

COMMENT

SOME EXPLICITLY GUARANTEED RIGHTS ARE MORE FUNDAMENTAL THAN OTHERS: The Right to Bear Arms in Arizona

Jerod E. Tufte*

I. INTRODUCTION

Like the United States Supreme Court, the Arizona Supreme Court has avoided the issue of the proper construction of the right to keep and bear arms under its respective constitution. The United States Supreme Court has repeatedly denied certiorari in cases implicating the Second Amendment¹ since the 1939 decision in *United States v. Miller*.² Similarly, the Arizona Supreme Court has consistently declined review of cases that would require it to define the contours of article II, section 26 of the Arizona Constitution.³ When the Arizona legislature has legislated in such a way as to raise a substantial question of constitutionality, it is appropriate for the Arizona Supreme Court

* J.D. candidate, Arizona State University College of Law, 2002; B.S. Computer Engineering, Case Western Reserve University, 1997. The author wishes to thank his wife Mylynn Tufte for her support and encouragement.

1. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1262 n.296 (1992) (citing as examples *Burton v. Sills*, 248 A.2d 921 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969) and *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)).

2. 307 U.S. 174 (1939). *Miller* is the last Supreme Court case to address the Second Amendment. In it, the Court reversed the district court judgment that § 11 of the National Firearms Act, 26 U.S.C. 1132 (current version at 26 U.S.C. §§ 5801–72 (1994)), was unconstitutional under the Second Amendment. *Id.* at 175, 177, 183. Although frequently cited for the proposition that the Second Amendment does not guarantee an individual right to bear arms, it is important to note that *Miller* did not appear in his defense, and the Court reversed because there was no evidence presented tending to show that a short barrel shotgun had some relationship to militia use and was thus an “arm.” *Id.* at 178. *Miller* did not assert membership in an organized militia or the national guard. If, in the Court’s view, the Second Amendment protected only the collective militia, his lack of such membership would have been an easier way to dispose of the Second Amendment claim than a judicial inquiry into whether the arm was suitable for militia use. For these reasons, *Miller* is woefully inadequate to resolve the proper boundaries of the federal right to bear arms.

3. In one case, the court granted review and heard oral arguments before reconsidering and denying review as improvidently granted. *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990), *review granted* Jan. 15, 1991, *and review denied* 167 Ariz. 535 (Apr. 16, 1991); *see also* *City of Tucson v. Rineer*, 971 P.2d 207 (Ariz. Ct. App. 1998), *review denied* Jan. 12, 1999; *State v. Moerman*, 895 P.2d 1018 (Ariz. Ct. App. 1994).

to accept appellate review to determine the proper scope of constitutional rights.

The issue of state regulation of firearms is an important one for many people. Arizona adopted a “shall issue” concealed weapons permit system in 1994.⁴ Since that time, 100,000 permits have been issued, of which 61,000 were outstanding in November of 2000.⁵ Currently, about one out of every 100 Arizona residents has a state-issued permit to carry a concealed weapon.⁶ Both men and women, young and old, can and do carry handguns concealed on their person or in their car for personal protection. Many of them feel that it is a right guaranteed to them by the Arizona Constitution that “shall not be impaired.”⁷ No right in modern society is absolute, but the right of self-defense and the necessary corollary right to bear arms is sufficiently important that it deserves stronger protection from the courts commensurate with the language of the constitution and the intent of the framers.

This Comment suggests that the Arizona Supreme Court should recognize the right to bear arms in self-defense as a fundamental right under the Arizona Constitution and give it protection equivalent to that it affords other fundamental rights. This suggestion is based upon consideration of the treatment given to other rights explicitly guaranteed in the constitution, the intent of the framers in light of the records of the state constitutional convention, and the reasoning of other state courts. This Comment also examines three recent Arizona Court of Appeals cases discussing the right to bear arms under the state Constitution. The Comment concludes by considering the application of a fundamental rights approach to existing Arizona firearms regulations.

4. ARIZ. REV. STAT. ANN. § 13-3112(E) (West Supp. 2000). Under this section, the state “shall issue” a concealed weapons permit to any applicant who is a U.S. citizen or Arizona resident, at least 21 years old, and not a felon, illegal alien, or mentally ill. *Id.*

5. Telephone Interview with Dave Thompson, Officer, Concealed Weapons Permit Unit, Arizona Department of Public Safety (Nov. 20, 2000).

6. The 1999 U.S. Census Bureau population estimate for Arizona was 4,778,332. U.S. Census Bureau State Population Estimates: Annual time series at <http://www.census.gov/population/www/estimates/statepop.html> (last visited Jan. 27, 2001).

7. ARIZ. CONST. art. II, § 26.

II. A FUNDAMENTAL RIGHTS APPROACH TO ARTICLE II, SECTION 26 OF THE ARIZONA CONSTITUTION⁸

A. Rules of Construction for Constitutional Provisions

The primary focus of constitutional interpretation is to give effect to the intent of the framers.⁹ Where the constitutional “mandate is clear and unambiguous, there is but one thing for the court to do, and that is to follow such mandate, regardless of the results.”¹⁰ The words of a constitutional provision “are to be given their natural, obvious, and ordinary meaning.”¹¹ When a constitutional provision is not clear on its face, however, the court may look to extrinsic evidence, such as the records of the constitutional convention and existing legislation at the time to determine the intent of the framers.¹²

Provisions of the constitution “are to be construed liberally to carry out the purposes for which they were adopted.”¹³ In cases where the constitutional provision at issue is designed to safeguard individual liberty, “every reasonable doubt should be resolved in favor of such liberty.”¹⁴ A clear intention to depart from the territorial laws by adopting a contrary provision may be an important consideration.¹⁵ In addition, many sections of the Arizona Constitution were copied verbatim from the Washington Constitution.¹⁶ If the Washington Supreme Court adopted a particular construction of one of its constitutional provisions prior to its adoption by the Arizona Constitutional Convention, and such construction is reasonable, that construction is “very persuasive, if not binding.”¹⁷

8. “The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.” *Id.*

9. *Desert Waters, Inc. v. Super. Ct.*, 370 P.2d 652, 655 (Ariz. 1962).

