



“[T]he Constitution is what the judges say it is.” When New York Governor (later U.S. Chief Justice) Charles Evans Hughes said that in 1907, five years before Arizona became a State, he was referring to the Justices of the United States Supreme Court and their power to say what the U.S. Constitution means. State supreme court judges have similar power to say what State constitutions mean, and the Arizona Supreme Court has not been reluctant to use that power. It took the Arizona Supreme Court, for example, just five months and a day after Arizona became a State to invalidate one of the first statutes passed by the Arizona Legislature after statehood—a statute

setting the date for the new State’s first general election.

The Court continues to decide important Arizona constitutional questions on a regular basis, as it recently did, for example, in invalidating Governor Brewer’s attempt to remove the chair of the Independent Redistricting Commission.

The 100th anniversary of Arizona’s Constitution seems a good time to ask how successful the Arizona Supreme Court has been in using that “judicial review” power during the first 100 years of Arizona statehood. Surveying all of those cases would be

The Law Journal at ASU’s Sandra Day O’Connor College of Law is publishing a special issue this summer in honor of the 100th Anniversary of the Arizona Constitution. The issue will focus on the Arizona Supreme Court’s interpretations of the Constitution since statehood. It will contain articles by Chief Justice Rebecca Berch, Professor Paul Bender, and lawyers David Abney, Clint Bolick, Lisa Hauser, Tim Hogan and Paul Eckstein. The following is an abridged version of Professor Bender’s article.

The Arizona Supreme Court & the Arizona Constitution

BY PAUL BENDER

THE FIRST HUNDRED YEARS



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an overwhelming task. It is possible, however, to focus on decisions interpreting constitutional provisions that were especially important to the framers of the Arizona Constitution—provisions that give the Arizona Constitution its distinctive character. Decisions regarding constitutional provisions on three subjects seem especially suited for such an examination: those concerning the Constitution’s “direct democracy” provisions; decisions concerning the provisions that establish a constitutional right to recover damages for personal injury; and decisions regarding the Constitution’s Declaration of Rights, which, at the time of its adoption, was to serve as the only constitutional protection of individual rights that Arizonans would enjoy.

Direct Democracy

The Arizona Supreme Court has had an uncomfortable relationship with the direct-democracy provisions of the Arizona Constitution and, judging from the Constitution’s text, has not applied them as generously as the Constitution’s framers intended. Those provisions give Arizona’s people, rather than its formal Legislature, a surprising amount of lawmaking power. In

delegating legislative authority to the Arizona Legislature, the Constitution expressly qualifies that delegation by providing that “the people” themselves, acting through the ballot, “reserve the power” both to enact laws “independently of the Legislature” and to “approve or reject at the polls” what the Legislature enacts.

Direct democracy in Arizona is exercised through the initiative and referendum. Arizonans can refer legislation enacted by the Legislature to the ballot for the approval or disapproval of the voters through petitions signed by only five percent of the number of Arizonans who voted for Governor at the last preceding general election. Arizonans can initiate legislation for voter adoption at the ballot by petitions signed by 10 percent of that number. Ballot propositions win if they get a simple majority of the votes cast on them.

The Court’s first direct-democracy decision, *Allen v. State*,¹ supported the strong populist spirit of those direct democracy provisions. It rejected a challenge to the results of a referendum election based on an alleged lack of the legally required pre-election publicity. The Court held that such defects, even if they occurred, could not be

used to invalidate a ballot proposition once it had been approved by the voters. Since the Court would not “go behind the record” of a statute enacted by the Legislature in order to impeach it, the *Allen* Court ruled that the same respect should be shown to legislation enacted by the voters.

