court).

71. *See, e.g.*, Nichols v. United States, 511 U.S. 738, 748–49 n.12 (1994); Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

72. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).

reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."[73] In *PruneYard Shopping Center v. Robins*,[74] the Court acknowledged that it lacked authority to forbid a state court from "adopt[ing] in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[75] In keeping with its federalist inclinations toward guaranteeing autonomy to the states on state constitutional matters, the U.S. Supreme Court has provided a mechanism for state courts to ensure that their state constitutional decisions are not subject to challenge in the U.S. Supreme Court.[76] The Court cannot reverse a state court judgment resting on state constitutional grounds if the state court's opinion clearly notes that independent and sufficient state grounds support the state court's holding.[77]

C. Illinois Courts Are Prohibited from Abdicating Their Judicial Sovereignty to the U.S. Supreme Court

Although the U.S. Supreme Court, as noted above, recognizes state court authority to interpret state constitutional provisions free from the restraints of federal law, the question remains whether state courts as a matter of state law may judicially impose limits on their own authority to decide state constitutional issues.[78] It should be underscored that whether state courts may permissibly limit their own authority to interpret their state constitutions turns on state law, not federal law.[79] Many commentators and state courts have argued that state court judges abdicate their state's sovereignty by requiring themselves to follow the approach of U.S. Supreme Court majority opinions in resolving state constitutional claims without independent analysis under a judicially imposed rule.[80] These commentators have

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73. *Id*. at 293.

74. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

75. *Id*. at 81.

76. *See* Michigan v. Long, 463 U.S. 1032 (1983).

77. *See id*. at 1041.

78. *See, e.g*., People v. Mitchell, 650 N.E.2d 1014, 1017 (Ill. 1995) (finding that although it is not bound to follow federal law when interpreting the Illinois Constitution, it hews to its own "judicially crafted limitations . . . defin[ing] the exercise of that right").

79. *See id*.

80. *See generally*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 169–77 (Oxford University Press 2009) [hereinafter "WILLIAMS, AMERICAN STATE CONSTITUTIONS"]; *see also* State v. Kennedy, 666 P.2d 1316, 1322 (Or. 1983) (criticizing the mistaken logic of state courts that apply U.S. Supreme Court decisions interpreting the U.S. Constitution as "presumptively fix[ing] [the] correct meaning also in state constitutions").

pointed out that state courts are duty-bound to interpret state law, including their own state constitutions, by applying their own reasoned analysis to the question at hand without mindless deference to the U.S. Supreme Court.[81]

The Illinois Supreme Court recently suggested in its 2013 decision *Hope Clinic for Women, Ltd., v. Flores*[82] that no Illinois court has the power to delegate its authority to interpret the Illinois Constitution to the U.S. Supreme Court or any federal court.[83] More specifically, *Flores* stated: "Illinois courts, not federal courts, are the arbiters of state law" and "[n]o federal court can interpret the meaning of our state constitutional provisions."[84] The Illinois Supreme Court has found that it may turn to U.S. Supreme Court decisions on federal law as guidance for interpreting a parallel state constitutional provision.[85] Nevertheless, the Illinois high court has adhered to the principle that it alone, and not the U.S. Supreme Court, possesses the final authority and responsibility for adjudicating Illinois constitutional

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81. *See*, *e.g.*, Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1073 (1997) (explaining that state courts have ultimate authority to interpret their respective state constitutions "in any way they deem sound").

82. Hope Clinic for Women, Ltd., v. Flores, 991 N.E.2d 745 (Ill. 2013).

83. *See id*. at 765. The Illinois Supreme Court's formulation of what it has dubbed its limited lockstep doctrine undermines the court's independent constitutional authority. Under the limited lockstep doctrine, Illinois courts are generally instructed as a mandatory rule to interpret an Illinois constitutional provision that is identical or nearly identically worded to a parallel U.S. constitutional provision in the same way as the U.S. Supreme Court interprets the parallel federal provision subject to certain exceptions discussed below. *See infra* notes 120–23 and accompanying text; s*ee* People v. Caballes, 851 N.E.2d 26, 31–32 (Ill. 2006) (explaining the Illinois limited lockstep doctrine). As has been explored in depth in another Article, the Illinois limited lockstep doctrine abrogates Illinois judicial sovereignty by requiring the Illinois courts to follow U.S. Supreme Court precedent as a matter of Illinois constitutional law, regardless of whether the U.S. Supreme Court's decision in the judgment of the Illinois court is persuasively reasoned. *See* James K. Leven, *A Roadmap to State Judicial Independence under the Illinois Limited Lockstep Doctrine Predicated On the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63 (2012) [hereinafter "Leven"]. This deferential method runs contrary to the intent of the framers of the 1970 Illinois Constitution who favored an independent judicial approach. *Id*.

84. *Flores*, 991 N.E.2d at 765; *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 334 (2011) [hereinafter "Blocher, *Reverse Incorporation*"] (noting that "state courts have final authority in construing state charters, just as the Supreme Court bears ultimate power over the federal Constitution"); Friedman, *supra* note 68, at 100 ("[S]tate supreme courts have the unquestioned, final authority to interpret their state constitutions.").

85. *See*, *e.g.*, People v. McCauley, 645 N.E.2d 923, 935 (Ill. 1994) ("[I]n the context of deciding State guarantees, Federal authorities are not precedentially controlling; they merely guide the interpretation of State law."); *Rollins*, 565 N.E.2d at 1316.

claims.[86]

The Illinois Supreme Court's recognition of its judicial sovereignty should govern issues arising under the Illinois constitutional right to arms. In interpreting article I, section 22, the Illinois Supreme Court, and not the U.S. Supreme Court's Second Amendment case law, determines what the Illinois constitutional right to bear arms means and how it applies. Although U.S. Supreme Court decisions such as *Heller* and *McDonald* are binding on Second Amendment questions, they are not controlling on Illinois constitutional claims. As a matter of Illinois constitutional law, *Heller* and *McDonald* may persuade the Illinois Supreme Court to adopt the federal view but they do not rigidly mandate the Illinois Supreme Court to follow. The Illinois Supreme Court is not doctrinally precluded from finding that *Heller*, *McDonald*, and future U.S. Supreme Court Second Amendment cases are insufficiently protective of individual liberty.

The Illinois appellate court's decision in *People v. Williams*[87] illustrates the fallacious reasoning of some Illinois courts that for all intents and purposes wrongly abrogate their power to decide article I, section 22 constitutional claims. At issue in *Williams* was whether the Illinois Aggravated Unlawful Use of a Weapon (AAUW) statute was unconstitutional because it prohibited possession of guns outside the home for self-defense.[88] The defendant who was prosecuted under the statute raised both Second Amendment and article I, section 22 challenges.[89] The court in *Williams* elected to ignore the state constitutional claim partially on the ground that "there is no need to resort to constructions of the Illinois Constitution's provision applicable to the right to bear arms" because *McDonald* made the Second Amendment applicable to Illinois as well as the other states.[90]

The *Williams* court erred in avoiding the state constitutional claim based on *McDonald* because in doing so it undermined Illinois judicial sovereignty to decide the state constitutional issue independently of federal law. While *Williams* was correct that the

86. *See Flores*, 991 N.E.2d at 765; *Harrod*, 372 N.E.2d at 59. However, by creating the limited lockstep doctrine, the Illinois Supreme Court has unwittingly undermined its judicial sovereignty. The doctrine requires it to defer to the U.S. Supreme Court when interpreting Illinois constitutional provisions that are closely analogous to parallel federal provisions. *See supra* note 83 and *infra* Part III.D.

87. People v. Williams, 962 N.E.2d 1148 (Ill. App. Ct. 2011).

88. Subsequent to *Williams*, the Illinois Supreme Court held that a blanket Illinois statutory ban on weapons possession outside the home for self-defense violated the Second Amendment, effectively overruling *Williams*, among other cases, on Second Amendment grounds. *See* People v. Aguilar, 2 N.E.3d 321 (Ill. 2013). For a more detailed treatment of *Aguilar*, see *infra* Part VI.

89. *Williams*, 962 N.E.2d at 1151–52.

90. *Id.* at 1151.

Second Amendment applies to state conduct under *McDonald*, this conclusion, arising out of federal law, does not control the outcome of the conceptually distinct Illinois constitutional right to arms issue. As noted by the Illinois Supreme Court in *Flores*, only Illinois courts, not the federal courts, can authoritatively interpret the Illinois Constitution.[91] Thus, *Heller* and *McDonald's* interpretation of the Second Amendment is not binding on Illinois courts construing article I, section 22, because principles of Illinois judicial sovereignty permit them to adopt a different approach from the U.S. Supreme Court. The *Williams* court in effect ceded its power to decide state constitutional claims to the federal courts. This misunderstanding of the nature and extent of the Illinois court's judicial authority underscores the pragmatic importance to the practitioner of raising dual constitutional claims, state and federal, and for the Illinois courts to distinctively analyze each of these claims.[92]

State supreme courts fail to properly perform their responsibility as sovereign judicial bodies if they uncritically presume that federal law, as articulated by the U.S. Supreme Court, binds them when they interpret parallel state constitutional provisions.[93] This erroneous construct essentially requires the state court to adopt the premise that a particular state constitutional provision means exactly what the U.S. Supreme Court says the corresponding U.S. constitutional provision means.[94] This judicial mirroring applies, regardless whether the state court agrees with the U.S. Supreme Court's reasoning.[95]

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91. *See supra* note 86.

92. In addition to *Williams*, the Illinois Appellate Court in *People v. Mimes*, 953 N.E.2d 55 (Ill. App. Ct. 2011) made a similar error in commingling the Illinois Constitution and U.S. constitutional arms right analysis. The court in *Mimes* mistakenly found that "the analysis and holding in *Kalodimos* have been impliedly overruled by *Heller* and *McDonald*." *Id.* at 73. *Heller* and *McDonald*, however, ruled on the Second Amendment and *Kalodimos* addressed article I, section 22 of the Illinois Constitution. Both of these constitutional provisions being drafted by different persons at different points in history with each provision located in separate Constitutions. As already discussed, the U.S. Supreme Court has no authority whatsoever to overrule the Illinois Supreme Court on a state constitutional question. *See supra* note 68 and accompanying text. Nonetheless, *Mimes* was correct to suggest that *Kalodimos* should be overruled. However, the reasons for overruling *Kalodimos* must be based not on *Heller* and *McDonald*'s pronouncements on Second Amendment law as mandatory authority. Instead, the Illinois Supreme Court must independently determine whether *Heller* and *McDonald* are constitutionally correct and any other important factors useful for cogent state constitutional analysis.

93. *See* WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 80, at 135–37.

94. *See id.*

95. *See id.*

To illustrate, suppose that the U.S. Supreme Court finds that it is constitutionally reasonable under the Fourth Amendment to arrest the driver of a vehicle who is not wearing a seat belt.[96] The state court under a mirroring construct is obliged to follow the U.S. Supreme Court by finding that an arrest for a minor violation presumptively complies with the state constitution.[97] It matters not whether the state supreme court would have found the seat belt violation so trivial that arresting the driver is unjustifiably invasive.

D. Lockstep and Interstitial Methods of State Constitutional Interpretation Abrogate Illinois Judicial Sovereignty

In one method of state constitutional interpretation known as the lockstep doctrine, the state court always parrots the U.S. Supreme Court's interpretation of the U.S. Constitution.[98] In another method known as the interstitial approach (or its close cousin the criteria approach), the state court adopts a presumption of federal law correctness, but compares its state constitutional provision with its federal constitutional counterpart to determine how the two constitutions may differ.[99] Under the interstitial method, the constitutional claimant seeks to show how the constitutions differ through text, history or other means to establish that the state constitution affords greater protection.

State courts applying either the lockstep or interstitial approaches undermine their judicial sovereignty because they wrongly presume that the U.S. constitutional solution is correct for state constitutional interpretation. Illinois judicial sovereignty requires that the Illinois Supreme Court be the final arbiter of the meaning of the Illinois Constitution.[100] The U.S. Supreme Court has no power to decide Illinois constitutional issues.[101] When the Illinois Supreme Court, interpreting the Illinois Constitution, presumptively follows the U.S. Supreme Court without

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96. The U.S. Supreme Court held that the Fourth Amendment is not violated when the police arrest a person for failure to wear a seat belt. Atwater v. Lago Vista, 532 U.S. 318 (2001).

97. *See* People v. Fitzpatrick, 986 N.E.2d 1163 (Ill. 2013) (following *Atwater* in interpreting the Illinois constitutional search and seizure clause without determining whether *Atwater* was correctly reasoned).

98. *See* People v. Caballes, 851 N.E.2d 26, 41–42 (Ill. 2006); *see also* Friedman, *supra* note 68, at 102–03.

99. *Caballes*, 851 N.E.2d at 42; *see also* Friedman, *supra* note 68, at 104–05.

100. *See*, *e.g.*, Hope Clinic for Women, Ltd., v. Flores, 991 N.E.2d 745, 765 (Ill. 2013) (finding that "Illinois courts, not federal courts, are arbiters of state law. No federal court can interpret the meaning of our state constitutional provisions").

101. *Id*.

independent analysis, it is for all intents and purposes abrogating its sovereignty as the final arbiter of Illinois law. Though the Illinois Supreme Court is required to defer to the U.S. Supreme Court on federal constitutional issues, it should not cede its authority to the U.S. Supreme Court on state constitutional interpretation. The Illinois Supreme Court has the authority to decide whether the U.S. Supreme Court is correct without any lockstep or interstitial straightjacket.[102]

Consistent with Illinois principles of judicial sovereignty, the Illinois Supreme Court should develop its own body of case law interpreting Illinois constitutional provisions based on the particular provision's text, history, precedent, values, and any other applicable factors shown to be important for determining constitutional meaning. The proper mode of state constitutional analysis should be unhinged from federal doctrine. The Illinois Supreme Court under the proper approach is authorized to adopt or reject U.S. Supreme Court precedent based on whether the justices of the Illinois Supreme Court are persuaded by the U.S. Supreme Court's reasoning.[103] State courts act legitimately if they agree or disagree with the U.S. Supreme Court based on their independently diligent interpretation of the state constitutional provision to reach a sound judgment, regardless of the existence of any unique Illinois textual or historical factors to support a divergence under an interstitial approach.[104]

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102. *See* Leven, *supra* note 83 (discussing how the framers of the 1970 Illinois Constitution intended the Illinois courts to interpret the Illinois Constitution independently of the U.S. Supreme Court).

103. *See, e.g.*, Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991) ("[I]f the state courts are not merely presuming that state and federal law are alike, but are coming to this conclusion after independent evaluation of the meaning of the state provisions, . . . [t]here is nothing improper in concluding that the Supreme Court's construction of similar text is sound.").

104. *Compare* People v. Smith, 447 N.E.2d 809 (Ill. 1983) *with* People v. Krueger, 675 N.E.2d 604 (Ill. 1996) in the Illinois search and seizure context. The Illinois Supreme Court in *Smith* followed the U.S. Supreme Court approach in *United States v. Ross*, 456 U.S. 798 (1982), finding that a warrantless search of a closed container inside a motor vehicle was constitutionally reasonable under article I, section 6. *Smith*, 447 N.E.2d at 813. In doing so, the Illinois Supreme Court followed *Ross* not merely because *Ross* was a binding or presumptively binding U.S. Supreme Court decision, but also because it agreed with *Ross's* reasoning. *See id*. By contrast, the court in *Krueger* rejected U.S. Supreme Court precedent in *Illinois v. Krull*, 480 U.S. 340 (1987) as poorly reasoned, interpreting the same Illinois search and seizure clause of the Illinois Constitution embodied in article I, section 6. *Krueger*, 675 N.E.2d at 610. *Smith* and *Krueger* differ insofar as *Smith* construed article I, section 6 narrowly, whereas *Krueger* interpreted the same Illinois provision expansively. These two decisions, however, share the common element by which the Illinois Supreme Court decides whether to follow or reject U.S. Supreme Court precedent as a matter of Illinois constitutional law based on its independent judgment about the soundness of

Accordingly, the correct analytical construct for interpreting the Illinois constitutional right to arms or any Illinois bill of rights provision should not depend on comparing the text or history of the Illinois constitutional provision to the parallel U.S. constitutional provision as a basis for determining whether the Illinois provision provides greater individual rights protection than does the U.S. Supreme Court for its constitutional counterpart. As former Oregon Supreme Court Justice Hans Linde explained:

> The right question . . . is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.[105]

If the Illinois court must find that article I, section 22 has different text, history, and values from the Second Amendment as a requisite to support a broader reading of Illinois's freedom to keep and bear arms, then it is implicitly finding that the federal approach is correct, absent reliance on such unique Illinois-specific factors for rebutting the presumption. Linking state constitutional analysis to the views of a federal Supreme Court majority by adopting a reflexive presumption of correctness through application of a required comparative approach to state constitutional adjudication disrespects the state court's duty and authority to interpret its own law independently as it sees fit.

We do not know at this juncture whether the U.S. Supreme Court will in future cases decide to broadly or narrowly construe *Heller* and *McDonald*. In the interim, lower federal courts and

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the U.S. Supreme Court rationale.

105. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984). James A. Gardner, among others, has observed that the U.S. Constitution sets a minimum "floor" of individual rights protection below which the courts cannot go, but that state courts construing their state constitutions are free to exceed this minimum. James A. Gardner, *State Constitutional Rights As Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1030 (2003). Gardner's finding can be harmonized with Linde's thesis that state constitutional law may provide more, less, or the same level of individual rights protection than federal law. Even if the state constitution confers less protection, the claimant can and should always raise her federal constitutional claim, which would entail that she receives the minimum floor of protection that the U.S. Constitution requires.

state courts have some latitude in limiting the reach of these landmark cases. The impetrative of formulating a state constitutionally based construct to devise alternative approaches to federal law or to expand on federal parameters without constraints or perceived constraints from *Heller* and *McDonald* should engender serious consideration.

It would undermine Illinois judicial sovereignty to allow future U.S. Supreme Court decisions or strained readings of *Heller* and *McDonald* that might be insufficiently protective of personal liberty to predominate in the Illinois constitutional sphere. Allowing federal precedent to substitute for the Illinois high court's reasoned analysis on article I, section 22 as a binding constraint would undermine the proper state constitutional structure that places the Illinois Supreme Court as supreme in the state constitutional hierarchy. The scope of the Illinois right to arms should not be dependent on a fallacious requirement imposed on Illinois courts to presumptively bind themselves to a narrow reading of individual liberty under *Heller* and *McDonald*.[106]

E. Illinois Supreme Court's Conflicting Approaches: People v. Caballes*'s Abdication of Judicial Sovereignty Versus* Kalodimos*'s Independence Model*

Notwithstanding the foregoing principles discussed above in Part III.D of this Article, the Illinois Supreme Court committed power-delegating errors in its seminal 2006 decision in *People v. Caballes*[107] by creating a framework for deciding Illinois constitutional issues implicitly premised on the presumption of federal correctness fallacy.[108] Under *Caballes*'s interpretive method, the Illinois Supreme Court starts its state constitutional analysis by determining if there is a federal counterpart to the state constitutional provision and if so, compares and contrasts the text of the Illinois constitutional provision with the parallel U.S. constitutional provision.[109] In doing so, the Illinois Supreme Court has instructed itself and lower Illinois courts, as a threshold matter before engaging in any substantive discussion as to

106. But the Illinois Supreme Court when interpreting article I, section 22 has the discretion to follow cases such as *Heller* and *McDonald* as an instructive influence or to reject them. *See infra* Part IV. Only when applying federal law would the Illinois Supreme Court be required to follow *Heller* and *McDonald*.

107. *Caballes*, 851 N.E.2d at 31. Unlike *Kalodimos*, which interpreted the Illinois constitutional right to arms under article I, section 22, the court in *Caballes* considered whether a dog sniff of an automobile for illegal drugs constituted an unconstitutional search under the search and seizure clause of Illinois article I, section 6.

108. *See id*. at 31–32.

109. *See id*.

meaning and application, to first determine whether the Illinois provision is linked or related to a parallel provision of the U.S. Constitution.[110]

As explained by *Caballes*, "[w]hen considering the relationship, if any, between the meaning of the state constitution and the meaning of the federal constitution, there are three possible scenarios."[111] But why consider the relationship, if any, between the Illinois and federal constitutions as an absolute prerequisite to the search for Illinois constitutional meaning? The Illinois Supreme Court did not answer this implicit question; it offered no explanation whatsoever why it is fundamentally necessary as a matter of Illinois law to compare the text of the particular state and federal constitutional provisions under consideration before ascertaining how the Illinois constitutional counterpart should be interpreted.

The answer is that the Illinois Supreme Court in *Caballes* has undermined its judicial sovereignty by binding itself to its own judicially crafted rule that inflexibly requires differences in text or history to justify broader interpretations of Illinois constitutional freedom. Rather than pledging uncritical allegiance to the presumptive validity of U.S. Supreme Court majority opinions, the Illinois Supreme Court should in its future decisions focus on what the Illinois Constitution means and how it applies based on Illinois constitutional text, history, values, purposes, policy, and precedent, irrespective of the U.S. Supreme Court's interpretation of the U.S. Constitution, except as an optional, persuasive influence.

Unlike *Caballes*, the court's earlier decision in *Kalodimos* interpreting the Illinois constitutional right to arms[112] did not find that it was required as a matter of Illinois constitutional law to relate the text of article I, section 22 to the Second Amendment. Instead, the Illinois Supreme Court in *Kalodimos* focused its interpretative model to a large extent on particular Illinois factors, including the Illinois floor debates, the substantive nature of the Illinois right to bear arms, the extent of the police power to regulate the right and the proper level of scrutiny.[113] Indeed, the plaintiffs in *Kalodimos* did not raise any Second Amendment claim

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110. *See id*. Whether the *Caballes* methodology should govern state constitutional gun rights analysis is an open question under Illinois law because the Illinois Supreme Court has not affirmatively decided any article I, section 22 issues after *Caballes*. The only two constitutional right to bear arms cases that the Illinois high court has substantively analyzed after *Caballes*, *Heller* and *McDonald* are *People v. Wilson*, 968 N.E.2d 641 (Ill. 2012) and *People v. Aguilar*, 2 N.E.3d 321 (Ill. 2013). Both of these were premised entirely on the Illinois Supreme Court's interpretation of Second Amendment law.