10. *Hudson v. Brooks*, 158 P.2d 661, 664 (Ariz. 1945) (quoting *Taylor v. Frohmiller*, 79 P.2d 961, 965 (Ariz. 1938)).

11. *County of Apache v. SW Lumber Mills, Inc.*, 376 P.2d 854, 856 (Ariz. 1962) (construing broadly a constitutional provision exempting manufacturers’ inventories from taxation by looking to the purpose of the tax provision and not to a definition provided in a contemporaneous statute).

12. *Id.*

13. *Laos v. Arnold*, 685 P.2d 111, 112 (Ariz. 1984).

14. *Stone v. Stidham*, 393 P.2d 923, 925 (Ariz. 1964) (holding the constitutional prohibition against imprisonment for debt applicable to some alimony payments).

15. *Laird v. Sims*, 147 P. 738, 740 (Ariz. 1915) (finding “a manifest lack of intention to follow the language of the organic laws of the territory”).

16. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, 658-59, 762 (John S. Goff ed., 1991) [hereinafter RECORDS].

17. *Ariz. E. R.R. v. Hinton*, 179 P. 963, 963 (Ariz. 1919).

The Arizona courts have repeatedly followed the United States Supreme Court in stating that a fundamental right is one that is “explicitly or implicitly guaranteed by the Constitution.”¹⁸ When reviewing a statute for constitutionality, if it encroaches on a fundamental right, it will receive strict scrutiny review.¹⁹ Under strict scrutiny review, a statute will be struck down as unconstitutional unless it is “necessary” to achieve a “compelling state interest.”²⁰ Where the statute at issue is merely one of economic or social regulation that does not impact a fundamental right, the court applies a deferential rational basis test.²¹ Under the rational basis test, a statute will be upheld “if it is reasonably related to a legitimate state objective.”²² When applying a rational basis test, the court gives any legislative enactment a strong presumption of constitutionality.²³ In addition, doubts as to constitutionality are to be resolved in favor of the act, and a statute will be given a constitutional construction if at all possible.²⁴

B. The Original Intent of the Arizona Right to Bear Arms Guarantee

1. The Language of the Provision Is Clear on Its Face

The right to bear arms is protected in the Arizona Constitution with the broad terms “shall not be impaired.”²⁵ There are three qualifications expressed in the language of the provision. All are relevant to this discussion of the proper limitations on bearing arms under the Arizona Constitution. First, the guarantee is limited to “individual citizen[s],”²⁶ not all persons, as some state constitutions provide. The second qualification is that the right is limited to bearing arms “in defense of himself or the State.”²⁷ The third qualification

18. *Bryant v. Cont’l Conveyor & Equip. Co.*, 751 P.2d 509, 512 (Ariz. 1988) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973)), *overruled on other grounds by Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 630 (Ariz. 1993); *Kenyon v. Hammer*, 688 P.2d 961, 971 (Ariz. 1984); *Evenstad v. State*, 875 P.2d 811, 819 (Ariz. Ct. App. 1993); *Ariz. Farmworkers Union v. Agric. Employment Relations Bd.*, 712 P.2d 960, 963 (Ariz. Ct. App. 1985).

19. *Bryant*, 751 P.2d at 512.

20. *Id.*

21. *Id.* at 512-13.

22. *Graville v. Dodge*, 985 P.2d 604, 610 (Ariz. Ct. App. 1999).

23. *State v. Tocco*, 750 P.2d 874, 877 (Ariz. 1988).

24. *Id.*; *Valley Nat’l Bank of Phoenix v. First Nat’l Bank of Holbrook*, 320 P.2d 689, 694 (Ariz. 1958).

25. ARIZ. CONST. art. II, § 26 (“The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.”).

26. *Id.*

27. *Id.*

states that the right does not extend to the employment of “an armed body of men.”²⁸

Where the constitutional language is “clear and unambiguous,” no further inquiry by the court is required.²⁹ The majority of Arizona cases and cases relied upon by Arizona courts relate to one of the express qualifications.³⁰ Yet, the courts summarily characterize the right to bear arms as not absolute without relying on an express qualification.³¹ In only the three recent cases has the Arizona Court of Appeals been confronted with situations that fall clearly within the guaranteed right of an ordinary citizen to bear arms in defense of himself.³² In the three cases discussed below, the court either stated that the intent of the constitutional guarantee was not frustrated or pointed to the existence of statutes barring the carrying of concealed weapons around the time of the adoption of the constitution in 1910. Relying on this apparent contradiction to the clear language of the constitution, the court wrongly applied a rational basis test and upheld the use of the police power to regulate the manner in which a citizen may carry weapons in self-defense. Where the right at issue is expressly guaranteed and the constitutional text is clear, the court should start and end with the constitutional text. Only where the text is unclear should the court look to extrinsic evidence of the framers’ intent, such as the records of the constitutional convention.

2. The Records of the Constitutional Convention of 1910

Even though the constitutional text is clear, the records of Arizona’s constitutional convention also show that the right to bear arms is a fundamental right. The records of the Arizona Constitutional Convention of 1910 reflect some of the debate surrounding what is now article II, section 26 of the Arizona Constitution and indicate that two votes were taken regarding

28. *Id.* This qualification was added in response to the growing use of large private security forces by industrial companies in labor disputes. JOHN R. MURDOCK, *THE CONSTITUTION OF ARIZONA* 49 (1929).

29. *Hudson v. Brooks*, 158 P.2d 661, 664 (Ariz. 1945) (discussing *Taylor v. Frohmler*, 79 P.2d 961, 964 (Ariz. 1938)).

30. *See, e.g., State v. Rascon*, 519 P.2d 37, 38 (Ariz. 1974) (holding that possession of firearm by felon on parole not protected by Arizona Constitution); *State v. Noel*, 414 P.2d 162, 164 (Ariz. Ct. App. 1966) (holding that a felon must prove that he or she has regained full status as a citizen before he or she will be afforded the constitutional right to bear arms); *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968) (bearing arms to the terror of the public not protected).

