

# THE ARIZONA STATE CONSTITUTION

A Reference  
Guide

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John D. Leshy

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*Foreword by Chief Justice Stanley G. Feldman*

REFERENCE GUIDES TO THE STATE CONSTITUTIONS OF THE UNITED STATES,  
NUMBER 15

G. Alan Tarr, *Series Editor*



GREENWOOD PRESS

Westport, Connecticut • London

## Library of Congress Cataloging-in-Publication Data

Leshy, John D.

The Arizona state constitution : a reference guide / John D. Leshy.

p. cm.—(Reference guides to the state constitutions of the United States ; no. 15)

Includes bibliographical references and index.

ISBN 0-313-27266-2 (alk. paper)

1. Arizona—Constitution. 2. Arizona—Constitutional law.

I. Title. II. Series: Reference guides to the state constitutions of the United States ; 15.

KFA2801 1911.A6L47 1993

342.791'02—dc20

[347.91022] 92-35922

British Library Cataloguing in Publication Data is available.

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Library of Congress Catalog Card Number: 92-35922

ISBN: 0-313-27266-2

First published in 1993

Greenwood Press, 88 Post Road West, Westport, CT 06881

An imprint of Greenwood Publishing Group, Inc.

Printed in the United States of America



The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48-1984).

10 9 8 7 6 5 4 3 2 1

## Series Foreword

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard as constitution makers sought to benefit from the insights of their counterparts in other states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the Constitutional Convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment on fundamental rights or important principles. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively to changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights, and they looked to the federal courts and the federal Bill of Rights for redress.

As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were rediscovered. The immediate impetus for this rediscovery was former President Richard Nixon's appointment of Warren Burger to succeed Earl Warren as chief justice of the U.S. Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court's jurisprudence because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor from erosion by the Burger Court. In particular, they began to look to state bills of rights to secure the rights of defendants and to support other civil-liberties claims that they advanced in state courts.

This new judicial federalism, as it came to be called, quickly advanced beyond its initial concern to evade the Burger Court. Indeed, less than two decades after it originated, it has become a nationwide phenomenon, for when judges and scholars turned their attention to state constitutions, they discovered an unsuspected richness. They found not only provisions that paralleled the federal Bill of Rights but also constitutional guarantees—of the right to privacy and of gender equality, for example—that had no analogue in the U.S. Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing. Taken altogether, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

The renewed interest in state constitutions has not been limited to judges and lawyers. State constitutional reformers have renewed their efforts, with notable success. Since 1960, ten states have adopted new constitutions, and several others have undertaken major constitutional revisions. These changes have usually resulted in more streamlined constitutions and more effective state governments. Also, in recent years political activists on both the left and the right have pursued their goals through state constitutional amendments, often enacted through the initiative process, under which policy proposals can be placed directly on the ballot for voters to endorse or reject. Scholars have begun to rediscover how state constitutional history can illuminate changes in political thought and practice, providing a basis for theories about the dynamics of political change in America.

John D. Leshy's fine study of the Arizona Constitution, part of the Reference Guides to the State Constitutions of the United States series, reflects this renewed interest in state constitutions and contributes to our knowledge of them. Because the constitutional tradition of each state is distinctive, Leshy's volume begins by tracing the history and development of Arizona's constitution. It then provides

the full text of the state's current constitution, with each section accompanied by commentary that explains the provision and traces its origins and its interpretation by the courts and other governmental bodies. For readers with a particular interest in a specific aspect of Arizona constitutionalism, this book offers a bibliographical essay that discusses the most important sources examining the constitutional history and constitutional law of the state. It also contains a table of cases cited and a subject index.

G. Alan Tarr

## Foreword

The framers of the [C]onstitution of the United States had before them the constitutions of the thirteen original states.

Delegate Kingan  
Arizona Constitutional Convention  
November 4, 1910\*

Not too many years ago in Arizona, one could graduate from law school, pass the bar, and commence the practice of law without having read any portion of the Arizona Constitution. The subject, indeed, was rather irrelevant to the everyday practice of law and was discussed mainly by those few who happened to practice in esoteric fields such as water law, workers' compensation, and the like. A few tort lawyers, also, were interested in the portions of our constitution dealing with damage actions. Beyond such small groups, no one seemed to know or care very much about the Arizona Constitution. Certainly anyone attempting to learn about it would have been hard pressed to begin. There were no textbooks, and the source material was not compiled, organized, or indexed. There was hardly any place to start.