111. *Caballes*, 851 N.E.2d at 31.

112. *See supra* note 16 and Part II.

113. *See Kalodimos*, 470 N.E.2d at 270–73 and 277–79.

whatsoever.[114]

The fact that the U.S. Supreme Court decided *Heller* and *McDonald* in the intervening period after *Kalodimos* does not support reversing course on Illinois's independent framework for interpreting article I, section 22 free from the constraints of Second Amendment law. It would defy straightforward principles of logic to say that merely because the U.S. Supreme Court has now spoken belatedly on the Second Amendment via *Heller* and *McDonald* that the Illinois Supreme Court must adopt the approach of those cases as binding or presumptively binding on Illinois law. The Illinois Supreme Court as the final adjudicator of the Illinois Constitution and in its sovereign exercise of judicial power is not wed to the U.S. Supreme Court. The mere existence of *Heller* and *McDonald* without more should not serve as the catalyst for the abdication of *Kalodimos*'s distinction from federal law.

The Illinois Supreme Court's method of adjudication in *Kalodimos* thus supports the proposition that article I, section 22's scope and meaning should not be premised on a model mandating the court to compare article I, section 22 to the Second Amendment, an approach which wrongly assumes the dominance of federal law in state constitutional interpretation. The Illinois Supreme Court's use of an independent construction in *Kalodimos* untethered to federal law should supersede *Caballes's* misguided comparative approach. In deciding state constitutional gun rights cases, *Kalodimos* is more authoritative than *Caballes*.[115]

1. Caballes*'s Erroneous Comparative Approach Explained*

For purposes of this Article, the *Caballes* construct, wrong as it is, will nevertheless be explained and applied to show that even under its implicit sovereignty-abdicating framework, substantive textual and historical differences between article I, section 22 and the Second Amendment constitute a secondary avenue supporting independent Illinois constitutional construction. *Caballes* began its analysis by conceiving of three different ways for Illinois courts to interpret Illinois constitutional provisions, depending on whether the Illinois provision has a parallel federal counterpart and, if so, how the Illinois constitutional provision's text is similar or dissimilar.[116] Under the first scenario, the Illinois constitutional provision has no parallel concept, textual similarities, or

114. *See id*. at 269.

115. Although the court in *Kalodimos* decided correctly to act independently from federal law as discussed in this Part, the court erred in other respects, namely, that it utilized misguided analytical techniques to reach a flawed outcome, as shall be discussed more fully in the Parts to follow.

116. *Caballes*, 851 N.E.2d at 31–32.

connection to any provision in the U.S. Constitution. The Illinois constitutional provision in this setting receives a construction that is "without reference to a federal counterpart" and functionally distinct from U.S. Supreme Court decisional law.[117]

The second possibility applies if the Illinois constitutional provision is similarly worded to a comparable federal constitutional provision but diverges in a material respect.[118] A differently worded Illinois constitutional provision under this approach requires an interpretative framework independent of and not subject to the control of U.S. Supreme Court majority opinions that interpret the co-extensive federal constitutional provision.[119]

The third category involves an Illinois constitutional provision whose text is identical to or nearly identical to a parallel federal constitutional provision.[120] A prime example of this category is the search and seizure clause of article I, section 6 of the Illinois Constitution, the language of which is very nearly identical to the Fourth Amendment to the U.S. Constitution.[121] Whenever the Illinois Supreme Court finds such textual similarity between the Illinois and federal constitutional provisions, it applies what it terms a "limited lockstep" approach in construing the parallel Illinois constitutional provision.[122] Generally, this means that the search and seizure section of article I, section 6 on any given issue has identical meaning to a U.S. Supreme Court majority's resolution of the same issue under the Fourth Amendment, subject to certain exception discussed more thoroughly in the next subpart and Part IV.A.[123]

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117. *Id*. at 31. A prominent example of such a state bill of rights provision is the Illinois privacy clause. The Illinois Supreme Court found that the Illinois privacy clause in article I, section 6 has no parallel provision in the federal constitution and therefore must be interpreted "without reference to a federal counterpart." *Flores*, 991 N.E.2d at 756.

118. *Caballes*, 851 N.E.2d at 31–32.

119. *Id*. The *Caballes* court cited its decision in *People v. Fitzpatrick*, 633 N.E.2d 685 (Ill. 1994), as fitting within such an interpretive framework that espouses Illinois judicial independence. *Caballes*, 851 N.E.2d at 31. The court in *Fitzpatrick* found that the then-applicable article I, section 8 of the 1970 Illinois Constitution requiring face-to-face confrontations in criminal trials was worded more broadly than and thus (before the state constitutional provision was amended) afforded greater protections to defendants than the comparable confrontation clause guarantee embodied in the Sixth Amendment. *Fitzpatrick*, 633 N.E.2d at 688.

120. *Caballes*, 851 N.E.2d at 32.

121. *Compare* ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches [and] seizures . . . ."), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

122. *Caballes*, 851 N.E.2d at 43–45; *see also supra* note 83 and Part IV.

123. *Caballes,* 851 N.E.2d at 43. Applying the *Caballes* court's formulation of the limited lockstep doctrine, the Illinois Supreme Court held that an arrest

2. Applying Caballes Notwithstanding: Textual and Historical Differences Between the Illinois and U.S. Constitutional Guarantees Support Illinois Judicial Independence

In choosing which of the three *Caballes* categories governs, the Illinois courts should observe that the Illinois arms-bearing provision fits neatly within the second option, in which the federal and state provisions are similar but have substantial textual variations. This method requires Illinois courts to reject lockstep application, and instead utilize an approach independent from the U.S. Supreme Court. Both the Illinois constitutional arms right and the Second Amendment protect a right to bear arms. Thus, the first *Caballes* scenario in which the Illinois constitutional provision has no federal counterpart does not apply.

Though the Illinois provision is similar to the Second Amendment inasmuch as both constitutionalize a right to keep and bear arms, the language of the Illinois right is far from identical to or nearly identical to the Second Amendment as shall be discussed thoroughly in the paragraphs to follow. This dichotomy leads to the conclusion that the third *Caballes* possibility, the limited lockstep approach, does not govern issues addressing article I, section 22. As a consequence of this lockstep rejection, practitioners and the Illinois courts should not treat the Illinois constitutional provision as an afterthought to the Second Amendment lacking in vitality or independent significance. This conclusion naturally flows, regardless of any currently prevailing view as to whether the U.S. Supreme Court is reading the Second Amendment too expansively or narrowly.[124]

Parsing the different word choice used by the respective

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for the petty offense of walking in the middle of a street was constitutionally valid under article I, section 6 merely because the U.S. Supreme Court found in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) that an arrest for a petty offense of failing to wear a seat belt was constitutional under the Fourth Amendment. *See* People v. Fitzpatrick, 986 N.E.2d 1163 (Ill. 2013). The Illinois Supreme Court in *Fitzpatrick* did not find any traditional practices in Illinois case law that disturbed the general lockstep rule under the facts of that case. *See id*. at 1167–70.

124. *See Caballes*, 851 N.E.2d at 43–45; *see also Fitzpatrick*, 986 N.E.2d at 1166–67. Although beyond an extended discussion in this Article, the two exceptions to the lockstep rule—the framers' intent underlying the passage of the 1970 Illinois Constitution and Illinois traditions as shown in Illinois case precedent—demonstrate broad historical support for the complete abandonment of any lockstep rule and its concomitant replacement with a framework respecting Illinois judicial independence from U.S. Supreme Court majority opinions on Illinois constitutional law. *See* Leven, *supra* note 83. Under such a model of Illinois judicial independence, the Illinois Supreme Court in interpreting the Illinois Constitution has discretion to agree or disagree with U.S. Supreme Court precedent based on its reasoned judgment and need not follow U.S. Supreme Court majorities based on an inflexible lockstep rule. *See id*.

framers of article I, section 22, and the Second Amendment when viewed through the context of history provides a compelling reason why Second Amendment jurisprudence does not control the outcome of Illinois constitutional issues. The express language of article I, section 22 granting a right to possess arms demonstrates that the beneficiaries of this right are individual citizens: "the right of the individual citizen to keep and bear arms shall not be infringed."[125] The operative part of the Second Amendment conferring an arms right closely parallels the language of article I, section 22 but with a crucial difference: the Second Amendment arms right by its terms is designated as a "right of the people," not a right of individuals: "the right of the people to keep and bear Arms, shall not be infringed."[126]

To be sure, the U.S. Supreme Court in *Heller* interpreted the phrase "right of the people" to mean that the Second Amendment was historically understood during the framing period as a right inuring to all Americans as individuals, not merely a right that could only be exercised through membership in a collective entity such as a local militia.[127] Notwithstanding the views of the *Heller* majority, the Second Amendment text does not explicitly bestow its libertarian benefits on all American citizens as discrete individuals, as does the language of the Illinois Constitution.

Another important textual difference centers on the Second Amendment's language referencing a "well-regulated Militia." Absent from article I, section 22, however, is any text manifesting a connection between a right to possess arms and the organization and maintenance of local militias. In addition, article I, section 22, unlike the Second Amendment, makes the arms right "subject to the police power." The substantive textual differences between the two provisions demonstrate that a lockstep rule under which the Illinois Supreme Court essentially parrots and adopts U.S. Supreme Court majority decisions as a judicially imposed rule does not apply to issues pertaining to gun rights. Instead, under the Illinois Supreme Court's *Caballes* methodology (even if that methodology improperly undermines Illinois judicial sovereignty), the Illinois Supreme Court has plenary authority to interpret article I, section 22 differently than the U.S. Supreme Court has applied or may apply the Second Amendment in the future.

Aside from textual differences, the Illinois constitutional framers' intent to distinguish article I, section 22 from the then restrictive reading of the Second Amendment by the U.S. Supreme Court during the Illinois constitutional convention also justifies a

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125. *See supra* note 3.

126. *See supra* note 1.

127. *Heller*, 554 U.S. at 581 ("We start therefore with a strong presumption that the Second Amendment is exercised individually and belongs to all Americans.").

divergent framework. In 1970, when the latest version of the Illinois Constitution was enacted, the U.S. Supreme Court had not yet decided *Heller* and *McDonald*. Prior to 1970, there were relatively few U.S. Supreme Court Second Amendment cases, and more importantly from the perspective of firearms owners, no cases supporting their cause.

In 1876, the Court decided *United States v. Cruikshank*,[128] which found that the Second Amendment applies only against the national government and not the States.[129] Ten years later, in *Presser v. People of the State of Illinois*,[130] the Court reaffirmed this holding.[131] *Cruikshank* and *Presser* read together support the proposition that when the Illinois framers drafted the 1970 Illinois Constitution, the Second Amendment did not limit state and local government from passing laws that deprive persons in their capacity as individuals from owning guns for individual defense of their property and personal safety. In codifying a state constitutional right to keep and bear arms, the Illinois framers likely understood the absence of federal constitutional protection against state infringement and endeavored to correct this deficiency.

Moreover, in 1970, not only was the Second Amendment inapplicable to the States, but the U.S. Supreme Court's 1939 decision in *United States v. Miller*[132] had further eroded the reach of the federal constitutional right to arms and was the dominant precedential force in the Second Amendment arena.[133] In *Miller*, the Court held that a short-barreled shotgun did not qualify as an arm protected by the Second Amendment because this type of weapon was not reasonably connected to the preservation and efficiency of a militia.[134] The almost universal scholarly interpretation of the U.S. Supreme Court's holding in *Miller*—prior to *Heller*—suggested that the Second Amendment safeguarded only a collective right to protect local militias from

128. United States v. Cruikshank, 92 U.S. 542 (1876).

129. *Id*. at 553 ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.").

130. Presser v. People of the State of Ill., 116 U.S. 252 (1886).

131. *Id*. at 265. The court in *Presser*, however, noted a narrow exception to the lack of federal constitutional constraints on state power to restrict arms possession: the states are prohibited from disarming the people in such a manner as to deprive the national government of the means of maintaining a reserved militia to protect public security. *Id*. at 265–66.

132. United States v. Miller, 307 U.S. 174 (1939).

133. *See*, *e.g.*, Jeffrey Monks, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms*, 2001 WIS. L. REV. 249, 256 [hereinafter "Monks"] ("*Miller* was the last case [before *Heller*] in which the Supreme Court interpreted the Second Amendment as part of its holding.").

134. *Miller*, 307 U.S. at 178.

federal encroachment.[135] Likewise, the federal circuit courts of appeal had almost unanimously interpreted the Second Amendment as conferring a collective right to organize a state militia, not a right belonging to individuals for the purpose of self-defense against violent confrontation.[136]

The U.S. Supreme Court *Heller* majority abruptly changed the judicial dynamic by broadening the reach of the federal right to arms provision to encompass an individual right. In doing so, the *Heller* majority ruled that *Miller* as a matter of precedent did not preclude the Court from embracing the concept that the Second Amendment enshrined an individual right without reference to the operation of local militias.[137] The *Heller* majority observed that the Court had not in its more than 200-year old prior history considered whether the Second Amendment provides individuals with a constitutionally based right to keep and bear arms, thus concluding that *stare decisis* did not foreclose the Court from ruling on the issue anew in Mr. Heller's appeal.[138] No doubt that the U.S. Supreme Court ushered in a new age with its

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135. *See*, *e.g.*, Hon. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 1016 (2013) [hereinafter "Anderson"] (collecting a representative sample of cases and noting that "[p]rior to 2008, the vast majority of federal reviewing courts opined that the Second Amendment conveyed a collective, rather than individual, right"); *see also* Blocher, *Reverse Incorporation*, *supra* note 84, at 380 ("For nearly two hundred years, it was widely understood and frequently held that the Second Amendment is essentially a federalism-based provision intended to protect state militia from disarmament by the federal government.").

136. *See* United States v. Cole, 276 F. Supp. 2d 146, 149 (D.D.C. 2003) ([Prior to *Heller* and *McDonald*,] "[t]he *Miller* decision was the last time the Supreme Court considered the meaning of the Second Amendment, and for over six decades since, the lower federal courts have uniformly interpreted the decision as holding that the Amendment affords 'a collective, rather than an individual, right' associated with the maintenance of a regulated militia.") (quoting Love v. Pepersack, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 516 U.S. 813, 816 (1995)). One notable exception and a forerunner to *Heller* is the federal court of appeals decision in *United States v. Emerson*, 270 F. 3d 203, 260 (5th Cir. 2001), which found that the Second Amendment protects an individual right.

137. Limiting the scope of *Miller*, the Court in *Heller* determined that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Heller*, 554 U.S. at 623. Hence, *Heller* found that *Miller* had not addressed the broader question whether individuals have a federal constitutional right to possess a weapon as a means of self-defense disconnected from military purposes. *See id*. ("It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment.").

138. *See Heller*, 554 U.S. at 625 (finding that prior to *Heller* the question whether the Second Amendment protected an individual right "ha[d] been for so long judicially unresolved" by the Court and that "for most of [American constitutional] history the question did not present itself" to the Court).

expansive watershed decision, breathing new life into the previously dormant Second Amendment.

In defining the scope and meaning of the Illinois constitutional arms right, however, it is important to derive the proper analysis from the correct historical context. *Heller* and *McDonald* are inapplicable to the question of whether the Illinois constitutional framers intended a broader reading of the state constitutional right than the Second Amendment because those cases post-dated the passage of the 1970 Illinois Constitution by approximately 40 years. As the following will show, the framers of the 1970 Illinois Constitution suggested that they understood *Miller* as rejecting the view that the Second Amendment conferred an individual right. The Illinois framers' conception of a limited Second Amendment stands in stark contrast to *Heller* and *McDonald's* broad reading.

The Illinois Bill of Rights Committee responsible for drafting the majority proposal, which eventually became article I, section 22, considered *Miller* to be the definitive Second Amendment case.[139] The Committee report described *Miller* as restricting the type of arms safeguarded by the Second Amendment to only those that are connected to strengthening and protecting local militias.[140] Turning from its analysis of the U.S. Supreme Court's understanding of the Second Amendment to that of the Illinois Supreme Court, the Committee cited the Illinois high court's then one-year old decision in *Brown v. City of Chicago*,[141] which held that a regulation not interfering with the operation of a State's organized militia is constitutionally compatible with the Second Amendment.[142]

Based on its reading of *Miller* and *Brown*, the Committee concluded that "the Second Amendment language only refers to a collective right, which must be reasonably connected to the maintenance of a militia or other form of common defense."[143] Given this conclusion, the Committee intended article I, section 22 to enjoy a broader meaning than the Second Amendment within their understanding of *Miller*, evidenced by inserting text in the majority proposal expressly granting individual citizens a constitutionally-based right to possess and use arms. As further explained by the Committee:

> By referring to the "individual citizen" and to the right to

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139. *See* 1 RECORD OF PROCEEDINGS, Committee Proposal § 27, at 84–85. The Committee also released a minority proposal that argued against the passage of an Illinois constitutional right to keep and bear arms.

140. *Id*. at 85.

141. Brown v. City of Chicago, 250 N.E.2d 129 (Ill. 1969).

142. 1 RECORD OF PROCEEDINGS, *supra* note 6, at 85 (citing *Brown*, 250 N.E.2d at 131).

143. *Id*.

> "keep" as well as "bear" arms, the proposed new provision guarantees an individual right rather than a collective right and seeks to assure that the "arms" involved are not limited by the armaments or needs of the state militia or other military body. The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property.[144]

Reinforcing this understanding of the Illinois framers' intent is the Constitutional Commentary to the final text of the then-recently enacted article I, section 22.[145] The Constitutional commentary explained that the Illinois constitutional provision granted "individual citizens" the right to "use arms, including firearms" and that the right "seeks to guarantee an individual right, as well as a collective right."[146] To further underscore the individual nature of the right guaranteed, the Commentary noted that the constitutional provision employs both the words "keep" and "bear" to identify individual citizens as the holders of the right.[147]

The Illinois framers' construction of the Second Amendment as a collective right under *Miller* stands in stark contrast to the U.S. Supreme Court's subsequent decision in *Heller*. Both the Bill of Rights Committee comments and the Constitutional Commentary to article I, section 22 demonstrate that the Illinois constitutional framers as an entire law-making body had envisioned a broader meaning for article I, section 22 as an individual rights guarantee distinguishing it from the then-limited scope of the Second Amendment. From a 1970 perspective, without the benefit of hindsight via *Heller* and *McDonald*, the Illinois framers operated under the widely understood conception of the Second Amendment as having nothing to do with individual self-defense. Rather, the Amendment only dealt with the task of equipping an organized militia.

Thus, the delegates to the 1970 Constitution understood article I, section 22 to have a different origin and broader scope than the Second Amendment. This intent should play a prominent role in any case deciding state constitutional claims based on article I, section 22. Scholars agree that the Illinois framers sought to go beyond the limited Second Amendment function imposed by the then generally accepted reading of *Miller*.[148] Remarkably, the

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144. *Id*.

145. ILCS Ann., ILL. CONST. 1970, art. I, sec. 22, Constitutional Commentary, at 499 (Smith-Hurd 1993).

146. *Id*.

147. *Id*.

148. *See* Anderson, *supra* note 135, at 1016 ("At the time of the 1970

Illinois framers' intent underlying article I, section 22 mirrors what *Heller* accomplished belatedly almost 40 years later by recognizing an individual constitutional right divorced from the needs of local militias.

IV. PRIMACY METHOD OF STATE CONSTITUTIONAL INTERPRETATION SHOULD BE ADOPTED

Once the Illinois Supreme Court's authority to diverge from the U.S. Supreme Court on state constitutional matters is firmly established, the next step is to ascertain the proper analytical tools for determining the meaning of the Illinois Constitution and more particularly article I, section 22. In interpreting the Illinois Constitution, the Illinois Supreme Court should apply to Illinois Bill of Rights provisions generally and article I, section 22 more specifically what courts and commentators have dubbed the primacy approach.[149] Under the primacy approach, "the state court undertakes an independent [state] constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance."[150] Such an interpretive technique could lead a state supreme court to construe its state constitution's rights and liberties more expansively than the comparable provisions of the U.S. Constitution.[151]

This Article recognizes that the *Caballes* court rejected the primacy approach and adopted its limited lockstep rule for the search and seizure clause of article I, section 6 of the 1970 Illinois Constitution.[152] This outcome was premised on the language of the search and seizure clause of article I, section 6 being nearly identical to the Fourth Amendment.[153] As noted above, the lockstep rule does not apply to the Illinois right to arms under article I, section 22 because the text of the Illinois provision is materially different from the Second Amendment.[154]

More important, however, *Caballes* expressly created two exceptions to lockstep interpretation: lockstep will not apply if either (1) the framers of the 1970 Illinois Constitution intended

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constitutional convention, delegates were apparently mindful of the then-status of Second Amendment jurisprudence and set out to ensure that Illinois citizens had an individual, rather than collective, right to bear arms."); ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 69 (2011) [hereinafter LOUSIN, ILLINOIS STATE CONSTITUTION] (describing the intention of the delegates to grant citizens a clear individual right to keep and bear arms, for fear that the "collective right" under the Second Amendment was perhaps limited to militia purposes).

149. *Caballes*, 851 N.E.2d at 42.

150. *Id*. (quoting Friedman, *supra* note 68, at 95).

151. *E.g*., Friedman, *supra* note 68, at 95.

152. *Caballes*, 851 N.E.2d at 43–45.

153. *See id*. at 32–33.

154. *See supra* Part III.E.2 at 28–29.

