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The ARIZONA State Constitution

John D. Leshy

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The Oxford Commentaries on the State Constitutions of the United States
G. Alan Tarr, Series Editor

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Foreword by Chief Justice Stanley G. Feldman

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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 Oxford Commentaries on 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 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.

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

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[1] 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 manufacturing, 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

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

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.[2] 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.

[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.

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 Cleave-land 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.

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PART ONE

The History of the Arizona Constitution

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Admitted to the Union as the forty-eighth state on February 14, 1912, Arizona is still operating under its original constitution. Although this charter has been modified by 118 amendments since statehood, it has not undergone fundamental revision. Most changes have been relatively minor, although modern ones attempting to place fiscal limitations on government added substantially to the constitution's length. The organization, structure, and most of the substance of the original version having endured, an examination of Arizona's constitutional history properly concentrates on the activities of the 1910 Constitutional Convention.

SETTING THE STAGE FOR THE 1910 CONVENTION[1]

Arizona endured a long territorial experience, marked by repeated unsuccessful attempts to gain statehood, a saga that a leading historian described as the "longest sustained admission fight in American territorial history."[2] Most of the area now within the state was acquired by the United States in 1848 in the Treaty of

[1] Most of the material in this section is recounted in much fuller detail in John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20 (1988), 1–113.

[2] Howard Roberts Lamar, *The Far Southwest 1846–1912* (New Haven, Conn.: Yale University Press, 1966; Norton Library reprint, 1970), 486.

Guadalupe Hidalgo that ended the war with Mexico.[3] This part of Arizona (north of the Gila River) was included in the territory of New Mexico established by Congress in 1850.[4] The area south of the Gila River (approximately the southern quarter of the state) was acquired from Mexico in the Gadsden Treaty of 1853.[5]

The Arizona territory was separately organized by an act of the Civil War Congress in 1863,[6] after the Confederate Congress had, at Jefferson Davis's urging, done the same. In fact, Davis had proclaimed it a Confederate Territory on February 14, 1862, exactly a half-century before statehood was achieved.[7] The new territory quickly adopted a rather comprehensive code of laws named the Howell Code after its author, William T. Howell.[8] One noteworthy feature of the code was a Bill of Rights. It contained a number of articles that strongly resemble provisions of the Declaration of Rights in the 1910 Constitution, although the texts are rarely identical. The Howell Code Bill of Rights was not formally of constitutional stature but was on a plane higher than ordinary legislation. Amending it required concurrence of a majority of all members elected to both branches of the territorial legislature, rather than the ordinary requirement of a majority of those present.[9]

Half-hearted attempts at statehood were begun as early as 1872 but were not taken seriously in the nation's capital because of the territory's remoteness and low population. Congress's admission of a quartet of new states in 1889 led the territorial legislature to resolve, that same year, to draft a constitution to bolster the case for admission. After many months of delay in getting under way, twenty-two men prepared a constitution in 1891 in less than a month, without much partisan wrangling.[10]

Some of the issues this convention addressed, such as female suffrage, property qualifications for voting, and an eight-hour work day for state employment, foreshadowed the successful statehood constitution that would follow nineteen years later. The Bill of Rights and sections on the legislative process, borrowing

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[3] 9 Statutes at Large 922 (1848).

[4] 9 Statutes at Large 446–52 (1850). Section 2 of that act specifically (if unnecessarily) reserved to the United States the power to divide "said Territory into two or more Territories, in such manner and at such times as Congress shall deem convenient and proper." Section 15 reserved, upon survey, two sections in every township for school purposes, a step that eventually led to Art. X of the constitution.

[5] 10 Statutes at Large 1031 (1853).

[6] 12 Statutes at Large 664–65 (1863).

[7] Robert W. Larson, *New Mexico's Quest for Statehood 1846–1912* (Albuquerque: University of New Mexico Press, 1968), 84; Lamar, *The Far Southwest*, 427–42.

[8] John S. Goff, "William T. Howell and the Howell Code," *The American Journal of Legal History* 11 (1967), 221; Jay J. Wagoner, *Arizona Territory: 1863–1912* (Tucson: University of Arizona Press, 1970), 31, 45–47.

[9] Howell Code, Bill of Rights, sec. 32.

[10] J. McClintock, *Arizona, the Youngest State* (Chicago: S.J. Clarke Pub. Co., 1916), 361; Wagoner, *Arizona Territory*, 288–91, 317–19.

liberally from the constitutions of other states, contained a number of provisions very close in language to the version eventually adopted in 1910. Reflecting the Zeitgeist, the 1891 document was substantially populist, calling for, among other things, an array of controls on corporate abuses. Although the voters of the territory overwhelmingly approved the document,[11] neither it nor the notion of statehood for Arizona survived the congressional gauntlet. The territory's sparse population and the proposed constitution's endorsement of the free coinage of silver (leading congressional Republicans to oppose the "free coinage of western senators") doomed this attempt.[12]

There is no direct evidence that the provisions of the Howell Code or the 1891 constitution had any influence on the deliberations of the 1910 Constitutional Convention. No explicit reference to either appears in the 1910 debates, and none of the delegates to the 1891 convention served in the one that succeeded nineteen years later. One historian has suggested that the 1910 framers did not even have a copy of the 1891 proposal on hand.[13]

Following the 1891 failure, serious attempts at constitution making in Arizona were put on hold for nineteen years while the political question of Arizona statehood was fought out on the congressional stage. The struggle for admission deserves attention here because it had considerable influence on the outcome of the Arizona Constitutional Convention.

At the center of the fight was Senator Albert J. Beveridge of Indiana, a Republican later prominent in the progressive movement. Concerned about the region's dominance by railroad and mining interests, and distrustful of the motives of many of his colleagues who had financial investments in the territory, Beveridge was not enamored of the idea of statehood for either Arizona or its neighboring territory to the east, New Mexico. As chair of the Senate committee on territories, a post he assumed in 1901, Beveridge was in a position of considerable influence. He spent much of the next nine years trying to stem the statehood tide.

Beveridge led a lengthy filibuster that successfully killed a statehood bill in 1903, but the close call persuaded him to shift tactics. In the next Congress he supported joining the Arizona and New Mexico territories together for admission as one state. This "jointure" proposal was eventually enacted by Congress in 1906, with the proviso that voters in both territories approve the idea at a referendum election. Railroad and mining interests in Arizona were horrified at the prospect of jointure, perceiving it as a threat to their hope for domination of state government. They were joined in opposition by cattle growers, the state bar

[11] John S. Goff, *Arizona Civilization*, 2d ed. (Cave Creek, Ariz.: Black Mountain Press, 1970), 49.

[12] Lamar, *The Far Southwest*, 480.

[13] Goff, *Arizona Civilization*, 50.

association, and nearly all the territorial newspapers. In the fall of 1906, the Arizona voters overwhelmingly rejected the idea.

This episode made separate statehood for Arizona and New Mexico inevitable. Although Beveridge continued to resist, he simultaneously turned to the task of making the statehood enabling act as protective of his perception of the national interest as possible. When, in early 1910, his Senate committee took up the bill authorizing separate statehood for Arizona and New Mexico, it inserted an unusual provision requiring them to submit their constitutions to both the Congress and the president for approval. This gave President William Howard Taft, who succeeded Theodore Roosevelt in 1909, a veto over admission. The bill also required the territorial electorate to vote on and pass the new constitution separately from and prior to the election of new officers and representatives, an approach for which it could find only one precedent, Colorado in 1876. This unusual process, designed to allow voters to focus singlemindedly on the constitution, was supported by Taft, who was concerned about the "rising tide of radicalism in the West," particularly as manifested in the constitution of the most recently admitted state, Oklahoma in 1906.[14]

Beveridge also persuaded Congress to reject the practice it had employed in prior enabling acts of using existing territorial law to determine the qualifications of the voters who would select the delegates to a constitutional convention, ratify the constitution, and cast ballots in the first general election after admission.[15] His undisguised purpose was to reject a literacy test for voting adopted by the territorial legislature in 1909 over the Republican territorial governor's veto. This measure had been rammed through the legislature by a solidly Democratic majority that had suddenly come to power in both houses that same year, ending many years of Republican domination.[16] The insurgents were led by the president of the upper legislative house (the Territorial Council), George W. P. Hunt, later a key figure at the Constitutional Convention. The highly partisan flavor of the literacy test led Beveridge to mistrust the motives behind it.

Although no one in Congress mentioned it, the rejection of the 1909 territorial election law also meant that the direct primary adopted as part of the same reform package by the Democratic insurgents would not be used to select candidates for delegates to the Constitutional Convention. The upshot was that candidates for convention delegates were selected by party conventions in each of

[14] John Braeman, *Albert J. Beveridge, American Nationalist* (Chicago: University of Chicago Press, 1971), 172, quoting a letter from Taft to Joseph G. Cannon, June 17, 1909.

