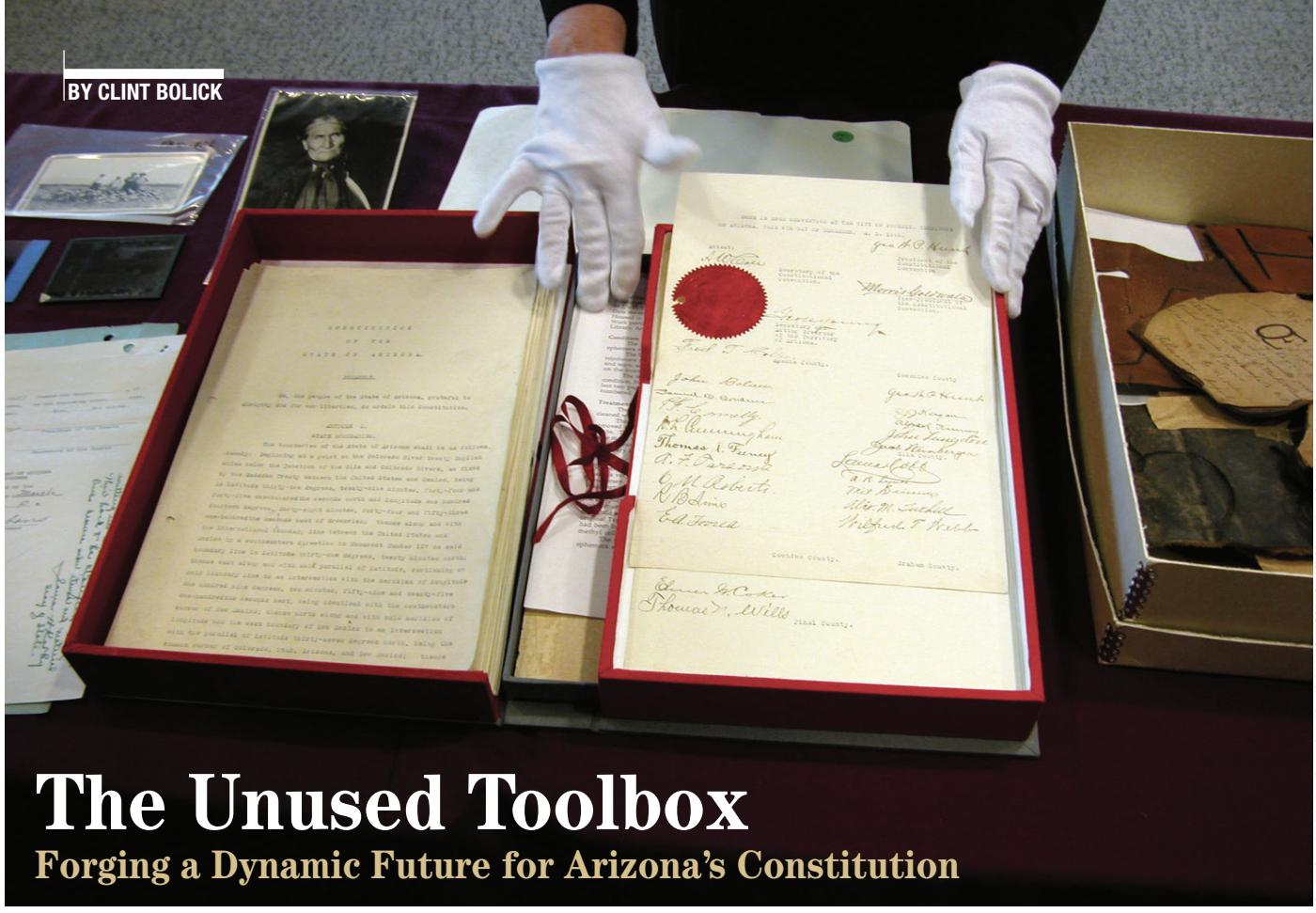

BY CLINT BOLICK

The Unused Toolbox

Forging a Dynamic Future for Arizona's Constitution

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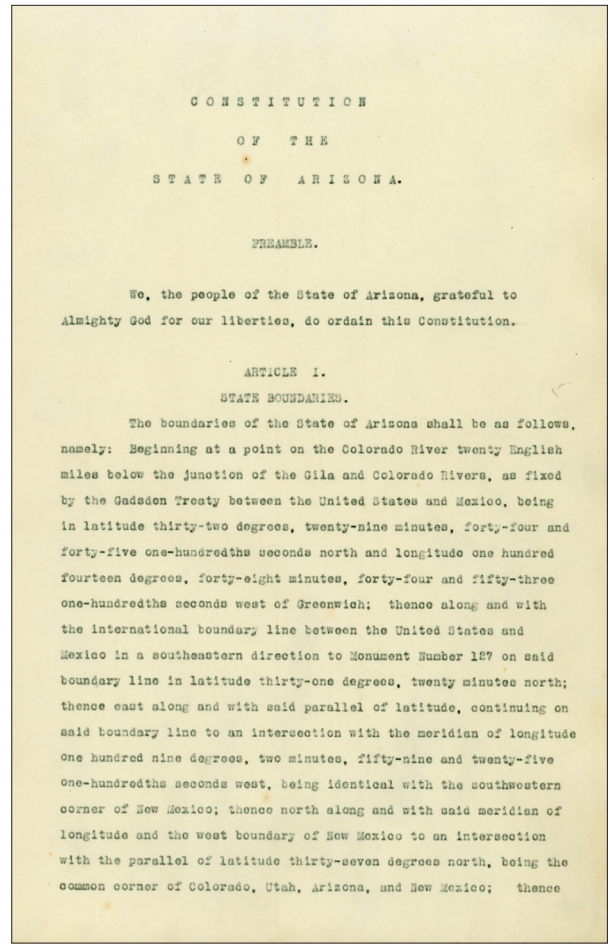
Back in my litigation days, any time I had the ear of a state supreme court justice, I asked the same question: "Are you interested in independently interpreting the Arizona Constitution?" Every justice responded with a variant of the same answer: "Absolutely, but we can't do so unless lawyers raise and develop state constitutional issues."



CONSTITUTION

OF THE

STATE OF ARIZONA.

PREAMBLE.

We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution.

ARTICLE I.

STATE BOUNDARIES.

The boundaries of the State of Arizona shall be as follows, namely: Beginning at a point on the Colorado River twenty English miles below the junction of the Gila and Colorado Rivers, as fixed by the Gadsden Treaty between the United States and Mexico, being in latitude thirty-two degrees, twenty-nine minutes, forty-four and forty-five one-hundredths seconds north and longitude one hundred fourteen degrees, forty-eight minutes, forty-four and fifty-three one-hundredths seconds west of Greenwich; thence along and with the international boundary line between the United States and Mexico in a southeastern direction to Monument Number 127 on said boundary line in latitude thirty-one degrees, twenty minutes north; thence east along and with said parallel of latitude, continuing on said boundary line to an intersection with the meridian of longitude one hundred nine degrees, two minutes, fifty-nine and twenty-five one-hundredths seconds west, being identical with the southwestern corner of New Mexico; thence north along and with said meridian of longitude and the west boundary of New Mexico to an intersection with the parallel of latitude thirty-seven degrees north, being the common corner of Colorado, Utah, Arizona, and New Mexico; thence

Now as a justice, I heartily concur in that judgment. Lawyers who fail to develop state constitutional arguments often leave valuable arguments—or causes of action and even entire cases—on the table. In most cases, even constitutional ones, the state constitution is an afterthought, if it is thought about at all. Hence, unless a case arises directly from the Arizona Constitution, we rarely have opportunity to consider what its words mean.

That condition owes to the fact that few lawyers have ever read their state constitutions, or taken courses in it. When we took "constitutional law" in our prescribed legal studies, it was as if there was only one constitution. Were we ever to deviously sneak a question about the Arizona Constitution into the bar examination—which, after all is the *Arizona* bar exam—most students, save the handful who have taken Paul Bender's state constitution class, would likely flunk the question.