Illinois courts to apply an independent construction of Illinois constitutional rights or (2) Illinois traditions as manifested by longstanding case precedent allow such independence.[155] These exceptions are sufficiently broad to jettison the lockstep rule entirely and replace it with the adoption of a primacy approach.[156]

A. The Illinois Framers' Intent and Illinois Traditions Support the Primacy Method

There is vast Illinois historical support for a primacy approach, which is briefly summarized as follows:[157] Illinois case law prior to the 1970 Illinois Constitution championed independent thinking by the Illinois Supreme Court on state constitutional matters, untied to any controlling influence from U.S. Supreme Court majority opinions.[158] The Illinois Supreme Court in the pre-1970 era often construed Illinois constitutional provisions more expansively than their parallel federal constitutional guarantees.[159] Even if the Illinois constitutional provision conferred the same level of protection as its federal counterpart on any given issue, the Illinois Supreme Court reached this outcome by applying U.S. Supreme Court precedent as a persuasive influence, not as a binding lockstep straightjacket under a self-imposed judicial rule.[160]

Certain research papers relied on by the delegates to the 1970 Illinois constitutional convention manifested a collective understanding that the Illinois Supreme Court was permitted but not required to interpret individual rights more broadly than the U.S. Constitution under the prior 1870 Illinois Constitution.[161]

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155. *See Caballes*, 851 N.E.2d at 43–45.

156. *See* Leven, *supra* note 83. Historical evidence shows that the framers of the 1970 Illinois Constitution intended to authorize but not require Illinois courts to interpret the meaning and scope of Illinois constitutional rights, even those that are similarly-worded to U.S. constitutional provisions, differently than their U.S. constitutional analogues. *See infra* Part IV.A. An extended discussion, however, is beyond the scope of this Article but is thoroughly covered elsewhere. *See* Leven, *supra* note 83.

157. *See id*.

158. *See*, *e.g.*, Bd. of Educ. v. Blodgett, 40 N.E. 1025 (Ill. 1895); Leven, *supra* note 83, at 73–83.

159. *See*, *e.g.*, *Blodgett*, 40 N.E. at 1026–27 (construing Illinois due process provision more broadly than federal due process provision); Leven, *supra* note 83, at 73–79.

160. *See*, *e.g.*, People v. Castree, 143 N.E. 112, 113 (Ill. 1924) (Illinois Supreme Court choosing to follow U.S. Supreme Court case law on particular Fourth Amendment issue for its interpretation of parallel article II, section 6 of the 1870 Illinois Constitution because it was "founded upon the better reason."); Leven, *supra* note 83, at 79–83.

161. See GEORGE D. BRADEN & RUBIN G. COHN, U. OF ILL., Inst. OF GOV'T & PUB. AFFAIRS, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 5–7 (1969); CON-CON: ISSUES FOR THE ILLINOIS

Acknowledging Illinois's history and traditions embracing state judicial independence, the research papers recommended to the 1970 Illinois delegates that the Illinois Constitution then under consideration preserve the traditional discretion of Illinois courts to grant greater individual rights protections than those recognized by the U.S. Supreme Court under federal law, even for those Illinois provisions that are identical or nearly identical to a parallel federal constitutional provision[162] Commentary in the debates and reports of the Illinois Bill of Rights Committee supply additional support for this broad understanding of Illinois judicial sovereignty.[163] The Illinois framers intended to preserve the Illinois courts' traditional independence on state constitutional matters, free from the restrictions imposed by U.S. Supreme Court precedent.[164]

Similarly, the Convention as a collective body expressed sentiments that should be judged as anti-lockstep. The delegates' drafted a document called the "Address to the People," which was included in the Official Text With Explanation of the Proposed 1970 Illinois Constitution sent to Illinois voters to help guide them in deciding whether to approve the 1970 Illinois Constitution.[165] The document explains: "[m]any had come to feel that few of the complex problems with which government must deal today can be solved in the national capitol, and that state and local governments, which are much closer to the people, must assume greater responsibilities."[166] This delegate statement should be interpreted together with another comment manifesting a "dominant theme[]" for the Convention of "greater protection of individual liberties."[167]

The U.S. Supreme Court, as an organ of the U.S. government, presumably falls within the scope of the Illinois framers' designation of federal government actors ill-equipped to resolve Illinois' pressing disputes, including the meaning and scope of Illinois rights and liberties. As such, Illinois courts should not be viewed as an inferior vehicle for guarding Illinois's most cherished liberties. Illinois courts contradict the delegates' overarching intent if they follow in lockstep with the U.S. Supreme Court without questioning the wisdom of U.S. Supreme Court decisions as proper for Illinois.

The intent of the framers of the 1970 Illinois Constitution and

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CONSTITUTIONAL CONVENTION 3, 30 (Victoria Ranney ed., 1970) [hereinafter "Con-Con"]; Leven, *supra* note 83, at 83–92.

162. *See id*.

163. *See* Leven, *supra* note 83, at 95–98.

164. *Id*.

165. Address to the People *in* 7 RECORD OF PROCEEDINGS at 2667–69, 2671.

166. *Id*. at 2671.

167. *Id*. at 2672.

the voters who consented to ratification must be understood within the proper historical context. Given Illinois' historical development through case law, constitutional research papers endorsed by the framers, the debates, the Committee reports and the Convention's Address to the People, the Illinois Supreme Court should select the primacy method for analyzing state constitutional issues arising under the right to arms provision of the Illinois Constitution or for that matter any individual right guaranteed by the Illinois Bill of Rights. Illinois right to arms adjudication should be implemented without hewing to or presuming any federal constitutional validity.

B. Wide Array of Legitimate Resources for Determining Illinois Constitutional Meaning and Application

In analyzing state constitutional arms right issues under a primacy approach, the Illinois courts should consider the text of article I, section 22 and Illinois Supreme Court and appellate court opinions addressing the provision. There is, however, an obvious scarcity of informative Illinois precedent in this area of the law. The *Kalodimos* opinion is the only Illinois Supreme Court decision focusing on article I, section 22 in the more than 40-year history of that provision. If an important area of the law is unsettled and in the process of development, the Illinois courts should not limit themselves to judicial opinions from Illinois. Rather, they should consider well-reasoned analysis from authorities outside the Illinois state judicial system.[168]

Illinois constitutional law should be solidly built on the full panoply of available resources to produce a sound and principled body of legal principles. These resources should include but not necessarily be limited to: the text of the Illinois constitutional provision; Illinois precedent; historical materials, including floor debates, committee reports, and other delegate-created documents; guiding precedent from other jurisdictions, including U.S. Supreme Court and sibling state appellate and supreme courts, concurring and dissenting opinions; and scholarly works.[169] U.S. Supreme

168. *See, e.g.,* People v. Clemons, 968 N.E.2d 1046, 1055 (Ill. 2012) (stating that "the analysis employed by other jurisdictions may inform [Illinois courts'] analysis"); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 931–32 (Ill. 2010) (Karmeier, J., concurring in part and dissenting in part) (finding it "appropriate to consider the well-reasoned decisions of other jurisdictions not only when interpreting statutory provisions, but also when examining the protections afforded by the Illinois Constitution.").

169. Commentators have voiced approval for a wide breath of arguments and materials as legitimate sources upon which to base state constitutional adjudication. *See* Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 TEX. TECH L. REV. 75, 79–105 (1993) (noting that state

Court decisions construing the parallel federal constitutional provision may constitute persuasive but non-binding precedent on an Illinois constitutional issue.[170] When considering these resources, the Illinois courts should be free to adopt the reasoning of non-Illinois authorities if the principles animating those decisions are logically sound and correct for Illinois.[171]

Although by no means dispositive, the floor debates to the 1970 Illinois constitutional convention shed light on the delegates' views about the merits of constitutional comparison in the arms right context. Delegate Hutmacher observed without objection from other delegates that in drafting the Illinois constitutional arms right, the Bill of Rights Committee borrowed language from provisions of other state constitutions. He pointed out that the Illinois arms provision then under consideration "is a paraphrase of what they have in many of our state constitutions. In fact, thirty-five have some reference to the right to bear arms."[172] Hutmacher also cited with approval the Michigan case of *People v. Zerillo*[173] as providing insight into the meaning and scope of the comparable Illinois arms provision.[174]

Also instructive is the Bill of Rights committee majority report recommending passage of article I, section 22. This report endorsed consideration of the Second Amendment and analogous constitutional provisions passed by other States and their corresponding decisional law as useful factors in determining the meaning of the Illinois right to arms provision.[175] Still another

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constitutional arguments and materials include those based on text, history, logic, academia, structure, policy, foreign authorities, doctrine, legislative and social facts, and the practical); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 380–92 (1980) [hereinafter "Linde, *First Things First*"] (analyzing various methodologies for state constitutional argument); Leven, *supra* note 83, at 113–16; Friedman, *supra* note 68, at 107.

170. *See, e.g., McCauley*, 645 N.E.2d at 935.

171. *See id.* at 936 (adopting Justice Simon's concurring opinion in *People v. Rolfingsmeyer*, 461 N.E.2d 410, 413 (Ill. 1984) (Simon, J., specially concurring), which admonished itself to decide state constitutional issues based on reason and logic as the final authority on the Illinois Constitution without being bound by U.S. Supreme Court precedent: "It is the nature of the Federal system that we, as the justices of the Illinois Supreme Court, are sovereign in our own sphere; in construing the State Constitution we must answer to our own consciences and rely upon our own wisdom and insights. If we would guide by the light of reason, we must let our minds be bold.") (internal citations omitted).

172. 3 RECORD OF PROCEEDINGS at 1707. *See also id.* at 1714–15 (noting that thirty-five states [in 1970] had provisions in their state constitutions granting a right to bear arms) (statement of Delegate Arrigo)

173. People v. Zerillo, 189 N.W. 927 (Mich. 1922).

174. *See* 3 RECORD OF PROCEEDINGS at 1707.

175. *See* Committee Proposals, *in* 1 RECORD OF PROCEEDINGS § 27, at 84 ("Since the right to arms provision is new, it will be helpful to put it in perspective by reviewing comparable provisions in the United States and in

resource, the Illinois convention's "Address to the People" discussed above, was intended to show that the Illinois Constitution was designed in part as a beacon to inspire other states.[176] As the Address states, "how well the Convention did its work—and acceptance of that work by the people—is important not only to Illinois, but also to other states, as an inspiration to others to undertake the task of revitalizing state and local government in this country."[177] Presumably, the delegates were willing to accept the reverse proposition as well; namely, that other states' thoughtful exposition of constitutional principles may have a constructive influence on Illinois. Apparently absent in the debates, committee reports, Address to the People, and Illinois constitutional text is any intent to dissuade Illinois courts from using outside authorities as a guiding force. To the contrary, these authorities demonstrate that the delegates affirmatively endorsed a comparative approach as appropriate for Illinois courts.

State constitutional decisions from foreign jurisdictions and U.S. Supreme Court decisions may be a rich repository for illuminating concepts that state courts may consult to aid them in crafting an analytically sound approach for interpreting state constitutional provisions.[178] Many commentators have endorsed the state constitutional practice of state courts that consider U.S. Supreme Court precedent and other state courts' judicial interpretations of similar constitutional provisions as persuasive authority.[179] This movement, also known as comparative

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the constitutions of the several states."). The majority report also noted with apparent approval decisions from the states of Idaho, Michigan and North Carolina that held unconstitutional under their respective state constitutions certain laws that forbade possession of arms or subjected the right to regulations that were so onerous that possession or use was effectively banned. *Id*. at 87 (citing *In Re* Brickley, 70 Pac. 609 (Idaho 1902); Zerillo, 189 N.W. 927; State v. Kerner, 107 S.E. 222 (N.C. 1921)). The framers thus expressed support to Illinois courts for comparative constitutionalism in which Illinois courts can look to outside jurisdictions for help in determining the meaning and application of the Illinois right to bear arms.

176. *See* Address to the People *in* 7 RECORD OF PROCEEDINGS at 2671.

177. *Id*.

178. *See*, *e.g.*, State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992) (Connecticut Supreme Court utilizing the following tools for constitutional interpretation of its own state constitution: (1) textual analysis; (2) holdings and dicta of the Connecticut Supreme Court and Connecticut appellate court; (3) U.S. Supreme Court decisional law and other federal court cases; (4) sibling state court decisions; (5) historically-based approach, including the debates of the framers; and (6) economic/sociological considerations).

179. A state court's citation of U.S. precedent as useful but non-binding precedent has been dubbed vertical federalism. This contrasts with horizontal federalism, a practice in which state courts follow decisions of other state courts. *See*, *e.g.*, WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 80, at 352; Blocher, *Reverse Incorporation, supra* note 84, at 351 (noting that "state courts borrow freely from one another, and—as noted above—state courts borrow from federal courts," and advocating comparative

constitutionalism, has also played a significant role in how many states other than Illinois have construed their respective right to arms provisions.[180] As shall be thoroughly discussed below, several state supreme courts have devised standards of review for their state constitutional arms right provisions by learning, comparing and utilizing the approaches of different states.[181]

The *Kalodimos* decision, however, stands as a rare case that diverges from the norm of state courts to freely borrow from other states. The Illinois Supreme Court in *Kalodimos* did not consider or analyze any decisions from other state jurisdictions for guidance in its efforts to construe article I, section 22.[182] It mattered not to

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constitutionalism in which courts from one jurisdiction consider the well-reasoned decisions of another jurisdiction); WOJCIK, *supra* note 10, at 21 ("researching similar [state constitutional] provisions from other jurisdictions can produce highly persuasive legal authorities and stimulate new thinking about constitutional litigation in [Illinois].").

180. *See*, *e.g.*, State v. Cole, 665 N.W.2d 328, 336–41 (Wis. 2003) and State v. Hamdan, 665 N.W.2d 785, 798–802 (Wis. 2003) (Wisconsin Supreme Court in two companion cases citing arms-rights decisions from several states including Alabama, Arizona, Colorado, Connecticut, Michigan, North Dakota, Ohio, Oregon, and West Virginia as support for its proposition that Wisconsin right to arms constricts the reach of the police power, and also citing as support for same proposition Illinois decision in *Rawlings v. Illinois Dep't of Law Enforcement*, 391 N.E.2d 758, 762–63 (Ill. App. Ct. 1979)); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 143–49 (W. Va. 1988) (West Virginia Supreme Court relying on arms-rights cases from states such as Colorado, Idaho, Michigan, New Mexico, Oregon and Vermont to invalidate state statute that barred possession of weapons without a license); State v. McAdams, 714 P.2d 1236, 1237 (Wyo. 1986) (Wyoming Supreme Court relying on cases from Michigan, Missouri and North Carolina to show that police power cannot destroy Wyoming right to arms); City of Junction City v. Mevis, 601 P.2d 1145, 1150 (Kan. 1979) (Kansas Supreme Court citing Colorado Supreme Court decision to show that local ordinance prohibiting possession of a firearm outside of home or place of business was a constitutionally overbroad exercise of the police power). The preceding catalogue of cases is not intended to be a complete list of all state constitutional arms rights decisions relying on other states' constitutional law but only a representative sample.

181. *See* Part VI *infra*.

182. In contexts other than the right to arms, the Illinois Supreme Court has on several occasions extensively relied on authorities other than Illinois case precedent to support a broad reading of Illinois constitutional rights and reject the U.S. Supreme Court's narrow interpretation of the parallel U.S. constitutional right. *See*, *e.g.*, *Blodgett*, 40 N.E. 1025 (Ill. 1895) (construing the due process section of the predecessor 1870 Illinois Constitution to reject U.S. Supreme Court majority opinion in *Campbell v. Holt*, 115 U.S. 620 (1885) and adopt that decision's dissent); *Krueger*, 675 N.E.2d 604, 610–12 (Ill. 1996) (construing the search and seizure section of article I, section 6 of the 1970 Illinois Constitution to reject U.S. Supreme Court decision in *Illinois v. Krull*, 480 U.S. 340 (1987) and adopt the dissenting opinion of Justice O'Connor as well as state constitutional decisions of sibling state courts and scholarly analysis); People v. Washington, 665 N.E.2d 1330, 1335–37 (Ill. 1996) (construing due process section of article I, section 2 of the Illinois Constitution to reject U.S. Supreme Court decision in *Herrera v. Collins*, 506 U.S. 390 (1993) and adopt the concurring opinion of Justice O'Connor and

the *Kalodimos* court whether these states employed a useful methodology that could be applied in Illinois to develop a body of cogent Illinois right to arms principles. For the Illinois Supreme Court to silently reject decisions from foreign jurisdictions outright as unworthy of consideration deprives meaningful review to the people of Illinois. Going forward, the Illinois Supreme Court should conduct a principled analysis on a case-by-case basis to decide whether to accept or reject the reasoning of out-of-state decisions based on the merits of those decisions. The court, however, should not choose silent rejection by ignoring foreign precedent or failing to give it serious consideration.

In *People v. Fitzpatrick*,[183] the Illinois Supreme Court found under its limited lockstep doctrine that state constitutional analysis in other states is irrelevant to whether U.S. Supreme Court precedent should be rejected as a matter of Illinois constitutional law.[184] In reaching this determination, the court restricted the range of authorities that Illinois courts can consider in the limited lockstep context to the intent of the drafters, delegates, and voters who adopted the 1970 Illinois Constitution.[185] Thus, the court concluded that Illinois constitutional adjudication "cannot be predicated on the actions of our sister states."[186]

The *Fitzpatrick* court, however, did not consider—let alone decide—whether Illinois courts may adopt a comparative approach, if such an approach is justifiable under the original intent of the Illinois framers. The preceding analysis in this Part of the Article shows that the delegates to the 1970 Illinois Constitution made written and verbal statements in the debates, committee reports and the Address to the People, which seemingly endorse state constitutional borrowing as a vital constitutional analytical tool. Ratifying voters also seemed to adopt this by voting in favor of the 1970 Illinois Constitution. By no means is there any evidence that the framers explicitly rejected constitutional comparison as a proper analytical tool. Besides, *Fitzpatrick* cuts against the weight of case authority from Illinois

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dissenting opinion of Justice Blackmun as well as state constitutional decisions of sibling state courts); *McCauley*, 645 N.E.2d 923, 932, 937 (Ill. 1994) (construing the Illinois constitutional right against self-incrimination to reject U.S. Supreme Court precedent in *Moran v. Burbine*, 475 U.S. 412 (1986) and adopt the dissenting opinion of Justice Stevens, state constitutional decisions of sibling state courts and scholarly works).

183. People v. Fitzpatrick, 986 N.E.2d 1163 (Ill. 2013).

184. *Id.* at 1169. One of the principal issues in *Fitzpatrick* was whether to reject the U.S. Supreme Court's Fourth Amendment opinion in *Atwater*, 532 U.S. 318 and instead follow the *Atwater* dissent together with state constitutional cases from other jurisdictions in construing the search and seizure section of article I, section 6 of the 1970 Illinois Constitution.

185. *Id.*

186. *Id.*

and other state courts and commentators that favor a comparative approach, if this approach helps to build a solid foundation of well-reasoned precedent.[187] Illinois constitutional law should not erect artificial roadblocks impeding the full development of article I, section 22 jurisprudence. Thus, Illinois courts err if they adhere to an ironclad judicially created rule that the law of foreign jurisdictions is categorically irrelevant.

C. Claim Resolution Sequence: Illinois First, Second Amendment Second

Besides advancing the intent of the Illinois framers and the voters who adopted the 1970 Illinois Constitution, the primacy approach furthers the policy interests of the Illinois Supreme Court underlying its avoidance doctrine. This doctrine requires Illinois courts to abstain from deciding constitutional issues that are unnecessary to resolve the underlying dispute.[188] Resolution of an issue becomes unnecessary where a definitive answer would not change the outcome, regardless how the issue is decided.[189] By instructing Illinois courts to winnow such nonessential issues, the Illinois Supreme Court has implemented judicial restraint as a major component of its overall policy.[190] As stated by the Illinois high court, "it is a fundamental rule of judicial restraint that a court not reach *constitutional* questions in advance of the necessity of deciding them."[191]

The primacy approach furthers judicial restraint by instructing courts to resolve the state constitutional issue first when considering both state and federal constitutional claims together in the same case.[192] If the claimant prevails on his state

187. Despite the *Fitzpatrick* court's application of the limited lockstep doctrine, the two exceptions to the limited lockstep doctrine—the framers' intent and Illinois traditions—show that the limited lockstep rule should be discarded in favor of a primacy approach reflecting Illinois judicial independence. *See supra* Part IV.A. Even so, the limited lockstep rule, if not abrogated, does not apply to Illinois right to arms cases because the text of article I, section 22 and history of its adoption substantially differ from the Second Amendment. *See supra* Part III.E.2.

188. *See, e.g.*, People v. White, 956 N.E.2d 379, 412 (Ill. 2011); People v. Campa, 840 N.E.2d 1157, 1174 (Ill. 2005).

189. *See, e.g.*, *White*, 956 N.E.2d at 412; *Campa*, 840 N.E.2d at 1174.

190. *See, e.g., White*, 956 N.E.2d at 413.

191. *Id.* at 414 (emphasis in the original).

192. Blocher, *Reverse Incorporation*, *supra* note 84, at 340 (noting that under the primacy approach, "state courts faced with state and federal constitutional claims should resolve the former first"); Hans A. Linde, *Without 'Due Process' Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970) [hereinafter "Linde, *Without Due Process*"] ("*Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.*") (emphasis in the original); *see also* Friedman, *supra* note 68, at 106 (crediting

constitutional arguments, the federal constitutional issue becomes moot[193] The federal claim is reached only if the state constitutional claim fails to provide complete relief.[194] Utilizing the primacy approach promotes judicial efficiency, because it allows courts to conserve judicial resources that might otherwise be spent deciding federal constitutional questions that might be irrelevant to the final outcome of a dispute.

If Illinois courts are to be faithful to principles of judicial restraint, then they should first endeavor to resolve the Illinois constitutional claim arising under article I, section 22, before considering the federal issues arising under the Second and Fourteenth Amendments. To begin its constitutional analysis under a primacy approach, the Illinois court must examine the content of state law, including the Illinois Constitution, to determine whether state legislation or a local ordinance must be voided under Illinois law.[195] If state law, as embodied in the Illinois Constitution, forbids enforcement of the firearms control law at issue, then the State does not deprive persons of their Fourteenth Amendment due process rights, because the federal constitutional issue becomes moot.[196]

A 2014 City of Chicago ordinance imposing strict restrictions on the sale of firearms illustrates how a primacy approach could be utilized to test the constitutionality of such a law.[197] Before

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former Oregon Supreme Court Justice Linde as "an originator of the primacy approach").

