

HON. GEORGE T. ANAGNOST is the Presiding Judge for the Peoria Municipal Court. Photos are with permission of the Arizona Historical Society. Thanks to Professor Toni McClory and Anthony B. Ching for their research suggestions. Any errors are those of the author.

The 1910 Constitutional Convention members.
Convention President and future Governor George W. P. Hunt is seated sixth from left, first row.
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Below and succeeding pages: Pages from the original copy of the Arizona Constitution.

In German, the word is *Gedankenversuch*. In English, it is known by the familiar term “thought experiment.”

As Arizona approaches the centennial anniversary of statehood, there is much to commend the idea that the drafters of Arizona’s first constitution undertook a successful “thought experiment” when they authored a new charter of government that has endured a century of tremendous social and cultural change, the impact of two world wars, and the mind-boggling challenges of the space age.

In this article, we look at the historical setting surrounding the Constitutional Convention of 1910 and explore the prevailing theories of good government that were ascendant at the turn of the century. Finally, we review selected Arizona cases that have interpreted the nature and meaning of the structural components of the Arizona Constitution—including some right up to the present day.

At the end of our journey, the reader may ponder a similar “thought experiment”: If you were tasked to create a new constitution, one able to last for future generations and respond to potentially unforeseen contingencies, what individual and shared values would you safeguard? What political process would you establish?

In other words, how would your “Arizona Constitution” read?

50 State Constitutions & the DNA of Statecraft

President William H. Taft may have provided the most colorful constitutional advice to Arizona. During the move for statehood in the early 1900s, he visited the territory and warned the locals not to go the radical way of recently admitted Oklahoma. Avoid the adoption of measures like the initiative or referendum, he warned, lest Arizona also turn its highest law into a “zoological garden of cranks.”¹

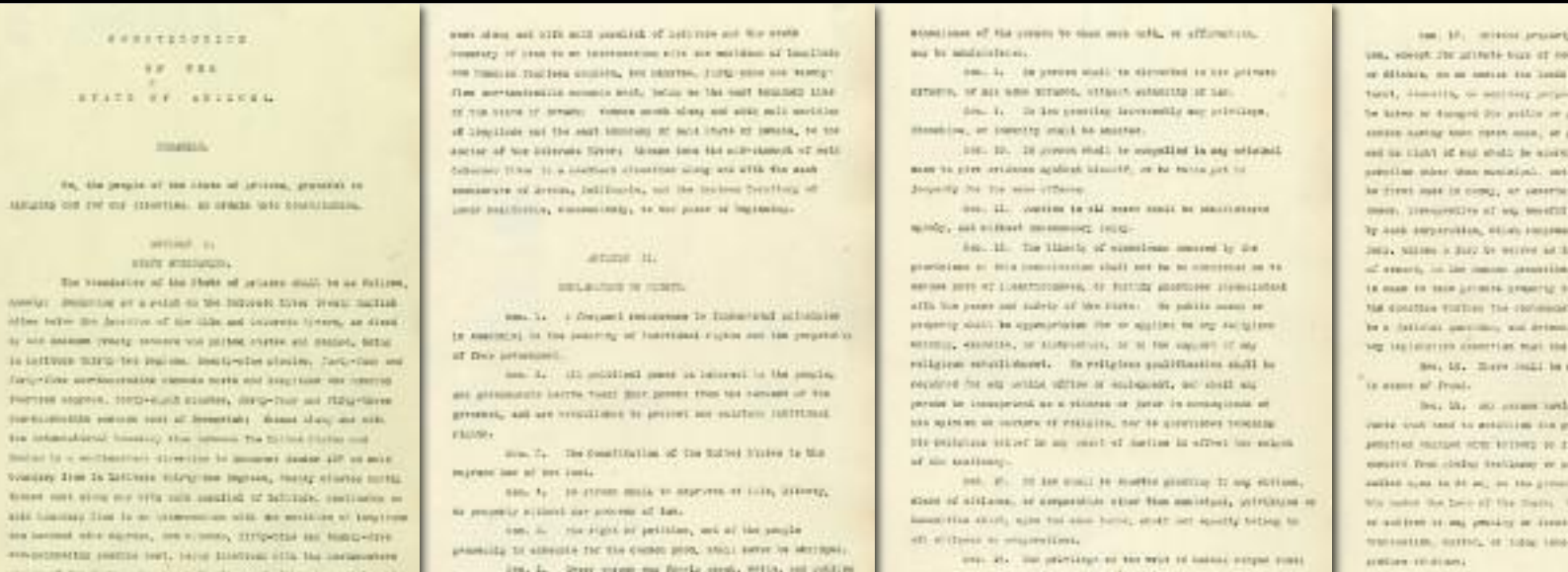
Taft’s metaphorical reference to a menagerie of sorts was both ironic and insightful: Ironic because the constitution that Arizona adopted did incorporate such progressive features. Insightful because America’s 50 state constitutions, like an assortment of all creatures big and small, are still composed of a finite group of basic DNA-like structures that nevertheless manifest themselves in myriad ways.