[15] See, e.g., Act of June 16, 1906, ch. 3335, secs. 2, 24; 34 Statutes at Large 267, 268, 278–79 (statehood enabling act for Oklahoma and combined Arizona/New Mexico).

[16] See S. Rep. No. 454, 61st Cong., 2d Sess. 4 (1910). The 1909 territorial statute required every voter, unless prevented by physical disability, to be able to read the U.S. Constitution in English, "in such manner as to show he is neither prompted nor reciting it from memory," and to write his name.

the thirteen eligible counties in the territory.[17] As it turned out, the effect of selecting candidates by conventions rather than a primary worked strongly in favor of the politically active labor and progressive forces. They deftly used the convention process to select slates of delegates pledged to particular constitutional goals, something that would have been more difficult to engineer with an open primary.

In addition to tinkering with the mechanics of the statehood process, Beveridge also took steps to leave his mark on the content of the Arizona Constitution itself. Section 20 of the statehood enabling act required the framers of the Arizona Constitution to include, "by an ordinance irrevocable without the consent of the United States and the people of said State," a number of provisions spanning a wide range of subjects, including religious freedom, polygamy, English literacy, racial discrimination in voting, state jurisdiction over Indian affairs and Indian lands, federal water projects, assumption of territorial debts, location of the capital, public schools, and management of lands granted by the federal government to the new state.[18] With the exception of those dealing with state lands, such provisions were little discussed in the legislative history of the Arizona Enabling Act; several were simply copied from prior enabling acts of other states. (These provisions are discussed in the commentary to Article XX.) The restrictions on state land management were, however, unprecedented in their detail and severity (see the commentary to Article X).

There is profound irony in Beveridge's role as chief adversary of Arizona statehood. He himself was already becoming an ardent progressive and would soon leave the Republican party. Indeed, one of his biographers saw his frustration in battling the large corporate interests in the territory as marking "the first step in [his] shift . . . to progressivism."[19] Many of the progressive features of the Arizona Constitution were the direct result of Beveridge's resistance to Arizona's statehood. The delays he engineered facilitated the coalescence of the progressive and labor forces in Arizona under the banner of the Democratic party. This, in turn, helped them to gain, after years of frustration, the political strength to dominate Arizona's constitutional convention. There is, however, no evidence that this was Beveridge's conscious strategy; to the contrary, all indications are that he remained genuinely skeptical of statehood for Arizona. Nevertheless, the events that followed paradoxically meant that, as his early biographer noted, "in the end his was the triumph, after all."[20]

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[17] Although the territorial legislature had created a fourteenth county, Greenlee, in 1909, it was not eligible to be allotted delegates. George H. Kelly, *Legislative History: Arizona 1864–1912* (Phoenix: Manufacturing Stationers, 1926), 266.

[18] 36 Statutes at Large 557, 568–579 (1910).

[19] Braeman, *Albert J. Beveridge*, 97.

[20] Claude G. Bowers, *Beveridge and the Progressive Era* (New York: The Literary Guild, 1932), 379.

THE 1910 CONSTITUTIONAL CONVENTION: THE SETTING AND THE DELEGATES

The 1910 census counted just over 200,000 residents in Arizona, fewer than in all but three states. Nearly four out of five Arizona residents were white (including Hispanics, then not counted separately). Most of the remainder were American Indian, with about 1 percent either African American or Asian American. With a large land area, Arizona's population density was lower than all but two states, but Arizona was not particularly frontier or rural. It ranked in the middle of all the states in the percentage of urban population as then defined by the Census Bureau. The state's economy was substantially agricultural and industrial, with the flourishing metal mines dominating employment. It had a growing middle class and a coterie of educated citizens beginning to exercise cultural influence. In short, it was not as far out of the mainstream of American life as its sparse population and relative geographic remoteness might have suggested.

The drafting of its constitution highlighted trends and crosscurrents that mirrored the nation as a whole. When the statehood enabling act finally emerged from Congress, two movements were on the ascendancy in territorial politics: the predominantly middle-class progressive movement and the labor movement, the latter finding particularly fertile ground in Arizona's mining towns. By the midpoint of the first decade of the twentieth century, railroad and mine workers were becoming well organized by local unions, and labor disputes were more frequent.

Elsewhere in the country, the progressive and labor movements experienced difficulty coalescing in politics; in fact, in some locales they were bitter enemies. In Arizona, however, these two groups achieved a tenuous but tenacious alliance in July 1910, on the eve of the Constitutional Convention. This understanding was reached under the leadership of George W. P. Hunt, after some labor interests had advocated forming a new Labor party. The compromise called for labor to remain within the Democratic party (itself increasingly dominated by progressives), with the party pledging support for some basic principles advocated by labor. This coalition significantly influenced the substance of the constitution that emerged. That it marched under the Democratic banner was in sharp contrast to much of the rest of the country, where progressives were mainly Republican.

The enabling act signed by President Taft in June 1910 fixed the number of constitutional convention delegates at fifty-two, apportioned by population among the counties. Territorial Governor Richard E. Sloan immediately set a special election for September to select the delegates. The enabling act having in effect outlawed a primary, the candidates were selected by party conventions in each county. Progressive and labor advocates used these conventions to hammer out platforms on the content of the constitution and to secure pledges of support from candidates. The principal issues captured in these platforms were such

progressive favorites as the direct primary and the initiative, referendum, and recall and labor proposals for an eight-hour day, an employer's liability law, and restricting judicial power to issue injunctions in labor disputes. Platform pledges became an important litmus test for separating "progressives" from "conservatives," and in the September election the former won an overwhelming victory. Forty-one of the fifty-two delegates selected were Democrats. Most had pledged to support the progressive platform, and a substantial number supported one or more of the labor planks.

The election results were interpreted by some on the left to be an overthrow of, as a Phoenix newspaper put it, "the cruel yoke of corporate control."[21] Some on the right, on the other hand, saw the outcome as a potential threat to statehood because of growing concern by some in Washington, not the least of whom was President Taft himself, that the progressives might write too radical a constitution. In an October 1909 visit to Arizona, Taft had pointedly warned against patterning Arizona's Constitution after Oklahoma's. The latter contained an initiative, referendum, and prohibition of legislative limitations on liability, and Taft described it as a "zoological garden of cranks."[22]

The fifty-two delegates to the 1910 Constitutional Convention were a fair cross section of white men in the territory at the time. (Only one delegate, a Mexican-born merchant from Tucson, can readily be classified as other than of European extraction.) Their ages ranged from twenty-six to seventy-six, with an average age of forty-five. Their average tenure of residency in Arizona was eighteen years. Three were Arizona natives, five were foreign-born, and the remainder had moved to Arizona from twenty-two different states. Fourteen (just over one-fourth) were lawyers, thirteen had ranching interests, nine had mining interests, and eight were merchants. The delegates also included miners, doctors, engineers, machinists, journalists, bankers, and a minister.[23]

The delegates were, for the most part, experienced in politics. At least nine had served in the territorial legislature. Two others had served in legislatures of other states before moving to Arizona, and at least fifteen had held office in local government. Three of the lawyers had served on the territorial supreme court. The framers were ambitious for the future as well. They rejected without debate a proposal to disqualify themselves from seeking any office created by the constitution for a period of five years. With a sense of humor appropriate to an arid state, convention president Hunt referred this proposal, which had been

[21] *Arizona Gazette* (Oct. 13, 1909), 1, cols. 1–2.

[22] Oklahoma Constitution, Art. V, secs. 1–8; Art. XXIII, sec. 7.

[23] Leshy, "The Making of the Arizona Constitution," 31–40; *The Records of the Arizona Constitutional Convention of 1910*, ed. John S. Goff (Phoenix: The Supreme Court of Arizona, 1991) (hereafter Goff, *Records*), 1387–98.

introduced amid "laughter and applause," to the convention's committee on "militia and the public defense" for a quiet burial.[24]

Some of the delegates would remain active in state government for the next forty years. Three would become governors, serving a total of twenty-six years. Three others unsuccessfully sought the office. Three would serve on the new state's supreme court, and several others would hold important posts in various branches of state government. This ambition probably served the state well, for it made the delegates more attuned to realism in designing a government in which many of them had ambitions to serve.

Two delegates deserve particular mention for the pivotal roles they played. Michael Cunniff, thirty-five years old in 1910, was educated at Harvard, taught there and at the University of Wisconsin, and then became literary editor and later managing editor of *World's Work* magazine in New York, a progressive publication. He moved to Arizona for his health in 1906 and had mining interests in Yavapai County. An ardent progressive, he was a ready and often eloquent participant in many convention floor debates. His literary training stood him in good stead, for as chair of the convention's committee on style, revision, and compilation he was the principal drafter of the constitution. Widely recognized as the most valuable single contributor to the proceedings, he went on to serve as president of the first state senate before his untimely death in 1914.