All that has changed. State constitutional law is now a hot topic. It is one of the subjects that may be covered in the bar examination. Issues of state constitutional law are raised with increasing frequency at trial and on appeal. Whether because of natural resistance to change or for some other reason—perhaps sometimes even for result-based reasons—there are some who are unhappy with the

*\*The Records of the Arizona Constitutional Convention of 1910*, ed. John S. Goff (Phoenix: The Supreme Court of Arizona, 1991), 200.

change. There are others, and I am one, who believe the change is salutary and long past due. If our jurisprudence is to conform to the intent of those who founded this country and this state, then the state constitution should provide the principles for state governance. The concept of federalism is at the heart of the American system of government, and this presupposes the existence and enforcement of both national organic law and an organic law for each constituent of the federal state.

This concept was well known to Arizonans. Our framers took the task of drafting a state constitution quite seriously. They intended that the constitution shape the formation, growth, and future of this state; they wanted to make this state different from the others. In my view, no principled argument can be made for the proposition that we should ignore or subordinate our state constitution. Our history, the genius of our nation, and the intent of our framers all require that we do just the opposite.

In his introductory historical essay, Professor Leshy carefully examines the social, political, and economic forces that shaped our constitutional convention and the key issues over which the framers fought. He also reviews the central themes of the original 1910 document as well as all of the subsequent proposed amendments. In Part II, Professor Leshy presents his definitive section-by-section analysis of the Arizona Constitution. We not only learn about the constitution's structure but also about the range of its guarantees and ambiguities. Thus, at last, those devoted to the Arizona Constitution have a source that not only gives us the flavor of the creation and evolution of our constitution but also provides us with comment about all of its provisions.

Almost every country has a written constitution, and most of those contain elegant and egalitarian phrases. As many countries in Europe have recently learned, in a free society the real question is not how fine the constitutional phrases are but whether there exists some implementing process to turn those phrases from inanimate words on paper to living principles that fairly govern society. To bring words to life, we must learn about the historical and societal importance of the constitution and have access to the material that will help scholars, judges, and lawyers understand the historical context of the document, the intent of the framers, and the evolution of precedent. Professor Leshy's work does just that and will have great significance for his adopted state.

Stanley G. Feldman  
Chief Justice



# Introduction

In the current climate of renewed interest in state constitutions, the Arizona Constitution is particularly worthy of examination. Admitted as the forty-eighth state in 1912, Arizona illustrates the politics of the statehood process and federal influence over state constitutional content in a comparatively recent context. At the same time, not having undergone fundamental revision since statehood, Arizona's constitution is also a relatively mature charter with a substantial history of interpretation and application. Its framing in the fall of 1910 came at the high-water mark of the progressive movement. This age of reform<sup>1</sup> was marked by enormous popular interest in government, with widespread debate over not only its role in American life but also, and especially, its structure and mechanics. The Arizona Constitution was heavily influenced by progressive thought: It is studded with progressive innovations like the initiative, referendum, recall, limits on child labor, public utility regulation, promotion of competition, and measures to control corruption and abuse of the political process. Moreover, to an unusual extent among state constitutions, it contains a number of provisions, such as workers' compensation, that responded to demands by rank-and-file workers for fairer treatment in a capitalist economy.

The Arizona Constitution also deserves examination in order to explore how both its text and interpretation have adapted to the radical demographic, economic, and political changes that have transformed the state in recent decades. Reaping the benefits and bearing the burdens of America's postwar shift to the sunbelt, Arizona's population has grown nearly sixteenfold since statehood. Its gross state product has multiplied 256 times, and its economic base has shifted dramatically from mining, ranching, and farming (the "three Cs"—copper, cattle, and cotton—was the common description of the state's dominant industries in the first half of the century) to real estate, construction, tourism, light man-

ufacturing, and trade. The dominant strain in its politics has shifted from Democratic progressive-liberalism through Democratic conservatism and then Republican conservatism to, most recently, politically divided government. The state constitution came into particularly sharp focus in 1987–88 when Arizona became the scene of the attempted recall and then the only impeachment and conviction of a sitting governor in modern U.S. history.

The Arizona Constitution is, then, a charter of government that is interesting in its own right, as well as being a useful lens through which to view the durability and adaptability of constitutional ideas and structure across decades of accelerating change.