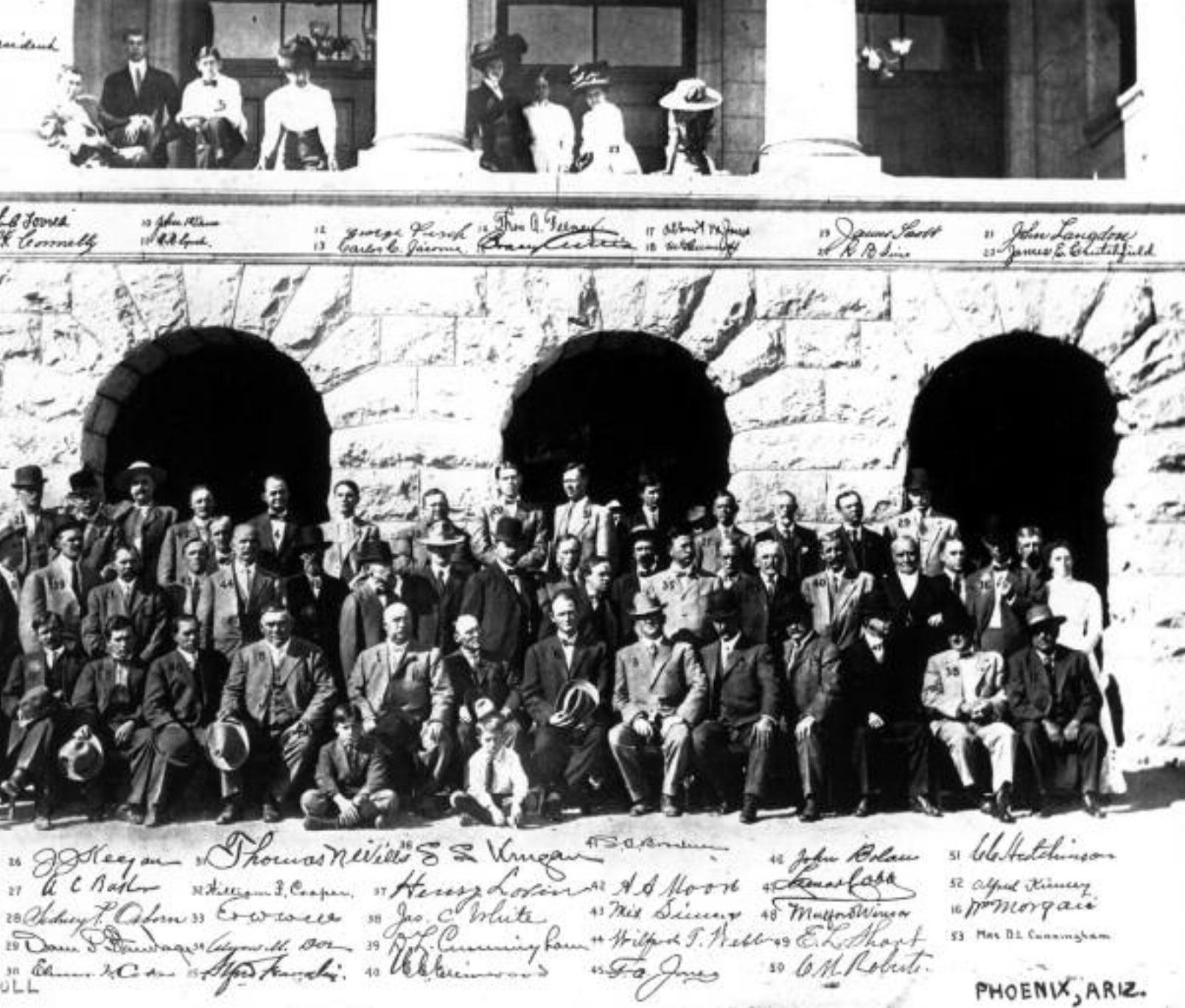
In general, when comparing federal and state constitutions, the cardinal distinction is that the U. S. Constitution embodies limited powers, whereas state constitutions represent expansive grants of authority. Moreover, the absence of a federal “general welfare clause” or “police power” further reduces the range of power that can exist at the federal level.

In contrast, state constitutions are the foundational source of a wide-ranging sovereignty whose quantum of authority is enlarged by the power to exercise control over matters affecting the general welfare and use of the police power.



The Arizona Constitution





Sources, Structure & Interpretive Cases

BY HON. GEORGE T. ANAGNOST

Thus, state constitutional provisions that allocate authority among state, county and local government and regulate utilities, natural resources and the public fisc, but are still restrained by other provisions that set boundaries on the reach of the state's domain, necessarily result in complicated and lengthy state charters.

This contrast explains a clear distinction when comparing the U.S. Constitution to state analogs: The federal constitution is comparatively short in length, whereas state constitutions are longer, as they recite both open-ended powers and concomitant limitations.

That general comparison masks great variety, however. Though state constitutions may claim to be derived from "self-evident" truths, they still display a multiplicity of shapes and forms. Just as the many states were formed with their unique historic pressures—westward migration, industrial development, a divisive civil war, the fractious admission of states from 1791 to 1959—their constitutions were made of the same distinctive stuff. They reveal an America whose motto could be "*e pluribus multi*."