31. *State v. Moerman*, 895 P.2d 1018, 1021-22 (Ariz. Ct. App. 1994); *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990).

32. *City of Tucson v. Rineer*, 971 P.2d 207 (Ariz. Ct. App. 1998) (rejecting challenge to absolute ban on guns in parks by non-felon carrying a pistol for self-defense); *Moerman*, 895 P.2d at 1023-24 (rejecting challenge to Arizona concealed weapons ban by two men carrying pistols concealed in fanny packs); *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990) (rejecting declaratory judgment challenge to Arizona concealed weapons ban).

this provision.³³ These two votes strongly suggest that some members of the convention felt there should be no constitutional provision securing the right to bear arms, and others wanted to limit the manner of bearing arms to arms carried in plain sight. The original text, copied from the Washington Constitution,³⁴ is what eventually was approved as article II, section 26. That section reads: “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.”³⁵

On the evening of November 25, 1910, convention delegate Baker moved to strike section 32 (now section 26) in its entirety.³⁶ Mr. Baker stated:

I never in all my life found it necessary to carry a six shooter and I have passed through nearly all the scenes and experiences of this wild and unsettled country. Carrying arms is dangerous. It is a very dangerous thing to oneself and to one’s associates and should not be permitted under any circumstances. I have seen lives lost and innocent blood spilled just through the carrying of arms, concealed weapons, under one’s coat or shirt. It is most dangerous and vile, a practice that should never be permitted except in times of war and never in time of peace. Think of it: carrying a six shooter or a knife or some other terrible arm of defense, and then in a moment of heated passion using that weapon. I do not believe in it, and I move to strike out that section.³⁷

Mr. Webb, seconding Mr. Baker’s motion, commented that he had “never seen the time when it was necessary to carry concealed weapons except in times of Indian troubles.”³⁸ A vote on Mr. Baker’s motion to strike section 32 is not recorded. The convention records report the defeat of two proposed amendments to this section later that same evening.³⁹

The first motion to amend, proposed by Mr. Parsons, would have replaced section 32 with the following: “The people shall have the right to bear arms for their safety and defense, but the legislature shall regulate the exercise of this right by law.”⁴⁰ This motion failed on a voice vote.⁴¹ The second proposed

33. RECORDS, *supra* note 16, at 678-79.

34. WASH. CONST. art. I, § 24.

35. ARIZ. CONST. art. I, § 26.

36. RECORDS, *supra* note 16, at 678.

37. *Id.*

38. *Id.*

39. *Id.* at 678-79.

40. *Id.* at 678. This proposed language would have clearly made the right to bear arms subject to reasonable regulation under the police power. Similarly, Illinois’ provision begins “[s]ubject only to the police power.” ILL. CONST. art. I, § 22. In contrast, the language adopted by the convention

amendment, introduced by Mr. Crutchfield, would have inserted after the word “impaired” the following language: “But the legislature shall have the right to regulate the wearing of weapons to prevent crime.”⁴² This proposed amendment failed on a roll call vote by a vote of twenty-two in favor and twenty-three against.⁴³ The results of these two votes indicate that the original intent of the delegates to the convention was to prohibit state regulation of the peaceful carrying of weapons.⁴⁴ Although the convention delegates may have merely been acting out of an abundance of caution to make explicit the police power they believed the State implicitly retained over the carrying of weapons, the rejection of the amendment after debate about concealed weapons is better interpreted as a rejection of the State’s power to regulate arms bearing.

3. Other State Constitutions and Cases

The framers of the Arizona Constitution did not start out with a clean slate. The delegates to the convention had at hand the constitutions of many other states, as reflected by the enumeration of 34 different states’ provisions for suspension of habeas corpus.⁴⁵ The committee on preamble and declaration of rights considered the declarations of rights in other state constitutions.⁴⁶ The declaration of rights adopted in the convention was taken entirely from the constitution of Washington and then “one or two small amendments and four or five sections [were] added.”⁴⁷ Thus, a brief examination of the constitutions of several other states, particularly Washington, is helpful in clarifying what

explicitly contains only three narrow qualifications, and no explicit general qualification. *See supra* Part II.B.1.

41. RECORDS, *supra* note 16, at 678.

42. *Id.*

43. *Id.* at 679.

44. These two provisions were not the only alternatives proposed at the convention. Three other provisions were also proposed at the convention, but did not reach a vote. *Id.* at 684. Each of these is also narrower than the language eventually adopted.

Proposition No. 98, section 4, would have guaranteed the following: “The right of the people to keep or bear arms for their own defense and that of the State shall not be infringed. The Legislature shall have the power to regulate the wearing of arms to prevent crime.” *Id.* at 1247.

Proposition No. 104, section 9, would have guaranteed the following: “The right of the people to keep and bear arms shall not be denied or abridged; but this section shall not be construed to deny the right of the law-making power to regulate or prohibit the carrying of concealed weapons upon the person.” *Id.* at 1252.

Proposition No. 116, section xvii, would have guaranteed the following: “That the right of no citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.” *Id.* at 1297.

45. *Id.* at 761-62.

46. RECORDS, *supra* note 16, at 759-60; see John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 81-88 (1988).

47. RECORDS, *supra* note 16, at 658-59.

the delegates to the constitution might have intended in the declaration of rights. The language differences between Arizona's bear arms provision and the provisions adopted by other states, as well as case law prior to 1910 that interpreted those provisions, are of particular importance.

a. Washington

The Declaration of Rights in the Arizona Constitution was in large part copied from the Washington Constitution.⁴⁸ Other than punctuation, the bear arms provision in the Washington Constitution is identical to the one adopted by the delegates to the Arizona Constitutional Convention.⁴⁹

As indicated in *State v. Gohl*,⁵⁰ as far back as 1907 the state courts of Washington have uniformly held that the constitutional right to keep and bear arms is subject to reasonable regulations under the police power.⁵¹ Because it was decided prior to the Arizona Constitutional Convention, *Gohl* carries special precedential weight.⁵² It sheds little new light on the general regulation of bearing arms, however, because the defendant was convicted of employing an armed body of men, an offense that falls squarely within the express qualification of the two bear arms provisions.

b. Other States

The framers of the Arizona Constitution should be assumed to have been aware of not only the provisions of other state constitutions, but also important court cases construing these provisions that upheld the right to carry arms in a concealed manner. In 1903, the Supreme Court of Vermont voided a city ordinance prohibiting the wearing of concealed weapons.⁵³ The court found the ordinance, requiring written permission of the Mayor or Police Chief to carry a concealed weapon, repugnant to the state constitution's guarantee of the right to bear arms.⁵⁴

48. *Id.*; Leshy, *supra* note 46, at 82 & n.501.