The other prominent delegate, George Wylley Paul Hunt, was elected president of the convention. Fifty years old at the time, Hunt had already had a remarkable career as a merchant and politician in the mining town of Globe in Gila County. He had promoted progressive and other assorted reform causes for a number of years, supporting an initiative and referendum in the territorial legislature as early as 1899, a compulsory school attendance law, and a commission to regulate railroads. He also had a deep streak of idealism and was a "sort of Sir Galahad in politics," as one national magazine writer put it.[25] He pushed prison reform, was president of the Anti-Capital Punishment League, and supported controls on saloons and prohibition of gambling—surprising positions for a mining town politician with little formal education.

Despite (or perhaps because of) his iconoclasm, Hunt remained popular. With a firm reputation as an honest and capable man, he went on to serve seven terms as governor. For forty years a major player in the state's political life, he lost only one general and one primary election in his career. Rarely joining in convention floor debates, his efficiency in presiding over the deliberations was applauded in most contemporary accounts, and his behind-the-scenes maneuvering and committee appointments surely played a significant role in the outcome. If Cunniff was the Arizona convention's counterpart to James Madison,

[24] Goff, *Records*, 714–15.

[25] P. H. MacFarlane, "The Galahad of Arizona: Governor Hunt," *Colliers* (Apr. 15, 1916), 21, 22.

Hunt was its George Washington, the silent presiding officer whose presence heavily influenced the proceedings.[26]

■ HOW THE CONVENTION OPERATED

The convention was called to order on October 10 and met over most of the next sixty-one days, Sundays excepted. After a slow start, the delegates eventually buckled down to serious business, moving into night sessions on November 15 and completing their task on December 9. Though they had no formal time limit, their determination was helped along by Congress's shrewd decision, in funding the proceedings, to provide delegates with a maximum of sixty days compensation.

On the first day the delegates elected George Hunt president on a party line vote although, with old-fashioned courtesy, Hunt and his Republican opponent, Edmund Wells, voted for each other. President Hunt then promptly created and appointed delegates to various committees. Besides three committees dealing with housekeeping items like finances and procedures, there were twenty-one standing committees of substance, ranging in delegate size from three (Ordinance and Preamble/Declaration of Rights) to thirteen (Public Debt, Revenue, and Taxation). It was in the committees that much of the actual drafting and compromising was done.

Typically, the process of actually drafting the document worked liked this: A proposition on a particular subject, as broad as an entire article or as narrow as a one-sentence section, would be introduced, usually by a single delegate but occasionally by more than one. (There were 153 propositions in all.[27]) The president would then refer it to the appropriate committee. If the committee was disposed in favor, it would report it back to the full convention with a "do pass" recommendation. More often, the committee would combine it with several other propositions to form a single recommended article, would alter its content, or would simply reject it. Once a committee proposal reached the convention floor, it was (after little or extensive debate) either approved as written, approved as amended on the floor, or recommitted to the committee. Sometimes measures that had been recommitted were reformulated and returned to the floor, so that a particular measure might be the subject of several different floor debates over a period of days or weeks.

The delegates compiled no official complete record of the convention proceedings. Almost nothing is available about the deliberations of the committees, where much of the actual drafting was done. Available minutes mostly merely record dry details like attendance, opening and closing times, and the results of

[26] See Charles L. Mee, Jr., *The Genius of the People* (New York: Harper & Row, 1987), 79–80.

[27] These are reprinted in Goff, *Records*, 1016–1357.

formal votes on motions and propositions. Journals were kept of delegates' remarks on the floor throughout most of the proceedings, but they omitted some of the longer speeches and were attacked as inaccurate by some members. An edited version of the journals was published by the State Librarian in 1925; a more detailed compilation of the available materials was published by the Arizona Supreme Court in 1991.[28]

In light of the available information, it is practically impossible to obtain a detailed, precisely accurate picture of the convention's deliberations. But if Arizona's delegates had but one eye on history, in this respect they did not greatly differ from their federal counterparts in Philadelphia, whose deliberations were largely unrecorded, except for James Madison's private notes.[29] Although the shortcomings of the available records of the Arizona convention qualify their value as a source of interpretive guidance, that was, in fact, the avowed aim of at least some of the substantial number of delegates who opposed keeping a written record of floor debates. For them, and substantially if not completely for us, the text that was adopted should speak for itself.

AN OVERVIEW OF THE CONTENTIOUS ISSUES

The questions commanding much of the convention's attention were a rather accurate reflection of those dominating the national, and especially the western, contemporary scene. First and foremost were the tools of direct democracy promoted by the progressives—the initiative, referendum, and recall—which had only recently made their debut in American politics. Oregon had adopted the first two in 1902 and added the recall in 1908; Arizona was the next state to embrace all three. Because inclusion of these devices had been an overriding issue in the delegate selection process, it was practically certain that they would be in the constitution; only the details were in question. The major fight at the convention was over extending the recall to judges.

The second major set of issues looming over the convention concerned the rights of workers and labor unions in relation to management. The progressive-labor alliance fashioned in the summer of 1910 had enhanced labor's opportunities, but many particulars were left to be wrestled with at the convention. Closely related to the labor proposals were those dealing with the other side of the ledger—regulation of private corporations.

Three other issues provoked much debate: home rule for counties and cities, prohibition of alcoholic beverages, and female suffrage. Surprisingly, neither of the latter two was a major issue in the selection of delegates to the convention,

[28] Goff, *Records*. For a discussion of this compilation, see John D. Leshy, review essay, *Arizona State Law Journal* 23 (1992), 1163–68.

[29] See, e.g., Catherine Drinker Brown, *Miracle at Philadelphia* (Boston: Little, Brown & Co., 1966), 29–30.

even though both had been debated in the territorial legislature—female suffrage regularly since 1891. Because of the fervor of the prohibition advocates and the distrust they engendered in others, these three issues were closely linked in the convention debates. Some "wets" among the delegates opposed female suffrage, for example, because women were thought to be generally supportive of prohibition. Home rule became similarly entangled because of concern about how localities might exercise power over alcoholic beverage sale and control. In the end, advocates of female suffrage and prohibition were unable to persuade a majority of the delegates. This failure probably heightened their ardor for including the initiative, and this would indeed be the instrument by which they would shortly realize their goals.

Like the founding fathers in Philadelphia, the framers of the Arizona Constitution grappled with the conflict between the national ideal of equal rights and the reality of racial prejudice. A number of proposals to constitutionalize racial segregation were offered and debated. These carried clout because a substantial number of the delegates had migrated to Arizona from the South, the progressives across the country were peculiarly ambivalent on matters of race, and the national level of racial tolerance in 1910 was at its post-Civil War nadir. Congress had at least paid lip service to equal rights in the enabling act. Section 20 required that the state constitution "make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."[30] Civil and political rights were narrowly defined in that era, however, so this language offered little protection to racial minorities. In the end, the delegates kept the Arizona Constitution free from the stain of racism. They defeated provisions to ban racial intermarriage and to require or authorize racial segregation in public schools, the latter on a tie vote.[31] While race crept into the debates on various subjects, such as whether to require a literacy test for voting and to restrict employers from hiring alien labor, a number of delegates, led by President Hunt and several of the lawyers, spoke up for equality of opportunity.

Beyond these emotion-laden issues, the delegates devoted substantial time to the mechanics of government: the legislative process, taxing, spending, and the like. They agonized over such politically potent minutiae as pegging salaries of elected officials—which was much ado about very little, because while the constitution initially fixed salaries it gave the legislature the power to change them.[32] The convention also spent considerable time on natural resource issues, including state-owned lands (provisions now found primarily in Article X) and water rights (provisions now found in Article XVII).

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[30] 36 Statutes at Large 557, 569 (1910).

[31] Goff, *Records*, 537–38, 732.

[32] Arizona Constitution (original version), Art. IV, pt. 2, sec. 22; Art. V, sec. 13; Art. VI, sec. 10.

THE DOMINANT THEMES OF THE ARIZONA CONSTITUTION

Like their counterparts in most other states, the Arizona framers manifested what one leading legal historian has called "more distrust than confidence in the uses of authority."[33] Their skepticism of concentrating power in the hands of the few extended beyond government to embrace the private sector as well, but their skepticism was not gloomy. Like progressives around the country, they were generally meliorists, confident of the ability of humankind to channel its energies toward worthy and noble ends. The Arizona delegates believed in progress and in the idea that, as the leading interpreter of the progressive era has put it, the "nation could be redeemed if the citizens awoke to their responsibilities."[34] Sober enough to reject the idea that the "future would take care of itself,"[35] they did share an intense faith in the future of themselves and their society.

This optimism did not cloud their vision of what was required for an effective political system. They saw a need for careful arrangement of the machinery of government, and they saw the wisdom of suffusing that machinery with checks and balances in an effort to forestall excessive concentrations of power. They were, like progressives generally, concerned with structure and process as much as with ultimate outcomes and values. They saw the need for government to be flexible and, more important, for processes that would permit an activist government.