In *Understanding State Constitutions* and *The American State Constitutional Tradition*,² the authors identify the basic concepts that form the DNA of state constitutional structure: the separation of powers and checks and balances of the legislative, executive and judicial branches; the direct election of multiple officials; universal suffrage; initiative, referendum and

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recall; a panoply of state civil rights and privileges; comprehensive economic and public utilities regulation; and mechanisms for citizen-initiated amendment of the constitutional charter itself.

As these scholars note, however, from this cluster of governmental building blocks, these recombinant units have adapted to changes of time, geography, political ideologies and regional social values. A sense of the variability of statecraft, and the extent to which their topics might range from the abstract to the mundane, can be seen in occurrences such as these:

- The Tennessee Constitution of 1796 provided for a personal right to navigate the Mississippi river.³
- The Illinois Constitution of 1848

required that public contracts for government stationery be given to the lowest bidder.⁴

- Longer than the 8,000 words of the U.S. Constitution or Arizona's 40,000-word Constitution, the Alabama Constitution, with 350,000 words and 700 amendments, reflects an emphasis on state, not local, control and includes provisions as particularized as mosquito control and dead farm animal regulation in certain counties.⁵
- Recognizing the realities of its arid desert climate, the Arizona Constitution expressly rejected the riparian rights of eastern states' water law for the doctrine of "prior appropriation."⁶

constitutions serve three functions:

- (1) define the basic structure of the branches of government;
- (2) safeguard individual liberties and rights; and
- (3) through the amendment process, provide a changeable document for social and political change.

For Arizona, the path from territory to statehood was politically complicated with issues regarding the balance in Congress between Republican and Democrat representation, the scope of home rule, women's suffrage, Protestant versus Catholic voters, bimetalism and the coinage of silver, and even whether there would be enough water in the arid southwest to support a growing population and mixed economy to make statehood worthwhile.⁹ As of the early 1900s, the fundamental question remained: From the basic elements of democratic rule, what political shape would Arizona's new government take?

Arizona About 100 Years Ago

Most likely, when the average person awoke to a warm Arizona sun on October 9, 1910, it was just "another day in the life." Yes, there was talk about a constitutional convention to start the next day that hoped to vault Arizona into statehood, but the change from territory to an outright state on equal footing with the country's other 47 states had been an unsuccessful effort for decades.¹⁰ That wasn't expected to change.

No, most likely, for the average person, hard work was the expected quotidian share. In the tough times of the 1900s, the social contract embraced in the *Lochner*-era "liberty of contract" did not involve the idealism of Locke or Rousseau. The terms were

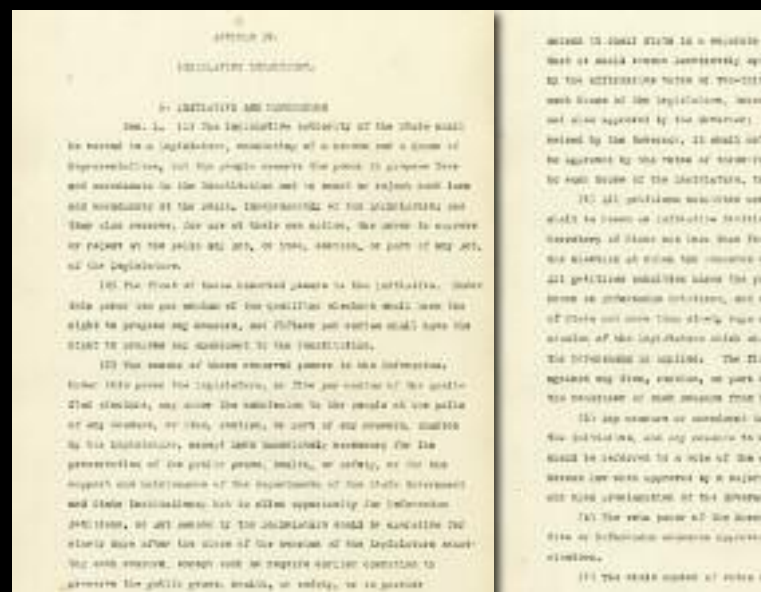
- Unlike states that were suspicious of big business interests, which legislated against preferential treatment for large corporations and railroads, Nevada's constitution, to encourage foreign capital investment, provided that its mines would be free from taxation.⁷

As Professor McClory observes in *Understanding the Arizona Constitution*,⁸ state



"With apologies to Aesop," the *Arizona Republican* warned against adoption of a "populistic" constitution.

The Arizona Constitution represented a progressive view of politics that seemed to reflect the times. It included many modern elements: initiative, referendum, recall; ...short terms of office; and provision for the direct election of many state executive positions.



simpler: Income must exceed living expenses. Long work days, low wages and child labor were measures of human capital.

In Arizona, like other parts of America, the race line was recognized: Anglo miners were paid \$4 a day, whereas Mexican miners received \$2. Public schools were segregated.¹¹ At the turn of the century, there was no radio, no television, no air-conditioning, no penicillin, no convenience store open 24 hours a day. Life was nasty, brutish, short (the at-birth male life expectancy in 1910 was 49 years), and, in Arizona, unbearably hot in the summertime.