Ten years later, however, the Court sharply reversed direction and made a major inroad into the voters’ referendum power by giving the Legislature the ability, if there are enough votes, completely to prevent the people from using that power. The Constitution postpones the effective date of legislation enacted by the Legislature until 90 days after the end of the legislative session, in order to give citizens time to gather referendum-petition signatures. Emergency legislation, however—legislation that may “require earlier operation to preserve the public peace, health or safety”—may go into effect immediately and not be subject to voter referendum. To invoke the emergency exception, the Legislature must muster a two-thirds majority in each house and enact an “emergency clause,” which “shall state ... why it is necessary that [the legislation] shall become immediately operative.”

Clockwise from opposite page, top left: Chief Justice Rebecca White Berch, Clint Bolick, Megan Scanlon, Jared Sutton, Paul Bender, Tim Hogan, David Abney, Lisa Hauser, Andy Gaona. Feb. 14, 2012, photos by David Sanders, courtesy of A.S.U.





The Arizona Supreme Court and the Arizona Constitution: The First Hundred Years

In *Orme v. Salt River Valley Water Users' Ass'n*,² the Arizona Supreme Court held

that it would not prevent the Legislature from ignoring the emergency requirement and using the emergency exception for the sole purpose of avoiding a referendum. The Court ruled in *Orme* that the Legislature's attachment of a generic emergency clause to legislation will preclude a referendum, whether or not an emergency actually exists. The Court in *Orme* thus gave the Legislature the power to nullify a power that the Constitution gave the people so that the people would be able to nullify what the Legislature does. The Court, that is, got things exactly backward. *Orme* has never been overruled or modified, and the Legislature has not been reluctant to take advantage of it.

Twenty-three years after *Orme*, in *Garvey v. Trew*,³ the Court again took a major bite out of the people's referendum power. It held that appropriations legislation is never subject to voter referendum, whether or not it is passed by a two-thirds vote, and whether or not there is an emergency or even an emergency clause. The applicable constitutional language appears to provide that a legislative appropriation may avoid a voter referendum only if, as with emergency legislation, it is supported by a two-thirds vote in each house and the Legislature states why immediate operation is necessary. In 1931 the Court had said that this language showed the framers

"thought that no act of the Legislature, and certainly not those as vital to the state as acts appropriating its funds, which might at times be extravagant and unnecessary, should be placed beyond the veto power of the people."⁴

Despite the constitutional text and that prior decision, the *Garvey* Court ruled that the "ordinary meaning" of the constitutional language "forced" it to the conclusion that appropriations legislation can never be referred by the voters. The ordinary meaning, however, as the Court had previously held, was that appropriations were referable unless a super-majority of the Legislature believed that their immediate operation was required. The real reason for the holding in *Garvey* was probably revealed by the Court's explanation that, despite the Constitution's text:

We cannot believe that the framers of the constitution, or the voters who adopted it, intended to make it possible for a small percentage of the voters to stop the functions of the various departments of government by cutting off their appropriations through the operation of the referendum. This does not make sense.

Perhaps the most important Arizona Supreme Court decision making the authority of the people's lawmaking power subject to the will of the Legislature, rather than the other way around, as the framers intended, was *Adams v. Bolin*.⁵ The

Constitution had been amended shortly after statehood in 1914 to clarify that, in accord with the people's right of direct democracy, neither "the veto power of the governor," nor "the power of the legislature, to repeal or amend," "shall extend to initiative or referendum measures approved by a majority vote of the qualified electors." The *Adams* Court managed to interpret this provision to mean that the Legislature can always repeal initiatives or referenda—the direct opposite of what the 1914 amendment was designed to achieve.

Adams read the amendment to say that the Legislature is barred from repealing an initiative or referendum only if it receives, not merely a majority of the votes of those who vote for or against it, but the votes of a majority of all Arizona registered voters, whether or not they voted on the matter. As Justice Stanford explained in dissent, however, and as the *Adams* Court knew, "No initiated or referred measure since statehood has been adopted by a majority of the qualified electors." (Under the Court's interpretation, if 50 percent of the registered voters participate in an election, for example, an initiative would have to get 100 percent of the vote to avoid the possibility of legislative repeal.) The *Adams* Court justified its interpretation, as had the Court in *Garvey*, by explaining that the Constitution had made a mistake that needed correction: "[T]o permit the legislature to make needed amendments to ill-considered initiated laws or referred measures that, through the passage of time, have become obsolete, will be a step forward and





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relieve the people of shackling legislation.” Legislative repeal of initiatives, however, was

what the 1914 amendment was adopted to prohibit.