193. Friedman, *supra* note 68, at 106 (explaining the judicial restraint justification for the primacy approach: "the state appellate court should begin its analysis . . . with the state constitution, when the issue has been raised, because there is no deprivation of a defendant's Fourteenth Amendment rights when the relief she seeks may be found in the state constitution").

194. In a criminal case, the defendant should usually raise her federal constitutional claim in state court to preserve the issue for federal habeas corpus review. *See* 28 U.S.C. § 2254(b)(1).

195. *See* Linde, *Without Due Process*, *supra* note 192, at 133 ("The state constitution is part of the state law, and decisions applying it are part of the total state action in a case.").

196. *See* Linde, *First Things First, supra* note 169, at 383 ("Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, then the state is not depriving the person of whatever federal claim he or she might otherwise assert. There is no federal question."); Linde, *Without Due Process*, *supra* note 192, at 133 ("When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.").

197. Chicago Mayor Rahm Emanuel and the Chicago City Council have adopted stringent gun control measures that include a zoning provision restricting gun shops from operating in all but a very limited part of Chicago. CHI., ILL., MUN. CODE tit. 2, 4, 8, 13, 15, 17 (amended June 2014) (concerning sale and transfer of firearms); *see also*, Mary Wisniewski, *Chicago Law Makers Approve Tough Gun Shop Restrictions*, REUTERS (Jun. 25, 2014), http://www.reuters.com/article/2014/06/25/us-usa-chicago-guncontrol-idUSKBN0F024F20140625.

addressing whether the Chicago prohibition violates due process within the meaning of the Second Amendment as incorporated into the Fourteenth Amendment, it is first necessary under the primacy approach to determine whether the Illinois constitutional right to keep and bear arms under article I, section 22 affords complete relief. If the Chicago Ordinance were to be voided under the Illinois Constitution, then the Chicago Ordinance does not *ipso facto* violate due process under the Fourteenth Amendment. The City of Chicago cannot logically deny federal due process if Illinois's constitutional right to bear arms provision has short-circuited the enforcement of the tough Chicago firearms ordinance.

Only if state remedies do not satisfy the constitutional claim is it necessary to proceed to a Second and Fourteenth Amendment analysis. As noted, the Illinois Supreme Court has been instructing Illinois courts under the avoidance doctrine to abstain from deciding federal constitutional questions unnecessary to the disposition of cases where state law satisfies constitutional concerns. This reasoning applies equally well when state constitutional principles, a subspecies of state law, obviate deciding a federal question.

The Illinois Supreme Court's recent decision in *People v. Aguilar*[198] and its aftermath also illustrate how the primacy approach can save courts from wasting valuable time and energy on federal constitutional issues. In *Aguilar*, a case that will be addressed more completely in Part VI of this Article, the Illinois high court held that an Illinois statutory provision completely banning firearms possession outside the home was unconstitutional on its face under the Second and Fourteenth Amendments.[199] The Illinois Supreme Court did not reach the state constitutional issue, though it was briefed by the

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Among its many other requirements, the Chicago law mandates videotaping all gun sales and compels all employees of gun shops to undergo background checks. *Id*. The impetus for these new rules was a Northern District of Illinois federal court decision that held unconstitutional on Second Amendment grounds an even more restrictive City of Chicago ordinance. Illinois Ass'n of Firearm Retailers v. City of Chicago, 961 F. Supp. 2d 928 (N.D. Ill 2014). The ordinance struck down in *Illinois Ass'n of Firearm Retailers* had imposed a blanket prohibition on gun sales and transfers within Chicago city limits. *Id*. The district court's order gave Chicago the option to enact an alternative ordinance that passed constitutional muster. *Id*. at 947. The City of Chicago has claimed that its recently enacted ordinance allows gun sales and therefore complies with the Second Amendment. *See*, *e.g*., Fran Spielman, *Facing Court Order, City Council Votes to Allow Gun Shops*, CHICAGO SUN-TIMES (June 25, 2014), *available at* http://politics.suntimes.com/article/chicago/ facing-court-order-city-council-votes-allow-gun-shops/wed-06252014-929am (describing the City Council vote). It remains to be seen whether the new ordinance will be successfully challenged under the Second Amendment as well as article I, section 22 of the Illinois Constitution.

198. People v. Aguilar, 2 N.E.3d 321 (Ill. 2013).

199. *Id*. at 328.

defendant.[200] Because the U.S. Supreme Court is the final arbiter of the meaning and scope of the U.S. Constitution, the State of Illinois as the losing party could have petitioned the U.S. Supreme Court for a writ of certiorari to challenge the federal constitutional basis for *Aguilar's* holding.[201] One commentator reasoned that the U.S. Supreme Court would likely accept an invitation to consider the merits of *Aguilar* because of the significant circuit split in the lower courts on whether the individual right to keep and bear arms extends outside the home.[202] That commentator predicted, however, that the State of Illinois would not petition the U.S. Supreme Court for *Aguilar*'s reversal, a prediction that has been proven correct.[203]

Had the State of Illinois chosen to appeal *Aguilar* on federal constitutional grounds, even a U.S. Supreme Court reversal of the Illinois Supreme Court's ruling under the Second and Fourteenth Amendments would not have finalized the case. The defendant under this hypothetical scenario would still be armed with his state constitutional claim under article I, section 22. He could return to the Illinois Supreme Court and argue that article I, section 22 extends arms right protection outside the confines of the home, thereby nullifying any U.S. Supreme Court reversal.

Thus, the state constitutional issue does not become moot as a consequence of the Illinois Supreme Court granting a Second Amendment claim as it did in *Aguilar*. The U.S. Supreme Court in this situation retains the authority to reverse the Illinois high court on the federal constitutional question.[204] By relying on federal grounds in *Aguilar*, the Illinois Supreme Court risked the needless expenditure of valuable judicial resources: first, by exposing its ruling to U.S. Supreme Court review; and second, by allowing the defendant to try again in the Illinois Supreme Court if he would have lost in the U.S. Supreme Court.[205]

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200. *See* Brief and Argument for Defendant-Appellant, People v. Aguilar, 2 N.E.3d 321 (2013) (No. 112116), *available at* http.//www.isra.org/lawsuits /Aguilar/Aguilar_Opening.pdf.

201. The U.S. Supreme Court has jurisdiction to review the final judgment of a state supreme court on a substantial federal question. *See* 28 U.S.C. § 1257(a).

202. Noting a deep circuit split on the question whether the Second Amendment secures the right to carry a firearm outside the home, Eugene Volokh in his blog, the Volokh Conspiracy, predicted a "good chance" for the U.S. Supreme Court to agree to hear *Aguilar* if the State of Illinois filed a petition for certiorari. *See* Eugene Volokh, *Illinois Supreme Court: Second Amendment Protects Carrying Outside The Home*, THE VOLOKH CONSPIRACY (Sept. 12, 2013, 11:12 AM), http://www.volokh.com/2013/09/12/illinois-supreme -court-second-amendment-protects-carrying-outside-home.

203. *See id*.

204. *See Hass*, 420 U.S. at 719 (finding that a state court has no authority to impose greater restrictions on state conduct as a matter of federal constitutional law when the U.S. Supreme Court has specifically rejected those specific restrictions as constitutionally mandated).

205. A similar confluence of the Illinois and U.S. Constitutions occurred in

Conversely, if the Illinois Supreme Court had first adjudicated the state claim, and had found in favor of the claimant, unlike the procedural posture of *Aguilar*, then the federal constitutional claim would have fallen by the wayside. The Illinois Supreme Court is the final arbiter on a state law claim because the U.S. Supreme Court has no jurisdiction to overturn an Illinois Supreme Court's decision based on state law.[206]

Furthermore, the Illinois Supreme Court can insulate its decision from U.S. Supreme Court review by simply issuing a finding that independent and adequate state grounds support its decision.[207] Even a federal issue decided by a state court is not subject to U.S. Supreme Court review where the state ground supporting the judgment is independent of the federal issue and adequate to support the judgment.[208] If the U.S. Supreme Court were to rule on a federal constitutional issue in a case where the state court judgment rests on independent and adequate state grounds, the U.S. Supreme Court's action would be tantamount to issuing an advisory opinion, thus exceeding its jurisdiction.[209]

When the state court grants the claimant the relief she is seeking by relying on independent and adequate state grounds, the case becomes a final adjudication. If the claimant's state constitutional claim is granted and the claimant is therefore not aggrieved by any state legislation or local ordinance, then federal due process has not been violated, because the constitutional claim

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Caballes. The Illinois Supreme Court initially ruled in *Caballes* that a canine sniff of an automobile during a routine traffic stop violated the Fourth Amendment because the sniff was not premised on specific and articulable facts. People v. Caballes, 802 N.E.2d 202 (Ill. 2003) (*Caballes I*). The State of Illinois successfully appealed the Illinois Supreme Court's Fourth Amendment ruling to the U.S. Supreme Court and obtained a reversal. Illinois v. Caballes, 543 U.S. 405 (2005) (*Caballes II*). Induced by an adverse decision from the U.S. Supreme Court, the defendant returned to the Illinois Supreme Court to challenge, albeit unsuccessfully, the canine sniff under article I, section 6 of the Illinois Constitution. People v. Caballes, 851 N.E.2d 26 (Ill. 2006) (*Caballes III*). Had the Illinois Supreme Court originally ruled in *Caballes I* that the canine sniff violated the Illinois Constitution, then the U.S. Supreme Court would have been barred from intervening in *Caballes II* and there would have been no need for the Illinois Supreme Court to revisit the issue again in *Caballes III*. The point here is not to argue whether a suspicion-less canine sniff violates the Illinois Constitution, but rather that reliance on the Illinois Constitution as opposed to the U.S. Constitution to support the result in *Caballes I* would have saved significant judicial resources.

206. *See*, *e.g.*, Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions From United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 896 (2005) (stating that "it is legally *impermissible* for the United States Supreme Court to interfere with" . . . "a state court if that state court bases its . . . decision on its own state law") (emphasis in the original).

207. *Long*, 463 U.S. at 1041.

208. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

209. *Id*. at 729.

has been fully met. Principles of judicial restraint counsel in favor of deciding the Illinois constitutional firearms right claim first because if the claimant prevails on this argument, the alternative Second Amendment claim becomes entirely irrelevant to the final outcome. Thus, the primacy method should be regarded as an obligation, and not merely a choice, if Illinois courts are earnestly dedicated to self-restraint and would forego reaching federal constitutional issues that might be irrelevant to a final outcome.

Also instructive are precedent from state courts in non-Illinois jurisdictions and the federal courts that follow the state claims first approach. Although not binding on Illinois courts, these federal and state decisions respect the independent significance of state constitutional provisions while exercising judicial restraint to avoid unnecessary federal constitutional adjudication. The U.S. Supreme Court has followed the state first approach in instructing federal courts to address the state law basis for a claim first, if it is raised, before turning to the U.S. Constitution.[210] Some state courts other than Illinois have also adopted the primacy approach's state constitutional claim first approach grounded on the avoidance doctrine and judicial restraint.[211] The Seventh Circuit Court of Appeals, which includes Illinois, among other states, also has expressed agreement with this methodology.[212] Most significantly for this article's purposes, a

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210. *See Aladdin's Castle*, 455 U.S. at 283, 294–95 ("If [state law] provides independent support for the [] judgment, there is no need for decision of the federal issue."); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 707 n.15 (1986) (Stevens J., dissenting) ("[T]here is no need for decision of the federal [constitutional] issue" if the state constitution provides "independent support.").

211. Justifying the primacy approach based on the avoidance doctrine and the court's judicial restraint policy, the Maine Supreme Judicial Court stated:

> Just as it is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary, a similar policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution.

State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); *see also* Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim."); State v. Ball, 471 A.2d 347, 351 (N.H. 1983) (holding that "the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims" and if there are no applicable rights protected under the state constitution, the New Hampshire court then proceeds to examine the Federal Constitution).

212. *See, e.g.*, RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997) (holding that Federal Circuit Court of Appeals "must at least try to address the state constitutional issue first, inasmuch as doctrine of constitutional avoidance counsels that 'federal courts should avoid addressing federal constitutional issues when it is possible to dispose of case on pendent

Seventh Circuit Court of Appeals decision addressed whether the Morton Grove, Illinois ordinance banning possession of handguns passed constitutional muster.[213] In deciding this question, the Seventh Circuit "consider[ed] the state constitutional issue first" under article I, section 22 before proceeding to the Second Amendment claim.[214]

D. Challenging a Narrow Reading of Heller *and* McDonald *By Using the Illinois Constitution*

Besides achieving judicial restraint, the placement of the state constitutional firearms right in a preferred position generates the salutary effect of impeding Second Amendment jurisprudence from eclipsing article I, section 22 as a viable source of constitutional protection. This method of seeking constitutional relief also underscores the independent vitality of the state constitutional provision and promotes its vigorous enforcement.[215] The primacy approach concomitantly preserves the Second Amendment as an alternative and supplemental constitutional guarantee if the state constitutional claim is rejected.

For most of American history state constitutions, rather than the federal constitution, served as the primary protectors of individual rights.[216] Prior to passage of the Due Process Clause of the Fourteenth Amendment, the Federal Bill of Rights did not constrain the conduct of state officials.[217] The predominance of state constitutional rights over federal constitutional rights became inverted, however, when the U.S. Supreme Court adopted its selective incorporation doctrine wherein the Court made most federal constitutional rights applicable to the States by incorporating them into the Due Process Clause of the Fourteenth Amendment.[218] The Warren Court's aggressive approach to

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state grounds"') (citations omitted).

213. Quilici v. Village of Morton Grove, 695 F.2d 261, 263–64 (7th Cir. 1982). The *Quilici* case preceded the Illinois Supreme Court's decision in *Kalodimos*, both of which upheld the Village of Morton Grove's flat ban on possession of handguns. *See supra* Part II.

214. *Id*. at 265.

215. Blocher, *Reverse Incorporation, supra* note 84, at 340 (Implementation of the primacy method "encourage[s] the growth of an independent and relevant body of state constitutional law.").

216. Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1836 (2004) ("As James Madison suggested during the ratification debates, for the first 175 years after adoption of the federal Constitution, state constitutions were the primary guarantors of individual rights.").

217. *See* Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 250 (1833) (stating that the Federal Bill of Rights "contain no expression indicating an intention to apply them to the state governments").

218. *See* Blocher, *Reverse Incorporation, supra* note 84, at 332 (discussing

incorporation combined with its broad reading of those federal rights to control state action resulted in a substantial weakening of corresponding state constitutional rights.[219]

These developments induced litigants to "put federal claims front and center," and relegate state constitutional claims off the field and to the bench.[220] This in turn incentivized scholars to focus their efforts on explaining U.S. Supreme Court case law, prognosticating future trends and advocating support or rejection of the burgeoning federal constitutional rights landscape.[221] State courts likewise relied on expansive federal guarantees, not their corresponding state constitutional provisions, to resolve cases.[222] The result: state constitutional law began to wither away, not because it is an unimportant tool for individual rights protection, but because the legal community lost interest.

The enthusiastic optimism that firearms rights advocates feel for the individual right to keep and bear arms recognized in *Heller* and incorporated against the States by *McDonald* should not render the pre-existing state constitutional rights to bear arms meaningless, obsolete afterthoughts. Just as the Warren Court's expansive reading of individual liberties faded with subsequent Courts that practiced retrenchment, the Roberts Court's unearthing of the Second Amendment as a broad font supporting arms possession as a liberty component for individual self-defense may also retreat, especially in light of the thin reed holding up the 5–4 decisions in *Heller* and *McDonald*.[223] Beginning a state constitutional renaissance belatedly when firearms rights

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how the incorporation doctrine "has bound the states to almost all of the guarantees in the federal Bill of Rights").

219. *Id*. at 336 ("Incorporation, combined with the Warren Court's expansive reading of the federal rights that were being incorporated, effectively sidelined state constitutional law."); Hon. Charles G. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1140 (1978) ("The federalization of all our rights has led to a rapid withering of the development of state decisions based upon state constitutional provisions.").

220. *See* Blocher, *Reverse Incorporation, supra* note 84, at 336 (illustrating the effect of incorporation on litigation strategies and state constitutional law in general).

221. *See* Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 936 (1993) (criticizing what has been dubbed as an "ingrained assumption[]" that state constitutional scholarship is a "minor league game").

222. Blocher, *Reverse Incorporation, supra* note 84, at 336 (noting that "many state courts, knowing that federal rights were so expansive, tended to resolve state cases on the basis of federal guarantees rather than state analogues").

223. *Cf*. State v. Draughter, 130 So. 3d 855, 861 n.6 (La. 2013) (noting a Louisiana state constitutional amendment granting broader arms protection was grounded on a fear that the "slim majority" 5–4 decisions in *Heller* and *McDonald* "might later be threatened by a change in the composition of the Supreme Court").

protection from the U.S. Supreme Court inevitably begins to pull back will lead detractors to claim that state courts accepting the invitation for vigorous state constitutional enforcement are practicing judicial activism and result-oriented judging. This erroneous perception is bound to permeate the consciousness of state court judges if state constitutionalism only serves as an unprincipled reaction to potential future U.S. Supreme Court precedent that may narrowly construe firearm liberties.[224]

Such an eventuality can be stymied, however, at least in part, by simply seeking bold enforcement of the corresponding state arms right provision while the U.S. Supreme Court is in the midst of exercising expansionist policies on Second Amendment interpretation. Litigants should raise article I, section 22 "front and center" to avoid the seemingly inevitable burying of the state constitutional claim under the Second Amendment. This mode of argument would help to ensure that the Illinois Constitution (and other state constitutions as well) is truly and meaningfully independent of the U.S. Constitution. The Illinois framers demanded no less.

V. ILLINOIS ORIGINALISM REJECTS ORIGINALISM

A. Illinois Originalism Repudiates Static Meaning Tied Conclusively to History

This Part of the Article argues against the *Kalodimos* court's heavy reliance on selective portions of delegate commentary found in the historical record to justify its finding that the Illinois right to arms is narrow in scope and does not guarantee a right to possess and carry a handgun. In particular, the court cited as support Delegate Foster's beliefs, expressed during the floor debates, that then-proposed article I, section 22 allows a flat ban on handguns.[225] Although not explicitly saying so, the *Kalodimos* court, having rested its holding to a large extent on delegate commentary, implicates an analytical tool sometimes used by courts for construing constitutional provisions known as framers' intent originalism.[226] For the reasons discussed throughout this Part of the Article, the court's rigid dependence on the views of

224. *See* Friedman, *supra* note 68, at 96 (rebutting criticism of state court decisions expansively construing state constitutional rights as "amount[ing] to simple result-oriented rejection of the U.S. Supreme Court's narrower interpretations of federal constitutional provisions protecting individual liberties").

225. *See Kalodimos*, 470 N.E.2d at 269–72 (noting statements of some delegates favoring the constitutionality of a flat ban on handguns).

226. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085 (1989) [hereinafter "Farber"] (offering a "tourist guide" for those inexperienced in the study of originalism).

Delegate Foster and its apparent adherence to originalism are significantly misplaced.

To begin, we start with a brief discussion about the meaning of originalism. Original framers' intent, original ratifiers' intent, and original public meaning—all branches of originalism—stem from the same source, but have distinguishable features.[227] Under original intent originalism, the court investigates historical evidence concerning the intent of the framers who drafted the Constitution as the vehicle for implementing constitutional meaning.[228] Original ratifiers' originalism, on the other hand, centers on a historical examination of the original constitutional understanding as seen not through the eyes of the framers but through those who ratified the Constitution.[229] Original public meaning originalism looks at what a reasonable person living during the framing period, including framers and ratifiers, would have understood about the meaning of a constitutional provision.[230]

A nonoriginalist, by contrast, does not assign conclusive meaning to the original intent but can consider such intent as one of many factors in interpreting and applying a constitutional provision.[231] Related to the concept of nonoriginalism is the notion of living constitutionalism. Under this approach, the constitution is interpreted not as fixed at the time that the constitution was adopted, but rather as a dynamic document that is adaptable to changing contemporary conditions.[232]

This Article presumes that Illinois courts should assiduously endeavor to apply a methodology that is consistent with the intent of the constitutional delegates, the voters that approved of the Illinois Constitution and Illinois traditions as formulated by case precedent.[233] In implementing the framers' and voters' intent, the

227. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 5 (2006) ("[T]here are at least three distinctive originalist approaches: original framers' intent, original ratifiers' understanding, and original public meaning.").

228. *Id*. ("Original framers' intent focuses on the intentions of those who wrote the Constitution.").

229. *Id*. ("Original ratifiers' understanding looks for the intentions and expectations of those who voted to ratify the text.").

230. *Id*. at 5–6 ("Original public meaning looks to how a reasonable member of the public (including, but not limited to, the framers and ratifiers) would have understood the words of the text (in context) at the time of its enactment.").

231. Farber, *supra* note 226, at 1086.

232. Hon. Jack L. Landau, *Some Thoughts about State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 855 (2011) (stating that under living constitutionalism, "the meaning of the constitution is dynamic, capable of changing in response to changing conditions in society").

233. *See Caballes*, 851 N.E.2d at 45 (discussing how proper methodology should be "predicated on [the court's] best assessment of the intent of the drafters, the delegates, and the voters" and "state tradition and values as

Illinois courts should be vigilant about the potential for drawing misplaced conclusions derived from inaccurate or incomplete understandings about history.[234] As will be shown, the understanding of the delegates and the ratifying voters of the 1970 Illinois Constitution, together with general principles gleaned from case precedent, demonstrate that Illinois traditions are most decidedly nonoriginalist. In other words, the Illinois court that is faithful to principles of originalism should adopt nonoriginalism as its guiding influence.[235] Delegate commentary from the Illinois debates and other sources should be understood as potentially informative but by no means binding on constitutional meaning.