Alongside the political news, the *Arizona Republican* offered its readers a variety of excellent bargains. The morning edition advertised new men's suits for \$17, ladies' dresses for \$12 and new Studebaker automobiles for \$750. For those needing a pick-me-up, a trademarked lady's silhouette offered "Lydia Pinkham's Vegetable Tonic," an elixir whose popularity annoyed liquor dealers aware that it contained more alcohol than the ales and spirits assailed by Prohibitionists. In the realm of technology, publisher William Randolph Hearst offered a \$50,000 prize to the first aviator who could fly an airplane coast-to-coast within 30 days. Other headlines covered the nearing completion of the Panama Canal and the Roosevelt Dam.

But even in a democracy that trumpeted the right of all citizens to participate in the governmental process, American society was divided into two worlds. Life on the street was one reality, politics the other for those able to find and afford the time.

By 1910, a new political agenda included the initiative, referendum and recall, the so-called "Oregon Plan" named after the state where those features had been adopt-

ed recently. Of equal importance was the social setting that the country faced in the early 1900s as railroads, big business, labor unions, suffragettes and urban reformers argued with and at times battled one another to promote their vision of representative government. Personifying the major political philosophies at play as the 1912 presidential election approached, Arizonans debated the offerings of the conservative incumbent Taft, the progressive Teddy Roosevelt, the democratic Woodrow Wilson and the socialist Eugene V. Debs.

Representing a cross-section of Arizona's key political and economic stakeholders, 52 delegates, mostly Democrats, convened in Phoenix on October 10, 1910. They hoped to succeed where two previous efforts to adopt a state constitution acceptable to a cautious and distant Congress had failed, efforts that had been ongoing since Arizona became a territory in 1863. Interspersed in a roster of business, railroad, ranching and mining interests were names that would become part of the fabric of Arizona's political and business landscape: E. A. Tovrea, "cattleman-butcher"; Morris Goldwater, "banker"; John Orme, "ranchman"; and George W. P. Hunt, "merchant." Under the constraint of an enabling act that authorized only 60 days of compensation, the convention brought forth a constitution 61 days later that accommodated the three components of Arizona's early economy—copper, cattle and crops ("cotton" would not become its own boom commodity until World War I.).

Creating a constitution that accommodated the agenda of such different political views was certainly challenging. But even more obstacles stood in the way of statehood. Approved by Arizona voters in early

1911, the proposed Constitution of 1910 was vetoed by President Taft because it included a provision for the recall of judges; Taft had a well-publicized concern that such a recall impermissibly threatened judicial independence.

Back to the drawing board, the voters re-adopted a constitution that removed the judicial recall and received Taft's approval. Upon attaining statehood on February 14, 1912, the voters re-convened to adopt an amendment that restored judicial recall. Events came full circle when, in the 1912 presidential elections, the Arizona electorate gave Taft the fewest votes of the four candidates.¹²

Against this background, the Arizona Constitution that was approved by the delegates and sent to the citizens for their approval represented a progressive view of politics that seemed to reflect the times. It included many modern elements: initiative, referendum, recall; workers' compensation and liability protection; regulatory commissions; short terms of office; and provision for the direct election of many state executive positions, such as governor, secretary of state, corporation commissioners, superintendent of public instruction and mining inspector.

As Professor Lesly described it, the Arizona Constitution of 1910 "bequeathed to posterity a document that embodied a noble vision of government: a healthy skepticism about concentrations of power balanced by a deep-seated optimism that government should play an active, positive role for social betterment."¹³

Our Constitution and Our Courts

The entire span of governmental authority in the Arizona Constitution derives from Article III and its allocation of state powers



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among the legislative, executive and judicial branches.

The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.¹⁴

Putting aside Article I, which defines the state geographic boundaries, and two repealed Articles that dealt with Prohibition, the structure of government; the rights, liabilities and duties of its citizens and public officials; and the overall process of governance are set out in 27 Articles. The legal meaning and interpretation of these numerous constitutional provisions has been the subject of scores of reported cases since statehood, and a full listing of them is beyond the scope of this presentation. Instead, in this section, we touch on a few important Arizona cases that illustrate the distribution of political power, economic regulation and the protection of individual civil liberties.

Two excellent law review articles discuss state court interpretation of the Arizona Constitution.

In *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*,¹⁵ former Arizona Supreme Court Chief Justice Stanley G. Feldman and David L. Abney describe the “double security” of constitutional protections that arise separately from guarantees set forth in the Arizona Constitution and the U.S. Constitution’s Bill of Rights:

- (1) rights protected by state constitutional text and state-sourced interpretation,
- (2) state liberties interpreted according to criteria taken from the U.S. Constitution, and
- (3) interpretations that borrow from both state and federal meanings.

Significantly, a key component of understanding state constitutional rights begins with the doctrine of “selective incorporation”: how some, but not all, of the protections set forth in the Bill of Rights are deemed applicable to states under the due process and liberty clauses of the Fourteenth Amendment.

