
AN ILLUSORY RIGHT? REVISITING ILLINOIS' RIGHT TO KEEP AND BEAR ARMS

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Article I, Section 22 of the 1970 Illinois Constitution states: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." This section is surprisingly new; before 1970, there was no state constitutional protection for the rights of gun owners in Illinois. But despite this recent vintage, this language still rouses several questions: What was Section 22 understood to mean by those who drafted and voted on it? What is the correct interpretation of its text? Why was the Police Power Clause added, and what, if anything, does it contribute?

There is one query that hovers like a dark cloud above the rest: Does Section 22 simply purport to grant an individual right to keep and bear arms, but take that right away in the same breath? Indeed, there would be little point in asserting an individual right if that right were completely subordinate to the police power of the state. Such a right would be an illusory one. Yet another question thus arises: What are the proper limits of the state's police power to regulate firearms, if any?

*This Article approaches these questions by first reviewing Section 22's history and then exploring the fundamental nature of the states' police power. Ultimately, the provision's history and text, as well as the proper limits of the states' police power, compel the conclusion that Section 22, while perhaps inartfully drafted, is not without force. While the courts continue to battle over the scope of the federal Second Amendment in the wake of *District of Columbia v. Heller* and *McDonald v. Chicago*, the time has also come to reevaluate Illinois' own constitutional limits on the General Assembly's ability to regulate firearms.*

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I. INTRODUCTION

Article I, Section 22 of the 1970 Illinois Constitution states: “Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.”¹ Although this section appears to be an ancient vestige of the frontier era, it is in fact relatively new; before 1970, there was no state constitutional protection for the rights of gun owners in Illinois.² Despite this recent vintage, though, this language still rouses several questions: What was Section 22 understood to mean by those who drafted and voted on it? What is the correct interpretation of its text? Why was “Subject only to the police power” (the “Police Power Clause”) added and what, if anything, does it contribute?³

There is one query that hovers like a dark cloud above the rest: Does Section 22 simply purport to grant an individual right to keep and bear arms, but take that right away in the same breath? Indeed, there would be little point in asserting an individual right if that right were completely subordinate to the vague and vast police power of the state. Such a right would be an illusory one—a dead letter, a “parchment barrier[.]”⁴ Yet another question thus arises: What are the proper limits of the state’s police power to regulate firearms, if any?

This Article approaches these questions by first reviewing Section 22’s constitutional history and then exploring the fundamental nature of the police power of the state. Ultimately, the provision’s history and text, as well as the proper limits of the states’ police power, compel the conclusion that Section 22, while perhaps inartfully drafted, is not without force. While the courts continue to battle over the scope of the federal Second Amendment in the wake of *Dis-*

1. ILL. CONST. art. I, § 22 (1970).
2. See ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 77 (2011).
3. ILL. CONST. art. I, § 22 (1970).
4. THE FEDERALIST NO. 48 (James Madison).

*trict of Columbia v. Heller*⁵ and *McDonald v. City of Chicago*,⁶ the time has also come to reassess Illinois' own constitutional limits on its ability to regulate firearms.

Part II of this Article reviews the history of Section 22, referencing both the 1969–1970 Constitutional Convention (“Con Con”) and the post-Con Con case law. Part III briefly surveys the legitimate boundaries of the police power. Part IV then recommends that courts interpret Section 22 in lockstep with the federal Second Amendment. Finally, Part V offers some closing thoughts.

II. A BRIEF HISTORY OF SECTION 22

As a relatively new addition to the state constitution, Illinois' right to keep and bear arms has had a fairly short history. This history is easily segregated into two categories: (1) Section 22's conception at the 1969–1970 Illinois Con Con, and (2) its maturation through the post-Con Con case law. This Part reviews both.

A. *The 1969–1970 Illinois Constitutional Convention*

Referencing the 1969–1970 Con Con transcripts,⁷ it can fairly be stated that the right to bear arms was an issue that was debated openly and passionately by the delegates. Yet, sadly, few definitive answers with which we are concerned can be gleaned from these records. Perhaps only two things can be made certain: that the delegates vehemently disagreed on the desirability and efficacy of strict gun-control laws,⁸ and that there was no universal consensus on the meaning or scope of the proposed new constitutional right to bear arms.⁹

Significantly, more than one proposal for a gun provision was introduced at the convention: proposals 13, 80, 105, 470, 502, and 526 all proposed some kind of right to keep and bear arms, with varying degrees of strength and specificity.¹⁰ In response to the then-common understanding of the Second Amendment as only protecting a collective right, these proposals generally sought to secure an *individual* right.¹¹ Another proposal (220), supported by the minority, sought to omit any gun provision from the constitution, thereby leaving the is-

5. 554 U.S. 570 (2008).