Power to the People

Perhaps the most constant thread running through the Arizona Constitution is its emphasis on democracy, on popular control expressed primarily through the electoral process. The delegates' shared belief was that if the citizenry sufficiently controlled the government, social justice could be accomplished. This was a cardinal tenet of the progressive movement, captured in its best-known innovations—the initiative, referendum, and recall—which allowed the people to take a direct role in the operation of government.

The initiative and referendum had been advocated in Arizona as early as 1894 by populist and soon-to-be Rough Rider W. O. "Bucky" O'Neill, who died in the charge up San Juan Hill. George Hunt then picked up the idea and unsuccessfully promoted it in the territorial legislature for more than a decade. The recall had a much shorter history, and in the end the question of whether to extend the recall to judges nearly derailed the convention and the statehood process itself.

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[33] J. Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1950), 241.

[34] Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955), 11.

[35] Richard Hofstadter, *The Progressive Movement, 1900–1915* (New York: Simon & Schuster, 1963), 4–5.

The floor debates on the initiative, referendum, and recall focused in part on the number of voters' signatures needed to invoke these processes (expressed as a percentage of the total number of voters). These percentages were hotly debated; one student of the convention observed that the difference of a mere percent or two "seemed to mark a man as a conservative or liberal Democrat."[36]

The Arizona framers were not content merely to graft these devices onto conventional government, however. They also sought to craft ordinary governmental processes to make them more responsive to the popular will. In so doing they were undoubtedly influenced by Arizona's long experience as a territory, where the governor and the judges were appointed by the president in far-off Washington. Some of these appointees had been political hacks with neither prior experience nor much interest in local affairs. The framers were thus determined to reverse that tradition of unrepresentative government, and they did, with a vengeance. All of the officers of state government created by the constitution were to be elected. Local government offices were treated the same way. Every time an issue was raised on the floor as to whether a particular office was to be appointive or elective, even such low visibility jobs as clerks of courts, the delegates opted for election. And, of course, judges themselves would stand for election.

This latter was not much of a contest. Nationally, progressives distrusted judges, for this was the heyday of "substantive due process" and other judicial doctrines that allowed courts dominated by conservatives to declare various regulatory measures unconstitutional. Labor interests also feared life tenure for judges because of considerable judicial interference, by such actions as enjoining strikes, in the efforts of workers to force employers to engage in collective bargaining. Arizona thus became the thirty-second state (including nearly all those in the West) to elect judges.

Arizona also followed the lead of some twenty-nine other states by providing for an "advisory" vote on the selection of U.S. Senators, three years before the Seventeenth Amendment to the federal Constitution was ratified. The progressives generally perceived the same evils and defense of privilege in legislatively appointed senators as they did in judges chosen by the legislature or the executive.

Another device the framers embraced to promote popular control was the direct primary, required to select candidates for all elective offices in the state—local, state, and federal. The reins of accountability were further tightened by short terms of office; elections for nearly all state and local government offices were to be held every two years. Once again, every time the question was raised, the delegates opted for more democracy, not less. Proponents of four-year terms

[36] Calvin Brice, "The Constitutional Convention of 1910" (M.A. thesis, Arizona State University, 1953), 39.

for some offices argued that the recall and the primary offered sufficient checks, but their arguments were swept away by the tide of popular sovereignty.

One other feature of the constitution might fairly be described as a device to allow for direct popular control of governmental action—the right of trial by jury. Consistent with their overall philosophy, the Arizona framers not only provided that the right shall "remain inviolate" (Article II, section 23) but took further steps to guard against encroachments on the independence of juries. Judges were forbidden to charge juries with respect to "matters of fact" and were prohibited from commenting on the evidence (Article VI, section 27). In the case of lawsuits to recover damages for death or injury, defenses of assumption of risk and contributory negligence were "in all cases whatsoever [and] at all times, [to] be left to the jury" (Article XVIII, section 5).

Suffrage and Safeguarding the Purity of Elections and Government

Besides female suffrage (rejected at the convention), the delegates debated whether to limit the franchise to property owners in certain local bond or special assessment elections. Although the propertied class carried the day in this contest, the delegates did overturn territorial law by prohibiting the exaction of a fee to place the name of any candidate on any ballot. The delegates also considered a literacy test for voting but, mindful of Congress's hostility to the territory's recently adopted literacy test, decided against it.

The convention continued the Australian import, the secret ballot, that had been adopted by the territorial legislature nineteen years earlier. It found numerous other ways to implement the progressives' reformist zeal to fight corruption and undue influence. It directed the first state legislature to enact a law requiring publicity of all contributions to and expenditures by candidates for public office (Article VII, section 16) and prohibited corporations from contributing anything with the purpose of influencing any election or official action (Article XIV, section 18). It also instructed the legislature to enact laws and adopt rules prohibiting the practice of lobbying on the floor of either house of the legislature and further regulating the practice of lobbying (Article XXII, section 19).

In the same vein, public officers were prohibited from receiving any transportation privileges from any corporation, and the legislature was directed to enact laws to "secure the purity of elections and guard against abuses of the elective franchise" (Article VII, section 12). To drive their concern further home, the delegates included a provision in the Declaration of Rights requiring all elections to be "free and equal" and proscribing any interference by any "power, civil or military [in] the free exercise of the right of suffrage" (Article II, section 21).

The convention also adopted detailed provisions prohibiting officials in the various branches from engaging in activities that might pose conflicts of interest. Legislators could not hold any other public office—local, state, or

federal (Article IV, part 2, section 4). Judges were similarly circumscribed and were also prohibited from practicing law during their terms (Article VI, section 28). Public officials' salaries were generally insulated from change during their terms of office (Article IV, part 2, section 17).

Allocating Power Among Branches of Government

The Arizona framers manifested their distrust of concentrations of governmental power by atomistically dispersing power among the institutions of government, an approach followed by the framers of the federal Constitution and all other states. Most prominent was the creation of the familiar three branches: legislative (divided into two houses), executive, and judicial.

With respect to the first and most powerful of these, the legislature, the framers accepted the traditional idea that the state legislature had inherent power to legislate. This meant, as one delegate put it, that the constitution "is one of limitations, and . . . the legislature or the people can do whatever they are not specifically prohibited from doing."[37] The result is that the Arizona Constitution fairly bristles with limitations on and instructions to the legislature: what it must do, what it may not do, and the processes by which it may act.

The constitution contains numerous examples of limitations on legislative power, such as a long list of prohibited subject matters for "local or special laws" (Article IV, part 2, section 19), special controls on taxes (Article IX, sections 3, 9), and general prohibitions against limiting causes of action or damages for injury (Article II, section 31; Article XVIII, section 6). Finally, the framers adopted a code of legislative procedure in the constitution, containing both housekeeping details on such question as sessions, attendance, quorum, and a legislative journal (see Article IV, part 2, sections 3, 8–11) and controls on drafting and packaging legislation such as the "one subject" and "title" rules and a prohibition against combining disparate appropriations into a single bill (see Article IV, part 2, sections 13, 14, 20).

The framers quite frequently directed the legislature to enact certain kinds of laws dealing with such disparate subjects as selling or leasing state lands (Article X, section 10), an eight-hour work day for public employment (Article XVIII, section 1), a workers' compensation system (Article XVIII, section 8), and funding a public school system (Article XI, section 10). They underscored their concern with separate provisions directing the legislature to "enact all necessary laws to carry [the constitution] into effect" (Article XXII, section 21) and making the constitutional policies "mandatory, unless by express words they are declared to be otherwise" (Article II, section 32).

[37] Goff, *Records*, 446 (statement of Mulford Winsor).

The Arizona framers dispersed executive power by distributing it among seven separate, elective offices: governor, secretary of state, auditor, treasurer, attorney general, superintendent of public instruction, and mine inspector. Many of the governor's powers mimic those of the U.S. president, but the governor has one power the president lacks—a line-item veto of appropriation bills (Article V, section 7). On the other hand, the governor has more limited powers of appointment than the president.

The judiciary was given considerable independence from the other branches but not from the people. The power of judicial review to declare acts of other branches unconstitutional was assumed by the framers to exist, although it was not expressly provided for in the constitution itself. Several proposals to limit judicial review were advanced, nearly all by progressive delegates, but none were adopted or even debated on the floor of the convention. The progressives and labor advocates in control of the convention were content to rely on frequent popular election (including primaries), the recall, and the relative ease of amending the constitution to control judicial excesses.

The Arizona Constitution dispersed governmental power in other ways as well, such as in the right to trial by jury (Article II, sections 23, 24); in the creation of an independent, directly elected corporation commission to regulate corporations (Article XV); and in the formation of substantially independent bodies—the state board of education and regents of the university—to supervise the state's system of public education (Article XI, sections 3, 5).