49. WASH. CONST. art. I, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.").

50. 90 P. 259 (Wash. 1907).

51. *Id.* at 260 (affirming conviction for employing an armed body of men against constitutional right to bear arms challenge).

52. *See supra* notes 16-17 and accompanying text.

53. *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903). This case has never been overruled, and as a result, any person in Vermont may carry a concealed weapon for self-defense without a permit.

54. *Id.* Vermont's constitution provides:

That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.

VT. CONST. art. 16.

Similarly, in 1822, the Kentucky Supreme Court voided a state prohibition of carrying concealed weapons in *Bliss v. Commonwealth*.⁵⁵ After conviction at trial for carrying a sword concealed in a cane, the defendant argued that the concealed weapons ban violated his right to bear arms.⁵⁶ In 1822, the Kentucky Constitution provided: “that the right of the citizens to bear arms in defence of themselves and the state, shall not be questioned.”⁵⁷ The court reasoned that the statute could not be upheld as a regulation of the manner of carry, because “whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution.”⁵⁸ The Kentucky Constitution of 1875, adopted during Reconstruction, contained amended language expressly giving the state the power to regulate concealed weapons.⁵⁹ Subsequent to *Bliss*, other states amended their constitution to explicitly grant the state the power to regulate the concealed carrying of weapons.⁶⁰

New Mexico adopted its constitution on January 21, 1911, less than two months after Arizona adopted its constitution. For this reason, it is particularly relevant in construing the intended boundaries of the Arizona provision because the delegates of the two neighboring states were necessarily considering the same legal and political context. As adopted in 1911, New Mexico’s constitution provided: “The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.”⁶¹ Thus, the delegates to the New Mexico convention, considering the same legal context, chose to qualify the right to bear arms with an express exclusion of concealed weapons.⁶²

55. 12 Ky. (2 Litt.) 90, 94 (1822).

56. *Id.* at 90.

57. KY. CONST. art. 10, § 23 (1822).

58. *Bliss*, 12 Ky. (2 Litt.) at 91-92.

59. “All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.” KY. CONST. § 1.

60. The Constitutional Convention of 1875 added the following language to the North Carolina bear arms guarantee: “Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice.” N.C. CONST. art. I, § 24 (1875) (current version at § 30). Missouri also added similar language in 1875. MO. CONST. art. I, § 23.

61. N.M. CONST. art. II, § 6 (amended 1971, 1986). The 1971 amendment added hunting and recreational uses to the protected right, and the 1986 amendment added state preemption of firearms regulation over cities and counties. Section 6 now reads: “No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.” N.M. CONST. art. II, § 6.

62. Eight other state constitutions contain similar express exclusions of concealed weapons from the right to bear arms. COLO. CONST. art. II, § 13; IDAHO CONST. art. I, § 11; KY. CONST. bill

4. Other Circumstances in Existence in 1910

Arizona courts have included the statutes existing at the time of the convention as a factor to be considered in a determination of the intent of the framers.⁶³ The 1901 Penal Code of the Arizona Territory contained a broad restriction of concealed weapons.⁶⁴ Although this may suggest that the framers intended that a regulation of concealed weapons be within the police power of the state as a reasonable regulation of the right to bear arms, it is far from conclusive. Carrying weapons was still common in 1910, and it may have been thought that no honest man had any reason to hide his sidearm.

When examined in light of the above-mentioned Vermont and Kentucky cases and the provisions of the constitutions of Kentucky, New Mexico, and other states that explicitly grant the state the power to regulate the carrying of concealed weapons, the debate and Arizona's final constitutional language take on a more libertarian cast. The debate and the close 23-22 vote against a proposed provision of the Arizona Constitution allowing the state to regulate the exercise of the right reflect that even in 1910 "gun control" was a contentious issue that sharply divided the people of Arizona.⁶⁵ The close vote illustrates that the side in favor of individual rights won the day. The debates at the convention reflect the delegates' intention to change the territorial penal code, because here, as the Arizona Supreme Court stated in 1915 when considering a difference in the pardoning power under the new constitution: "[t]here is a manifest lack of intention to follow the language of the organic laws of the territory."⁶⁶

The inclusion of a ban on concealed carry in the 1913 penal code should not be interpreted as reflecting a specific intent of the first legislature to ban concealed weapons. The 1913 penal code was simply a complete codification of the existing territorial laws.⁶⁷ The lack of a constitutional challenge may be explained by the existence of a society more tolerant of openly wearing a

of rights, § 1, para. 7; LA. CONST. art. I, § 11; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.C. CONST. art. I, § 30.

63. *County of Apache v. Southwest Lumber Mills, Inc.*, 376 P.2d 854, 855 (Ariz. 1962); *State v. Moerman*, 895 P.2d 1018, 1022 (Ariz. Ct. App. 1994).

64. Rev. Stat. of Ariz. Terr., Penal Code, tit. 11, § 382 (1901) ("[I]t shall be unlawful for any person (except a peace officer in actual service and discharge of his duty), to have or carry concealed on or about his person, any pistol or other firearm . . ."), *quoted in Moerman*, 895 P.2d at 1022.

65. *See supra* Part II.B.2.

66. *Laird v. Sims*, 147 P. 738, 740 (Ariz. 1915).