6. 561 U.S. 742 (2010).

7. See REPORT OF THE BILL OF RIGHTS COMMITTEE ON THE PREAMBLE AND BILL OF RIGHTS [hereinafter COMMITTEE REPORT], 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 92 (1970) [hereinafter 6 PROCEEDINGS].

8. The delegates' general thoughts on gun control are outside the scope of this Article.

9. See COMMITTEE REPORT, 6 PROCEEDINGS, *supra* note 7.

10. COMMITTEE REPORT, 6 PROCEEDINGS, *supra* note 7, at 92.

11. See LOUSIN, *supra* note 2, at 77.

sue entirely in the hands of the General Assembly.¹² In the first vote of the new Bill of Rights Committee chaired by Delegate Elmer Gertz,¹³ what would become Section 22 passed with a surprising margin of twelve to three.¹⁴

According to Delegate Leonard Foster, the committee was hesitant to include any constitutional right to bear arms until Delegate Victor Arrigo suggested adding a qualifier: that the right would be “subject only to the police power of the state[.]”¹⁵ The transcripts suggest that the Police Power Clause was added to placate wary delegates rather than to contribute anything of substance. Arrigo “stated that it might be much more readily acceptable and much easier to understand by stating explicit[ly] that which has been found impliedly to rest with the state.”¹⁶ The police power “applies to every section [of the constitution], whether it is stated or not [W]e have made it explicit [in] this [provision] to make sure that nobody thinks we are trying to pull a fast one, and that we realize that the right to bear arms is subject to that specific restriction.”¹⁷ Foster, too, described the Police Power Clause as “desirable, although unnecessary.”¹⁸ When asked if he would support striking it, he stated, “I won’t go along with striking it. I may agree with you that it is redundant, but we think it is a useful redundancy.”¹⁹

Foster was simply incorrect, however, in thinking that the inclusion of the Police Power Clause would make the provision “easier to understand.”²⁰ To the contrary, the language caused considerable consternation among the delegates trying to discern its practical implications. Foster, for one, had a strong opinion on what the “police power” meant, which he explained to the convention:

[T]he police power of the state is an absolute right of the state to pass reasonable regulations dealing with the public health, safety, welfare and morals. These must be reasonable. They cannot be capricious and arbitrary. In general, the committee feels that the state has the right to . . . regulate firearms; that is to say, to determine who can have them and under what circumstances. It would have the right to make the owner of a firearm identify himself and get a card, as is required now under state law. . . . [T]he state would have the right, as has been exercised by the city of Chicago, to require the registration of firearms—if necessary, every one by serial number. And finally, we feel that under this provision,

12. COMMITTEE REPORT, 6 PROCEEDINGS, *supra* note 7, at 92.

13. The name Gertz may ring a bell. Elmer Gertz was the plaintiff in a well-known Supreme Court case, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court established the standard of First Amendment protection against defamation claims brought by private individuals.

14. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1686, 1692 (1970) [hereinafter 3 PROCEEDINGS].

15. *Id.* at 1687.

16. *Id.* at 1689.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category.²¹

It is clear from the record that at least some delegates (such as Foster and Arrigo) interpreted the Police Power Clause as preserving expansive powers of the state to regulate firearms. As indicated above, Foster felt that any “reasonable” regulation would be a permissible exercise of the state’s “absolute right” to regulate for the public health, safety, welfare, and morals.²² Yet, Foster also said, “It could be argued that, in theory, the legislature now has the right to ban all firearms in the state as far as individual citizens owning them is concerned. That is the power which we wanted to restrict—an absolute ban on all firearms. Nothing further.”²³ Thus, to reconcile Foster’s statements is to conclude that the only “unreasonable” form of firearm regulation would be an absolute prohibition of all firearm ownership. Everything to that point would remain a valid exercise of the police power. It would be, in Foster’s words, a “right limited by the police power extending up to but not including total abolition.”²⁴