Restraining Government by Securing Individual Rights

The Arizona framers' appreciation that concentrations of power threaten individual freedoms led them to establish a so-called Declaration of Rights, found in Article II. The delegates understood that such rights as declared in the state constitution would be the first line of defense for individual liberty. At the time they were meeting, the U.S. Supreme Court had not yet interpreted the Fourteenth Amendment to the federal Constitution as incorporating the basic guarantees of the federal Bill of Rights and thus making them applicable to the states.[38]

There was some opposition to the idea of a Declaration of Rights in Arizona, but it was brushed aside with ringing statements, most prominently by lawyer delegate Ingraham, of the importance of these principles. The Arizona delegates did not pause very long over the substance of the rights to be protected, borrowing most of the text of Article II from the Washington State Constitution adopted twenty-one years earlier. There were a few short and sometimes contentious

[38] There was one limited exception to this. In *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U.S. 226 (1897), the U.S. Supreme Court had applied the Fifth Amendment to an action of local government, but not through a process of explicit incorporation. No mention was made of this exception in the reported deliberations of the Arizona convention.

debates over particular provisions, such as religion (the delegates included an atheist and a clergyman who sparred repeatedly) and what was then an almost unprecedented proposal to exclude coerced confessions from evidence. Although Arizona delegates rejected this limited form of what later became known as the controversial "exclusionary rule," it would later become nationally applicable through decisions of the U.S. Supreme Court.[39]

Some of the debates revealed delegate sentiments that clash sharply with today's popular image of pioneer Arizona. A farmer and a judge both expressed opposition to including a right to bear arms, finding the practice "pernicious" and "dangerous and vile."[40] The clergyman delegate unsuccessfully proposed to abolish the death penalty.[41] The delegates firmly rejected a proposal to limit the writ of habeas corpus, refusing to follow the language of the federal Constitution that authorized its suspension "when in Cases of Rebellion or Invasion the public Safety may require it."[42]

Policing the Struggle Between Capital and Labor

The convention's alliance between progressive and labor forces was strongest on questions of regulating corporations; conversely, it was most tested on questions of protecting the rights of workers. Firmly united on the need to provide ample authority to regulate corporations, the delegates took pains to assure that the legislature would retain the right to alter existing or pass new laws regulating corporations, regardless of any limitations expressed in corporate charters previously issued by the state (Article XIV, sections 2, 14).

The delegates were not content simply to assure broad legislative power to regulate corporate activities. Instead, they established a separate branch of state government—an elected corporation commission—and vested it with broad powers to regulate particularly the activities of "public service corporations," defined to include private utilities and common carriers (Article XV). They also included an entire separate article of nineteen sections directly limiting the power of private corporations, mostly aimed at protecting consumers and investors (Article XIV). The convention debates reflected an overwhelming sentiment to regulate and restrict corporate activities in the public interest, many delegates decrying the abuses they perceived existed in the territorial era. But, like the bulk of progressives across the country, the Arizona framers were not socialists. The majority were themselves small businessmen and entrepreneurs, and they believed in competition as well as private ownership. Thus they included a strong condemnation of monopolies and trusts (Article XIV, section 15) and

[39] See Leshy, "The Making of the Arizona Constitution," 84–85.

[40] Goff, *Records*, 678.

[41] Goff, *Records*, 1248 (proposition 98, sec. 6).

[42] Goff, *Records*, 760–62; Leshy, "The Making of the Arizona Constitution," 86, note 533.

prohibited the legislature from "granting irrevocably any privilege, franchise, or immunity" (Article II, section 9).

On the labor side of the ledger, the record was a bit more mixed, for here some tension manifested itself in the otherwise firm progressive-labor coalition. The convention approved a number of items on labor's agenda that specifically targeted labor-management relations. Most of these were contained in a separate article styled "Labor" and included mandatory workers' compensation and employers' liability laws, abolition of the fellow servant doctrine and blacklists, an eight-hour work day for government workers, and limitations on child and alien labor (Article XVIII).

The convention would not rubber-stamp all labor proposals, however, and a few delegates manifested outright hostility to their aims. In the end, however, though labor interests did not succeed entirely, they did defeat several proposals they deemed inimical to their interests, such as a "right to work" proposal outlawing union shops and another that was perceived as restricting labor's right to picket recalcitrant employers.[43]

Wealth and Taxation

Consistent with their overall philosophy, the delegates generally authorized curbs on the accumulation of great wealth. They gave the legislature explicit power to levy graduated income and other taxes (Article IX, section 12). They also sought to ensure, by a variety of individual measures, that the players in the economy were on a level field and that the government would not unfairly favor particular enterprises or individuals (Article II, section 13; Article IV, part 2, section 19(9), (10), (13); Article IX, sections 1, 7, 12).

Providing for the Future: Children and Public Education

The Arizona delegates followed the practice of many other states and adopted a separate article on the subject of public education (Article XI). If they had needed any prompting, Congress had provided it in the enabling act, requiring the state to provide "for the establishment and maintenance of a system of public schools . . . open to all the children."[44] Article XI contains considerable guidance on the establishment of a comprehensive public education system extending from common schools through the university level. None of these provisions provoked much comment on the convention floor.

The delegates also wrestled with the problem of child labor, then a growing national concern and a favorite target of both progressives and labor

[43] Goff, *Records*, 897–98; Leshy, "The Making of the Arizona Constitution," 93–95.

[44] 36 Statutes at Large 570 (1910), sec. 20 (fourth).

(Article XVIII, section 2). Finally, the convention provided special protection for juveniles caught up in the criminal justice system (Article XXII, section 16).

Amending the Constitution

The convention was reluctant to regard its wisdom as final. The delegates' emphasis on popular sovereignty led them to subject their handiwork to ready review and reconsideration by the people. The constitution they adopted is one of the easiest state constitutions to change; in fact, it is quite rare in that it lays out three different avenues of constitutional change: by legislative proposal, by popular proposal (initiative), and by a new convention (see Article XXI).

Legislative proposals for constitutional amendment require only a majority (albeit of those elected, not just of those voting) of the members of each legislative house to put a constitutional amendment on the ballot. Only a majority of those voting on the proposed amendment is necessary to adopt it. To put initiated amendments on the ballot, the signatures of qualified electors equal to 15 percent of the votes cast for all candidates for governor in the last election are required. Adoption again requires approval of only a majority of those voting.

The third method of change, a constitutional convention, requires a call from the legislature (whether by a majority of those elected or of those voting is not specified). The call must then be approved by the people on a referendum vote before the convention may meet. As with other avenues of constitutional change, convention proposals (whether for amendment, "alterations, revisions," or replacement of the constitution) must be submitted to the voters and approved by a majority of those voting before they can take effect.

■ A SLIGHT DETOUR ON THE WAY TO STATEHOOD

The convention produced a document containing nearly 21,000 words, almost triple the length of the federal Constitution. Length per se was not an issue, although there were frequent debates about whether a particular proposal was appropriate for constitutional enshrinement or was, instead, "purely legislative."[45] Near the end of the proceedings, Michael Cunniff's committee on style, revision, and compilation did yeoman work stitching the various provisions together into a coherent document. Some problems of organization could not be solved, however, as the delegates rushed to complete their work. As a result, Article XXII, originally designed to ensure a smooth transition between territoriality and statehood, contains several substantive provisions that belong elsewhere.

On December 9, 1910, the convention approved the constitution and adjourned. The 40-12 vote of approval reflected the Democratic dominance; all

[45] See, e.g., Goff, *Records*, 509–10, 512, 526.

members of that party but one approved it, while all Republicans but one rejected it. A special ratification election was quickly scheduled, and two months later, after a spirited campaign, the electorate approved the product of the convention's labors by a margin of better than three to one.

Formal proclamation of statehood was, however, another year away. Invited into the Union by the same enabling act as Arizona, New Mexico had ratified its own considerably more conservative constitution in January 1911, a month before Arizona. Congressional opponents of Arizona's progressive constitution pushed to separate its admission from that of its neighbor, but their effort died in the face of a filibuster in the lame duck session of the sixty-first Congress in the spring of 1911. A joint resolution approving statehood for both territories finally emerged from Congress on August 10, 1911, after a brief debate in which leading Senate conservatives denounced in particular Arizona's constitutional provision allowing recall of judges. In response to this concern, Congress included a requirement that the Arizona voters decide whether to retain the recall at the first general election to be held in the new state.

President Taft vetoed the joint resolution, following the Senate conservatives in singling out the recall of judges as his principal objection. Congress swiftly responded by sending another resolution to Taft on August 21, which he approved the same day, that authorized statehood on the condition that the Arizona voters delete the judicial recall provision in the fall 1911 election.