This should be contrasted with the *Heller* majority opinion, which appeared to champion originalism (with some parts of the opinion notably nonoriginalist, as this Part of the Article will show) and more specifically the original public meaning originalism variant as its mode for interpreting the Second Amendment.[236] The *Heller* majority's governing standard reflects this principle, stating that "[i]n interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[237]

The Illinois Supreme Court in *Kalodimos* also used originalist

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reflected by long-standing state case precedent").

234. Hon. Jack L. Landau, *A Judge's Perspective On the Use and Misuse of History In State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 452 (2004) (noting among the problems in using history for state constitutional interpretation are the selective use of source materials and drawing misplaced inferences from a silent historical record).

235. In determining whether originalism is compatible with the Illinois framers' intent, Illinois courts and commentators should consider the work of some scholars who argue that the original intent of the framers of the comparable U.S. Constitution was that future interpreters of the document be free to reject the intent of the framers. *See*, *e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–04, 948 (1985) (discussing and ultimately concluding that the modern notion that the Constitution should be interpreted by looking to the original intent of the framers is unsubstantiated by anything in the historical record during the battle for ratification).

236. Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926 (2009). ("[T]he Court embraced originalism—the theory that 'original meaning' should guide interpretation of the Constitution."); *id*. at 940 (referring to *Heller*, "it is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision."); David B. Kopel, *The Right to Arms In the Living Constitution*, CARDOZO L. REV. DE NOVO 99, 99 (2010) [hereinafter "Kopel, *Living Constitution*"] ("The Supreme Court's 2008 decision in *District of Columbia v. Heller* was the epitome of originalist jurisprudence.").

237. *Heller*, 554 U.S. at 576 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)); *see also id*. at 634–35 (stating that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad").

phraseology to describe their interpretation of article I, section 22: "[t]he meaning of a constitutional provision depends, of course, on the common understanding of the citizens who, by ratifying the Constitution, gave it life."[238] The majority explained that ascertaining the electorate's common understanding of a constitutional provision merely requires examining the common meaning of the provision's text.[239] However, when the meaning of the words is ambiguous, the meaning of a provision attributable to the understanding of the delegates before they inserted the provision into the Illinois Constitution is "relevant in resolving ambiguities."[240] Consistent with the court's emphasis on the electorate as the body whose interpretation remains the guiding focus, the majority found that the court's reason for examining the intent of the delegates is that the provision would not have been submitted to the electorate in the first place if it had not received the support of the convention.[241] The three *Kalodimos* dissenters expressed a similar originalist bent: "[t]his court has long adhered to the principle that a constitutional provision must be interpreted in accordance with the intent and understanding of the electorate who ratified the instrument."[242]

After articulating their basic framework for determining the meaning of a particular constitutional provision, both the majority and dissenting opinions in *Kalodimos* launched into a historical examination about how the justices believed delegates would have ruled on the state constitutional challenge to the Morton Grove ordinance banning handgun possession.[243] The majority opinion looked at the floor debates of selected delegates at the constitutional convention who voiced approval for the concept that a discrete category of weaponry, including handguns, could be totally prohibited without offending article I, section 22, as long as other types of firearms were permitted.[244]

Focusing on the commentary of Delegate Leonard Foster in particular, the majority in *Kalodimos* noted Foster's opinion that the proposed arms right provision subject to the state's police power could be regulated by "*prohibit*[ing] *some classes of firearms, such as* war weapons, *handguns*, or some other category."[245] In another statement supporting a narrow reach for the state

238. *Kalodimos*, 470 N.E. 2d at 270.

239. *Id*.

240. *Id*.

241. *Id*.

242. *Id*. at 283 (Moran, J., dissenting).

243. *Compare id*. at 269–72 (majority opinion) *with id*. at 282–85 (Moran, J., dissenting) (illustrating respectively the commentary cited in both the majority and the dissents in *Kalodimos* on how the delegates would have responded to the Morton Grove ordinance).

244. *Id*. at 270–71.

245. *Id*. (quoting 3 REPORT OF PROCEEDINGS 1687) (statement of Delegate Foster) (emphasis added).

constitutional right to arms, Delegate Foster stated that the proposed constitutional provision would permit a "ban [on] all hand guns."[246] In still another statement, Delegate Foster noted that the soon-to-be enacted provision "would prevent a complete ban on all guns, but there could be a ban on certain categories."[247] Though primarily relying on Delegate Foster, the majority went on to cite statements of other delegates given at the floor debates to support its finding that article I, section 22 allows a state or local governmental prohibition on handguns.[248] The majority relied on these individual delegate statements approving a blanket handgun ban as support for its holding affirming the Morton Grove ordinance.

Justice Moran's dissent, however, perused the same debates, but drew a different conclusion; namely, that the delegates did not reach consensus on whether handguns were subject to a total ban.[249] Indeed, Justice Moran pointed out commentary from several delegates suggesting that the Convention was deeply split as to the meaning of article I, section 22.[250] Determining that the majority's reliance on the debates was misplaced, Justice Moran noted several delegates whose interpretation of article I, section 22 differed from Delegate Foster, and that only a few of the convention's 116 delegates expressed any public opinion at all concerning the meaning and scope of the right to arms provision then under consideration.[251]

Remarking on Delegate Foster's lack of consistency, Justice Moran observed that Foster contradicted himself by stating that "[t]he majority does believe that those law-abiding citizens in this state who need and want to have *certain types* of firearms in their possession are entitled to have that as a constitutional right."[252] Relying on the Convention's committee report on the Bill of Rights instead of the debates, Justice Moran found that the report communicated the understanding of the delegates that a total ban on possession of handguns would be constitutionally prohibited.[253]

The majority and dissenting opinions in *Kalodimos* correctly suggest that delegate commentary at the 1970 Illinois Constitutional Convention as expressed through the verbatim record of the debates may be one of many useful tools for understanding the intent of individual delegates or the Illinois

246. *Id*. at 271 (citing 3 REPORT OF PROCEEDINGS 1687).
247. *Id*. (citing 3 REPORT OF PROCEEDINGS 1693).
248. *Id*.
249. *Id*. at 283 (Moran, J., dissenting).
250. *Id*. at 284 (Moran, J., dissenting).
251. *Id*. at 283–84 (Moran, J., dissenting).
252. *Id*. at 284 (Moran, J., dissenting).
253. *Id*. (relying on Committee Proposal, *in* 1 RECORD OF PROCEEDINGS, § 27)

convention.[254] Delegate commentary, however, as shall be explored later in this Part, should not be accorded undue or dispositive weight to the exclusion of other factors in determining the meaning or proper application of a constitutional provision. The Illinois Supreme Court should not be wedded to the comments of Delegate Foster who gave his blessing to state or local bans on possession of handguns. This is a constitutional imperative since the Illinois framers collectively did not intend delegate commentary to be conclusive of Illinois constitutional meaning.

Conspicuously, both the *Kalodimos* majority and dissenting opinions failed to expressly articulate the proper weight that Illinois courts should afford delegate commentary from the floor debates when interpreting article I, section 22 or any other Illinois constitutional provision. The court did not generate any rule that says delegate commentaries are binding to the exclusion of other interpretive aids. Neither did the court say that the meaning of article I, section 22 should be forever stuck in time to 1970, some 45 years prior to the publication date of this Article. Nor did the court say that delegates voicing their opinions in 1970 have the power to determine how article I, section 22 should be applied to contemporary conditions, irrespective of intervening developments in the law or social and political changes.

The court did not explain the import of isolated delegate commentary when the vast majority of delegates did not publicly voice an opinion or when those who did speak gave contradictory assessments as to how the state constitutional right to arms should be applied to a given set of facts. No guidance was given to issues on which the Convention failed to speak in one unified voice. Given the numerous unanswered questions, *Kalodimos* illustrates why the Illinois historical records cannot always serve as a talismanic panacea to the conundrum of interpreting abstract constitutional language.

Appearing to accept the proposition that clear answers about abstract constitutional language cannot be definitively derived solely from history in a fast-changing world, the Illinois constitutional convention drafted a document entitled "Address to the People."[255] As shall be more specifically discussed below, the Illinois 1970 constitutional convention through the Address spoke with one unified voice, embracing the substantive nature of the Illinois Constitution as a flexible, dynamic document adaptable to the needs and customs of a growing and changing society.[256] The Address sought to educate the electorate on certain general

254. Foreword *in* 1 RECORD OF PROCEEDINGS, at iii ("Study of the intent of the delegates, as expressed in these proceedings, will deepen understanding of the new constitution.").

255. *See* Address to the People *in* 7 RECORD OF PROCEEDINGS, at 2671.

256. *See id.* at 2671–72 (discussing how one of the dominant themes of the Convention was greater protection of individual rights).

concepts that the delegates understood applied not just to isolated constitutional provisions, but also to the entire document on which the voters would later cast their ballots.[257] It stands to reason that Illinois voters apparently understood the policy reasons supporting passage of the 1970 Illinois Constitution, and assented to the sentiments expressed by the Convention in its Address.[258]

One of the principal reasons for drafting a new constitution, according to the Address, was the "great need to modernize an essentially nineteenth century document," a reference to the predecessor 1870 Illinois Constitution.[259] Continuing in this vein, the delegates wrote that "[t]he Convention gave to the people of Illinois a chance to demonstrate to themselves and especially to those who will inherit their responsibilities that they could respond to a changing world."[260] These comments essentially reject the notion that the interpretation of a constitution must be frozen in time to reflect only the views of those who drafted the constitution.

The Convention briefly examined past Illinois constitutional problems and the need for flexibility to solve new problems. As the delegates noted, "[t]he Illinois Constitution of 1870 has been difficult to amend. It was written at a time when the fashion was one of detailed, restrictive constitutions which attempted to present legislative solutions to current problems."[261] The delegates in fashioning the preceding statement communicated their views to the voters, as well as the Illinois courts responsible for interpreting the Illinois Constitution, that their opinions on how particular constitutional provisions should be applied are not commands to impose immutable legislative-type solutions on the courts.

Continuing with its rejection of a static meaning for the Illinois Constitution, the Convention stated: "[c]onstitutional rigidity forced citizens and officers of government to evade and violate constitutional statements, as changing conditions called for constitutional change which could not be secured by traditional means. Such evasion was largely responsible for much of the

257. *Id*.

258. The Convention's Address to the People was adopted on September 2, 1970. *Id*. at 2671. The next day, September 3, 1970, the Convention published the official version of the proposed 1970 Illinois Constitution as adopted. *Id*. at 2669. The Address along with a sample ballot, the official text of the proposed constitution, and explanations about each section were mailed to prospective Illinois voters who were instructed to cast a "yes" or "no" vote on whether they approved of the proposed Illinois Constitution. *Id*. at 2679–80. Illinois citizens voted in favor of the proposed Illinois Constitution at a special election held on December 15, 1970. *Id*. at 2669.

259. *Id*. at 2671.

260. *Id*.

261. *Id*. at 2672.

feeling in behalf of a convention which had developed by 1968."[262] These comments convey a sense that the framers believed that the 1970 Illinois Constitution, unlike the former 1870 Illinois Constitution, should not be a static document incapable of growth and disconnected from modern conditions.

Also in its Address to the People, the Convention outlined what it believed were some of the most significant changes and additions concerning particular provisions in the proposed new constitution. This included a "dominant theme[]" of "greater protection of individual liberties."[263] Among the new individual rights protections that the Convention "guaranteed" was "the right of the citizen to keep and bear arms, subject to the police power."[264]

Aside from the Address to the People, the Convention in its Official Explanation of the 1970 Illinois Constitution to the electorate not only set out the right to arms verbatim, but also it described the nature of the newly-minted right succinctly: "This new section states that the right of the citizen to keep and bear arms cannot be infringed, except as the exercise of the right may be regulated by appropriate laws to safeguard the welfare of the community."[265] This is a bold statement supporting the basic right of ordinary citizens to possess and carry arms subject to reasonable but not excessively intrusive regulations or prohibitions.

In a research paper prepared for delegates to the Illinois 1970 constitutional convention, Frank P. Grad noted that "age itself does not affect the efficacy of constitutional protections. If cast in sufficiently broad and general language, they are likely to be reinterpreted from time to time to reflect contemporary needs."[266] In another research paper, Paul G. Kauper quoted Justice Cardozo: "A constitution states or ought to state not rules for the passing hour but principles for an expanding future."[267] These sentiments reinforce the principle—which reflects the understanding of the delegates as a cohesive body—that the Illinois Constitution should not be cast as an indelible document fixed in meaning to what delegates opined in 1970 about the proper application of a particular constitutional provision.[268]

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262. *Id*.

263. *Id*.

264. *Id*. at 2673.

265. Official Explanation *in* 6 REPORT OF PROCEEDINGS at 2689.

266. Frank P. Grad, *The State Bill of Rights*, *in* CON-CON, *supra* note 161, at 34.

267. Paul G. Kauper, *The State Constitution: Its Nature and Purpose*, *in* CON-CON, *supra* note 161, at 16 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 24 (1921).

268. People v. Tisler, 469 N.E.2d 147, 162–63 (Ill. 1984) (Ward, J., concurring) ("The research papers should not be overlooked in any search to determine the mind of the convention.")

Ann M. Lousin, a prolific and respected teacher, lecturer and scholar on the 1970 Illinois Constitution, has sought to dispel the notion that the historical record of the proceedings leading to the adoption of the Illinois Constitution should be determinative of constitutional interpretation or even that history can be significantly useful.[269] Lousin noted that the historical record is often ambiguous, contradictory or misleading, including sponsors of provisions filling the record with quotations to influence future courts, or delegates making statements calculated to imply that they spoke for the entire convention.[270] Some delegates also purposely withheld commentary to allow the Illinois courts the greatest possible latitude to interpret broadly worded provisions.[271]

The prescient framers of the 1970 Illinois Constitution spoke out not as individual delegates but as a unified convention on the general principles guiding the interpretation of abstract constitutional text of the 1970 Illinois Constitution. The delegates, and by extension the electorate-ratifiers, understood that commentary from individual delegates about their preferred choice for constitutional meaning and application did not exert a controlling influence on constitutional issues, because they did not account for changing conditions and the dynamic nature of the 1970 Illinois Constitution. The task of interpreting the Illinois Constitution is reserved for the Illinois courts, not the delegates themselves. At best, delegate commentary serves as an aid to understanding together with any other persuasive resources. In light of this spirit, the *Kalodimos* majority was wrong for its steadfast adherence to Delegate Foster's opinion that the state constitutional right to bear arms would permit a total ban on handguns.

1. Nonoriginalist Illinois Case Law

Several Illinois Supreme Court decisions add to the persuasive evidence that the Illinois Constitution has been traditionally understood as a forward-looking, organic document. Prior to the adoption of article I, section 22 of the 1970 Illinois Constitution, the Illinois Supreme Court had analyzed the nature and extent of the police power and had explained that the police power is not "circumscribed by precedents arising out of past conditions but is elastic and capable of expansion in order to keep pace with human progress."[272] The court further stated that the

269. *See* Ann M. Lousin, *Constitutional Intent: The Illinois Supreme Court's Use Of The Record In Interpreting The 1970 Illinois Constitution*, 8 J. MARSHALL J. PRAC. & PROC. 189, 191 (1975).

270. *Id*.

271. *Id*.

272. Zelney v. Murphy, 56 N.E.2d 754, 758 (Ill. 1944).

police power "is not a fixed quantity, but [] is the expression of social, economic and political conditions."[273] Because the police power concept is elastic and malleable, the contours of the Illinois right to bear arms and its myriad applications, which must be balanced against the police power, must also not be fixed in time to what some Illinois delegates believed was a correct construction in 1970.

In another case, the Illinois Supreme Court again suggested that a court's role in applying the law is not beholden to the framers' opinions about how it should be applied. In *Chicago Real Estate Board v. City of Chicago,*[274] the Illinois Supreme Court held that an 1871 Illinois statute providing municipalities with broad regulatory power conferred on municipalities the power to enact an ordinance that prohibits real estate brokers from discriminating based on race, color, religion, national origin or ancestry in the sale, rental or financing of residential property.[275] The plaintiff real estate brokers challenged the ordinance on the grounds that the power to regulate, conferred by the Illinois statute, did not include the power to regulate with respect to civil rights.[276] They reasoned that the power to regulate as understood by the framers of the statute in 1871 did not include the power to regulate on matters relating to discrimination.[277] The Illinois Supreme Court rejected that construction. Seemingly acknowledging that the power to regulate on civil rights was not an application of the statute conceived by the drafters of the legislation, the court nevertheless determined that the statute authorized civil rights ordinances.[278] In recognizing a flexible construction of the statute, the Illinois Supreme Court expressly declared that it was the policy of the court "to maintain the resiliency of the law."[279]

Taking a similar approach in yet another case, the Illinois Supreme Court underscored the malleable nature of the common law in *Amann v. Fiady*.[280] The court described the common law as having a continually broadening range under a "system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country."[281]

The instructive principles emanating out of these Illinois

273. *Id*.
274. Chicago Real Estate Board v. City of Chicago, 224 N.E.2d 793 (Ill. 1967).
275. *Chicago Real Estate Board*, 224 N.E.2d at 799.
276. *Id*.
277. *Id*.
278. *Id*.
279. *Id*. at 799–800.
280. Amann v. Fiady, 114 N.E.2d 412 (Ill. 1953).
281. *Amann*, 114 N.E.2d at 418.

cases show that the Illinois constitutional right to bear arms does not embrace a fixed meaning to be applied solely in the manner envisioned by delegate commentary.[282] This conclusion naturally flows from the understanding that the meaning and reach of the countervailing police power, also a part of article I, section 22, must be adaptable to the contemporary conditions of future generations. Moreover, the Illinois right to keep and bear arms as an enumerated Illinois constitutional provision likewise reflects dynamic principles that are subject to growth, depending on the conditions of contemporary society.

2. Nonoriginalist U.S. Supreme Court Case Law

Exerting a persuasive, albeit non-binding, influence on Illinois courts, the U.S. Supreme Court, like the Illinois Supreme Court, has in several cases championed a method of constitutional interpretation unrestricted by the framers' views as to the manner in which constitutional principles should be applied. For example, in deciding whether segregation in the public schools violated equal protection, the Court in the landmark case of *Brown v. Board of Education*[283] looked not at how the framers of the Fourteenth Amendment dealt with segregation in 1868, when it enacted that provision into the organic document.[284] Rather, the Court examined public education in light of contemporary society, as it existed in 1954, as a basis for outlawing segregation in the public schools under the Fourteenth Amendment.[285]

In another case dealing with racial discrimination, *Loving v. Virginia*,[286] the Court struck down a Virginia statute that criminalized interracial marriage. Recognizing that the State has the authority to regulate marriage under its police power, the Court found nevertheless that the police power cannot supersede Fourteenth Amendment protections.[287] Theorizing on the drafters'

282. The concurring opinion of Justice Clark in *People v. Tisler*, 469 N.E.2d 147, 163 (Ill. 1984) (Clark, J., specially concurring) also deserves special mention. Justice Clark referred to both the Illinois and U.S. Constitutions as "living document[s]" that preclude delegate commentary or the lack thereof from exerting a controlling influence in Illinois constitutional interpretation. *See id*. at 165. He further noted that "[t]he Illinois Constitution, like the United States Constitution, is framed in general terms to prevent the document from being 19,000 pages long and to retain flexibility to deal with unforeseen questions." *Id*. These wise observations show that the framers purposely used open-ended language to protect constitutional guarantees so that Illinois courts would not be bound to predetermined yet inadequate answers given by delegates to complex constitutional questions.

283. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

284. *Brown*, 347 U.S. at 492–93.

285. *Id*.

286. Loving v. Virginia, 388 U.S. 1 (1967).

287. *Loving*, 388 U.S. at 7.

intent underlying the Fourteenth Amendment, the State argued that those who drafted the Fourteenth Amendment did not intend passage to overturn existing laws barring interracial marriage.[288] The Court rejected this formulation, finding that "although these historical sources 'cast some light' they are not sufficient to resolve the problem; '[a]t best, they are inconclusive . . . .'"[289] Focusing instead on effectuating the objectives of the Amendment, the Court boldly declared: "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[290]

Also rejecting history as the exclusive source controlling constitutional interpretation was another landmark U.S. Supreme court case, *Lawrence v. Texas*.[291] In *Lawrence*, the Court recognized the rights of individuals to engage in private, consensual sexual conduct as a protected liberty interest arising from the Fourteenth Amendment.[292] Justice Kennedy, speaking for the Court, surveyed traditional values and historical attitudes toward sexual practices that were once condemned in some segments of American society. But Justice Kennedy did not restrict his analysis to the historical roots of laws aimed at punishing sexual conduct, noting: "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[293] Justice Kennedy summed up his analysis by pointing out that liberty as a component of substantive due process is a broad concept not restricted to the applications of liberty contemplated by the framers:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[294]

Justice Kennedy's eloquent recitation can be traced in the

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288. *Id*. at 9.

289. *Id*. (quoting *Brown*, 347 U.S. at 489).

290. *Id*. at 10.

291. Lawrence v. Texas, 539 U.S. 558 (2003).

292. *Lawrence*, 539 U.S. at 578.

293. *Id*. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 855, 857 (1998)) (Kennedy, J., concurring).

294. *Id*. at 578–79.