67. ARIZ. CONST. art. XXII, § 2 ("All laws of the Territory of Arizona now in force, not repugnant to this Constitution, shall remain in force . . .") The Code Commissioner was charged with codifying the territorial laws, not passing on whether any were repugnant to the state constitution. Act of May 16, 1913, ch. 64, § 2, 1913 Ariz. Sess. Laws 17 (3d Special Sess.) (indicating that the Code Commissioner must compile all laws "not repealed or adjudged unconstitutional by the Supreme Court of Arizona"); Act of May 2, 1912, ch. 12, § 1, 1912 Ariz. Sess. Laws 25 ("[I]t shall be [the] duty [of the Code Commissioner] to compile, revise, and codify the laws of the State of Arizona.").

pistol on one's hip. It was only when the social stigma attached to gun ownership, and particularly gun carrying, grew to a sufficient degree that Arizona citizens were inspired to challenge it.⁶⁸ The debates and defeated amendments, along with the above cited cases and amendments to other states' constitutions outweigh the persuasiveness of the existence of a prior territorial law barring concealed carry. The subsequent passage of a similar ban cannot change the original intent of the constitutional guarantee. If the 1913 statute determines the boundary of the constitutional right to bear arms, that right is made nearly meaningless in the present day where openly carrying weapons gives rise to a substantial social stigma as well as undue police attention.

III. THREE RECENT ARIZONA COURT OF APPEALS CASES⁶⁹

A. *Dano v. Collins*⁷⁰

Dano was a declaratory judgment action in which the plaintiff requested that the prohibition of carrying concealed weapons in Arizona Revised Statutes title 13, section 3102(A)(1)–(2)⁷¹ be declared unconstitutional. Plaintiff claimed a violation of the right to bear arms guaranteed by article II, section 26 of the Arizona Constitution.⁷² In response to plaintiffs' claims, the court cited several cases for the proposition that the right to keep and bear arms is not absolute.⁷³ The court suggests that there is a broad police power in this area by citing one Arizona Court of Appeals case and nine cases from the courts of other states, most of which uphold various restrictions on *possession* of weapons, not concealment thereof.⁷⁴

68. See *Moerman*, 895 P.2d at 1020-21; *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990).

69. Notably, two of the three opinions were written by the same judge, Judge Voss. *Moerman*, 895 P.2d 1018; *Dano*, 802 P.2d 1021.

70. 802 P.2d 1021 (Ariz. Ct. App. 1990).

71. (A) A person commits misconduct involving weapons by knowingly:

1. Carrying a deadly weapon except a pocket knife concealed on his person; or
2. Carrying a deadly weapon concealed within immediate control of any person in or on a means of transportation.

ARIZ. REV. STAT. ANN. § 13-3102(A)(1)–(2) (West 1989) (current version at ARIZ. REV. STAT. ANN. § 13-3102(A) (West Supp. 2000)).

72. *Dano*, 802 P.2d at 1022.

73. *Id.* at 1023 (citing *Carfield v. State*, 649 P.2d 865 (Wyo. 1982), *People v. McFadden*, 188 N.W.2d 141 (Mich. Ct. App. 1971), and others).

74. *Id.* (finding that the state may prohibit possession by convicted felon (citing *State v. Noel*, 414 P.2d 162 (Ariz. Ct. App. 1966)); *Second Amendment Found. v. City of Renton*, 668 P.2d 596, 597-98 (Wash. Ct. App. 1983) (finding that the state may limit possession in places where "alcoholic beverages are sold").

Only two of the nine cases cited by the *Dano* court directly support the proposition that the state may regulate the carrying of weapons in the face of an unqualified state constitutional guarantee.⁷⁵ In the first, the Michigan Court of Appeals upheld a Michigan law requiring a license to carry a concealed weapon.⁷⁶ This case supports the *Dano* court's proposition that the right to bear arms is not absolute, but the Michigan concealed carry law was upheld against a challenge that the licensing process was void for vagueness, not that the license requirement was in violation of the Michigan Constitution's bear arms guarantee.⁷⁷ The second case cited by the *Dano* court, *Matthews v. State*,⁷⁸ strongly supports the proposition that the state has plenary powers over bearing arms. The Indiana Supreme Court, with one dissent, upheld a state licensing scheme that required a license for a person to carry a pistol outside of his home or business.⁷⁹ This result is analogous to that in *Dano*, and is reached under a similarly worded constitutional guarantee.⁸⁰ The restriction upheld in *Matthews* is not the complete ban on carrying concealed weapons upheld in *Dano*, but it does support a police power to regulate the right to bear arms in a state with a strongly worded constitutional guarantee.

The *Dano* court purported to adopt a standard of review somewhat more stringent than a rational relationship test.⁸¹ After stating that the right could not be stifled broadly where the purpose could be achieved by narrower means, the court concluded incongruously and without discussion that "[t]he right to bear arms in self-defense is not impaired by requiring individuals to carry weapons openly."⁸² The test stated in *Dano* is not quite the strict scrutiny applied to other fundamental rights, because although it requires narrowly tailored means, it requires only "a legitimate governmental purpose"—not a compelling one.⁸³ If properly applied, the stated test may give the level of protection appropriate to a right explicitly guaranteed by the Constitution.⁸⁴ In this case, however, the court failed to make any determination as to what degree individual arms bearing in self-defense was

75. *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958); *McFadden*, 188 N.W.2d at 143-44.

76. *McFadden*, 188 N.W.2d at 143-44.

77. *Id.*

78. 148 N.E.2d 334 (Ind. 1958).

79. *Id.* at 338.

80. See IND. CONST. art. I, § 32 ("The people shall have a right to bear arms, for the defense of themselves and the State.").

81. "[A] legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990) (citing *State v. Comeau*, 448 N.W.2d 595, 598 (Neb. 1989)).

82. *Id.*

83. *Id.*

84. Reduction of the compelling state interest requirement to a requirement of only a legitimate state interest would likely have little difference in result, as a state interest in reducing deaths involving firearms would probably always be deemed compelling.

stifled by the statutory prohibition. The court also failed to consider any narrower means by which the state may accomplish the same public safety goals.