Unsurprisingly, this expansive view of the police power (and correspondingly narrow view of the individual right) was disagreeable to other delegates. For example, Delegate Ronald Smith took issue with the near-absolute supremacy of the police power over an express individual right and “assumed that the standard definition of a right was an area that was not subject to the police power of the state.”²⁵ Foster retorted, “That might be your standard definition. I wouldn’t concur with it entirely.”²⁶

Delegate Gertz spearheaded the opposition to Section 22 and advocated the view that gun policy was entirely a matter for the legislature.²⁷ This argument was based largely on the fear that such a provision would “tie [the legislature’s] hands[.]”²⁸ Delegate Bernard Weisberg, though, had perhaps the most potent criticism of the new provision’s wording:

[T]he majority proposal is inevitably ambiguous and self-contradictory. I think this appears from the face of the language. The majority proposal puts together two concepts which are inconsistent with each other. On the one hand, it holds out the purported declaration of an individual right, the right to keep and bear arms. With the other hand, it seems to take away that right by stipulating that this right shall be subject to the police power of the state. Read at its face value, the right would therefore be an illusory

21. *Id.* at 1687.

22. *Id.*

23. *Id.* at 1688.

24. *Id.*

25. *Id.* at 1689.

26. *Id.*

27. *Id.* at 1692–93.

28. *Id.* at 1693.

right, depending upon what definition is given to the vague concept of the police power.²⁹

Weisberg feared the “high potential for mischief” created by the language—that courts would wrestle with the language of the provision and consequently invalidate gun laws enacted by the legislature.³⁰

Weisberg then turned to “the question of how the public will understand and interpret approval by the Convention of this new constitutional right,” and feared that the public would interpret the provision to grant a broader right to bear arms than intended by the delegates because of the average citizen’s unfamiliarity with legalistic concepts such as the “police power.”³¹ He was also wary of the courts placing limits on the police power, since a “lawyer’s argument” would be that “the court should interpret it in some reasonable fashion to try to give it some meaning and effect on the premise that the Constitutional Convention wasn’t doing an idle act, and that . . . some limitation should be placed upon the police power . . .”³²

Weisberg felt that the only kind of law that would exceed the police power would be a law “prohibit[ing] the possession or use of arms that law-abiding citizens commonly employ for purposes of recreation or the protection of person and property.”³³ Yet Weisberg’s main point, which perhaps proved prescient, was that he and the other delegates could not possibly determine what effect future courts would give to the police power.³⁴

Foster himself made conflicting statements. For example, he argued that “the 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.”³⁵ This statement suggests that *certain types* of firearms could not be banned under Section 22, contradicting his other claim that only absolute prohibition would exceed the police power.³⁶

Additionally, the Bill of Rights Committee’s report stated:

By referring to “the individual citizen” and to the right to “keep” as well as to “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 per-

29. *Id.*

30. *Id.*

31. *Id.* at 1694.

32. *Id.* at 1697.

33. *Id.* at 1700.

34. *Id.*

35. *Id.* at 1718 (emphasis added).

36. *Id.* at 1700.

sons commonly employ for purposes of recreation or the protection of person and property.³⁷

The report said nothing to indicate that laws prohibiting any category of “arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property” would be permissible, and a fair reading of the text in fact indicates the opposite.³⁸

Finally, the explanatory language submitted to the voters was similarly imprecise: “This new section states 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 safeguard the welfare of the community.”³⁹ Reading such language, one must wonder: Is it likely that the average downstate Illinoisan would understand this language as permitting a government confiscation of his old Remington hunting rifle, his Browning shotgun, or the Colt revolver in his nightstand? Probably not.

The views of only five individual delegates have been discussed here because—although some additional delegates gave their views on gun control generally—as Illinois Supreme Court Justice Thomas Moran recognized: “Little more than a handful of the 116 delegates expressed their opinion during the debates concerning the meaning of section 22.”⁴⁰ Like Congress, the Illinois Constitutional Convention was a “they,” not an “it.”⁴¹ Justice Moran thus soberly concluded: “[A]t most, the debates reflect a lack of consensus as to the meaning of section 22.”⁴²

Of course, it is not up to any individual delegate to determine what constitutes a “reasonable” regulation, or what are the bounds on the police power. These questions are left to the courts.