American jurisprudential tradition as far back as Chief Justice Marshall, who stated: "[w]e must never forget, that it is a *constitution* we are expounding . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[295] The precedential support at the U.S. Supreme Court level for a dynamic constitutional interpretation is further bolstered by these prophetic words:

> If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.[296]

A very recent 2014 case is also illustrative of living constitutionalism in practice, and the nonoriginalist proclivities of the U.S. constitutional framers, which can serve as a useful analogue to Illinois constitutional interpretation. In *NLRB v. Noel Canning*,[297] the Court unanimously ruled that President Obama lacked the constitutional authority under the Recess Appointment Clause to appoint certain individuals to the National Labor Relations Board because the Senate was not in recess when the appointments were made. The justices, however, were divided 5–4 on the reasoning to achieve that result. Justice Breyer on behalf of himself and four of his brethren, Justices Kennedy, Ginsburg, Sotomayor and Kagan, extolled the concept that the framers intended the Constitution to be adaptable to changing circumstances as long as the Court's interpretation is consistent with the provision's text and guiding purposes.[298]

Justice Breyer found that the phrase "recess of the Senate" in which presidential appointments could be made without Senate consent applied to both the recess between formal Senate sessions (inter-session recess) and a recess within a formal session (intra-session recess).[299] Justice Breyer was cognizant of the originalist argument that intra-session recesses were virtually unknown during the founding period, and that the framers could not have intended the Recess Appointment Clause to apply to that sort of recess.[300] However, Justice Breyer was quick to point out that the relevant question for constitutional interpretation is not what the

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295. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

296. Home Bldg & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442–43 (1933).

297. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

298. *See Noel Canning*, 134 S. Ct. at 2564–65; *but see id.* at 2592 (joining the result, but not the reasoning, Justice Scalia delivered a concurring opinion signed by Justices Thomas, Alito and Chief Justice Roberts.).

299. *Id.* at 2567.

300. *Id.* at 2566.

framers understood about the practice of recess appointments that prevailed in 1787 when the Constitution was written.[301] Rather, the correct question is whether the Clause's broad purpose—to allow the President to maintain the efficient running of the government when the Senate is not in session—authorized both inter-session and intra-session appointments that were consistent with the prior historical practices, understandings and agreements of the Senate and presidents that began shortly after the Civil War and later became an accepted tradition.[302]

Justice Breyer, speaking for the Court, found that the true intent of the framers recognizes the broad, practical principle that they "were writing a document designed to apply to ever-changing circumstances over centuries."[303] Continuing with this line of reasoning, Justice Breyer explained that the Constitution "must adapt itself to a future that can only be 'seen dimly,' if at all."[304] Thus, under *Noel Canning*, constitutional interpretations come within the framers' original intent, even if the framers could not have envisioned that particular interpretation, as long as the interpretation falls within the ambit of the constitutional provision's purposes and does not contravene the provision's text.[305]

In the Second Amendment arena, the majority opinion in the *Heller* decision, while generally read as adopting an originalist framework, in fact contains elements of nonoriginalist thought.[306] The respondents in *Heller* attempted to justify the D.C. handgun ban on the grounds that D.C. authorized its residents to possess long guns, even if handguns were not similarly permitted. This showed that the D.C. statutory scheme did not entirely thwart the use of firearms as a protective weapon for self-defense. The *Heller* majority did not rely on founding area rationales to rebut this argument. Instead, the *Heller* majority rejected this line of

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301. *Id*.

302. *Id*. at 2563.

303. *Id*. at 2565.

304. *Id* (citing *McCulloch*, 17 U.S. at 415).

305. *Noel Canning*, 134 S. Ct. at 2565.

306. Endorsing the outcome in *Heller* on nonoriginalist grounds, several scholars have recognized an individual federal constitutional right to arms by invoking the interpretive techniques of living constitutionalism. *See*, *e.g*., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009) (discussing how living constitutionalism is in part the process of shaping the law to reflect politics and culture); Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551, 1574 (2009) (stating that "[t]he living Constitution strongly supports the *Heller* majority's recognition of an individual right to keep and bear arms"). Though not necessarily advocating the use of living constitutionalism, another scholar has written that a living constitutionalism framework, if applied, supports a broad individual rights reading of *Heller*. *See* Kopel, *Living Constitution*, *supra* note 236, at 103 (tracing the development and evolving meaning of the Second Amendment throughout American history following the founding era).

reasoning by attributing unique significance to the handgun as an essential weapon that safeguards Americans, reasoning that the "American people have considered the handgun to be the quintessential self-defense weapon."[307] The Court went on to make several empirical observations why handguns in the Court's judgment are more effective tools and more widely available to defend against unauthorized home intruders than long guns.[308]

Justice Stevens's dissent in *McDonald v. City of Chicago* took aim at the notion that constitutional interpretation must be founded exclusively on historically based observations originating at or near the point in time that the U.S. Constitution was enacted.[309] Although recognizing that history can be an instructive influence, Justice Stevens cautioned that a history-driven methodology cannot be the sole, excusive consideration in the constitutional calculus.[310] Justice Stevens noted further that the practical consequences and contemporary public understandings of the nature and scope of the claimed right under consideration must also be evaluated in light of ongoing societal changes occurring after the historical period coinciding with constitutional

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307. *Heller*, 554 U.S. at 629. One scholar described the *Heller* majority's finding that handguns are entitled to Second Amendment protection based on contemporary notions of widespread handgun acceptance as epitomizing living constitutionalism. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 419 (2009) [hereinafter, "Blocher, *Categoricalism and Balancing*"] ("Basing categories on popular understanding is living constitutionalism, plain and simple.").

308. *See Heller*, 554 U.S. at 629–30 (illustrating the differences between having a handgun versus a long gun in one's home for protection). Eugene Volokh justified *Heller*'s strong preference for handguns over long guns in present society by pointing to the widespread popularity of handguns with the American people as their weapon of choice. Accordingly, the D.C. law depriving individuals of handguns constituted a material burden to the exercise of Second Amendment rights, which would not be significantly reduced by permitting the sporadically used long gun as an alternative source. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443, 1456–57 (2009) [hereinafter, "Volokh, *Implementing the Right to Keep and Bear Arms*"].

309. *See generally McDonald*, 561 U.S. at 871 (Stevens, J., dissenting) (Justice Stevens in his *McDonald* dissent focused on whether the right to bear arms identified in *Heller* should be recognized as "implicit in the concept of ordered liberty" within the meaning of Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The *Palko* test, according to Justice Stevens, should be the governing standard to determine whether the individual right to bear arms is deserving of substantive due process protection as a guarantee against state and local infringement under the Fourteenth Amendment. *Id*. at 871–76. In discussing this question, Justice Stevens criticized Justice Scalia's methodological approach to constitutional evaluation discussed in his *McDonald* concurrence as mistakenly tied inexorably to history as the exclusive, constitutional consideration. *Compare id*. at 904–12 (Stevens, J., dissenting), *with id*. at 791–92 (Scalia, J., concurring).

310. *See id*. at 871–77.

enactment.[311] The Illinois courts should recognize the dynamic nature of Illinois constitutional interpretation and application, just as the U.S. Supreme Court and its justices have articulated throughout its history with the U.S. Constitution.

Some state courts interpreting their respective state constitutional right to arms provisions have championed living constitutionalism. The defendant in *State v. McAdams*[312] argued that her possession of a knife for self-defense discovered in a jacket pocket after a police-initiated vehicle stop was protected under the Wyoming constitutional right to arms provision. She reasoned that Wyoming's historical practices before and at the time of its statehood permitted individuals to carry concealed weapons.[313] The Wyoming Supreme Court rejected the suggestion that history is determinative of whether the legislature is constitutionally authorized to prohibit the carrying of concealed weapons.[314] Instead, the court endorsed the broad concept for constitutional interpretation, generally that a living constitutionalism methodology is Wyoming's guiding force.

> [A] constitution is not a lifeless or static instrument, the interpretation of which is confined to the conditions and outlook prevailing at the time of its adoption; rather, a constitution is a flexible, vital, living document, which must be interpreted in light of changing conditions of society.[315]

3. *Scholarly Works Reconciling Originalism and Nonoriginalism*

In addition to case law, this Article consults the path-breaking work of several scholars whose work coincides with an originalist framework, adopting nonoriginalist themes along the lines of the Illinois and U.S. Supreme Court models described above. These works embrace an originalist constitutional theory but with refinements to address the need for developing a workable analytical framework for construing indefinite, vague or abstract constitutional provisions. Yale law professor Jack M. Balkin's articles entitled *Abortion and Original Meaning*[316] and

311. *See id*.

312. State v. McAdams, 714 P.2d 1236 (Wyo. 1986).

313. *McAdams*, 714 P.2d at 1237.

314. *Id*.

315. *Id*. (citing 16 Am. Jur. 2d § 96 (1979)). Had the defendant in *McAdams* supplemented her originalist claim with one resting on living constitution themes, she would have enhanced her prospects of prevailing.

316. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

Original Meaning and Constitutional Redemption[317] exemplify this movement. Balkin sought to reconcile original public meaning originalism with what had been regarded as an opposing theory known as living constitutionalism.[318] Under living constitutionalism, Balkin explained, the organic document can be construed to fit modern realities and changing circumstances without rigid adherence to the past.[319] As shall be seen below, Balkin's constitutional theory combines elements of both originalism and living constitutionalism to better reflect the original meaning of the U.S. Constitution.[320]

Balkin draws a distinction between the original meaning of a constitutional provision, which he recognizes as the binding organic law, and the constitutional framers' original expected applications, which are not.[321] A judge implementing the original expected application, according to Balkin, examines the historical record from the perspective of the framers to ascertain how they would have applied a given constitutional provision to a particular issue.[322] Balkin notes, however, that a judge properly interpreting the Constitution to find its original meaning must not assume that original public meaning and original expected applications are one in the same; she may legitimately follow what the words mean and the principles that undergird it without applying text and principles to particular issues in the same way as the framers. A constitutional interpreter must examine text and principles and decide how to apply them from the perspective of contemporary conditions. These applications may change over time as future interpreters are exposed to changed circumstances. The text and underlying principles, however, remain binding, even on future generations. Balkin dubbed this approach as the method of text and principle.[323]

Balkin further expounded that although the original expected application is not controlling, it might be relevant to understanding the text and the principles which underlie it and as an aid to interpretation, provided that it does not become conflated with original public meaning.[324] Court precedents, standards,

317. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

318. Balkin, *Abortion and Original Meaning*, *supra* note 316, at 293; s*ee also* Solum, *supra* note 236, at 935 (identifying Jack Balkin as a leading scholar in the field advocating reconciliation of originalism and living constitutionalism).

319. Balkin, *Abortion and Original Meaning*, *supra* note 316, at 293.

320. *Id.*

321. *Id.* at 292–93.

322. *Id.* at 296.

323. *Id.* at 293.

324. *See also* Solum, *supra* note 236, at 935 (stating that "[e]xpected applications of a text may offer evidence about its meanings, even if these applications are neither decisive evidence of meaning nor meaning itself.").

rules and doctrines also assist in defining and implementing constitutional text and principles that are essential to the process of giving meaning to abstract concepts arising from the constitutional language.[325] According to Balkin, the focus of constitutional interpretation must be on the concepts embraced by the words and the often general and abstract principles underlying those words. Balkin noted that the framers often chose such general and abstract language because they intended to provide discretion to current and future generations to give life to the underlying principles.[326] Judicial interpreters must bear in mind that the framers used broad language to envision broad constitutional concepts, such as liberty and equality, and that the application of constitutional concepts to contemporary problems should reflect this comprehensive purpose.[327]

An illustrative example of Balkin's constitutional theory in practice is the Eighth Amendment ban on cruel and unusual punishment.[328] As noted by Balkin, interpreters are bound to the text and principles that underlie the provision. But whether a particular punishment for a distinct criminal act was cruel and unusual in 1791 when the U.S. Constitution was enacted is not dispositive of whether such punishment is cruel and unusual in contemporary American society. The manner of applying the Eighth Amendment to particular punishments in the framing period should not be conflated with the original public meaning of the text and its principles as understood by the framers. The Constitution was designed to be flexible to accommodate contemporary notions of what is a cruel and unusual punishment while at the same time constraining the constitutional interpreter from going beyond the text and principles that animate the meaning of cruel and unusual punishment. Balkin's living originalism corresponds to and compliments traditional interpretive principles that in large measure are embodied in the Illinois constitutional convention's Address to the People, Illinois constitutional research papers, Illinois case law and persuasive U.S. Supreme Court and sibling state court precedent.[329]

Other adherents of originalism accept the premise that the concept of constitutional interpretation, the act of determining the meaning of the words and phrases of constitutional provisions as understood by the framers and ratifiers must be distinguished from constitutional construction, the practice of creating doctrine to interpret the meaning of vague, indefinite or abstract provisions. Randy E. Barnett[330] and Keith E. Whittington[331]

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325. Balkin, *supra* note 316, at 306–07.
326. *Id*. at 304.
327. *Id*. at 352.
328. *Id*. at 295.
329. *See supra* notes 255–315 and accompanying text.
330. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L.

represent this approach. The original public meaning of a particular abstract constitutional provision may be inadequate to the task of resolving a particular dispute, thus necessitating the use of constitutional construction to fill the gap. This type of originalism theory, which requires originalism to be supplemented with constitutional construction, is compatible with Balkin's theme stressing the logical consistency of a methodology that incorporates both originalism and living constitutionalism.[332]

The Illinois framers either individually or as a collective entity never voiced an intention to renounce a forward-looking methodology consistent with living constitutionalism. Given the Illinois Convention's Address to the People, Illinois and U.S. Supreme Court precedent and scholarly works, the Illinois judiciary should draw the conclusion that a constitutionally legitimate and principled analysis will not be bound to delegate commentary. What a few delegates said on the floor of the Convention about whether the Illinois or local government may constitutionally ban handguns—as discussed in *Kalodimos*—does not in and of itself dispose of any constitutional claims that such prohibitions violate the Illinois Constitution. Such commentary, even if strenuously supporting the constitutionality of a ban, do not insulate legislative or local prohibitions from state constitutional attacks under article I, section 22.

Kalodimos wrongly elevated the stature of delegate commentary above and beyond its original design as a potentially legitimate aid to understanding article I, section 22 but one of many such tools. Hopefully, future Illinois courts will avoid the same error. Individual commentary culled from the floor debates concerning how a delegate or delegates believed a particular constitutional provision should be applied and implemented should not be the endpoint of constitutional analysis. Whether the Illinois delegates prognosticated that Illinois courts should find that article I, section 22 guarantees a right to possess handguns or does not guarantee such a right should not be conflated with the original meaning of the Illinois Constitution. Illinois courts should thus resist the temptation to determine whether a ban on handguns or other unduly restrictive prohibitions or regulations

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REV. 611, 645 (1999) (finding that "[d]ue to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy . . . . When this happens, interpretation must be supplemented by constitutional construction—within the bounds established by original meaning.").

331. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

332. Solum, *supra* note 236, at 934 ("Once originalist theory [in the form articulated by Randy E. Barnett and Keith E. Wittington] . . . had acknowledged that vague constitutional provisions required construction, this step opened the door for reconciliation between originalism and living constitutionalism.").

are permissible under the Illinois Constitution simply by taking the deceptively easy route of canvassing the on-the-record views of individual delegates. Practitioners should invoke the techniques of living constitutionalism or non-originalism as envisioned by the framers to support a broad reading of the Illinois constitutional right to keep and bear arms consistent with the framers' expansive views of civil liberties.[333]

B. The Illinois Constitutional Convention's Disunity

As discussed in the preceding Part V.A. of this Article, an Illinois court's use of the 1970 Illinois constitutional floor debates as a dispositive source of constitutional meaning is incompatible with the framers' vision of the organic document as dynamic and adaptable to contemporary thinking. Another analytical flaw in such excessive dependence on individual statements made during the floor debates is that it can erroneously lead to misleading judgments about the mindset of the Convention as a collective body. Illinois Bill of Rights provisions purposely crafted with general, abstract language, when considered only with isolated delegate commentary, are most likely insufficient to yield a thorough, intelligently reasoned disposition as to whether a particular law violates an Illinois constitutional command.

The perception of harmony at the Convention on any particular issue is often illusory. This lack of consensus in terms of what constitutes a correct application of a constitutional provision should counsel against Illinois courts placing too much faith on the opinions of any delegate or even multiple delegates as an accurate reflection of the will of the Illinois convention. The *Kalodimos* majority's unyielding adherence to Delegate Foster's support for the Illinois constitutionality of a complete handgun ban is illustrative of a flawed originalist approach premised on the presumed validity of one or a few delegates' orations.[334]

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333. Scholars have devised roadmaps under living constitutionalism for interpreting the Second Amendment broadly as a means of recognizing a robust individual liberty interest to possess and carry firearms. *See, e.g.*, Kopel, *Living Constitution*, *supra* note 236, at 103. Practitioners should consider devising similar theories for the Illinois Constitution or for that matter arms guarantees from other state constitutions.

334. Some commentators have criticized the 2–1 federal court of appeals opinion in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (see *supra* note 56 and accompanying text) for upholding the blanket handgun ban in Morton Grove against a Second Amendment and particularly an Illinois constitutional challenge based on "statements made by a delegate [Delegate Foster] during the floor debates that handguns could be banned." *See, e.g.*, Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 227 n.231 (1982), (quoting T. COOLEY, CONSTITUTIONAL LIMITATIONS 101 (7th ed. 1903)) (stating "[e]very member of such a convention acts upon such motives and reasons as influence

Illinois courts should carefully avoid cherry-picking floor debate statements from individual delegates as a means of providing easy, seemingly conclusive answers to difficult constitutional problems. As the Illinois Supreme Court has wisely stated: "[i]t is possible to lift from the constitutional debates on almost any provision statements by a delegate or a few delegates which will support a particular proposition; however, such a discussion by a few does not establish the intent or understanding of the convention."[335] The Illinois Supreme Court has also cautioned that floor debates cannot be equated with the text of an Illinois Constitution provision: "While statements and reports made by the delegates to the constitutional convention are certainly useful and important aids in interpreting ambiguous language of the constitution, they are, of course, not a part of the constitution. It would be improper for [the Illinois Supreme Court] to transform statements made during the constitutional convention into constitutional requirements where such statements are not reflected in the language of the constitution."[336]

Scholars have cited a number of practical difficulties inherent in determining the mindset of a constitutional convention. First, there is the almost, if not entirely, impossible task of comprehending the collective intention of a large body of constitutional delegates who have differing interests and goals in enacting particular provisions of the constitution.[337] The debates

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him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause . . . ."). The debates when reviewed in their entirety reveal that the delegates did not achieve consensus on whether handguns may be subject to a complete ban. *See id*. at 227–29; *see also Kalodimos*, 470 N.E.2d at 283 (Moran, J., dissenting) ("After considering the debates on section 22, I am of the opinion that, at most, the debates reflect a lack of consensus as to the meaning of section 22."). Some delegates who voiced support for a complete handgun ban under the Illinois arms right guarantee may have been motivated by political considerations to secure the votes of wavering delegates. *See* Dowlut & Knoop, *supra*, at 228 n.239 (noting a statement by Delegate Foster). Expressing skepticism about the value of the debates for constitutional interpretation, especially when they are of a conflicting nature, Dowlut and Knoop concluded that they should generally not be considered in determining the scope of the Illinois constitutional right to arms. *Id*. at n.231.

335. Client Follow-Up Co. v. Hynes, 390 N.E.2d 847, 852 (Ill. 1979).

336. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1187 (Ill. 1996) (quoting Vill. of Carpentersville v. Pollution Control Board, 553 N.E.2d 362, 366 (Ill. 1990)) (internal citation omitted).

337. *See*, *e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 214 (1980) (discussing why it is difficult or nearly impossible to glean a collective intent from the framers). Many scholars of history have attacked the proposition that a court can be sufficiently prescient to glean a unified intent in enacting a particular constitutional provision. *See*, *e.g.*, Saul Cornell, *Originalism on Trial*: *The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L. J. 625, 631 (2008) (discussing how "most historians have abandoned the search for a

elucidate this point. Many supporters of article I, section 22 had diametrically different reasons for its passage. Some thought it would permit a substantial degree of arms regulation while others thought the Illinois right to keep and bear arms would protect Illinoisans against what they regarded as unfairly intrusive regulations.[338] In its "Address to the People," the Illinois delegates themselves recognized the arduous obstacles to reaching consensus, noting that "[i]ntense disagreement was often encountered" in drafting the Constitution.[339]

The Address explained the delegates' inherent difficulty in reaching agreement on the meaning, implementation and application of particular provisions other than the Convention's overall objectives:

> The Convention sought to write a constitution which was acceptable to a majority. This process of democratic discourse was seldom easy. Intense disagreement was often encountered. Members differed with one another, in their efforts to find the best constitutional course for the people of Illinois. The dominant themes throughout the search were three in number: greater protection of individual rights, increased responsiveness of government to the people, and heightened efficiency and effectiveness of government in its service to the public.[340]

Delegate Whalen, who was chairman of the Illinois Constitutional Committee on Style, Drafting and Submission, and

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single monolithic meaning for the [U.S.] Constitution").

338. *See* 3 RECORD OF PROCEEDINGS at 1710 (noting one delegate's view: "I think the fact that we have just seen the last two or three speakers here unite in support of [the proposed article I, section 22] for different reasons indicates how this proposal will mean different things to different people.") (statement of Delegate Fay); *id*. at 1713 ("[S]ome of the delegates are for the majority report because they are sure it will reduce the—or possibly eliminate the gun registration laws, and other delegates are for it because they are sure it will give power to increase the gun registration activities.") (statement of Delegate Connor).

339. Address to the People *in* 7 RECORD OF PROCEEDINGS at 2672.

340. *Id*. Delegates to the Illinois Constitutional Convention of 1970 attested to the strong passion evoked by debate on an arms right proposal. *See*, *e.g*., 3 PROCEEDINGS at 1686 ("I think it is a fair statement to say that this issue is slightly controversial.") (statement of Delegate A. Lennon); 3 PROCEEDINGS 1718 ("I've heard some rather intemperate remarks.") (statement of Delegate L. Foster). *See also Kalodimos*, 470 N.E.2d at 520–21 (Moran, J., dissenting) ("The debates illustrate that the issue of whether Illinois' citizens should have the right to bear arms was a highly controversial and emotional issue."); *see generally Quilici*, 695 F.2d at 261 (addressing the same issue as *Kalodimos*, whether a local Morton Grove Ordinance banning handguns violated the Illinois constitutional arms right provision, the *Quilici* court stated: "[W]e recognize that this case raises controversial issues which engender strong emotions.").