Adams is no longer good law in Arizona. In 1998, spurred by legislative actions that frustrated or nullified voter-initiated measures, voters adopted a constitutional amendment, the “Voter Protection Act” (VPA), that absolutely prohibits any legislative repeal of initiatives and referenda, and that permits only those legislative amendments that further the purpose of the voter-adopted measure and are passed by three quarters of each house of the Legislature. In

of Rights provides, “No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.” And section 6 of the Constitution’s Labor article provides, “The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”

The Arizona Supreme Court has applied these provisions with a great deal more enthusiasm than it has shown for Arizona direct democracy. The Court, for example, has broadened the scope of the provisions by treating them, despite their different language, as having the same meaning. The Labor article provision prohibits both the

including the right to sue doctors for medical malpractice,⁸ the right to sue for defamation,⁹ and the right to recover damages for defective products.¹⁰

The Court has also generously defined what constitutes prohibited legislative “abrogation.” That prohibition might have been read to forbid only statutes that completely abolish certain rights of action. The Court, however, has used the provision to invalidate statutes of limitation that have left causes of action intact, but deprived particular plaintiffs of the opportunity to bring suit.¹¹ And it has interpreted the provisions to protect not only causes of action that existed at the time the Constitution was adopted, but also common-law causes of action developed by the courts after statehood. The constitutional prohibition of statutes limiting the amount of damages has been generously construed to invalidate a statute that required successful medical-malpractice plaintiffs to accept periodic rather than a lump-sum payment of future medical expenses and lost wages.¹²

The difference between the Court’s generous right-to-sue-for-personal-injury decisions, as compared with its skeptical direct-democracy decisions, may be due to the fact that, when interpreting



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recently applying the VPA for the first time, the Court correctly applied it to prevent the Legislature from using funds for a purpose different from what the voters had prescribed.⁶ Just as this article was being written, however, the Court denied review in *Fogliano v. Brain*,⁷ a case in which the Court of Appeals had held that the “political question” doctrine prevented it from vindicating the voters’ intention to fund an expansion of the coverage of the State’s AHCCCS program. It may therefore be too early to tell whether the Court will permit the VPA to have its intended effect.

The Right to Recover Damages for Personal Injury

The right to recover damages for personal injury appears in two places in the Arizona Constitution. Section 31 of the Declaration

Legislature’s abrogation of the right of action to recover damages for injuries, and any statutory limitation on the damages recoverable in such actions. It is surrounded by other provisions applicable only to suits by employees against their employers. On the other hand, the Declaration of Rights provision, which is applicable to all personal injury actions, prohibits statutory limits on damages, but does not prohibit legislative abrogations.

A Court inclined to limit the anti-abrogation right in the way that the Court has limited Arizona direct democracy could easily have restricted application of that right to employment-related litigation. Holding that the two provisions were “intended to guarantee the same basic right,” however, the Court has used them to prohibit legislative abrogation of all personal-injury torts,

constitutional provisions protecting the right to sue for injury, it is dealing with legislative attempts to change rights that the Court itself has developed through the common law. The Constitution’s direct democracy provisions, on the other hand, have their source in the progressive politics of the early 1900s, which often saw the judiciary as part of the problem, not part of the solution. For that, as well as other reasons, the direct-democracy provisions of the Arizona Constitution may appear to the Court to be seriously outdated.