B. The Post-Con Con Case Law

The task of the courts “when construing a constitutional provision is to determine and effectuate the common understanding of the citizens who adopted it . . . and courts will look to the natural and popular meaning of the language used as it was understood when the constitution was adopted[.]”⁴³ This task is often much easier said than done, and one might suppose that Section 22—with its odd language protecting an individual right while also superflu-

37. COMMITTEE REPORT, 6 PROCEEDINGS, *supra* note 7, at 87.

38. *Id.*

39. PROPOSED 1970 CONSTITUTION FOR THE STATE OF ILLINOIS, OFFICIAL TEXT WITH EXPLANATION, 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2689 (1970) [hereinafter 7 PROCEEDINGS].

40. *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 283 (1984) (Moran, J., dissenting).

41. See, e.g., Kenneth J. Shepsle, *Congress Is a “They,” Not an “It”*: *Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

42. *Kalodimos*, 470 N.E.2d at 283 (Moran, J., dissenting).

43. *Kanerva v. Weems*, 13 N.E.3d 1228, 1239 (2014) (citations omitted).

ously invoking the police power—would be one such instance where discerning the true meaning of the provision is exceedingly difficult. In the decades since the convention, however, the courts have been quite consistent in their construction of Section 22.

Professor Ann Lousin⁴⁴ phrases it aptly: “Cases interpreting [Section 22] have favored the governmental regulations. They have noted that gun ownership and use is not a fundamental right, and therefore the government need only show a ‘rational basis’ for its regulation.”⁴⁵ Thus, although an individual right to keep and bear arms is plainly enumerated in the Illinois Bill of Rights,⁴⁶ it is afforded no more protection than one’s economic pursuits and the many other areas of life in which the government may interfere with only a mere showing of “rationality” for its actions. And, of course, under rational-basis review, the government typically need not show that the reason it gives actually *was* the impetus for its action.⁴⁷

The most important case interpreting Section 22 is *Kalodimos v. Village of Morton Grove*,⁴⁸ a 4-3 decision in which the Illinois Supreme Court upheld a local ordinance prohibiting handgun ownership. The majority opinion, after exploring the convention debates, adopted Delegate Foster’s view and concluded that the framers intended to allow for the prohibition of certain classes of firearms.⁴⁹ The court determined that the language “clearly leaves the right to bear any type of arms subject to the police power.”⁵⁰ The court then stated that it “has long recognized the police power comprehends laws ‘restraining or prohibiting anything harmful to the welfare of the people[.]’”⁵¹ To support this proposition, the court cited a case upholding a ban on the sale of *sparklers*.⁵² The only difference between sparklers and firearms, in the eyes of the court, is that firearms cannot be *absolutely* abolished; this was all that was accomplished by explicitly enumerating the individual right in the Illinois Bill of Rights.

The court summarily dismissed the argument that a higher standard than rational-basis review should apply to the right to keep and bear arms.⁵³ It never mentioned intermediate scrutiny and summarily dismissed strict scrutiny because the right to keep and bear arms “does not lie at the heart of the relationship between individuals and their government.”⁵⁴ The court, therefore, offi-

44. Professor Lousin was a research assistant at the convention and is now an Illinois constitutional law expert at the John Marshall Law School.

45. LOUSIN, *supra* note 2, at 77.

46. ILL. CONST. art. I, § 22 (1970).

47. See Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & Liberty 897, 897 (2005).

48. 470 N.E.2d 266 (1984).

49. *Id.* at 272–73.

50. *Id.* at 270.

51. *Id.* at 272 (citations omitted).

52. *Id.* (citing *Acme Specialties Corp. v. Bibb*, 358 U.S. 840 (1958)).

53. *Id.* at 278.

54. *Id.*

cially sanctioned an absolute ban on handgun ownership in Illinois—but it only did so over three dissenting votes and two vigorous dissenting opinions.⁵⁵

The first dissent, authored by Chief Justice Howard Ryan, focused on “the use of police power by the village of Morton Grove to ban the ownership of handguns.”⁵⁶ Ryan argued that, to justify a use of the police power, the action taken must seek to accomplish a proper purpose using a rational means.⁵⁷ Here, there was no proper purpose: “The purposes of the ordinance cited in its preamble were . . . pure and simple litany, inserted in the ordinance for window dressing and to help withstand constitutional challenge.”⁵⁸ In fact, based on the records of the Morton Grove Village Board, Ryan concluded the true end of this use of the police power was to “publiciz[e] a political viewpoint,” not to preserve health, safety, or welfare.⁵⁹ Ryan therefore argued the ordinance should be struck down: “If the police power can be exercised for the sole purpose of publicizing a political viewpoint, then I feel that our constitutionally guaranteed rights are in serious jeopardy.”⁶⁰