Having been forcefully apprised of the price of admission, in the election held on December 12, 1911, the Arizona voters dutifully removed the recall by a margin of nearly nine to one. Two months later, on February 14, 1912, Taft signed the proclamation admitting Arizona into the Union. The independent-minded Arizona voters extracted their revenge from Taft in several ways. Democrats swept nearly all the state offices at that election, and less than eleven months later Arizonans soundly rejected Taft's bid for reelection. He garnered less than 13 percent of the popular vote, finishing behind Woodrow Wilson, Teddy Roosevelt (running on the progressive Bull Moose ticket), and socialist Eugene Debs. At that same election, the voters reinstated the judicial recall in the constitution by a margin of almost fifty to one.[46]

■ AMENDMENTS TO THE 1910 CONSTITUTION

The Arizona Constitution has been amended 118 times since its adoption.[47] As shown in Table 1, more than 80 percent of the amendments have resulted from

[46] Leshy, "The Making of the Arizona Constitution," 58, note 320.

[47] This figure refers to amendment proposals separately submitted to the electorate rather than amendments to individual sections. In fact, sometimes several sections had to be amended to make a single kind of subject-matter change. A modification in the constitutional method of setting salaries of public officials in 1970, for example, required separate amendments to five different sections in several

TABLE 1 *Amendments to the Arizona Constitution 1912–1992**

Method of Proposal	Total Referred	Adopted	Rejected	Success Rate
Legislative referral	160	95	65	59%
Citizen initiative	54	23	31	43%

* This includes only those voted upon by the electorate, through the 1992 general election. Several other proposed amendments initiated by the voters in the 1930s were struck from the ballot by the courts for various reasons.

legislative referrals rather than direct citizen initiatives. The table also shows that the legislature has a better track record with the voters than citizen petitions.

Although the large number of amendments might suggest that the original constitution has changed a great deal, that is not the case. Many of the amendments are of a minor, even technical, nature. For example, Article VIII, section 3 was changed in 1974 simply to give the legislature authority over the timing of recall elections, eliminating the fixed time frame adopted by the framers in 1910. The child labor provision in Article XVIII, section 2 was amended in 1972 to delete the general prohibition on "night" work by persons under sixteen years of age. While that was an interesting reflection of social change, it was hardly an earthshaking modification of constitutional policy.

Statistics alone do not provide a full picture of how much of the original constitution of 1910 has survived, but they are a useful starting point. About three-fourths of the 256 sections contained in that document (counting the separate numbered paragraphs of the Ordinance in Article XX as separate sections) survive in their original form. Some of these have been renumbered, most notably in Article VI dealing with the judiciary. Although the twenty-four sections in the original version of Article VI were replaced by a new thirty-five section article adopted in 1960 (and enlarged to forty-two sections by subsequent amendments), many of the core principles and much of the original text were maintained.

Apart from Article VI, somewhat fewer than fifty of the sections in the original constitution have been amended, often in only minor ways. Nine sections of the original have been repealed outright. About thirty entirely new sections have been added by amendment. Five of the added sections—those prohibiting the manufacture and sale of alcoholic beverages—were themselves subsequently repealed by amendment.

Although bald statistics on the number of amendments overstate the degree of change, there can be no quarreling with the assessment that the length of the Arizona Constitution has been substantially changed by amendment. The current document is about half again as long as the original, from a little over 20,000 to nearly 30,000 words. Much of the new verbiage stems from a detailed, nearly impenetrable fiscal control amendment adopted upon a legislative referral in

different articles. A single initiative providing for merit selection of most judges and related changes in 1974 required amending twelve different sections of Art. VI.

1980 (Article IX, sections 18–21), a legacy of a tax limitation movement of the late 1970s.

Table 2 summarizes the proposed amendments to the Arizona Constitution that have been submitted to the voters since statehood. It indicates their subject matter, which sections they would amend or add, whether they were adopted or rejected, whether the election was a general or special election, the popular vote totals, and whether they were proposed by initiative petition or by legislative referral. The amendments are grouped by year and, within that year, in order of the article and section affected, grouped separately by successes and failures, at general and special elections.

The inclusion of amendments rejected by the voters in this table is not to suggest that failed amendments have overwhelming significance in interpreting the constitution, for it is of course impossible to determine the motives of those who voted against such proposals. Nevertheless, in a broad sense these rejections are indicative of constitutional values and merit inclusion in this general summary.

Table 3 groups the constitutional amendments proposed and adopted since 1910 by decades.

As Tables 2 and 3 show, the early decades saw relatively little constitutional tinkering. Indeed, some of the earliest amendments could be considered of a piece with the original constitution—unfinished business left over from the 1910 convention—in the same way that the Bill of Rights is popularly regarded as part of the original U.S. Constitution, even though the first ten amendments were not ratified until sometime later. The package of amendments to the Arizona Constitution adopted in 1912 included reinstating the judicial recall, recognizing the right of women to vote and hold office, and adding a clause to the Declaration of Rights allowing the state and municipal governments to engage in "industrial pursuits." The first had been adopted at the 1910 convention and deleted in the fall of 1911 as the price of admission. The other two had been seriously considered at the convention. A 1914 amendment narrowed what some regarded as a loophole left in the initiative process as originally adopted. Alcohol prohibition, the focus of amendments approved in 1914 and 1916, had also sparked considerable debate at the 1910 convention.

What followed were several decades of relatively measured change. There were no alterations during the seven years between 1918 and 1925 (which saw fifteen proposals rejected, ten at a single election in 1922), and during the six years between 1940 and 1946 (when only one amendment was proposed). Ten amendments were also rejected in 1950. Amendment frenzy then seemed to strike the state beginning in the mid-1960s. Indeed, about half of the amendments made since 1912 came in the seventeen years between 1964 and 1980. The largest number of amendments approved in any one year was eleven, in 1974. Ten were approved in 1980. Relative calm was restored after 1980, but 1992 saw eight of eleven proposed amendments approved.

TABLE 2 *Amendments to the Constitution of Arizona Proposed to the Electorate Since Statehood*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
1912	Industrial pursuits (2/34)	Adopt	14,928	(81)	3,602	(19)	Legis
	Women suffrage, right to hold public office (7/2)	Adopt	13,442	(68)	6,202	(32)	Init
	Recall of Judges (reinstatement) (8/1)	Adopt	16,272	(81)	3,705	(19)	Legis
	Limit School District Debt to 10% of Property Value, increase override pet. from 5% to 10% (9/8)	Adopt	15,358	(85)	2,676	(15)	Legis
	Taxation, method (9/11)	Adopt	15,967	(87)	2,283	(13)	Legis
1914	Initiative & referendum measures, no legislative power to repeal or amend (4/1/1(6))	Adopt	16,567	(50)	16,484	(50)	Init
	Alcohol manufacture or import prohibition, penalty (23)	Adopt	25,887	(53)	22,743	(47)	Init
	Alcohol prohibition elections (7/new 17–20)	Reject	16,059	(38)	26,437	(62)	Init
	$5 million in bonds for state highways (9/5)	Reject	13,215	(36)	23,499	(64)	Init
	$5 million bonds for state reclamation (irrigation) service (9/5)	Reject	14,701	(45)	17,994	(55)	Init
1916	Alcohol prohibition on possession (24)	Adopt	28,473	(62)	17,379	(38)	Init
	Would have required majority of votes cast at election rather than those voting on the proposition to enact initiative or referendum measures (4/1/1(5))	Reject	18,356	(49)	18,961	(51)	Legis
	Abolition of senate (4/1/1 and 4/2/1)	Reject	11,631	(34)	22,286	(66)	Init
	Legislative redistricting (4/2/1)	Reject	15,731	(47)	17,921	(53)	Init
	Taxation, educational, religious, gov't exemptions (9/2)	Reject	14,296	(46)	16,882	(54)	Legis
	Alcohol local option (23/new 4)	Reject	13,377	(31)	29,934	(69)	Init
	Workmen's compensation (new 24)	Reject	18,061	(46)	21,255	(54)	Init

TABLE 2 *(Continued)*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
1918	Legislative representation in lower house based on population, by county (4/2/1)	Adopt	17,564	(62)	10,688	(38)	Init
	State lands, delete 5-yr. term for leasing or sale (10/10)	Adopt	16,372	(60)	10,867	(40)	Init
	State lands delete maximum acreage for leasing (10/11)	Adopt	14,379	(56)	11,179	(44)	Init
	Workmen's compensation, hazardous employment (new 25)	Reject	12,873	(32)	27,177	(68)	Init
1920	Allow legislators to be appointed to new job after term ends (4/2/5)	Reject	8,945	(25)	26,520	(75)	Legis
	State Tax Commission, election of members (unnumbered new article)	Reject	9,592	(28)	25,234	(72)	Legis
	Salary increases for teachers, public officers (new 25)	Reject	13,701	(33)	28,053	(67)	Init
1922	Education, public school system (overhaul 11)	Reject	14,212	(37)	24,062	(63)	Init
	Legislature, allowing elections to other offices (4/2/5)	Reject*	6,899	(22)	25,095	(78)	Legis
	Legislature, 4 year terms (4/2/21)	Reject*	7,292	(22)	25,659	(78)	Legis
	Executive dep't, 4 year terms (5/1)	Reject*	6,988	(21)	25,710	(79)	Legis
	Authorize legislature to abolish direct primary (7/10)	Reject*	7,774	(23)	26,302	(77)	Legis
	General elections date to allow for 4 yr. terms (7/11)	Reject*	7,487	(23)	25,602	(77)	Legis
	Public debt & taxation, increase debt limit (overhaul 9)	Reject*	12,033	(33)	24,422	(67)	Legis
	$25 million bonds for Hassayampa-Co. R. highway (9/new 5A)	Reject*	22,130	(47)	24,688	(53)	Legis
		Reject*	7,796	(24)	25,322	(76)	Legis
	County officers 4-yr. terms (12/3)	Reject*	13,848	(40)	20,559	(60)	Legis
	Agriculture, permitting cooperative associations (14/new 20)						