[N]either the delegates who created our constitution in 1910, the citizens who adopted it, nor the Congress and presi-

dent who finally approved its implementation in 1912 could have intended that *federal* constitutional law would protect the rights and liberties of Arizona’s populace. Because the federal Bill of Rights did not then apply to the states, the Arizona framers clearly intended that the state constitutional guarantees would be the solitary, fundamental rules shielding our people from government power.¹⁶

Through the lens of this “double security,” the authors explore how Arizona courts have interpreted citizens’ rights under the wording of the state constitution in the areas such as equal protection, the privilege against self-incrimination, search and seizure, freedom of expression and religion, the right of privacy, and the confrontation clause. As they note, an additional complication arises from the different wording used in Arizona’s Declaration of Rights versus the text of the Bill of Rights. For example, Arizona’s protection from unreasonable search and seizure is expressed as a right of privacy such that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”¹⁷ In contrast, the Fourth Amendment’s protection derives from the people’s right to “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹⁸ As to matters of judicial construction and legal semantics, the question is how substantively coextensive or variant such verbal formulations are, and why.

All in all, from the viewpoint of coherent and clear judicial writing, the authors opine that our Arizona courts had not fully met the challenge of articulating well-stated state or federal grounds in deciding the meaning of state constitutional claims:

At the very minimum, we must expect out judges to have greater awareness and appreciation for our fundamental state charter. If the record raises a state constitutional issue, and the text of the applicable state provision is significantly different from the analogous federal clause, Arizona judges must confront the challenge. It may make little practical difference whether they do so at the beginning, middle, or end of the analysis, but at some point Arizona jurists *must* consider the impact, in appropriate cases, of our state constitution.¹⁹

The Feldman and Abney article was written in 1988. In 2003, Chief Justice Ruth V.

McGregor continued the theme of that earlier essay in *Recent Developments in State Constitutional Law*.²⁰ In her view, the bench and the bar had not yet avoided ambiguity in setting forth the state or federal bases of their decisions and arguments. There was still a need for a type of “special pleading” to make clear the source of any pronouncement about the constitutional meaning of our state guarantees: “The result of the joint efforts of parties, lawyers and the court should be the development of a body of state constitutional law that fairly and objectively defines the meaning of the state constitution.”²¹

Against the backdrop of this intersection of state and federal constitutional principles, let us look at a few cases that have interpreted Arizona’s Constitution, keeping in mind that no singular or overarching theme of interpretation may necessarily be identified. As Justice O’Connor once observed, the search for a “Grand Unified Theory” of constitutional law may be unavailing.²²

Interpretive Arizona Cases

Justiciability: *Kromko v. Arizona Board of Regents and Roosevelt Elementary School District v. Bishop*

At the turn of the century, the value of public education as a way to develop a literate and intelligent citizenry was widely accepted. Arizona’s enabling act required portions of state and federal land to be set aside to fund public schools. Given those mandates, Article XI of the Arizona Constitution requires that the state provide for a “general and uniform” system of public education and, in addition, that university tuition be “as nearly free as possible.”²³

In *Kromko v. Arizona Board of Regents*,²⁴ the Arizona Supreme Court considered the aspect of “nearly free” university tuition against the overriding concept of justiciability and whether the judicial branch or the Legislature should be the final arbiter of its meaning.

After the Board of Regents, pursuant to its rule-making authority, approved a 39 percent tuition increase for the state universities, a group of students filed a declaratory action claiming that the “nearly free” constitutional standard had been violated. For the Court, the threshold question was whether notions of “departmentalism” should preclude judicial review of the actions of a separate and co-equal branch of government. The dispositive legal standard was succinctly stated by Justice Hurwitz:

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“A controversy is nonjusticiable—*i.e.*, involves a political question—where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”²⁵

Looking at the Arizona Constitution’s provisions on education as a whole, and recognizing that the judicial branch was not qualified to set tuition rates and that it possessed no manageable standards to determine them, the Court held that the “nearly free” requirement was a political question and, as such, the students’ complaint did not state a valid claim for relief. The Court had no “North Star” to follow that would allow it to substitute its judgment for that of the Legislature.²⁶ If students sought financial relief, their recourse was to the Legislature and the political process.

Thus, in *Kromko*, the phrase “nearly free” was deemed a political question. In *Roosevelt Elementary School District v. Bishop*,²⁷ the Court was asked to consider the constitutional mandate that the state provide a “general and uniform” system of public education. Based on a stipulated factual statement that revealed great differences in the quality of facilities in the public schools (some schools had no libraries or grass athletic fields, whereas others had computer labs and domed stadiums), *Bishop* was a suit by school districts and parents who claimed that the legislative scheme itself, which relied on funding from local property taxes, violated the “general and uniform” standard of Article XI.

In contrast to *Kromko*, the *Bishop* decision, veering away from any analysis of justiciability or manageability, found a constitutional violation on the basis of the statutory framework itself and its allowance for so much variability in the funding process. This time, the Court was able to locate a “North Star” to navigate a way through the constitutional waters. The case was remanded to allow the trial court and Legislature an opportunity to take remedial measures.