A few notes on the methodology used in preparing the section-by-section commentary. First, space limitations have required selectivity in discussing judicial decisions interpreting individual sections, but I have generally attempted to address the most significant reported decisions rendered through the early fall of 1992. The amendments are current through the same date. Sometimes more than one judicial decision bears the same name; in such cases, the case name is followed by the date of decision to distinguish it from the others (e.g., *State v. Thomas*, 1981). Second, except in unusual cases, I have not discussed decisions of Arizona courts primarily or exclusively addressing the U.S. Constitution, even if there is a counterpart provision in the Arizona Constitution. Third, I have included few references to attorney general opinions addressing constitutional issues because they “are advisory only and do not bind courts of law, and they are not a legal determination of what the law is at any certain time” (*Green v. Osborne*).

Regarding nomenclature, “Supreme Court” refers to the Arizona Supreme Court, “constitution” refers to the Arizona Constitution. Constitutional amendments proposed by the people through the initiative process are so identified; others not specially identified were proposed by the legislature. Furthermore, the initiative process of Article IV, part 1 also allows the people to make ordinary laws directly, bypassing the legislature. The people and the legislature therefore share legislative power (*Home Builders Assn. v. Riddel*; see also Article XXII, section 14). Strictly speaking, it would be more precise when discussing legislative authority to refer to the “law-making power” (as the constitution itself occasionally does, e.g., Article IX, section 12) rather than simply to the “legislature.” The former seems clumsy, however, and is not used; readers should understand that references to the power of the “legislature” include the people’s right to bypass their elected representatives and make laws directly through the initiative.

Finally, there is the confusing matter of captions. The original version of the constitution adopted in 1910 contained captions only on articles and not on individual sections. Beginning with the publication of the constitution in the 1939 Arizona Code, captions have appeared on the individual sections in published versions of the constitution, although their source has not been identified.<sup>2</sup> Undoubtedly, most if not all such captions accurately reflect the text; however,

as they were added by unknown persons subsequent to adoption of the constitution, they cannot be taken as influencing the meaning to be given to the text.

To complicate matters, starting in about 1970, many amendments submitted to and approved by the voters have contained captions on the sections they were adding or amending; for example, the “Victim’s Bill of Rights” added in 1990 as Article II, section 2.1 bore that caption on the ballot. Captions are included here only when they were submitted to the voters in the amendment process. While that leaves what seems to be a random sprinkling of captions on individual sections, it is the only accurate rendering because only those captions approved by the voters may properly be considered as part of the constitution.

Finally, although I have attempted to present a fair portrayal of each section in light of its history and judicial interpretation, this book covers a lot of legal terrain, and errors may exist. In the expectation that there may be future editions of or supplements to this book, I sincerely invite comment and criticism from readers.

I owe debts of gratitude to many people: first and foremost, to my wife, Helen Sandalls, and our son, Alec, for their toleration and support. My friend Hans Linde originally inspired me (as he has many others) to explore state constitutional law. Former Dean Paul Bender and current Dean Richard Morgan of the Arizona State University College of Law have been supportive. Several dozen ASU College of Law students who have taken my occasional seminar on the Arizona Constitution have helped me gain insight into the subject. I have had the benefit of able research assistance from former ASU law students Mark McGinnis, Hank Lacey, Tom Bartlett, Patrick Sheehan and from current law students Bill Cleaveland and Bob Mann. The staff at the ASU Law Library, especially Susan Brodsky, Donna Larson-Bennett and Marianne Alcorn, have been indefatigable in tracking down many obscure sources. Donald Jansen, Jim Matthews, and Deborah Scott Engelby have read parts of the commentary and provided useful feedback. Professor Emeritus Bruce Mason of the Department of Political Science at ASU, who himself broke much ground on this subject, has been encouraging and helpful. Isabel Figueroa and Carolyn Landry have been a big help in processing the manuscript. Errors of course remain my own.

## NOTES

1. See generally Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955).

2. The 1939 Code was prepared under the supervision of the Supreme Court by authority of Laws 1939, ch. 89. In that code the captions were printed within brackets, perhaps added to facilitate the indexing of the constitution that the 1939 act required. When the constitution was published with the *Arizona Revised Statutes* in 1956, the captions were somewhat expanded and the brackets were removed from all of them except those on Art. IV, pt. 1.

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