Arizona’s Declaration of Rights

When Arizona’s Constitution was written and adopted, the United States Constitution provided virtually no protection against state and local governmental



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violations of fundamental individual rights. The U.S. Constitution, for example, did not at that time prohibit state or local police from searching homes without warrants or probable cause, or from forcibly coercing confessions. It did not prohibit states from banning the practice of unpopular religions or banning speech critical of the government. It did not prohibit states from requiring racial segregation. That lack of U.S. constitutional protection existed because the U.S. Bill of Rights, originally adopted to limit the actions of only the federal government, had not yet begun to be substantially “incorporated” by the U.S. Supreme Court into the 14th Amendment, which does apply to the States. When Arizona became a State, constitutional protection from the actions of Arizona’s state and local governments and officials depended entirely on state constitutions, which were to be enforced by state courts.

The Constitution’s framers put a comprehensive Declaration of Rights right at

the beginning of the Arizona Constitution in order to provide constitutional protection that otherwise would not have existed. The Declaration of Rights protects, against state action, all of the basic individual rights that the Bill of Rights protects against federal action—sometimes in virtually the same language that is used in the Bill, sometimes in significantly broader language. Whether the language is the same or different, however, state courts enforcing state constitutions were not required in 1912, and are not required today, to follow narrow interpretations that the U.S. Supreme Court may have given to U.S. constitutional rights. States may, and often do, provide greater protection for their citizens from state and local laws and officials than is provided by the federal Constitution.

The Arizona Supreme Court has made only limited and sporadic use of its responsibility to give independent and meaningful effect to the Arizona Declaration of Rights:

- During the first 40 years of statehood,

when the Arizona Declaration was the only protection that Arizonans had from state and local laws and official actions, I have been able to find only three cases in which the Court used the Arizona Constitution to protect fundamental rights. In 1918 the Court recognized that the Arizona Constitution protected peaceful union picketing and leafletting during a wage dispute.¹³ In 1927 it held that a state statute that prohibited anyone other than registered pharmacists to sell “patent” medicines violated the Arizona Constitution’s due process clause.¹⁴ And in 1929 it decided that a state statute that taxed slaughterhouses in different locations at different rates violated the Arizona Constitution’s equal protection guarantee.¹⁵

- During the next 25 years—a time during which the U.S. Supreme Court was vigorously expanding the application of the U.S. Constitution to protect individuals from state rights violations—the Arizona Supreme Court continued to use the





Arizona Constitution's individual rights protections on only rare occasions. The only significant uses that I have been able to find during that period are two cases that invalidated injunctions prohibiting newspapers from publishing information about preliminary hearings in widely publicized murder prosecutions.¹⁶ When those cases were decided, the U.S. Supreme Court had not yet used the U.S. Constitution's First Amendment to provide the press with protection in such situations.

- The last 35 years have been ones in which the U.S. Supreme Court has generally been inclined to limit, rather than expand, federal protections against fundamental rights violations committed by state and local governments and officials. State constitutional protections for rights have, in consequence, become increasingly important. During this time the Arizona Supreme Court has, somewhat more frequently, used the Arizona Constitution to provide protections that the U.S. Constitution does not provide. It has held, for example, that Arizona's due process clause prohibits the use of psychotropic drugs to manage, rather than treat, mentally ill prison inmates.¹⁷ It recognized the constitutional right of a person in a chronic vegetative state to refuse medical treatment and nourishment at a time when the U.S. Supreme Court had not yet recognized that right.¹⁸ It has protected adult bookstores from discriminatory regulations that would not have been deemed to violate the U.S. First Amendment.¹⁹ It has used the Arizona Constitution to invalidate a school-voucher program that did not violate the Establishment Clause of the First Amendment.²⁰ And it has held that

Arizona's constitutional equal protection guarantee was violated by an abortion-funding program that the U.S. Supreme Court had refused to invalidate under the U.S. Constitution.²¹ With regard to the rights of defendants in state criminal proceedings, the Arizona Constitution has been used during this period to provide a somewhat greater right to trial by jury in misdemeanor cases than is guaranteed by the 6th Amendment²²; to prohibit some searches that would not have been found to violate the Fourth Amendment²³; and to provide due-process protection in prison disciplinary proceedings that probably did not violate the U.S. Constitution's Due Process Clause.²⁴