1924	Legislature, reapportionment, enlarge senate to 19 members (4/2/1)	Reject	8,779	(20)	34,602	(80)	Legis
	Hassayampa-Co. R. highway bonds (9/new 5A)	Reject	13,656	(25)	40,372	(75)	Init
1925	Workmen's compensation rewrite (18/8)	Adopt*	11,879	(57)	9,078	(43)	Legis
1926	State executive offices, limit to 2 consecutive terms (5/10)	Reject	23,401	(45)	28,299	(55)	Init
1927	Taxation in Indian Country (20/fifth)	Adopt*	9,377	(75)	3,191	(25)	Legis
	Public lands (repeal 20/tenth)	Adopt*	9,202	(74)	3,279	(26)	Legis
1928	Tax exemption, widows, soldiers, sailors, and army nurses (9/2)	Adopt	30,208	(60)	20,044	(40)	Legis
	Medical liberty, protecting "any method of healing" (2/new 35)	Reject	11,424	(27)	31,324	(73)	Init
1930	Equal pay, for multi-member courts or agencies (4/2/17)	Adopt	31,022	(61)	20,168	(39)	Legis
	Voters on bond issues, limit to "real" property taxpayers (7/13)	Adopt	31,314	(60)	20,867	(40)	Legis
	Employees on public works (18/10)	Adopt	35,387	(66)	18,560	(34)	Legis
	Legislature, apportionment (4/2/1)	Reject	18,406	(41)	27,003	(59)	Legis
	Abolish auto taxes except motor fuel tax (9/1)	Reject	20,505	(35)	37,942	(65)	Init
	$10 million in bonds for state highways, motor fuel license tax (new 25)	Reject	21,678	(37)	33,454	(61)	Init
1932	Legislature, apportionment (4/2/1)	Adopt	56,182	(65)	29,806	(35)	Init
	Prohibition, repeal (23 and 24)	Adopt	63,850	(64)	36,218	(36)	Init
	Gasoline tax exemption for public bodies; apportionment of revenues among state subdivisions (9/2 new unnumbered sections)	Reject	27,498	(34)	53,867	(66)	Init

TABLE 2 *(Continued)*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
	State expenditures, limit on (new 25)	Reject	37,453	(42)	51,441	(58)	Init
	County expenditures, limit on (new 26)	Reject	37,229	(43)	49,934	(57)	Init
1933	Death penalty, lethal gas (22/22)	Adopt	14,999	(56)	11,585	(44)	Legis
	Legislature, 4 year terms (4/2/21)	Reject	8,158	(30)	18,746	(70)	Legis
	State officers, 4 year terms (5/1)	Reject	10,751	(38)	17,537	(62)	Legis
	General election date to allow for 4-yr. terms (7/11)	Reject	8,587	(38)	13,966	(62)	Legis
	County officers, 4 year terms (12/3)	Reject	10,549	(37)	18,076	(63)	Legis
	Mine inspector, 4 year term (19)	Reject	9,771	(37)	16,764	(63)	Legis
1938	Legislators not available for appointment to public office; exempt school officials (4/2/5)	Adopt	37,438	(57)	28,478	(43)	Init
	Tax free homes (9/2a)	Reject	39,589	(47)	43,771	(53)	Init
1940	Auto license tax; modifying municipal corporation exemption (9/11)	Adopt	53,124	(58)	37,856	(42)	Init
	State lands lease terms (10/3)	Adopt	45,228	(54)	39,008	(46)	Legis
	Irrigation districts as municipal corporations (13/7)	Adopt	61,795	(65)	32,646	(35)	Init
		Reject	51,739	(46)	60,068	(54)	Init
	Tax free homes (9/2a)	Reject	41,696	(49)	42,748	(51)	Init
	Tax limitations (9/12)						
	Public service corporations, limiting municipal corp. exemption (15/2)	Reject	20,981	(26)	60,531	(74)	Legis

1944	Annuities for aged and disabled, 3% income tax (new unnumbered article)	Reject	22,698	(23)	77,693	(77)	Init
1946	Tax exemption for army nurses (9/2)	Adopt	48,357	(54)	41,040	(46)	Legis
	Right to work (new 25)	Adopt	62,875	(56)	49,557	(44)	Init
	Legislators' salaries and mileage (4/2/1)	Reject	49,877	(48)	54,502	(52)	Legis
	Executive dep't, 4 year terms (5/1)	Reject	42,304	(43)	55,930	(57)	Legis
	County offices, 4 year terms (12/3)	Reject	36,666	(42)	51,539	(58)	Legis
1948	Legislature, special session (4/2/1)Adopt	Adopt	77,941	(68)	37,392	(32)	Legis
	Gubernatorial succession (5/6)	Adopt*	113,038	(78)	31,151	(22)	Legis
	Superior courts, consolidate (6/25)	Adopt	83,120	(69)	37,839	(31)	Legis
	City managers may be non-residents (7/15)	Adopt	73,363	(60)	48,052	(40)	Legis
1950	Legislature, annual sessions (4/2/3)	Adopt*	63,514	(56)	50,918	(44)	Legis
	Inventory tax abolished (9/13)	Adopt*	70,090	(62)	43,650	(38)	Legis
	State and school lands leasing (10/3)	Adopt*	80,732	(69)	35,553	(31)	Legis
	Legislature, apportionment and 4 year terms (4/2/1)	Reject*	57,201	(50)	58,001	(50)	Legis
	Executive officers, 4 year terms (5/1)	Reject*	54,032	(46)	64,064	(54)	Legis
	County officers, 4 year terms (12/3)	Reject*	53,863	(46)	62,366	(54)	Legis
	State board of education, revise membership to exclude school officials, staggered terms (11/3)	Reject	38,239	(25)	112,109	(75)	Init
	Additional funds for maintenance of schools (11/new 11)	Reject	65,263	(39)	100,286	(61)	Init

TABLE 2 *(Continued)*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
	Liability of bank stockholders (14/11)	Reject	61,196	(40)	91,067	(60)	Legis
	Merit system for public employees (new unnumbered article)	Reject	58,182	(37)	98,233	(63)	Init
1952	Limiting expenditure of highway-related tax revenues to transportation purposes (9/new 14)	Adopt	128,094	(73)	48,409	(27)	Legis
1953	Legislature, Senate membership and apportionment (4/2/1)	Adopt*	30,157	(50)	29,713	(50)	Legis
	Salaries, public officials (4/2/17)	Adopt*	35,039	(59)	24,548	(41)	Legis
	Revision of state educational supervisory bodies (revise 11/2, repeal 11/3,4)	Reject*	24,069	(40)	35,652	(60)	Legis
	Education, allow apportionment of school funds on other than strict per-pupil basis (11/8)	Reject*	25,855	(43)	33,953	(57)	Legis
1954	Liquor to Indians, prohibition adjustment (20/third and eleventh)	Adopt	64,493	(59)	44,965	(41)	Legis
1956	State boundaries alteration process (1/2)	Adopt*	79,021	(72)	30,758	(28)	Legis
	Liability of shareholders of banking corporation and association, federal insurance exemption (14/11)	Adopt*	70,670	(64)	39,741	(36)	Legis
	Employment of aliens, exempt exchange teachers (18/10)	Adopt*	82,834	(72)	31,434	(28)	Legis
	Salaries of legislators (4/2/1)	Reject*	41,297	(36)	72,954	(64)	Legis
1958	Salaries of legislators (4/2/1)	Adopt*	68,207	(59)	47,281	(41)	Legis
	Retired judges may serve (6/26)	Adopt*	84,502	(73)	31,584	(27)	Legis
1960	Court System revision - modern courts amendment (6 rewrite)	Adopt	166,199	(68)	86,508	(34)	Init
	Authorize employment of aliens by colleges and universities (18/10)	Adopt	144,792	(57)	109,280	(43)	Legis
1962	Maintenance of government operations in emergency (4/2/25)	Adopt	163,024	(67)	79,681	(32)	Legis