Paula Wolff stated in a law review article subsequent to the adoption of the 1970 Illinois Constitution that the delegates themselves did not intend to bind the Illinois courts with their judgments about the proper application of abstract Illinois constitutional provisions.[341] The delegates left the task of interpretation and application to the courts. Thus, the courts err if they search the historical record for a dispositive meaning of an Illinois constitutional provision.[342] The Illinois Supreme Court adopted Whalen and Wolff's assessment by quoting liberally from their scholarly piece:

> Anticipation of judicial review provided the delegates with the opportunity to draft intentionally ambiguous provisions for inclusion in the constitution. The delegates envisioned that these ambiguities would be ultimately resolved by the courts. In some cases delegates even

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341. *See* Wayne W. Whalen & Paula Wolff, *Constitutional Law: The Prudence of Judicial Restraint under the New Illinois Constitution*, 22 DEPAUL L. REV. 63, 65 (1972) (discussing how the delegates drafted the Constitution ambiguously in anticipation of judicial review and with the intention that the courts would interpret and resolve these ambiguities).

342. The Illinois Supreme Court relied to a large extent on a colloquy between Delegate Francis Lawlor and Delegate Elmer Gertz, chairman of the Bill of Rights committee, to conclude that the Illinois constitutional right to privacy guaranteed by article I, section 6 of the 1970 Illinois Constitution does not protect a right to an abortion. *See* Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 757 (Ill. 2013) (quoting a discussion between these two delegates concerning their opinion about the scope of the right to privacy). A comprehensive analysis as to whether the contours of the Illinois right to privacy extend to abortion is far beyond the scope of this Article. For purposes of this Article, however, *Flores*, like *Kalodimos*, illustrates the flaws and deficiencies of a narrow originalist methodology as inconsistent with the delegates' overall intent. The court in *Flores* appeared to inexorably tie the meaning and application of the Illinois right to privacy to a few short on-the-record comments by only two delegates during the floor debates that seemed to opine that the Illinois right to privacy "has nothing to do with the question of abortion." *See Flores*, 991 N.E.2d at 757 (relying primarily on the floor debate between Lawlor and Gertz in concluding that the right to privacy does not involve abortion). This deficient approach undercuts the framers' intent and Illinois traditions that reflect the desirability of utilizing a wide array of sources to develop constitutional meaning, including but not limited to text, constitutional purposes and goals, Illinois precedent, historical materials, U.S. Supreme Court and state court decisions construing their respective state constitutions, concurring and dissenting opinions, scholarly works, reason, logic, political, economic and social analysis as well as the practical. *See supra* Part IV.B. These viable sources legitimately relied upon for reasoned constitutional interpretation suggest that it is far too narrow an approach to limit the court's analytical tools to isolated delegate commentary. The court, of course, is vested with wide discretion within the boundaries of precedent to follow or reject any source as long as its rejection is based on the court's thoughtful judgment and sound analytical reasoning and not on a reflexive, foregone conclusion that the nature of the source is somehow unworthy of serious consideration.

> expected a specific interpretation by the courts which was politically impossible to obtain in the Constitutional Convention for want of majority agreement on the substantive issue . . . .[343]

VI. FUNDAMENTAL RIGHT, STANDARD OF SCRUTINY AND OVERBREADTH

A. The Kalodimos *Perspective*

Kalodimos provides an excellent starting point to discuss whether the Illinois arms guarantee is sufficiently important to elevate its status to a fundamental right and whether laws impinging on the right should be subject to overbreadth analysis and an exacting form of judicial scrutiny. The plaintiffs in *Kalodimos* argued that the Morton Grove Ordinance categorically prohibiting the ordinary citizen from possessing handguns, even in the home, was overbroad because its far-reaching scope unjustifiably infringed on the right of law-abiding citizens to legitimate self-defense.[344] They further contended that constitutional overbreadth analysis required the court to consider whether Morton Grove could have devised less burdensome alternatives to further its safety goals instead of an outright handgun ban.[345] The *Kalodimos* majority responded that the overbreadth doctrine is a hallmark of strict scrutiny, triggered only when a fundamental right is at issue.[346] Declaring that the Illinois constitutional right to bear arms is not of such fundamental stature, the court concluded that overbreadth analysis was inapplicable to test the constitutionality of gun control measures and that the least rigorous rational basis test, the lowest form of scrutiny, would suffice.[347] According to the court, the Morton Grove ordinance passes this low threshold of minimal scrutiny because the ordinance is rationally related to the village's legitimate interest in reducing handgun related violence resulting in serious injury or death.[348]

The *Kalodimos* majority gave two reasons to support its finding that the Illinois constitutional right to bear arms is not fundamental. First, the court analogized the Illinois constitutional right to the United States Supreme Court's long-standing interpretation of the Second Amendment in *United States v.*

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343. *Client Follow-Up Co.*, 390 N.E.2d at 852–53 (quoting Whalen & Wolff, *supra* note 341, at 65).

344. *Kalodimos*, 470 N.E.2d at 277.

345. *Id.*

346. *Id.*

347. *Id.* at 277–78.

348. *Id.* at 278.

Miller.[349] Through this analogy, the *Kalodimos* court interpreted the Second Amendment as conferring only a collective right to bear arms, not a right bestowed on individuals.[350] Second, the *Kalodimos* court reasoned that the Illinois constitutional right to bear arms is subject to a substantial degree of impairment under the police power.[351]

B. A Rebuttal to Kalodimos

1. Illinois Right to Arms Is Fundamental

The *Kalodimos* court's rejection of the Illinois right to arms as a fundamental right is unpersuasive in light of the *Kalodimos* court's faulty construction of the Second Amendment, later borne out by *Heller* and *McDonald*, and its failure to address other influential precedent. The constitutional landscape has markedly changed since *Kalodimos* was decided in 1984, more than thirty years ago, especially in recent history with new groundbreaking doctrines from the U.S. Supreme Court. The *Kalodimos* court's basis for rejecting the fundamental nature of the Illinois right to bear arms cannot be squared with the prevailing standard in the United States under the U.S. Constitution. Although U.S. Supreme Court constitutional law is not mandatory precedent under the primacy approach to state constitutional interpretation, the U.S. Supreme Court's *Heller* and *McDonald* decisions should exact an instructive influence on the Illinois Supreme Court in future cases thereby stimulating judicial re-interpretation of the Illinois constitutional right to bear arms.

In *Heller*, as discussed above, the Court unequivocally found that the Second Amendment protected an individual right, not merely a collective right to form local militias unimpeded by the federal government.[352] Following *Heller*, the Court in *McDonald* determined that the framers and ratifiers of the Fourteenth Amendment understood that the right to keep and bear arms is fundamental to an ordered concept of liberty and justice.[353] In arriving at this conclusion, the *McDonald* Court relied heavily on *Heller's* core finding that the central component of the right to bear arms is that arms are integral to individual self-defense.[354] Undertaking a detailed, historically driven analysis, the Court found that the right to bear arms is deeply woven into the fabric of

349. United States v. Miller, 307 U.S. 174 (1939).

350. *Kalodimos*, 470 N.E.2d at 278.

351. *Id*.

352. *Heller*, 554 U.S. at 595 (holding that "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

353. *McDonald*, 561 U.S. at 767.

354. *Id*.

America's history and traditions as an essential safeguard protecting liberty.[355] The Court found that the right to keep and bear arms—a right now recognized as fundamental—applies equally in substance and scope to the federal government *and* to the States, including Illinois.[356]

The shaky constitutional ground upon which *Kalodimos* rests was recognized by *McDonald* in its survey of other gun-related court decisions in the United States. In fact, the court in *McDonald* found that the only case to permit a total prohibition on handguns was *Kalodimos*.[357] The *McDonald* Court's holding that the right to bear arms is fundamental to the American system of liberty should operate as persuasive authority for adopting a similar holding when construing the Illinois Constitution. Under the Illinois constitutional standard for determining whether a right is fundamental—whether the right lies at the heart of the relationship between the individual and the national government[358]—the Illinois right to arms under article I, section 22 falls squarely within the purview of this standard.

The *McDonald* Court traced historical evidence to show that one of the primary purposes of the right to arms is to protect against arbitrary government actions confiscating arms from its citizens.[359] If *McDonald* is applied, the Morton Grove Ordinance

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355. *Id*. at 767–78.

356. *Id*. at 790.

357. *Id*. at 786 (singling out *Kalodimos* as the only case the City of Chicago, as defendant in *McDonald*, was able to cite from the late 20th century in which a court upheld a complete ban on possession of handguns). The Court also cited the Respondent National Rifle Association's brief "asserting that no other court [besides *Kalodimos*] has ever upheld a complete ban on the possession of handguns." *Id*.

358. *See supra* note 50 and accompanying text. The Illinois Supreme Court in *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996) noted the federal standard for determining whether a constitutional provision protects a fundamental right as stated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973): whether the right is "explicitly or implicitly guaranteed by the Constitution." *Comm. For Educ. Rights*, 672 N.E.2d at 1193. Under this formulation, the Illinois right to arms is a fundamental right because article I, section 22 explicitly guarantees the right subject to the state's exercise of the police power.

359. *See, e.g.*, *McDonald*, 561 U.S. at 768 (quoting *Heller*, 554 U.S. at 594) (noting "King George III's attempt to disarm the colonists in the 1760's and 1770's 'provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.'"); *see McDonald*, 561 U.S. at 768 (stating further that "[d]uring the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."); *see id*. at 3041 (positing that "[i]n an 1868 speech addressing the disarmament of freedmen, Representative Stevens emphasized the necessity of the right: 'Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.' 'The fourteenth amendment, now so happily adopted, settles the whole question.'") (internal citations omitted).

prohibiting possession of handguns violates a core foundational right that stands as a bulwark between the government and individual citizens, a right that indeed forms an integral part of the relationship between the individual and the federal government. The right to arms under the Illinois Constitution is thus deserving of recognition as a fundamental right, notwithstanding *Kalodimos's* antiquated reasoning.[360]

Prior to *McDonald*, several state courts categorized the right to arms under their respective state constitutions as fundamental rights.[361] The Wisconsin Supreme Court, for example, determined that the Wisconsin Constitution's right to bear arms provision grants a fundamental right, noting that the provision was explicitly enacted into the Wisconsin Constitution through the rarely used constitutional amendment process in 1998.[362] Additionally, an Ohio Supreme Court case echoing language similar to *McDonald*, though it was decided several years before that decision, held that the Ohio Constitution grants individuals the right to defend themselves, their family and property as "a fundamental part of [Ohio's] concept of ordered liberty."[363] Relying on Black's Law Dictionary, among other sources, the Ohio Supreme Court defined fundamental rights as "those rights which are explicitly or implicitly embraced by [the Ohio] Constitution and the federal Constitution."[364] The Ohio Supreme Court championed the principle that "[t]he right of defense of self, property and family is a fundamental part of our concept of ordered liberty."[365] In still another state, Colorado, their supreme court characterized its state constitutional right to arms provision as protecting "fundamental personal liberties" in a case pre-dating

360. Research papers prepared for the 1970 Illinois constitutional convention also attest to the fundamental importance of the Illinois Bill of Rights, which includes the Illinois right to bear arms. *See*, *e.g.*, Paul G. Kauper, *The State Constitution: Its Nature and Purpose*, in CON-CON, *supra* note 161, at 22 (stating "[t]he inclusion of a declaration of rights conforms to the principle deeply rooted in American constitutional experience that the basic rights of the citizen are of such importance as to require recognition in the *fundamental* law and thereby receive the added protection furnished by the process of judicial review") (emphasis added); Frank P. Grad, *The State Bill of Rights*, in CON-CON, *supra* note 161, at 30 (discussing how "the several state constitutions, [including Illinois] from earliest times on, have included the protection of individual liberties as a primary part of the constitutional document itself").

361. This Article does not attempt to catalogue or analyze all authorities that specifically hold, imply, advocate or suggest that right to bear arms provisions guaranteed in most state constitutions rises to the stature of a fundamental right.

362. State v. Cole, 665 N.W.2d 328, 336 (Wisc. 2003).

363. Arnold v. City of Cleveland, 616 N.E.2d 163, 169–70 (Ohio 2003).

364. *Id*. at 170.

365. *Id*. at 169.

McDonald by almost forty years.[366]

In applying the primacy approach, the Illinois Supreme Court is at liberty to agree with the reasoning of *Heller* and *McDonald*, which together found that the right to keep and bear arms is a fundamental right. The court can also premise a finding that the Illinois right to bear arms is fundamental on the explicit text of article I, section 22 protecting the right to bear arms from infringement. Such a declaration would be in accordance with how Black's Law Dictionary, the U.S. Supreme Court's *Rodriguez* decision and the Ohio Supreme Court's *Arnold* decision define a fundamental right: the core principle that is embraced by the explicit text of the constitutional provision in the organic law. Furthermore, the court is justified in recognizing arms right as fundamental, based on the decisions of several state supreme courts. Lastly, the court could recognize the fundamental nature of the Illinois arms right by holding that the right lies at the heart of the relationship between the individual and a nationally integrated government, the test employed by *Kalodimos*.

2. Police Power Is Subject to Constitutional Limitations

The second reason given by the *Kalodimos* court to justify its treatment of the Illinois right to bear arms as inferior to fundamental status was its determination that the police power substantially undercuts the right.[367] The text of article I, section 22 conditions the exercise of the right to bear arms on the countervailing police power language: "subject to the police power."[368] Under the police power, according to *Kalodimos*, the state or local government has the broad power to regulate or even prohibit an entire class of firearms such as handguns.[369] Interpreting the police power expansively, the Illinois Supreme Court determined in *Kalodimos* that state or local government may "restrain[] or prohibit[] anything harmful to the welfare of the people."[370] The *Kalodimos* court cited two cases, *People v. Warren*[371] and *Acme Specialties Corp. v. Bibb*,[372] in support of its finding that the police power may be utilized to enact comprehensive prohibitions on firearms possession. For the reasons that follow, the *Kalodimos* court's reliance on *Warren* and *Acme Specialties Corp.* as support for broad prohibitions on the exercise of enumerated, constitutional rights is severely misplaced.

At issue in *Warren* was a measure regulating splashguards on

366. City of Lakewood v. Pillow, 501 P.2d 744, 745–46 (Colo. 1972).
367. *Kalodimos*, 470 N.E.2d at 278.
368. *See supra* note 3.
369. *Kalodimos*, 470 N.E.2d at 272.
370. *Id.* (internal citation omitted).
371. People v. Warren, 143 N.E.2d 28 (1957).
372. Acme Specialties Corp. v. Bibb, 150 N.E.2d 132 (1958).

motor vehicles, which the plaintiff claimed was arbitrary and unreasonable in light of other options that were simpler and less expensive.[373] The Illinois Supreme Court rejected the plaintiff's argument, finding that the legislature, under its inherent police power, may regulate or prohibit anything deemed harmful to the people's welfare, even if the legislation it promulgates interferes with individual liberty or property.[374] According to the court, the police power is limited only by the requirement that it be used to correct an evil or promote a valid state interest in some way without violating a constitutional mandate.[375] The *Acme Specialties Corp.* case involved a prohibition on the sale of sparkler fireworks, except by permit for public display.[376] The Illinois Supreme Court held that the state has the power to enact broad prohibitions to advance public safety, even if the legislation interferes with the operation of a person's chosen business.[377]

The *Kalodimos* court was wrong to equate the state's exercise of the police power in *Warren* and *Acme Specialties Corp.*, which was proper, to the village of Morton Grove's enactment of a total ban on handguns. At stake in *Warren* and *Acme Specialties Corp.* was the plaintiffs' liberty interests in running their businesses unencumbered by what they believed were unreasonable state regulatory prohibitions. The welfare of their business interests, however, were not guaranteed by any enumerated right spelled out in the Illinois Bill of Rights section of the Illinois Constitution.

By contrast, prohibitions on handgun possession are subject to the express constitutional protections afforded to firearms owners through article I, section 22. While the state or local government may unquestionably enact some prohibitions as valid measures to protect health and safety, this power is substantially circumscribed if the governmental entity seeks to prohibit explicitly protected constitutional activity. The Illinois right to keep and bear arms falls within this protective umbrella, insulating individuals from comprehensive arms bans that infringe on the right to meaningful self-defense. The mere fact that article I, section 22 recognizes the government's power to exercise its police power does not give the state complete or nearly complete carte-blanche authority to trammel on constitutionally protected rights.

Frank P. Grad, one the chief researchers on bill of rights issues for the delegates to the 1970 Illinois constitutional convention, noted the widely accepted principle that the State has the inherent police power to enact laws which it decides are

373. *Warren*, 143 N.E. 2d at 423–26.
374. *Id*. at 424–25.
375. *Id*. at 424.
376. *Acme Specialties Corp*., 150 N.E.2d at 517–19.
377. *Id*. at 518–19.

needed to promote health, safety and the general welfare.[378] This power does not depend on a written constitution as a source for its authority because the police power operates independently of the state's constitution.[379] The codification of constitutional rights, however, acts as a restriction on the state's exercise of its police power.[380] Absent enumerated constitutional guarantees, the government could ignore individual rights by expediently invoking the police power. [381] Constitutional rights, such as the Illinois right to keep and bear arms, however, operate as a counterweight to the government's police power.

The framers of article I, section 22 codified a pre-existing police power into the provision's text. As recognized in the majority committee report on article I, section 22, Illinois has the police power to regulate arms under its inherent authority, regardless of whether such power is expressly made available in the constitutional provision.[382] Thus, even in the absence of a constitutional stipulation making the right to bear arms "subject to the police power," Illinois state government and its municipalities nevertheless have regulatory authority.[383] The framers inserted the "subject to the police power" clause out of a sense of "super-abundant caution" to ensure that the police power remained intact.[384] Because the police power clause in article I, section 22 is functionally superfluous, the courts should assign no special significance to the added police power language.[385] The

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378. *See* Grad, *in* CON-CON, *supra* note 161, at 39 (noting that the police power, although broad, is not unlimited).

379. *Id*.; s*ee also* Linde, *Without Due Process*, *supra* note 192, at 147, 184 (finding that no constitution, state or federal, grants police power to a state since the state has police power without constitutional authorization; the police power, however, is subject to constitutional limitations).

380. *Id*.

381. *See id*. (emphasizing that the police power is broad but can be challenged by asserting that a specific constitutional limitation has been violated).

382. *See* Committee Proposals, *in* 1 RECORD OF PROCEEDINGS §27, at 91.

383. Michael D. Ridberg, *The Impact of Some State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 189 (1970) [hereinafter "Ridberg"] ("[T]hese qualifying phrases [such as "subject only to the police power"] neither expand nor constrict the scope of regulation permissible under the police power.").

384. *Id*.

385. The *Kalodimos* majority found the explicit recognition of a police power in article I, section 22 to be "distinctive." *Kalodimos*, 470 N.E.2d at 269. In the same vein, one commentator noted that "the Illinois guarantee is unique because it is specifically 'subject only to the police power.'" Robert Dowlut, *Federal and State Constitutional Guarantee to Arms*, 15 U. DAYTON L. REV. 59, 75–76 n.114 (1989). Although the Illinois language is distinctive and unique when compared to other state arms rights guarantees that do not codify police power limitations, see *supra* note 2, this difference has no impact on constitutional meaning. Other state arms right provisions are still subject to the police power without any enabling constitutional enactment due to the

police power, regardless of its explicit codification in article I, section 22, does not undercut the fundamental nature of the Illinois constitutional right to bear arms.

3. Standard of Scrutiny Alternatives and Overbreadth

Once the Illinois constitutional right to bear arms is judged to be a fundamental right, the question arises as to whether a standard of scrutiny should be applied to restrictions on an individual's liberty to own, possess and carry firearms, and if so, what that standard should be.[386] This Article does not argue for

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inherent nature of the police power. Illinois' explicit acknowledgment does not expand the police power at the expense of the right to arms.

386. The Illinois courts should earnestly consider whether and how to apply First Amendment doctrine or its Illinois free speech counterpart to Illinois constitutional arms rights issues. The *Kalodimos* court, however, rejected the plaintiffs' arguments that First Amendment jurisprudence can be helpful in this setting. *Kalodimos*, 470 N.E.2d at 273. In reaching this conclusion, the court drew a distinction between the First Amendment, which the court said was designed to encourage the creation of and dissemination of ideas, and the Illinois constitutional right to arms, which the court said was not designed to encourage or discourage arms possession. *Id*.

The court's distinction is based on a faulty premise. The First Amendment allows individuals the freedom of choice whether to speak or not to speak, just as the Second Amendment allows individuals to choose to own a weapon for self-defense or not to own one. *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 4–5 (2012) (comparing the concept that "the Second Amendment's guarantee of an individual right to keep or bear arms in self-defense should include the freedom not to keep or bear them at all" with "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)). In *Heller*, and in case law both before and after, courts and commentators have made abundant use of First Amendment case law and concepts to guide them in fashioning a principled analysis of the Second Amendment as well as parallel state constitutional provisions. *See*, *e.g.*, *Heller*, 554 U.S. at 582 (stating that "[j]ust as the First Amendment protects modern forms of communications, . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding"); Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011) ("borrowing from the Court's First Amendment doctrine" to evaluate Second Amendment claim in light of *Heller*); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 97 (2009) ("Analogies between the First Amendment and the Second (and comparable state constitutional protections) are over 200 years old."); Kopel & Cramer, *State Standards of Review*, *supra* note 15, at 1115 ("Several scholars have suggested that the well-developed analytic tools originally created for the First Amendment can also be applied to the Second Amendment.") (citations omitted). One reason for the utility of such a comparative approach is that both the First and Second Amendment "directly guarantee the right to engage in an activity." Blocher, *The Right Not To Keep or Bear Arms*, *supra*, at 23. Contrary to *Kalodimos's* erroneous rejection of a comparative approach, the same helpful analogizing of the Second Amendment to the First Amendment can serve to develop rules, doctrines and standards for construing article I, section 22.

definitive answers but rather suggests different viable possibilities. One option is for Illinois courts not to allow themselves to be straightjacketed into applying any specific standard of scrutiny for every conceivable issue that might arise.[387] The U.S. Supreme Court's *Heller* decision fits within these parameters. In striking down the District of Columbia handgun ban, the *Heller* Court declined to apply a standard of review.[388] Instead, the Court utilized a categorical approach in which it determined whether the D.C. handgun ban fell within certain predetermined boundaries defining the core of the Second Amendment.[389] In doing so, the Court declined to engage in a balancing of the private and public interests at stake.[390]

The Illinois Supreme Court's decision in *People v. Aguilar*,[391] a Second Amendment case, can best be described as exemplifying a categorical rather than an interest-balancing approach. The court in *Aguilar* declared that a provision of the Illinois aggravated unlawful use of a weapon statute (AUUW) barring possession of loaded weapons in public was void on its face because it violated the Second Amendment right to keep and bear arms.[392] The court did not apply or even consider whether to apply one of

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387. Eugene Volokh has argued that courts should abandon the traditional standards of scrutiny for assessing the constitutionality of legislation burdening the exercise of constitutional rights; i.e., the strict, intermediate, rational relationship and undue burden standards of review. Specifically, he maintains that courts should evaluate the strength of four different governmental reasons for arms restrictions: scope, burden, danger reduction and government as proprietor justifications to determine whether gun laws pass constitutional muster. *See generally* Volokh, *Implementing the Right to Keep and Bear Arms, supra* note 308 (outlining an innovative approach to determine whether constitutional rights restrictions are justifiable). Under the Illinois Constitution, the Illinois courts are free from federal law to adopt a different analytical framework than the oft-used strict, intermediate and rational relationship standards of scrutiny that the court in *Kalodimos* assumed should be borrowed from federal doctrine. This article does not advocate for or against Volokh's approach but only seeks to point out that Illinois constitutional analysis permits its viability as an alternative.