That is a pity and a shame. One of the great attributes of the American republic is that we have not one constitution but 51. All state constitutions are chock-full of provisions unknown to the federal constitution. But ours perhaps more than most, owing to our late arrival to the Union. As former Chief Justice Rebecca Berch has observed, "The framers had the opportunity to ponder more than 100 years of United States history before penning their own Constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona's needs."

The framers of our state constitution viewed the combination of corporate and government power as a great

danger, and many of its provisions reflect that progressive-era philosophy. Hence the Declaration of Rights protects the right to recover damages for injuries and prohibits limiting the amount of recovery. We have an independently elected Corporation Commission, often referred to as a fourth branch of government, empowered to regulate utility rates and other corporate activities. We have a clause prohibiting gifts of public funds (by subsidy or otherwise) to private corporations, associations and individuals. We have a provision forbidding government-conferred monopolies. We have an explicit privacy guarantee. None of those provisions appear in the national constitution, so it is entirely up to Arizona courts to interpret them and lawyers to litigate them. Failing to do so reduces them to mere verbiage.

Even when our constitution's provisions have counterparts in the national constitution, we are free to interpret them differently than federal courts interpret the United States Constitution. But we may do so only in one direction: Our courts can give *greater* protection to individual rights than do federal court decisions, but not less. And so long as our decisions do not contravene the national constitution or valid federal law, our courts have the final word on the subject.

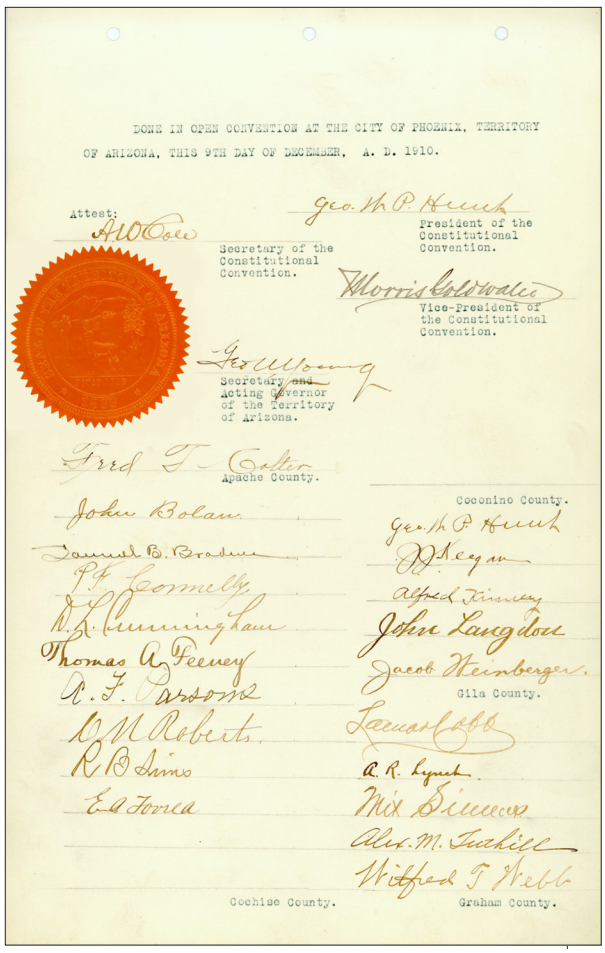
That vital attribute of federalism inspired former U.S. Supreme Court Justice William Brennan to extol the virtues of state constitutionalism in a pair of law review articles. Brennan feared that an increasingly conservative court would erode many of the constitutional rights recognized during the Warren era, particularly rights of criminal defendants. So he urged liberal advocates to recourse to state constitutions to independently protect those rights.

Many heeded the call, so that only a decade following his initial call to arms, Brennan was able to cite more than 250 state court decisions providing greater protection to individual rights than recognized under the federal constitution. Brennan recognized that state constitutionalism is not just a liberal doctrine but protects rights that conservatives cherish, as well. Indeed, state constitutions can be read to provide substantial protections of private property rights, freedom of contract, and the right to keep and bear arms.

State constitutions provide potential tools for all practitioners, including greater access to the courts. For instance, our constitution does not contain a "case or controversy" requirement, so that standing considerations that thwart many cases in federal courts might be litigated in Arizona courts, which treat standing as a prudential rather than a mandatory requirement. Likewise, Arizona courts may consider cases that are moot or not yet ripe. Indeed, our constitution gives the Supreme Court authority over all procedural rules, which need not mirror federal rules and can be initiated by petition.