The *Dano* court's failure to meaningfully consider the tailoring requirement is an important omission. There are many reasons why one might choose to conceal a personal defense weapon rather than bear it openly. First, in many communities there is such a significant social stigma attached to guns that many people would be compelled not to exercise their rights at all rather than exercise them in so public a fashion. Second, there are substantial self-defense advantages to concealing the fact that one is armed: in any sudden physical conflict with an attacker, the element of surprise is an advantage and one is less likely to be disarmed by an attacker at the outset of an attack if the attacker is unaware of the presence of a firearm. Furthermore, the deterrent effect on criminals is shared by all when the criminals do not know who is armed.⁸⁵

The court stated the purpose of the statute was to "protect[] the public by preventing an individual from having on hand a deadly weapon of which the public is unaware, and which an individual may use in a sudden heat of passion."⁸⁶ The prohibition on concealed weapons upheld in *Dano* cannot serve the purpose attributed to it *unless* it is broadly stifling. The court did not explain how requiring people to carry weapons openly rather than concealed would increase public safety. The State had at least two more narrowly tailored options available to it in 1990. First, Arizona could have simply made criminal intent an element of the concealed weapons offense, as does Vermont.⁸⁷ Second, Arizona could have instituted a concealed weapons permit system, as several other states had done prior to 1990⁸⁸ and which it later did in 1994.⁸⁹ Consideration of either of these options should have led the *Dano* court to strike down the absolute ban. The court wrongly relied on the paternalistic justification that weapons are dangerous in any person's hands because one could fly into a heat of passion without notice. With this rationale, the *Dano* court reduced a strongly worded constitutional guarantee by such a degree that it no longer comports with the language of the guarantee.

85. See generally JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (1998).

86. *Dano*, 802 P.2d at 1023.

87. See *State v. Rosenthal*, 55 A. 610, 610-11 (Vt. 1903) (citing VT. STAT. 4922 (1892), currently at VT. STAT. ANN. tit. 13, § 4003 (1998)).

88. Ryan S. Andrus, Note, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129, 130 n.12 (2000).

89. ARIZ. REV. STAT. ANN. § 13-3112 (West Supp. 2000).

B. State v. Moerman⁹⁰

In 1994, the constitutionality of title 13, section 3102(A)(1) was again challenged, this time by two men who were charged with illegally carrying handguns inside fanny packs specially designed for that purpose.⁹¹ Once again the Arizona Court of Appeals addressed the defendants' argument that the intent of the framers was to not grant the state the power to regulate the manner in which a citizen may carry weapons.⁹² The defendants pointed out that the framers had twice voted down amendments that would have limited the right to bear arms by giving the state the power to regulate concealed carrying of weapons.⁹³ Hence, the defendants asserted, the framers demonstrably did not intend the state to have the power to regulate the manner in which citizens may bear arms.⁹⁴ The court disagreed, noting that these two proposed amendments would have modified the right in other ways as well.⁹⁵ The court concluded that in its view, the framers had no intent "to make Arizona's right to bear arms absolute."⁹⁶

Unpersuaded by the constitutional convention records, the *Moerman* court went on to say that the "plain wording" of the guarantee shows that the right is qualified.⁹⁷ The court focused on the stated purpose in article II, section 26 of the Arizona Constitution: "the right of the individual citizen to bear arms *in defense of himself or the State* shall not be impaired."⁹⁸ This supports the court's repeated statements that the right is not absolute, in that by the plain wording, a person has no right to bear arms for purposes other than defense of himself or the state. It does not, however, support the power of the state to regulate the manner in which an individual citizen may bear arms "*in defense of himself*," as were the defendants. By qualifying the right to exclude purposes other than defense of self and state, the framers gave the state the power to regulate bearing arms for those other purposes, but not for the purposes specifically protected. Citing its earlier decision in *Dano*, the court again upheld the constitutionality of title 13, section 3102(A)(1) under the rationale that the public requires notice when a citizen is armed, because that citizen may use his weapon "in a sudden heat of passion."⁹⁹

90. 895 P.2d 1018 (Ariz. Ct. App. 1994).

91. *Id.* at 1020.

92. *Id.* at 1020-22.

93. *Id.* at 1021; *see also supra* notes 40-44 and accompanying text.

94. *Moerman*, 895 P.2d at 1021.

95. *Id.* at 1022. One amendment would have guaranteed the right to bear arms for *safety* and defense, not just in defense of self, and the other would have eliminated the explicit prohibition on employing armed bodies of men. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1024.

C. City of Tucson v. Rineer¹⁰⁰

The third recent case to raise a challenge to a firearms regulation on constitutional grounds is *City of Tucson v. Rineer*. The defendant, Ken Rineer, believed Tucson's ban on guns in parks to be unconstitutional, so he arranged through his attorney to be arrested in a park while carrying a weapon as a test case to challenge the ordinance.¹⁰¹ Rineer won dismissal of the charge in city court by arguing that the ordinance was unconstitutional. The City of Tucson appealed to Superior Court, which reversed the dismissal.¹⁰² Rineer appealed to the Arizona Court of Appeals, challenging his conviction under the Tucson ordinance banning guns in parks as a violation of (1) the state preemption of firearms laws under Arizona Revised Statutes title 13, section 3108¹⁰³ and (2) his right to bear arms in self-defense as guaranteed by the Arizona constitution.¹⁰⁴ Citing *Moerman* and *Dano* for the proposition that the right to bear arms is not absolute, the court dismissed Rineer's constitutional argument. The court stated that the framers of the Arizona Constitution did not intend to prohibit regulation of carrying weapons.¹⁰⁵ The court cited Arizona statutes from 1901 and 1913 that prohibited the carrying of concealed weapons in most circumstances.¹⁰⁶ The 1901 and 1913 statutes show only that prior to its constitutional convention, the Arizona territorial government restricted concealed weapons and that the new state government codified the existing criminal laws.¹⁰⁷ They do not reflect particularized intent about the scope of the constitutional guarantee.

Rineer argued that prior cases upholding regulation of arms bearing were limited to situations that did not impair a citizen's right to defend himself.¹⁰⁸ In response, the court, citing *State v. Rascon*,¹⁰⁹ pointed out that the Arizona

100. 971 P.2d 207 (Ariz. Ct. App. 1998).