Debt Limitations and the Gift Clause: Arizona State Highway Commission v. Nelson and Turken v. Gordon

The early 1900s were a time of economic warning signs to the constitutional convention members. A series of events made it predictable that Arizona’s Constitution, like those of other states, would include limited debt and government borrowing—the

Panic of 1873, bank and railroad failures, the monopolist tendencies revealed in investigative works such as Ida Tarbell’s exposé of Standard Oil, and the local disaffection with the influence of big business during Arizona’s territorial period.

Section One of Article IX states the governing principle: “[A]ll taxes shall be ... collected for public purposes only.”²⁸ Section Five specifically deals with debt limitation. Except in times of war or insurrection, when unlimited borrowing is allowed, the Arizona Constitution limits the state’s total indebtedness to \$350,000.²⁹

Like many aspects of public policy, there are competing social needs at play in the realm of government financing. Although fiscal responsibility is one concern, there is a countervailing need to engage in large-scale, ongoing public works without unnecessary delay. This creates a tension between rationalized growth and spending controls.

That was the setting in *Arizona State Highway Commission v. Nelson*,³⁰ where the Court considered whether the proposed issuance of \$2 million in Highway Right of Way Bonds was lawful. The litigation was filed when the Commission’s request for approval of the bonds from the attorney general and commissioner of finance was withheld. Because the bonds were payable from a statutorily defined source of revenue—namely, vehicle registrations and gasoline taxes—and were not obligations against the general credit of the state, the Court held that the bonds were valid and not in violation of the state debt limitation provisions.

Early in the state’s history, there were reformist concerns over the misuse of public monies that had resulted in “orgies of extravagant dissipation.”³¹ This misuse had accompanied the construction of railways and canals during the territorial period, and it led to another important spending prohibition in Article IX: the so-called Gift Clause (although, properly speaking, it is an “anti-gift” clause): “Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.”³²

In *Turken v. Gordon*,³³ the Court of Appeals recently interpreted the meaning of the Gift Clause, and the case is noteworthy for its methodological review of the text, legislative history, precedent and what the

court called “panoptic” analysis of the purpose of this state constitutional limitation.

To promote a master-planned community in the northern part of Phoenix, and too late to provide infrastructure by way of public roads or off-site improvements, the City of Phoenix passed an ordinance by which the city was granted long-term public parking access to 3,180 on-site spaces in exchange for a market-rate parking fee payable as an annual credit against privilege tax obligations. The ordinance was adopted pursuant to an enabling statute and after a third-party consultant had validated the economic assumptions supporting the ordinance’s approval.

Alleging that the economic reality of the transaction provided public funds for a private benefit, a group of Phoenix business owners and taxpayers filed suit to enjoin implementation of the ordinance as a violation of the Gift Clause.

Ruling in favor of the plaintiffs, the Court of Appeals reversed a summary judgment in favor of the developer and held that the transaction violated the clause. After analyzing previous cases and varying fact situations involving the Gift Clause, the court determined that the controlling test was the purpose of the expenditure, what the public received in return, and how the purpose was carried out. Although it admitted that “public purpose” did not have an exact definition, the court rejected the developer’s arguments that the public would benefit from increased retail activity and that more than adequate consideration was present in the net gain from sales tax revenues and the project’s overall positive economic impact. When those factors were measured against the lack of any ownership interests being acquired by the City and the reality that the parking would primarily benefit the developer’s retail business, the constitutional ban on the use of tax monies for private purposes was sustained.

Whether or not the Court of Appeals opinion is the final word in *Turken*, its casebook significance lies in illustrating the various “North Stars” that are involved in interpreting the Gift Clause.

Variant Standards Between State and Federally Protected Rights: Moerman v. Superior Court

The Second Amendment of the Bill of Rights concerns the right to bear arms: “A well regulated militia, being necessary to the security of a free state, the right of the peo-

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ple to keep and bear arms, shall not be infringed.”³⁴ Over the course of time, that wording had been interpreted to refer to a collective right of the people to possess arms for a local militia and not to describe an individual right to bear arms.³⁵ Last term, in *District of Columbia v. Heller*,³⁶ the U.S. Supreme Court broke away from this line of reasoning and held that the Second Amendment did protect an individual right. The issue presented was special police officer Heller’s claim that a District of Columbia ordinance, which prohibited handgun possession and registration, effectively banned his right to possess a handgun in his home. After reviewing colonial and British origins and pre- and post-Civil War era commentaries on the right to bear arms, Justice Scalia wrote the majority opinion that invalidated the ordinance and held that the Second Amendment protected an individual right of possession of a handgun.

The 5-to-4 opinion in *Heller* has already been the subject of comment and law review articles as to its implications with regard to the incorporation doctrine and its Fourteenth Amendment application to persons (or just citizens?) hoping to challenge state regulation or gun control.³⁷ *Heller* looks to be the source of further Second Amendment and state constitutional jurisprudence as the attributes of this federal guarantee are elucidated.