388. *See*, *e.g.*, United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (finding that *Heller* "consciously left the appropriate level of scrutiny for another day").

389. *See* Blocher, *Categoricalism and Balancing*, *supra* note 307, at 377 (finding that *Heller* endorsed a categorical rather than a balancing approach to Second Amendment protection).

390. *Heller*, 554 U.S. at 635 (rejecting judicial balancing of individual and government interests on a case-by-case basis).

391. People v. Aguilar, 2 N.E.3d 321 (Ill. 2013).

392. The court vacated the defendant's Class 4 felony conviction under section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d)), having declared that provision unconstitutional on its face. *Aguilar*, 2 N.E.3d at 328. The court, however, affirmed his conviction for unlawful possession of a firearm (UPF) under section 24-3.1(a)(1) of that statute, (720 ILCS 5/24-3.1 (a)(1)), which is directed at criminalizing firearm-possession by individuals under 18 years of age. *Id*. at 329.

the traditional tiers of scrutiny under a balancing test—i.e. strict, intermediate or rational basis review. Instead, the court determined whether the *Heller* Court's holding—the right to possess weapons for defense of persons and property in case of violent confrontation in the home—should be extended to the public domain outside the home.

The *Aguilar* court relied extensively on the Seventh Circuit Court of Appeals decision in *Moore v. Madigan*.[393] In *Moore*, the Seventh Circuit struck down an Illinois statutory provision that created a blanket prohibition on the carrying of loaded and easily accessible firearms for self-defense in public, except for certain groups such as police, security officers, hunters and members of target shooting clubs.[394] The court reasoned that because the Second Amendment right to keep and bear arms guarantees individuals the right to arms as instruments for protection against violent confrontations, the right naturally extends beyond the home because attacks against innocent individuals are commonplace outside the home.[395] The Illinois Supreme Court in *Aguilar* noted approvingly of *Moore's* findings that the need for self-defense outside the home is just as crucial to meaningful self-defense as that which applies to the home in light of the prevalence of violent public attacks on law-abiding citizens.[396]

Turning back to Illinois constitutional analysis, the *Aguilar* decision, though based on the Second Amendment, is tellingly persuasive for applying the parallel Illinois constitutional arms right to attack substantial infringements on the scope of arms possession. The *Aguilar* court denounced wholesale bans on the exercise of constitutionally guaranteed rights, regardless of the context, and distinguished prohibitions from limited regulations:

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393. Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012). After declaring the Illinois law forbidding public weapons possession outside the home unconstitutional, the Seventh Circuit in *Moore* authorized the Illinois legislature to pass a new law permitting the carrying of weapons in public for self-defense with reasonable limitations consistent with public safety and Second Amendment guarantees. *Id.* at 942. The Seventh Circuit sitting *en banc* upheld *Moore* when it denied the City of Chicago's petition for rehearing. Moore v. Madigan, 708 F.3d 901 (7th Cir. 2013). In response to *Moore*, the Illinois legislature enacted a statute known as the Firearm Concealed Carry Act, permitting individuals to carry concealed weapons in public upon the issuance of a permit. *See* 430 ILCS 66/1 et seq. (West 2013) (setting out, in part, the qualifications for obtaining and renewing a concealed carry permit). The Illinois General Assembly was the last and the 50th state legislature to approve a concealed carry law. Ray Long, Monique Garcia, and Rick Pearson, *General Assembly Overrides Governor's Veto of Concealed Carry Bill*, CHI. TRIB. (July 9, 2013), *available at* http://articles.chicagotribune.com/2013-07-09/news/chi-illinois-concealed-carry_1_harrisburg-democrat-gun-bill-quinn.

394. *Moore*, 702 F.3d at 934, 942.

395. *Id.* at 935–36.

396. *Aguilar*, 2 N.E.3d at 326–27.

> Of course, in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation. That said, we cannot escape the reality that, in this case, we are dealing not with a reasonable regulation but with a comprehensive ban. Again, in the form presently before us, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) categorically prohibits the possession and use of an operable firearm for self-defense outside the home. In other words, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) amounts to a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court. In no other context would we permit this, and we will not permit it here either.[397]

Though *Aguilar* did not address any state constitutional claims, its Second Amendment reasoning applies with equal force to claims directed at the constitutionality of a flat ban on handguns under article I, section 22. The *Kalodimos's* court's endorsement of the constitutionality of a flat ban on handguns cannot be reconciled with *Aguilar's* reasoning. Neither the comprehensive statutory ban on weapon possession outside the home (*Aguilar*) nor the substantially more invasive and burdensome flat ban on handguns extending both inside and outside the home (*Kalodimos*) can be characterized as mere reasonably limited regulations. Instead, both of them are a total prohibition on the exercise of personal rights guaranteed under the U.S. Constitution as well as the Illinois Constitution.

The Illinois Supreme Court's cautionary note in *Aguilar* bears special emphasis—"[i]n no other context, would we permit this."[398] The Illinois Constitution is such a different, albeit related, context; it should be read to preclude total prohibitions that substantially infringe on the right to armed self-defense, just as *Aguilar* vindicated this broad principle in the Second Amendment setting.[399]

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397. *Id*. at 327 (citation omitted).

398. *Id*.

399. Arms proponents celebrated victory in *Aguilar* might be doomed for eventual extinction because it is premised on the Illinois Supreme Court's reading of *Heller's* Second Amendment analysis rather than the parallel Illinois constitutional provision. Recall that *Heller* and *McDonald* were closely contested 5–4 decisions. One of the five majority justices could retire and be replaced by a justice inclined to favor the ideology of the dissenting justices or one of the five majority justices such as Justice Kennedy could narrowly construe the core Second Amendment as limited to the home. *See* R. Randall

Article I, section 22's "subject only to the police power" limitation on the right to bear arms does not eviscerate this conclusion. As discussed, the police power clause in article I, section 22 does not expand the police power nor restrict the exercise of the constitutional right, since the police power is an inherent governmental power that exists independently of the Illinois Constitution. And just as *Aguilar* clarified that the Second Amendment is subject to reasonable regulations (but not wholesale bans), article I, section 22 permits such sensible regulations as long as they do not create unduly burdensome prohibitions that substantially interfere with the essence of the right's core protections.

Aside from the categorical approach invoked in *Aguilar*, the Illinois courts should consider applying a standard of scrutiny and the appropriate level of that scrutiny. The least rigorous rational basis test, however, should be altogether rejected for Illinois right to arms claims. As persuasively shown in *Heller*, the rational basis test should not be used when evaluating the constitutionality of legislation that infringes on a specific, constitutionally enumerated right such as the right to free speech, the guarantee against double jeopardy, the right to counsel or the right to keep and bear arms.[400] If a court were faced with a constitutional challenge to a law that did not affect such an enumerated right, a court would still need to assess whether the law passed minimal rational basis review because of constitutional requirements prohibiting passage of irrational laws.[401] If a rational basis was all that was required to defeat a Second Amendment claim, then the

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Kelso, *Justice Kennedy's Jurisprudence on the First Amendment Religion Clauses*, 44 MCGEORGE L. REV. 103, 131 (2013) (opining that Justice Kennedy would normally be expected to join the *Heller* dissenters because of his usual methodology of deciding cases); Solum, *supra* note 236, at 980 (noting that "[o]f course, we can imagine that a future Supreme Court decision on the Second Amendment would involve a different configuration of Justices. Justice Kennedy might vote with the *Heller* dissenters to uphold a statute that Roberts, Scalia, Thomas, and Alito would strike down."). Commenting on *Aguilar*, Eugene Volokh observed that many jurisdictions outside of Illinois take a position contrary to *Aguilar*, holding that individuals do not have a Second Amendment right to carry weapons in public for self-defense. *See* Eugene Volokh, *Illinois Supreme Court: Second Amendment Protects Carrying Outside The Home*, THE VOLOKH CONSPIRACY, (Sept. 12, 2013), http://www.volokh.com/2013/09/12/illinois-supreme-court-second-amendment-protects-carrying-outside-home (agreeing with the result in *Aguilar* based on his judgment that *Heller's* reasoning applies outside the home). The future legal landscape at some point might be ripe for a reconstituted U.S. Supreme Court to limit *Heller* to the confines of the home, which would then force the Illinois Supreme Court to overrule *Aguilar* or substantially limit the reach of its holding. Any future Illinois case that protects the right to bear and carry outside the home would be immunized from federal constitutional attack if the decision rested on state constitutional grounds.

400. *Heller*, 554 U.S. at 628 n.27.

401. *Id*.

Second Amendment would be redundant of constitutional prohibitions against irrational laws and functionally meaningless.[402]

The *Kalodimos* court's utilization of rational basis review suffers from the same type of error. Similar to the Second Amendment, the right to keep and bear arms is a specific, enumerated constitutional right guaranteed by article I, section 22 that is not to be infringed. Even in a hypothetical scenario where article I, section 22 was deleted from the Illinois Constitution, the Illinois courts would nevertheless need to determine whether the gun control regulation at issue as an exercise of the police power was a rational means to accomplish a legitimate safety objective. To avoid rendering the Illinois constitutional right to arms meaningless, courts should not apply a standard of scrutiny that is simply a duplication of the low-level rational basis review standard used for non-enumerated rights. Given the Illinois right to arms' status as not only a specific Illinois constitutional right bestowed on individual citizens and a fundamental right guaranteed in the Illinois Bill of Rights, the standard of scrutiny, if a standard of scrutiny is applied, should be more stringent than mere rational basis review.

The question becomes what sort of rigorous standard of scrutiny. The court in *Kalodimos* found that laws burdening fundamental rights are subject to strict scrutiny under Illinois constitutional standards.[403] Assuming that the Illinois right to bear arms is fundamental, notwithstanding *Kalodimos*'s finding to the contrary, the Illinois courts can invoke either strict scrutiny under Illinois law or search other sources, including the law of an outside jurisdiction for a useful analogue. Courts applying Second Amendment law for Illinois constitutional guidance, however, must be cognizant that they are not bound by restrictive readings of *Heller* and *McDonald* that are insufficiently protective of individual rights.

Whether the U.S. Supreme Court will apply a standard of scrutiny in the Second Amendment context and the level of scrutiny to be applied if a standard is selected remain unsettled questions.[404] Some cases following *Heller* and *McDonald* have

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402. *See id*.

403. *Kalodimos*, 470 N.E.2d at 277 ("[S]trict scrutiny [] comes into play only when a fundamental right is invaded."); *see also* People v. Cornelius, 821 N.E.2d 288, 304 (Ill. 2004) (holding that "where the right infringed upon is among those rights considered 'fundamental' constitutional rights, the challenged statute is subject to strict scrutiny analysis").

404. *See, e.g.*, People v. Taylor, 3 N.E.3d 288, 296 (1st Dist. Ill. 2013) ("Courts have been inconsistent in the level of scrutiny to apply to laws that place restrictions on an individual's second amendment right to bear arms. Courts have applied intermediate scrutiny, strict scrutiny and, most recently a 'text, history, and tradition' analysis.").

applied strict scrutiny.[405] Under strict scrutiny, the legislative means must be the least restrictive on the constitutional right as well as necessary and narrowly tailored to serve a compelling government interest.[406] Intermediate scrutiny—the middle ground between strict scrutiny and rational basis review—is another standard that some Second Amendment cases have used to test gun control measures.[407] This standard asks whether the government restriction on firearms serves a substantial and important interest and whether the statutory means chosen to accomplish that interest are a reasonable fit with the government objective.[408]

Some courts, such as the Illinois Supreme Court, have applied a two-pronged standard to determine whether the challenged law creates an unjustifiable burden on conduct protected by the Second Amendment guarantee.[409] The first prong addresses whether the challenged law creates a burden on conduct that falls within the scope of the constitutional guarantee.[410] If the conduct cannot be conclusively determined to be outside the ambit of the Second Amendment, then the court proceeds to the second prong in which it applies a form of heightened scrutiny, beyond mere rational

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405. *See*, *e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 708–09 (7th Cir. 2011) (striking down on Second Amendment grounds a Chicago ordinance prohibiting firing ranges) ("[A] severe burden on the core Second Amendment right to armed self-defense will require an extremely strong public interest justification and a close fit between the government's means and its end … "if not quite strict scrutiny."). Relying on *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), one commentator recommended the use of a deferential form of strict scrutiny within the rationale of *Heller*, under which the state's interest in gun control legislation is strictly scrutinized but with a degree of deference to the state's expertise in regulation. Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1570–73 (2009).

406. *See*, *e.g.*, *Cornelius*, 821 N.E.2d at 304 (delineating the government's burden under the strict scrutiny standard). Another commentator analyzing the standard of review for gun control measures has dubbed his approach semi-strict scrutiny. Calvin Massey, *Guns, Extremism, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1133 (2000); *see also* Kopel & Cramer, *State Standards of Review*, *supra* note 15, at 1121–22 (noting the semi-strict standard proposed by Massey as well as the deferential strict scrutiny standard proposed by Gould as viable options to evaluate gun control regulations). These discussions about the appropriate standard of scrutiny addressing Second Amendment issues can be adapted to arguments concerning the proper standard to be applied to article I, section 22 claims.

407. *See*, *e.g.*, *Taylor*, 3 N.E.3d at 296 (citing People v. Alvarado, 964 N.E.2d 532, 545 (Ill. 2011), a pre-*Aguilar* decision, to show use of intermediate scrutiny to examine gun control provisions).

408. *E.g.*, *Alvarado*, 964 N.E.2d at 545.

409. *See*, *e.g.*, Wilson v. County of Cook, 968 N.E.2d 641 (Ill. 2012) (discussing that after *Heller* and *McDonald*, courts are taking a new approach to analyzing the Second Amendment right).

410. *Id*. at 654.

basis review.[411]

Some states relying on their respective state constitutions have used a form of scrutiny focused on the reasonableness of the restriction as balanced against the values supporting the state constitutional right to keep and bear arms.[412] The Wisconsin Supreme Court, for example, applies a reasonableness standard that asks whether pursuant to the state's inherent police power, the challenged health and safety regulation is a reasonable limitation on the Wisconsin state constitutional right to arms.[413] In formulating its reasonableness inquiry, the court pointed out that reasonableness should not be equated with the deferential and least stringent rational basis standard of scrutiny.[414] Because the right to arms under the Wisconsin Constitution is a fundamental right, the court found review of any regulation must be performed with a more exacting scrutiny that precludes the right from being transformed into a meaningless, illusory

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411. *Id*. The two-part test applied by the Illinois Supreme Court in *Wilson* seems to have been collapsed into a single strand in *Aguilar*; the Illinois Supreme Court's other substantial foray into the Second Amendment realm following *Heller*. As discussed above, *Aguilar* limited its analysis to determining whether the Second Amendment as understood by *Heller* protected the carrying of a firearm in public outside the home; it did not look at the government's justification for restricting the public carrying of firearms under any form of means-ends scrutiny. *See supra* notes 391–99 and accompanying text.

412. Adam Winkler has concluded that state courts construing their state constitutional arms right provisions have historically applied a deferential standard of review in which those courts have for the most part upheld firearms restrictions as permissible regulation. *See generally* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007). Critics of Winkler's article such as David B. Kopel and Clayton Cramer have pointed out that many state courts pursuant to a reasonableness standard have used a heightened form of scrutiny beyond mere rational basis review, including overbreadth, narrow tailoring, and least restrictive alternatives as part of the methodology of their governing approach. *See*, *e.g.*, Kopel & Cramer, *State Court Standards of Review*, *supra* note 15, at 1119–24 (illustrating that even states that appear to be applying a reasonableness standard may look to the motives behind the statute—a key sign that the court is applying a more exacting scrutiny). Moreover, as discussed in this Article, the Illinois Supreme Court is entitled to adopt a primacy approach to state constitutional interpretation in which the court is permitted to craft an analytical approach based on judicial interpretations from other jurisdictions, state and federal, and the views of scholarly articles, if they are persuasively reasoned as correct for Illinois. *See supra* Part IV. The purpose of this Part of this Article is to explore authorities that have applied or advocated for many different types of standards but share the common element of adopting a rigorous constitutional scrutiny that goes beyond minimal rational basis review. To be sure, Winkler is correct that many state court decisions have used the least stringent form of review. Notwithstanding this supposition, the Illinois Supreme Court need not follow decisions using minimal scrutiny if they lack a compelling justification.

413. State v. Cole, 665 N.W.2d 328, 337 (Wis. 2003); State v. Hamdan, 665 N.W.2d 785, 800 (Wis. 2003).

414. *Cole*, 665 N.W.2d at 338.

concept.[415] The Wisconsin Supreme Court explained:

> When a state has a right to bear arms amendment, the test generally changes from "Is it a 'reasonable' means of promoting the public welfare?" to "Is it a 'reasonable' limitation on the right to bear arms?"[416]

The focus of the standard is not whether the state can proffer any conceivable basis to support its regulatory measure as a health and safety measure, as is the case with the rationale basis standard.[417] Rather, a court applying this approach balances the public interest supporting the restriction against the extent to which the purposes underlying the right to arms provision for defense of self and property are substantially burdened.[418]

In addition to applying a balancing approach, state courts have invoked overbreadth analysis that considers whether there are less-restrictive alternatives to the challenged arms restrictions and whether the regulations are narrowly tailored to serve the government's objectives. The West Virginia Supreme Court, for example, found that restrictions on the West Virginia constitutional right to keep and bear arms are unconstitutional if they "frustrate the guarantees of the constitutional provision."[419] The West Virginia Supreme Court underscored that the statute or ordinance at issue cannot be so extensive that it "stifle[s] the exercise of [the state constitutional arms] right where the governmental purpose can be more narrowly achieved."[420] Similarly, the Colorado Supreme Court found that police power restrictions even those found to be legitimate and substantial may not sweep so broadly that they stifle fundamental person liberties guaranteed by the Colorado constitutional right to bear arms when the state interest can be achieved through narrowly tailored means.[421]

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415. *Id.*

416. *Id.* (quoting Monks, *supra* note 133, at 275 n.147). In other words, as cogently articulated by Monks, the government may permissibly enact firearms restrictions absent a constitutional right to arms as long as the government may rationally conclude that the regulations advance public safety. On the other hand, a constitutional right to arms may invalidate arms restrictions, even if they promote public safety, if the restrictions are so unduly burdensome that they infringe on the right to arms. *Id.* The *Kalodimos* court apparently did not grasp this crucial distinction in allowing blanket prohibitions on handguns.

417. *Id.*

418. *Id*; Ridberg, *supra* note 383, at 202–03 ("The scope of permissible regulation in states with arms provisions is dependent upon a balancing of the public benefit to be derived from the regulation against the degree to which it frustrates the purpose of the provision.").

419. City of Princeton v. Buckner, 377 S.E. 2d 139, 145 (W. Va. 1988).

420. *Buckner*, 377 S.E.2d at 146.

421. City of Lakewood v. Pillow, 501 P. 2d 744, 745–46 (Colo. 1972).

This Article does not intend to catalogue all the different ways in which the Illinois constitutional right to arms may challenge state or local restrictions burdening the right. The analysis here covers a limited sampling of the U.S. Supreme Court, state supreme court and scholarly analysis available to guide the Illinois courts. The touchstone in any analysis should call for the Illinois courts to formulate analytical tools that produce logical and informed results. The outcome of all cases should respect the importance of the Illinois constitutional right to armed self-defense together with the state's valid health and safety interests without compromising the core aspects of constitutional liberty safeguarded by article I, section 22.

VII. CONCLUSION

The Illinois courts should develop the proper analytical tools for interpreting, determining the meaning of, and applying article I, section 22 of the 1970 Illinois Constitution that conform to the intent of the framers and well-established traditions. The focus of this Article is not to recommend to Illinois courts how to decide particular gun rights issues, but rather to shape the correct framework in which to decide these issues. The correct analytical tools should provide Illinois courts with the authority to permit but not require them to follow Second Amendment cases or state constitutional cases from foreign jurisdictions when analyzing the nature and scope of article I, section 22.

The history concerning the adoption of Article I, section 22 should be consulted as well, including the floor debates, committee reports and Address to the People. However, the Illinois interpreter should bear in mind that the Illinois framers intended the Illinois Constitution to be a forward-looking document that is dynamic and capable of growth commensurate with contemporary conditions. Thus, the views of selected delegates about how a constitutional provision should be applied to a particular issue might be instructive but it is by no means dispositive to the exclusion of other interpretive aids. The overriding consideration that should guide any analysis of article I, section 22 or for that matter any Illinois Bill of Rights provision is that the Illinois courts reach a principled, effective and logical construction that comports with and furthers the basic purposes, principles and values that support the provision.