101. Telephone Interview with Ken Rineer (Jan. 7, 2001).

102. *Id.*

103. At the time *Rineer* was decided, section 13-3108(A) provided: "Ordinances of any political subdivision of this state relating to the transportation, possession, carrying, sale and use of firearms in this state shall not be in conflict with this chapter." ARIZ. REV. STAT. ANN. § 13-3108(A) (West 1989). Rineer lost his preemption argument. Section 13-3108(A) was amended in the wake of *Rineer* to more clearly reflect the intent of the state to preempt all firearms regulation within the state. ARIZ. REV. STAT. ANN. § 13-3108(A) (West Supp. 2000) (reflecting changes made by Laws 2000, ch. 376, § 2).

104. *Rineer*, 971 P.2d at 211-14.

105. *Id.* at 211-12 (citing *State v. Moerman*, 895 P.2d 1018 (Ariz. Ct. App. 1994), and *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990)).

106. *Id.* at 212 (citations omitted).

107. *See supra* note 67.

108. *Rineer*, 971 P.2d at 212. The ban at issue in *Rineer* was an absolute ban on guns in parks, not merely a ban on concealed weapons like those at issue in *Dano* and *Moerman*. *Id.* at 208. The defendants in *Dano* and *Moerman* were free to carry their weapons openly, whereas Rineer was prevented from bringing any weapons into the park.

109. 519 P.2d 37 (Ariz. 1974).

Supreme Court had upheld a probation condition prohibiting possession of firearms against an article II, section 26 challenge.¹¹⁰ Interestingly, the *Rascon* court relied on the defendant's not having "regained full status as a citizen," thus placing him outside the constitutional guarantee which applies only to citizens and denied his equal protection claim by pointing to the reasonableness of treating convicted felons differently under the law.¹¹¹ *Rascon*, like many other cases relied upon by the *Rineer* court, does stand for the proposition that a state may regulate the right to bear arms where there is a heightened risk, such as a defendant with a prior felony conviction,¹¹² possession in a place where alcohol is served or sold,¹¹³ possession by prisoners in a penal institution,¹¹⁴ carrying or displaying a weapon with an intent to intimidate, or warranting alarm for the safety of others.¹¹⁵ The cited cases do not, however, stand for the more general proposition that ordinary citizens who do not pose a heightened risk are subject to broad regulations that restrict their right to bear arms in self-defense.

The situations referred to by the court are all quite different from the case of a non-felon carrying a firearm for self-defense in a public park because in this situation none of the common risk factors exist. The court stated that "no leap of logic"¹¹⁶ is required to see that keeping dangerous weapons out of parks contributes to public safety by reducing accidents and armed conflict. This proves too much, for if this rationale is accepted, there is no place where one's right to bear arms in self-defense is protected, because "residents gather and children play" in homes, streets, and nearly everywhere.¹¹⁷ Under a rational relationship level of scrutiny, this reasoning is adequate, but under the heightened scrutiny that should be given to explicitly guaranteed rights, a stronger justification is needed, particularly where there is mounting empirical evidence to the contrary.¹¹⁸

Three cases cited by *Rineer* uphold blanket bans on firearms in a given city under the police power.¹¹⁹ At first glance, these cases would seem to support the power of Tucson to pass the ordinance at issue in *Rineer*, but upon closer inspection, there are factors that make these cases less than persuasive.

110. *Rineer*, 971 P.2d at 212.

111. *Rascon*, 519 P.2d at 38.

112. *Id.*

113. *State v. Lake*, 918 P.2d 380 (N.M. App. 1996); *Second Amendment Found. v. Renton*, 668 P.2d 596, 597 (Wash. Ct. App. 1983).

114. *State v. Barnes*, 708 P.2d 414, 415 (Wash. Ct. App. 1985).

115. *State v. Spencer*, 876 P.2d 939, 941, 943-44 (Wash. Ct. App. 1994).

116. *City of Tucson v. Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998).

117. *Id.*

118. See generally LOTT, *supra* note 85.

119. *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984); *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33 (Mo. Ct. App. 1994); *State v. Dawson*, 159 S.E.2d 1, 6 (N.C. 1968).

In *Kalodimos v. Village of Morton Grove*,¹²⁰ the Illinois Supreme Court upheld a total ban on handguns within the city limits under a markedly different constitutional provision.¹²¹ The Illinois guarantee provides: “Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.”¹²² In addition to the explicit mention of the police power, the records of the Bill of Rights Committee of 1970 that drafted the provision explained that “[b]ecause arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control under the police power.”¹²³ This stands in stark contrast to the Arizona provision and associated history.

The North Carolina Supreme Court in *State v. Dawson*¹²⁴ specifically stated that the right to keep and bear arms was “not at issue” but only whether the defendant may “bear arms to the terror of the people.”¹²⁵ The court thus affirmed the convictions of three men who had gone about at night in a truck and fired into a store and a private dwelling.¹²⁶ No right to bear arms could reasonably be construed to protect men who ride around at night to harass racial minorities and fire into their houses. As the *Dawson* court stated, “[i]t is the wicked purpose, and the mischievous result, which essentially constitute the crime.”¹²⁷

The Missouri case, *City of Cape Girardeau v. Joyce*,¹²⁸ provides the strongest support for the *Rineer* court’s rationale.¹²⁹ The *Joyce* court, reviewing an ordinance under a broadly worded constitutional guarantee,¹³⁰ concluded that the ordinance was constitutional because it only prohibited openly carrying weapons “readily capable of lethal use,” and hence, the defendant could legally ride his motorcycle about town with his pistol in a belt holster “provided he leave his ammunition at home.”¹³¹ The city did not allege that the defendant intended to threaten anyone or even that he unintentionally caused any public fear or disruption, yet the court upheld the ordinance. Where the police power is held to be so expansive with respect to the right to bear arms, any arguably rational weapons regulation may be upheld. The

120. 470 N.E.2d 266 (Ill. 1984).

121. *Id.* at 269, 278-79.

122. ILL. CONST., art. I, § 22.

123. *Morton Grove*, 470 N.E.2d at 269 (quoting the report of the Bill of Rights Committee).