A threshold issue in litigating state constitutional issues is when and whether our courts should interpret the Arizona Constitution independently of the federal constitution. So far our courts have done so on a largely ad hoc basis. Many older cases state that we generally follow federal precedents in construing similar provisions in the state constitution, but they are typically perfunctory and rarely explain why. In some areas, such as our speech provision (which is worded differently than its First Amendment counterpart), we have announced that our constitution provides greater protection than the federal constitution, but the contours of that protection are far from determined.

Some states have followed a "lockstep" approach in which state courts follow federal precedents to interpret their state constitutions. I reject such an approach, for it ignores the presumably conscious decisions of the framers to differentiate the wording of state constitutions from the national document.


DONE IN OPEN CONVENTION AT THE CITY OF PHOENIX, TERRITORY OF ARIZONA, THIS 9TH DAY OF DECEMBER, A. D. 1910.

Attest:

Secretary of the Constitutional Convention.

President of the Constitutional Convention.

Vice-President of the Constitutional Convention.

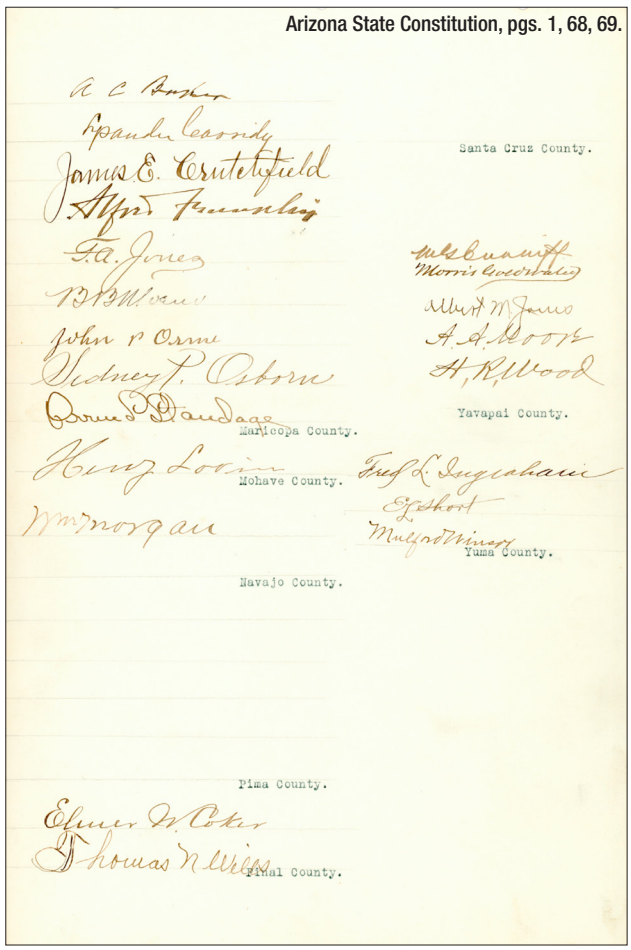
Secretary and Acting Governor of the Territory of Arizona.

Apache County.

Coconino County.

Cochise County.

Graham County.


Arizona State Constitution, pgs. 1, 68, 69.

Santa Cruz County.

Yavapai County.

Maricopa County.

Mohave County.

Yuma County.

Navajo County.

Pima County.

Final County.

Moreover, under the lockstep doctrine, every time the U.S. Supreme Court changes its mind on a particular issue, it would have the effect of essentially amending our state constitution.

Instead, having taken an oath not only to the U.S. Constitution but to the Arizona Constitution, I favor recognizing the independent vitality of each. Especially where the wording is different, we should give effect to those differences. Likewise, where the wording is similar, we should look to the meaning of the words when our constitution was adopted, rather than reflexively adopting constantly evolving federal constitutional precedents that might alter the intended meaning of our provisions (again, without making our constitution less protective of individual rights than the U.S. Constitution).