Justice Thomas Moran wrote a separate dissent disputing the court’s conclusion that local governments can enact “flat bans on the possession of ordinary handguns.”⁶¹ Moran reminded the court that “[a]lthough the constitutional debates may often be helpful in understanding the meaning of doubtful constitutional provisions, the true inquiry concerns the understanding of its provisions by the voters who, by their vote, have given life to the product of the convention.”⁶² Where the delegates had reached no consensus, the court has traditionally stayed away from relying too much on the words of certain delegates.⁶³ Moran could not help but point out the obvious—a court can cherry-pick statements made by certain delegates on almost any constitutional provision to support its view.⁶⁴

Moran focused less on statements by individual delegates—except to demonstrate their inconsistency—and more on the above-quoted committee report, which is best understood as considering handguns within a protected class of firearms.⁶⁵ The Committee Report indicated that three types of laws would be permissible under Section 22: (1) those regulating or prohibiting arms not commonly used for lawful purposes; (2) those regulating possession by the

55. *See id.*

56. *Id.* at 279 (Ryan, C.J., dissenting).

57. *Id.* at 280.

58. *Id.* at 280.

59. *Id.* at 281.

60. *Id.*

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

62. *Id.* (citing *Client Follow-Up Co. v. Hynes*, 390 N.E.2d 847, 853 (1979)).

63. *Id.*

64. *Id.*

65. *Id.* at 284–85.

mentally ill, felons, or minors; and (3) gun licensing and permit laws.⁶⁶ Nowhere did the report indicate a handgun ban would be permissible.⁶⁷

The next most important case also dealt with Morton Grove's ban on handgun ownership but was litigated in federal court because the law was also challenged under the federal Second Amendment. In *Quilici v. Village of Morton Grove*,⁶⁸ the Seventh Circuit miraculously held (with regard to the state constitutional challenge) that an absolute prohibition on handguns did not violate Section 22—even though handguns *are in the class of arms protected by Section 22*.⁶⁹

The Seventh Circuit based its conclusion largely on the debates, the Committee Report, and the case law cited within it: handguns were clearly “arms” covered by the provision.⁷⁰ The police power so limited the right to keep these arms, however, that a complete ban on handgun ownership did not violate that right.⁷¹ The court drew this conclusion from the fact that Section 22 “grants only the right to keep and bear *arms*, not *handguns*.”⁷² If the court's conclusion that the police power can be used to ban constitutionally protected firearms baffles the reader, you are in good company.

This case law, however, should be reevaluated in light of the current supreme law of the land as announced by the United States Supreme Court. While at the time of the 1969–1970 Con Con the federal Second Amendment was widely assumed to confer only a *collective* right—which spurned convention delegates to draft a state provision protecting an *individual* right—the ‘individual-rights’ approach . . . gained steam among academics in the late 1980s and ‘90s, as a surge of originalist debate flooded law reviews and shifted popular academic thinking the other way.’⁷³ In *District of Columbia v. Heller*,⁷⁴ the Supreme Court affirmed the individual-rights interpretation. Two years later, the Second Amendment was incorporated against the states in *McDonald v. City of Chicago*,⁷⁵ which dealt with another local Illinois handgun ban. Professor Lousin correctly notes, therefore, that “[i]t is doubtful whether *Quilici* and perhaps even *Kalodimos* are ‘good law’ after the U.S. Supreme Court's decision in [*Heller*.]”⁷⁶

66. *Id.* at 285.

67. *Id.*

68. 695 F.2d 261 (7th Cir. 1982).

69. *Id.* at 267, 269.

70. *Id.* at 266–67.

71. *Id.* at 267.

72. *Id.* (emphasis added).

73. LOUSIN, *supra* note 2, at 77; Sam Zuidema, Note, *Raising Heller: Constitutional Scrutiny in a New Age of Second Amendment Rights*, 2018 U. Ill. L. Rev. 817 (2018).

74. 554 U.S. 570, 592 (2008).

75. 561 U.S. 742, 791 (2010).