At the state level, Arizona’s Declaration of Rights also guarantees an individual the right to bear arms, but by way of a differently worded formulation: “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.”³⁸


In *Moerman v. Superior Court*,³⁹ decided before *Heller*, the Arizona Court of Appeals focused on the meaning of the right to carry a gun as a matter of state constitutional law. Defendant Moerman was convicted of violating Arizona’s concealed weapon statute when police found him carrying a weapon inside a “fanny pack.” On appeal, he argued that Section 26 conferred an “absolute” right to bear arms. Because the state constitutional guarantee was by its own text connected to the need for self-defense, his argument was rejected. As the court stated, Arizona’s right to arms “is not absolute and implies that some qualification is permissible.”⁴⁰

The textual differences between the Second Amendment and the state guarantee are self-evident. The *Moerman* case is a helpful teaching point as to the interpretive variance that may occur when comparing the nature of the incorporated federal rights to those already established by a state constitution. In this instance, the question becomes to what extent the right to bear arms will be re-formulated or supplanted by a federal standard. More precisely, to the extent that *Heller* recognizes a “fundamental” right to bear arms under the Second Amendment, what level of review (strict scrutiny, intermediate or rational relation) will be applied against any state law purporting to regulate the possession or use of handguns or other weapons.⁴¹ Because the *Heller* decision did not reach those issues, the question remains open and the subject of future interpretation.

Conclusion

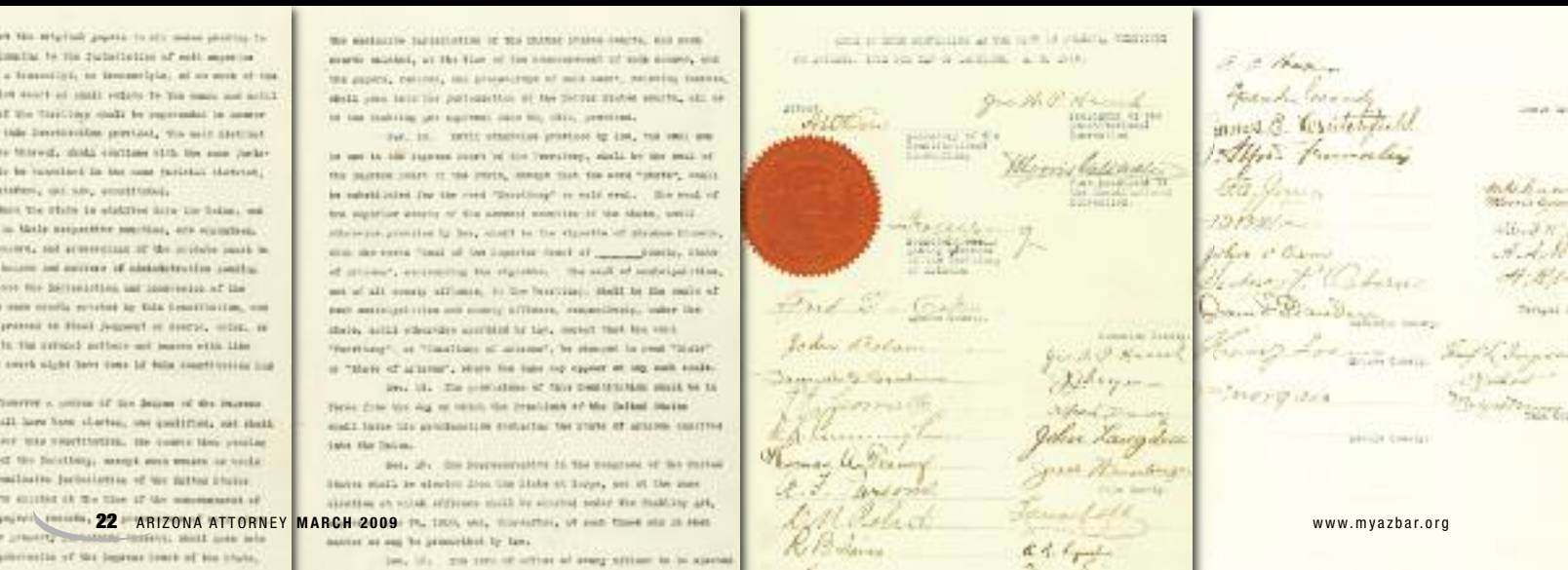
A longstanding debate surrounding the meaning of the U.S. Constitution is whether it should be strictly interpreted according to its original intent or whether it should be understood as a type of “living

document” meant to change to fit the social circumstances of the times. In a sense, as to the meaning of the Arizona Constitution, that type of intellectual disagreement may be of secondary importance. Since statehood, Arizona voters have amended their Constitution some 200 times, thereby suggesting that, as far as state governance is concerned, the people will resort to the initiative and referendum to ensure that their constitution speaks both to them and for them.