During the last 35 years, however, the Court has just as often failed to use the Arizona Constitution to protect fundamental individual rights in situations in which the adequacy of U.S. Constitutional protection was questionable at best. Here are three significant examples:

- In 1988, the Arizona Court of Appeals held that voters seeking to recall then-Governor Mechem did not have a right under the Arizona Constitution to solicit recall-petition signatures in large shopping malls in the Phoenix area.²⁵ The U.S. Constitution's First Amendment was not applicable because the shopping malls were privately owned, and the First and Fourteenth Amendments apply only to governmental action. The Arizona Declaration of Rights, however, contains no state action limitation. It provides that "[t]he

right of petition ... shall never be abridged." The Recall Committee had argued that the Declaration could and should be used to protect their activities, despite the fact that they were conducted on private, rather than state or city, property, because of the importance of giving citizens an adequate opportunity to gather signatures relating to Arizona's constitutional recall process. The Arizona Supreme Court denied review, an action that seems inconsistent with the Court's statement, in a case decided by the Court just one week later, that Arizona's constitutional protection for free expression is more protective than the First Amendment in part because the Arizona free-expression protection has no state-action limitation.²⁶

- Four years after *Fiesta Mall*, the Arizona Court of Appeals decided a sexual assault case, in which the U.S. Supreme Court had held that federal due process is not violated by the failure of police to preserve potentially exculpatory evidence unless the defendant is able to prove that the police acted in bad faith in failing to preserve the evidence. The Court of Appeals held that Arizona's due process clause gave greater protection, and required such evidence to be preserved by police whether or not their failure to preserve was in bad faith. The Arizona Supreme Court granted review and reversed. It decided to use the significantly less protective federal rule, rejecting the argument that, regardless of the requirements of the federal Constitution, the Arizona Constitution ought to be read to encourage Arizona police to exercise



due care in preserving evidence.²⁷

- A recent cruel and unusual punishment

case was the occasion for an especially striking failure of the Arizona Supreme Court to use the Arizona Constitution in order to avoid an unjust outcome. In 2003, the Court had decided a case in which the question was whether sentencing a 20-year-old male defendant to a mandatory minimum jail sentence of 52 years for having voluntary sex with two post-pubescent teenage girls constituted cruel and usual punishment. The Court in that case asked the parties to submit briefs addressing whether the Arizona Constitution might provide greater protection against cruel and unusual punishment than is available under the U.S. Constitution's Eighth Amendment. The Court asked that question because it recognized that the U.S. Supreme Court's "splintered" Eighth Amendment jurisprudence had "not 'established a clear ... path for [state] courts to follow.'" The Arizona Court ultimately concluded that the grossly disproportionate length of the sentence in that case so clearly violated the Eighth Amendment that there was no reason to consider the application of the Arizona Declaration of Rights.²⁸

Three years after *Davis*, in *State v. Berger*,²⁹ the Court considered the constitutionality of a 200-year mandatory-minimum sentence of imprisonment, without possibility of parole, that Arizona law required to be imposed

on a defendant convicted of possessing 20 images of child pornography. The charge was personal possession only—there was no evidence that the defendant, a middle-aged man with no prior criminal record, had bought, sold or in any way shown, distributed or displayed these images to others, or that he had ever acted inappropriately toward children or anyone else. One member of the Court aptly, if understatedly, characterized the sentence as "unnecessarily harsh."

The *Berger* Court, however, unlike the Court in *Davis*, did not ask the parties to submit briefs on how the Arizona Constitution might be used to decide the case. The Court instead held that the U.S. Supreme Court's Eighth Amendment cases, despite their lack of clarity, "bind us." Using those cases, the Court decided, with no majority U.S. Supreme Court opinion available to provide guidance, that the 200-year sentence should stand.