76. LOUSIN, *supra* note 2, at 77–78.

III. WHAT IS THE POLICE POWER?

The convention records and key Illinois case law have now been reviewed. Nevertheless, to approach something resembling a complete understanding of the Section, one must better acquaint oneself with the general concept of the police power. The debates sampled above demonstrate that the Police Power Clause has caused confusion from the beginning. Accordingly, this Section very briefly examines the nature and scope of the inherent police powers of the states.⁷⁷

The police power, despite having undergone centuries of explication, remains an elusive area of the law, “shrouded in doubt.”⁷⁸ Over a hundred years ago, Walter Wheeler Cook—a preeminent law professor at Yale in the early 20th century—described the police power as “the dark continent of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place.”⁷⁹ It “amounts in substance to saying that the government must not act unreasonably; that its laws shall not be arbitrary or in violation of the fundamental principles of liberty and justice.”⁸⁰ Most assuredly, “[i]t is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise.”⁸¹

Commonly understood today, the police power is the inherent authority of a state to regulate for the good of the health, safety, and (perhaps more controversially) the morals of its citizens.⁸² This power derives from a state’s sovereign authority over all areas of the law not delegated to the federal government.⁸³ Under the Tenth Amendment, what is not forbidden of the states under the federal Constitution is permissible under the inherent power of the state (its police power).⁸⁴ The Constitution imposes a number of limits on the states throughout Article I and the amendments.⁸⁵ But these are not the only limits; state constitutions, too, are self-imposed restrictions on the police power.⁸⁶

77. In first writing this Article, the Author underwent a textual analysis of Section 22. Unfortunately, the need for brevity precluded the inclusion of this section, but its conclusion was as follows:

It would, perhaps, be bold to proclaim that the application of these canons yields an obvious result. But they do seem to reiterate the need for clear boundaries on the scope of the police power, primarily so as to avoid violating the first fundamental principle above: undermining the manifest purpose of Section 22. This would be to render the individual right to bear arms illusory.

78. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 429 (2004).

79. Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907).

80. *Id.*

81. *Commonwealth v. Alger*, 61 Mass. 53, 85 (1851).

82. *See* Barnett, *supra* note 78, at 485.

83. *See* U.S. CONST. amend. X.

84. *Id.*

85. *See, e.g.*, U.S. CONST. art. I, § 10; *id.* amend. XIV.

86. Barnett, *supra* note 78, at 430.

Exercises of a state's police power have long been reviewed under rational-basis scrutiny, where the government must show that its act was rationally related to a legitimate government interest.⁸⁷ When the state constitution protects an enumerated individual right, however, the police power should be more restricted so as not to render the constitutional protection meaningless; after all, the constitutional identification of an individual right is itself a limit on the exercise of the police power, even if the constitution admits to the police power's existence.⁸⁸

As noted above, some Con Con delegates viewed absolute firearm prohibition as the only type of regulation that would be "unreasonable" under the police power.⁸⁹ But Professor Cook argued that one could not avoid mention of federal protections when discussing the state police power because a state has no legitimate police power which is denied to it by the federal Constitution.⁹⁰ Accordingly, arguments that a ban on handguns—"the quintessential self-defense weapon"—constitutes an unreasonable regulation on an explicit constitutional right to keep and bear arms may have more force today than at the Con Con, in light of recent Supreme Court precedent.⁹¹ *Heller* rejected both rational-basis review and the proposition that a right to own arms was not infringed as long as there was some available alternative.⁹²

IV. THE APPLICATION OF LOCKSTEP

Should the interpretation of a federal constitutional provision really affect the independent analysis of a state constitutional provision? This Author is hesitant to adopt this view, but Illinois courts have nonetheless adopted the "limited lockstep doctrine," in which the court will compare the state constitutional provision at issue with an analogous federal constitutional provision.⁹³ Under this approach, a state constitutional provision may be either (1) unique to the state constitution; (2) similar to a federal constitutional provision, but differing from it in some significant respect; or (3) identical to or synonymous with a federal provision, in which case the provisions are interpreted "in lockstep."⁹⁴ Illinois courts should select the third option and interpret Section 22 in lockstep with the federal Second Amendment. But why is this if the texts of the provi-

87. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

88. See *id.* ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . ."); Barnett, *supra* note 78, at 430.

89. See *supra*, Section II.A.

90. Cook, *supra* note 79, at 321.

91. See *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

92. *Id.* at 628 n.27, 629.