In their article, Messrs. Feldman and Abney noted that when the drafters of the Arizona Constitution met in 1910, they sought to “build a modern state in the western desert, not a pale reflection of the traditional eastern states.”⁴² The vibrant sun that rises every morning over Arizona’s mountains, rivers and saguaro landscapes celebrates the vision and spirit that brought those delegates together about 100 years ago. 

endnotes

1. See JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 6 (1993).
2. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006).
3. TARR, *supra* note 2, at 75.
4. *Id.* at 125.
5. See ALABAMA CONST. arts. 351 and 482, respectively, available at www.legislature.state.al.us.
6. See ARIZ. CONST. art. XVII, § 1.
7. See TARR, *supra* note 2, at 116-117.
8. TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 1-3 (2001).
9. The Arizona Territorial Legislature authorized a constitutional convention in 1891. Due to concern that the railroads, mines and speculators might control its political future, Arizona’s admission as a state encountered years of delay. A key figure hoping to shape the state constitution at the time was a progressive Republican, Indiana Sen. Albert J. Beveridge. His efforts led to Congress’s enactment



- of a “jointure” bill to admit Arizona and New Mexico as a single state, a proposal favored in New Mexico but rejected by Arizonans. When it appeared likely that two separate states would be admitted, Beveridge succeeded in including a provision that President Taft would have a veto power over any proposed Arizona Constitution. See THE ARIZONA CONSTITUTION STUDY GUIDE (2008) at 1 and LESHY, *supra* note 1, at 2-4.
10. Constitutional conventions were attempted in 1872 and 1891. See generally John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1 (1988). The proceedings of the convention are compiled in Goff, *The Records of the Arizona Constitutional Convention of 1910* (Ariz. Supreme Court). For a general history of Arizona, see THOMAS E. SHERIDAN, ARIZONA: A HISTORY (1995). The HISTORICAL ATLAS OF ARIZONA by Walker and Bufkin is treasure trove of historical geographic, economic and thematic maps. All books by Marshall Trimble make for fine reading; see, e.g., A ROADSIDE HISTORY OF ARIZONA (2004), and ARIZONA: A CAVALCADE OF HISTORY (2003).
 11. See *Dameron v. Bayless*, 14 Ariz. 180 (1912) (Territorial Code provision authorizing separate but equal schools for black children valid as against claim that requiring children to walk longer distances near railroad tracks violated equal protection guarantee). Segregated public education was overturned in Arizona in 1953 when parents challenged segregated public high schools in the City of Phoenix. In a three-page ruling, Maricopa County Superior Court Judge, and later Arizona Supreme Court Chief Justice, Fred C. Struckmeyer, held the statutory scheme invalid. Although he noted, “There are no second-class citizens in Arizona,” Judge Struckmeyer’s actual holding did not rest on equal protection grounds, but on the ground that the legislation delegated standardless discretion to the school districts to determine racial classifications. See *Phillips v. Phoenix Union High Schools*, Maricopa County No. 72909, Opinion and Order (1953).
 12. See MCCLORY, *supra* note 8, at 30-32.
 13. LESHY, *supra* note 1, at 30.
 14. ARIZ. CONST. art. III.
 15. Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115 (1988).
 16. *Id.* at 116.
 17. See ARIZ. CONST. art. II, § 8.
 18. See U.S. CONST. amend. IV.
 19. FELDMAN & ABNEY, *supra* note 15, at 146.
 20. Ruth V. McGregor, *Recent Developments in State Constitutional Law*, 35 ARIZ. ST. L.J. 265 (2003).
 21. *Id.* at 280.
 22. See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 850 (1995) (“When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified”).
 23. See ARIZ. CONST. art. XI, §§ 1 and 6.
 24. 216 Ariz. 190 (2007).
 25. *Id.* at 192, quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993).
 26. *Id.* at 194.
 27. 179 Ariz. 233 (1994).
 28. ARIZ. CONST. art. IX, § 1.
 29. See ARIZ. CONST. art. IX, § 5.
 30. *Ariz. State Highway Commission v. Nelson*, 105 Ariz. 76 (1969).
 31. See *Day v. Buckeye Water Conservation Dist.*, 28 Ariz. 466, 473 (1925).
 32. See ARIZ. CONST. art. IX, § 7.
 33. 1 CA-CV 08-0310.
 34. See U.S. CONST. amend. II.
 35. See *United States v. Miller*, 307 U.S. 174 (1939).
 36. 128 S. Ct. 2783 (2008).
 37. See, e.g., *District Of Columbia v. Heller*: The Individual Right To Bear Arms, 122 HARV. L. REV. 1 (2008); *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008). For a survey of state constitutional doctrine regarding regulation of the right to bear arms prior to *Heller*, see Winkler, *The Reasonable Right To Bear Arms*, 17 STAN. L. & POL’Y REV. 597 (2006).
 38. See *Ariz. Const.* art. II, § 26.
 39. 182 Ariz. 255 (Ct. App. 1995).
 40. *Id.* at 259.
 41. “[T]he *Heller* majority’s refusal to be pinned down on a specific standard of review might also leave an opening for lower courts to confine *Heller* to its facts. For example, a court might read *Heller* as standing for the proposition that anything less than an absolute ban could pass muster.” Glenn Harlan Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 NW. U. L. REV. 2039 (2008).
 42. FELDMAN & ABNEY, *supra* note 15, at 117.