Berger presented the Court, as had *Fiesta Mall* and *Youngblood*, with an attractive opportunity to develop Arizona individual-rights law in a situation in which the U.S. Constitution, as interpreted by the U.S. Supreme Court, failed to provide adequate protection. The Arizona Court did not take advantage of that opportunity. The intention of the framers of the Arizona Constitution, however, clearly was that the Court would use the Arizona Declaration of Rights for precisely that purpose.

Conclusion

Commentary about the U.S. Supreme Court often focuses on whether that Court is a "liberal" or a "conservative" Court, or whether the Justices are "activists" or "strict constructionists." Those labels have little, if any, relevance in describing how the Arizona Supreme Court has interpreted and applied the Arizona Constitution during the first 100 years of Arizona statehood. It seems more meaningful to inquire instead whether the Arizona Court has, in its decisions, accurately captured and reflected the intention and spirit of Arizona constitutional provisions that were especially important to the Constitution's framers, and that also serve to give the Arizona Constitution its distinctive Arizona character. That has been a difficult job for the Court in a dynamically evolving state.

Examination of the Court's decisions in three important areas of constitutional law reveals a mixed record of success. The Court has quite successfully applied the framers' intention regarding the place of the common law as the principal source of law governing the right of individuals in Arizona to recover damage for injury. It has been less successful in implementing the framer's intentions regarding the central place of direct democracy in Arizona's governmental structure. And it has been both successful and unsuccessful in fulfilling its responsibility to develop an independent Arizona individual-rights jurisprudence, something the Constitution's framers intended the Court to do. 

endnotes

1. 14 Ariz. 458 (1913).
2. 25 Ariz. 324 (1923).
3. 62 Ariz. 342 (1946).
4. *Warner v. White*, 39 Ariz. 203 (1931).
5. 74 Ariz. 269 (1952).
6. *Arizona Early Childhood Development & Health Board v. Brewer*, 221 Ariz. 467 (2009).
7. 229 Ariz. 12 (2012).
8. *Kenyon v. Hammer*, 142 Ariz. 69 (1984); *Barrio v. San Manuel Division Hospital*, 143 Ariz. 101 (1984).
9. *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9 (1986).
10. *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340 (1993).
11. *Kenyon*, 142 Ariz. At 69; *Hazine*, 176 Ariz. At 340.
12. *Smith v. Myers*, 181 Ariz. 11 (1994).
13. *Truax v. Bisbee Local No. 380*, 19 Ariz. 379 (1918).
14. *State v. Childs*, 32 Ariz. 222 (1927).
15. *Gila Meat Co. v. State*, 35 Ariz. 194 (1929).
16. *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257 (1966); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557 (1971).
17. *Large v. Superior Court*, 148 Ariz. 229 (1986).
18. *Rasmussen v. Fleming*, 154 Ariz. 207 (1987).
19. *State v. Stummer*, 219 Ariz. 137 (2008).
20. *Cain v. Horne*, 220 Ariz. 77 (2009).
21. *Simat Corp. v. AHCCCS*, 203 Ariz. 454 (2002).
22. *E.g., State v. Strohson*, 190 Ariz. 120 (1997).
23. *State v. Bolt*, 142 Ariz. 260 (1984); *State v. Ault*, 150 Ariz. 459 (1986).
24. *State v. Melendez*, 172 Ariz. 68 (1992).
25. *Fiesta Mall Venture v. Mecham Recall Committee*, 159 Ariz. 371 (1988).
26. *See Mountain States Telephone and Telegraph Co. v. Arizona Corporation Commission*, 160 Ariz. 350 (1989).
27. *State v. Youngblood*, 173 Ariz. 502 (1993).
28. *State v. Davis*, 206 Ariz. 377 (2003).
29. 212 Ariz. 473 (2007).