93. See *People v. Caballes*, 851 N.E.2d 26, 45 (2006).

94. *Id.* at 31–32.

sions vary appreciably? The answer is that there is more than one way to say the same thing; the two provisions, though differently worded, are synonymous. Nor would it be unusual for Illinois courts to interpret differently-worded provisions in lockstep with one another.⁹⁵

The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁹⁶ There are five reasons why Section 22 should be interpreted in lockstep with the Second Amendment. (1) The Second Amendment and Section 22 both protect an *individual* right to keep and bear arms.⁹⁷ (2) Though the preservation of the militia was the historical reason for codifying the Second Amendment, the right to bear arms is not predicated upon service in one.⁹⁸ Therefore, the absence of any mention of a militia in Section 22 should not preclude a lockstep approach. (3) Both the Second Amendment and Section 22 protect only arms commonly employed by law-abiding individuals for lawful purposes.⁹⁹ (4) Section 22’s Police Power Clause only reiterates what already impliedly rests with the state of Illinois, and therefore neither contributes to nor subtracts from the individual right identified therein.¹⁰⁰ (5) Because of Justice Clarence Thomas’s concurring opinion in *McDonald*, in which he argued that the Second Amendment applies against the states through the Privileges and Immunities Clause rather than the Due Process Clause, the Second Amendment only protects the right of *citizens* to keep and bear arms—as does Section 22.¹⁰¹

In other words, both the Second Amendment and Section 22 could effectively be rewritten as such without distorting their identical meaning: “The right of the individual citizen to keep and bear arms shall not be infringed.” Because the provisions are synonymous, the Illinois courts should adopt a lockstep approach.

The effect of this would be to broaden the Section 22 right beyond the extremely restrictive and unwarranted interpretation that courts have given it.¹⁰² Of course, this would not leave the state without power to regulate firearms. Under both the Second Amendment and Section 22, Illinois would have the

95. *See* Bd. of Educ., Sch. Dist. No. 142, Cook County v. Bakalis, 299 N.E.2d 737, 743–45 (1973) (interpreting ILL. CONST. art. X, § 3 in lockstep with the First Amendment’s Establishment Clause, despite their entirely dissimilar language).

96. U.S. CONST. amend. II.

97. *See* ILL. CONST. art. I, § 22; District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

98. *See* Heller, 554 U.S. at 577.

99. *See id.* at 627, 629; Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 273–74 (1984); COMMITTEE REPORT, 6 PROCEEDINGS 87.

100. *See supra*, Sections II, III.

101. McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring); *see also* Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”).

102. *See, e.g.*, Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (1984).

power to regulate firearm ownership among felons, youths, or the mentally ill; it could impose reasonable regulations on the carrying of firearms and firearm registration laws; and it could prohibit ownership of firearms not commonly employed by law-abiding citizens for lawful purposes.¹⁰³ States do have the police power to regulate firearms, but the explicit identification of an individual right in the Illinois constitution necessitates a more restrained police power in this area. Rational-basis scrutiny should not be the standard of review because it permits the drastic infringement of a clearly identified right, and under Illinois precedent, would only prohibit the extreme act of *absolute prohibition*.¹⁰⁴

The question remains: What standard should courts apply, if not rational-basis review? Federal courts, though far from unified, have largely applied some form of intermediate scrutiny to Second Amendment challenges.¹⁰⁵ But this Author suggests that this approach, too, is improper.¹⁰⁶ Rather, courts should apply the very test used in *Heller* itself: one based in text, history, and tradition.¹⁰⁷

V. CONCLUSION

The Illinois courts have been led astray in their interpretation of Section 22 by their overreliance on select statements of select delegates. They should revisit their approach and adopt an interpretation in lockstep with the Second Amendment. This broader interpretation would *not* eliminate the power of the state to regulate firearms—far from it—but it *would* revive a constitutional right that has been obliterated by the very courts entrusted with protecting it. Aside from the hortatory provisions in the Illinois constitution—and nobody has argued that Section 22 is hortatory—enumerated constitutional rights are not meaningless or illusory. They are individual freedoms meant to be protected, not contracted, by the courts of law.

103. See *Heller*, 554 U.S. at 626–27.

104. See *supra*, Sections II.A–B.

105. See, e.g., *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

106. For a more complete explanation, see Zuidema, *supra* note 73.

107. See *id.*