For courts to address those issues, litigators must take on the task of not merely raising them, but explaining in detail why and how we should (or should not) interpret our provisions differently than U.S. Supreme Court precedents interpreting similar provisions. In turn, these questions provide tremendous fertile ground for scholarly development. If you'd like to have a law review article cited in a judicial opinion, chances are good if you're writing on an undeveloped area of state constitutional law.

Our state's constitutional history is relatively scant. John Leshy and others have performed a salutary task in compiling and explaining that history, which can inform constitutional interpretation. Arguing constitutional meaning also can encompass the meaning of the words at the time they were used, examining sources of Arizona constitutional provisions in other state constitutions, and federal and state jurisprudence concerning similar provisions at the time our constitution was ratified.

Making state constitutional arguments—or failing to do so—can have important real-world consequences. A recent case, *State v. Jean*, presented the issue of whether a warrant was needed to install a GPS device on a commercial vehicle that police suspected was being used to transport drugs. Under Fourth Amendment jurisprudence, we were required to determine whether the co-driver who did not own the vehicle had a property interest under common law (we unanimously agreed he did not) or a reasonable expectation of privacy (four of us concluded he did). The latter inquiry required us to determine, among other things, whether the privacy interest is "one that society is prepared to recognize as 'reasonable,'" a standard I criticized in a separate opinion as "hopelessly subjective" and beyond the proper scope of judicial inquiry.

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In my opinion, I noted that article 2, section 8 of the Arizona Constitution is worded quite differently from the Fourth Amendment, providing that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Other state supreme courts, construing similar language in their constitutions, held that warrants were necessary for GPS devices in similar circumstances. But because the parties did not fully develop state constitutional arguments in *Jean*, the Court had to do its best to navigate difficult Fourth Amendment jurisprudence. Our view could change depending on future U.S. Supreme Court decisions, whereas a decision under our constitution would not be subject to ever-evolving federal jurisprudence.

A case that perhaps best illustrates the importance of independent interpretation is one my former colleagues and I litigated earlier in my career. Readers are surely aware of the *Kelo v. City of New London* case in which a 5–4 majority of the U.S. Supreme Court, over a strong dissent by Justice Sandra Day O'Connor, upheld under the Fifth Amendment the city's use of its eminent domain power to take homes and businesses to make way for amenities for a local Pfizer plant. The Court reasoned that although the Fifth Amendment restricts eminent domain to takings for "public use," it was proper in that case because the taking would confer a public benefit. Although the neighborhood was bulldozed, the new facilities were never built.

Around the same time, we were litigating a case on behalf of Bailey's Brake Service against the City of Mesa. The city wanted to take the brake shop and surrounding homes and businesses at the corner of Country Club and Main in order for a local hardware store to relocate and expand. Had we litigated the case under the federal constitution, the result surely would have been the same for Randy Bailey as it was for Suzette Kelo. Instead, we litigated it under article 2, section 17 of the Arizona Constitution, which, like the Fifth Amendment, limits eminent domain to public use. But it also provides that "the question whether the public use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." Relying on that distinction, the Court of Appeals, in a decision by Judge John Gemmill, rejected the city's use of eminent domain. Because the Arizona Constitution was held to provide greater protection than its federal counterpart, the result was that even as Suzette Kelo and her neighbors were losing their homes and businesses, Randy Bailey was able to keep his family business alive.

Surely, not every case asserting rights under the Arizona Constitution will have such a happy outcome. The State of Arizona has extensive police powers, and it has invested its subdivisions with broad authority. But there is no question that the framers of our constitution intended Arizonans to enjoy important freedoms beyond those recognized under the U.S. Constitution and to limit the powers of government in significant ways.

And unlike the national constitution, ours is fairly easily amended. In recent years, Arizonans have made a number of rights part of our organic law, including crime victims' rights, the right to choose doctors and access potentially life-saving drugs, and the right to secret-ballot elections to organize unions. It is safe to say that our constitution is an unfinished document.

The meaning of many of our constitutional provisions is yet to be fully determined. Like all constitutional guarantees, they are meaningful only if applied and enforced. To all Arizona lawyers fall the responsibility and opportunity of making good on our constitution's guarantees.