124. 159 S.E.2d 1 (N.C. 1968).

125. *Id.* at 11.

126. *Id.* at 11-12.

127. *Id.* at 8.

128. 884 S.W.2d 33 (Mo. Ct. App. 1994).

129. *Id.* at 34.

130. “That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.” MO. CONST. art. I, § 23.

131. *Joyce*, 884 S.W.2d at 34-35.

residual right that “shall not be questioned”¹³² is apparently quite narrow. By the court’s reasoning, a citizen’s right to defend his person with a firearm is limited to unloaded weapons, which are no more useful for self-defense than a rock or a club.

The *Rineer* court concluded that reasonable limitations “do not offend individual constitutional rights.”¹³³ Finding that *Rineer* had failed to show that the ban on guns in parks was unreasonable, the court affirmed the ban.¹³⁴ The court noted that although the ordinance may limit his right to bear arms, it does not unreasonably impair it because *Rineer* can avoid the burden by simply walking around the park instead of through it.¹³⁵ Read broadly, this decision effectively limits the exercise of the right to bear arms to one’s own property even though the text of the constitution only limits the right to defense of self. A ban on guns in parks is very different from a ban in courthouses, prisons, and bars—there is no heightened risk factor. If a city may restrict the right to bear arms in parks with a public safety justification, it may expand the same limitation to public sidewalks and streets, to nature trails, and to just about any public place.

IV. APPLICATION OF THE SUGGESTED APPROACH TO CURRENT ARIZONA REGULATIONS

Because the right to bear arms in self-defense is “explicitly . . . guaranteed by the Constitution,”¹³⁶ it is a fundamental right.¹³⁷ The court should apply the same heightened scrutiny to a regulation impairing the right to bear arms as it does to regulations impacting other fundamental rights.¹³⁸ Under strict scrutiny, a police power regulation that impairs the right of a citizen to bear arms in his own defense would be struck down if it is not narrowly tailored to achieve a compelling government interest.¹³⁹ Even under this heightened standard, most cases cited by the Arizona Court of Appeals would reach the same result. Protection of the public from the misuse of firearms should properly be considered a compelling governmental interest in nearly all circumstances. Regulation of arms bearing by felons is permissible because it

132. MO. CONST. art. I, § 23.

133. *City of Tucson v. Rineer*, 971 P.2d 207, 214 (Ariz. Ct. App. 1998).

134. *Id.*

135. *Id.*

136. *Evenstad v. State*, 875 P.2d 811, 819 (Ariz. Ct. App. 1993) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973)).

137. *See supra* note 18 and accompanying text.

138. *See, e.g., Ruiz v. Hull*, 957 P.2d 984, 991 (Ariz. 1998) (First Amendment free speech); *State v. Ramirez*, 871 P.2d 237, 243 (Ariz. 1994) (article 2, section 24 right to criminal appeal); *Kenyon v. Hammer*, 688 P.2d 961, 975 (Ariz. 1984) (article 18, section 6 right of action to recover for bodily injuries).

139. *Ruiz*, 957 P.2d at 991.

has long been held that felons are not considered full citizens.¹⁴⁰ Regulations concerning carrying weapons in jails, bars, or by those who are intoxicated should probably be considered narrowly tailored to such places or people that pose a significantly heightened risk of harm to the public. A regulation such as the Tucson ban on all guns in parks, which under the recently passed state preemption statute¹⁴¹ is limited to parks of less than one square mile, should fall because it is not narrowly tailored to achieve the legitimate objective of preventing criminal misuse. With this ordinance, Tucson prohibits all citizens from carrying defensive weapons in parks. A more narrowly tailored ordinance would address only the accidental and criminal misuse objectives.

Applying this heightened scrutiny to Arizona's concealed weapons permit system leads to a more uncertain result. Under the scheme laid out in Arizona Revised Statutes title 13, section 3112, a person must attend 16 hours of classroom instruction at a cost of \$75-150, pay a \$50 application fee, submit two sets of fingerprints at a cost of about \$10, and pass a basic marksmanship test.¹⁴² The classroom instruction covers legal use of deadly force, Arizona weapons laws, and basic gun safety concepts.¹⁴³ The public safety objective of this scheme would almost certainly meet even a compelling state interest requirement. But, under the narrow tailoring requirement applied to other fundamental rights and stated but not applied in *Dano*, if the objective can be achieved with a narrower regulation, the law violates the constitutional guarantee. The permit system is not much of a burden on middle and upper-class citizens, but it may be a substantial burden on some citizens who would find both the time and the money requirements too great. If the state objective¹⁴⁴ could be achieved with a more narrowly tailored regulatory scheme, such as by enforcement of substantial mandatory sentences for violent crimes, making criminal intent an element of the general prohibition of concealed carry without a permit, or by public education campaigns for all citizens on gun safety and the legal standards for defensive use of force, the law should fall.

140. See, e.g., *State v. Noel*, 414 P.2d 162, 164 (Ariz. Ct. App. 1966).

141. ARIZ. REV. STAT. ANN. 13-3108 (West Supp. 2000) (stating that except for six enumerated exceptions, political subdivisions of the state are forbidden from enacting laws related to firearms).

142. § 13-3112 (West Supp. 2000).

143. § 13-3112(N) (West Supp. 2000).

144. A state objective of broadly discouraging all citizens from carrying weapons might be considered facially unconstitutional for the same reason that a state objective of discouraging all political speech would be. The assumed objective is to increase safety by decreasing the number of weapons carried by criminals and citizens in a place or condition associated with significantly higher risk.

V. CONCLUSION

There is a place for reasonable regulation of the bearing of arms. But, as set forth above, there are some important questions left unanswered in Arizona about the proper scope of the constitutional right to bear arms. The framers indicated the importance of the right to bear arms by including a broadly worded express guarantee in the constitution. The low scrutiny applied by the Arizona Court of Appeals in situations squarely within the self-defense purpose of the guarantee should be corrected by the Arizona Supreme Court by applying the heightened scrutiny applicable to all other explicitly guaranteed rights.