	Qualifications for voting for presidential electors (7/2)				78,477	(34)	
	Election to fill vacancies in congressional offices (7/17)	Adopt	154,476	(66)	101,482	(42)	Legis
	Real estate brokers, preparation of legal papers (new 26)	Adopt	139,603	(58)	64,507	(21)	Legis
		Adopt	236,856	(79)			Init
1964	Repeal of inventory tax (9/2)	Adopt	227,463	(65)	120,563	(35)	Init
	License tax on aircraft (9/15)	Adopt	254,204	(74)	85,948	(26)	Legis
	State Board of education, composition of (11/3)	Adopt	209,364	(63)	124,203	(37)	Legis
	Apportionment of school fund (11/8)	Adopt	240,439	(70)	102,608	(30)	Init
	County officers, 4 yr terms (12/3)	Adopt	219,329	(62)	131,604	(38)	Init
1965	Bond issues and special assessments submitted to voters (7/13)	Reject*	44,098	(20)	171,432	(80)	Legis
	Bonded indebtedness, relax limitations for capital outlay program (9/5)	Reject*	38,924	(18)	178,124	(82)	Legis
1966	License tax on watercraft (9/16)	Adopt	118,044	(61)	75,978	(39)	Legis
1968	Legislators' pay increase (4/2/1)	Adopt	208,685	(55)	172,340	(45)	Legis
	Executive dep't, 4 year terms (5/1)	Adopt	266,035	(67)	129,991	(33)	Legis
	State auditor office abolished (5/1; 5/6; and 5/9)	Adopt	206,432	(55)	171,474	(45)	Legis
	Tax exemptions, phase out for veterans (9/2)	Adopt	263,372	(66)	138,049	(34)	Legis
	Tax exemption, limitations for widows (9/2)	Adopt	274,579	(68)	126,819	(32)	Legis
	Exempt household goods from personal property tax (9/2)	Adopt	319,595	(80)	80,088	(20)	Legis
	Mobile homes, ad valorem property tax, license tax exemption (9/11)	Adopt	293,813	(73)	106,660	(27)	Legis

TABLE 2 *(Continued)*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
	Insurance dep't removed from corporation commission (14/17 and 15/5)	Adopt	238,442	(63)	142,150	(37)	Legis
	State examiner office abolished (22/18)	Adopt	217,352	(58)	160,072	(42)	Legis
	Making corporation commission appointive (15/1)	Reject	176,676	(46)	210,862	(54)	Legis
1970	Modify procedure for eminent domain (2/17)	Adopt	225,535	(67)	111,579	(33)	Legis
	Modify bail provisions (2/22)	Adopt	294,724	(85)	53,143	(15)	Legis
	Compensative of elective state officers (4/2/1, 5/13, 6/29, 15/18)	Adopt	211,592	(64)	120,016	(36)	Legis
	Commission on judicial qualifications (New 61)	Adopt	249,068	(74)	89,436	(26)	Legis
	Gasoline and diesel taxes (9/14)	Adopt	225,082	(69)	100,956	(31)	Legis
	Arizona sweepstakes lottery (new 27)	Reject	88,204	(25)	260,324	(75)	Legis
1972	Juries, size and unanimity (2/23)	Adopt	325,965	(65)	173,642	(35)	Legis
	Composition of Legislature (4/2/1)	Adopt	308,801	(63)	162,550	(34)	Legis
	Procedure for reading bills (4/2/12)	Adopt	319,332	(67)	156,993	(33)	Legis
	Prescribing jurisdiction of superior court in civil actions (6/14, 6/22)	Adopt	333,880	(69)	148,145	(31)	Legis
	Qualifications for public office (7/15)	Adopt	299,918	(63)	172,652	(37)	Legis
	Authorizing indebtedness for cities and towns to acquire land for parks (9/8)	Adopt	310,626	(63)	185,784	(37)	Legis
	Motor vehicle license tax; property tax exemption (9/11)	Adopt	303,939	(61)	191,134	(39)	Legis
	Employment of children (18/2)	Adopt	292,355	(58)	215,344	(42)	Legis
	Public Utility and corporation regulation reform (14/8, 14/17, entire 15)	Reject	216,886	(43)	283,187	(57)	Legis

1974	Merit selection of judges 6/3; 6/4; 6/12; 6/20; 6/28; 6/30; 6/35 through 6/40)	Adopt	255,914	(54)	220,462	(46)	Init
	Modification in recall process (8/1/3)	Adopt	242,952	(52)	226,914	(48)	Legis
	Relating to local debt limits (9/8.1)	Adopt	256,131	(55)	209,021	(45)	Legis
	Public service corporations (15/2)	Adopt	270,890	(59)	188,535	(41)	Legis
	Removing residency requirement for state officers (5/1)	Reject	228,928	(50)	232,276	(50)	Legis
	Prescribing 10% of electors must vote for bond issue or special assessment elections to be effective (7/13)	Reject	195,570	(41)	281,066	(59)	Legis
	Enlargement of use of vehicle, user and gasoline and diesel tax receipts for bikeways, etc (9/14)	Reject	157,904	(33)	323,639	(67)	Legis
	Expenditure limit for state government, create Economic Estimates Commission (9/17)	Reject	225,488	(49)	237,659	(51)	Legis
1976	Senate appointments consent, commissions on appellate and trial court appointment and terms (6/36)	Adopt	368,505	(66)	190,326	(34)	Legis
	Senate appointments consent, commission on judicial qualifications (6.1/1)	Adopt	397,778	(67)	195,360	(33)	Legis
	Senate appointments consent, state board of education (11/3)	Adopt	390,890	(66)	200,449	(34)	Legis
	Senate confirmation of regents (11/5)	Adopt	383,645	(65)	204,862	(35)	Legis
	Senate confirmation of insurance director (15/5)	Adopt	385,686	(66)	196,865	(34)	Legis
1978	Limiting state expenditures (9/17)	Adopt	382,174	(78)	106,746	(22)	Legis
	Increasing debt limit of certain school districts (9/8,8.1)	Reject	173,163	(36)	312,919	(64)	Legis
1980	Modifying tax exemptions (9/2)	Adopt*	185,454	(75)	60,574	(25)	Legis
	Widower's exemptions (9/2.1)	Adopt*	186,258	(77)	56,566	(23)	Legis
	Disabled exemptions (9/2.2)	Adopt*	198,809	(75)	47,403	(19)	Legis

TABLE 2 *(Continued)*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
	Authorizing legislature to increase exemptions (9/3)	Adopt*	176,185	(72)	67,424	(28)	Legis
	Increasing local debt limits (9/8, 9/8.1)	Adopt*	152,419	(62)	93,427	(38)	Legis
	Limiting public spending (9/17)	Adopt*	173,822	(72)	67,011	(28)	Legis
	Placing 1% tax limit on owner occupied residential property (9/18)	Adopt*	211,433	(85)	36,495	(15)	Legis
	Limiting property tax corrections (9/19)	Adopt*	203,291	(83)	41,191	(17)	Legis
	Limiting county and city spending (9/20)	Adopt*	206,817	(84)	40,595	(16)	Legis
	Limiting school district spending (9/21)	Adopt*	201,439	(82)	44,311	(18)	Legis
	State treasurer's term (5/10)	Adopt	516,131	(69)	266,500	(34)	Legis
	Corporation Commission, deregulating motor carriers and airlines (15/2;15/10)	Adopt	537,240	(68)	252,688	(32)	Legis
	Workmen's compensation (18/8)	Adopt	436,290	(56)	342,603	(44)	Legis
	Elected officials must "resign to run" for other office	Adopt	540,605	(69)	241,625	(31)	Legis
	Private airport taxation, partial exemption (9/2.4)	Reject	318,144	(41)	451,676	(59)	Legis
	Limiting maximum ad valorem tax, 2/3's vote required to increase other taxes (9/18)	Reject	247,107	(30)	570,820	(70)	Init
	Allowing confinement of minors convicted as adults with adults (22/16)	Reject	385,035	(49)	406,944	(51)	Legis
1982	Crimes, prohibiting bail in some cases (2/22)	Adopt	550,220	(81)	128,992	(19)	Legis
	Regulation of ambulance services (new 27)	Adopt	360,164	(63)	212,878	(37)	Legis
	Compensation of elective & judicial officers, allow commission to set legislative salaries and allow salary increases during term of office (4/2/17; 5/13)	Reject	167,556	(25)	497,888	(75)	Legis

	Tax exemption for certain property in blighted areas (9/new 2.4)	Reject	294,220	(44)	371,674	(56)	Legis
	State board of education membership revision (11/3)	Reject	232,524	(35)	430,383	(65)	Legis
1984	Providing initiative petitions to be filed 6 rather than 4 months preceding election (4/1/1(4))	Reject	353,835	(40)	528,151	(60)	Legis
	Allow legislators to approve expenditure of federal funds received by state, and establish joint committee to oversee state spending when legislature not in session (4/2/new 26)	Reject	350,744	(40)	523,309	(60)	Legis
	Provide that jury be drawn from portion of county as designated by court rule (6/17)	Reject	337,187	(38)	545,197	(62)	Legis
	Lower existing limits on state spending; establish state revenue commission and reserve fund (9/17)	Reject	356,570	(45)	430,363	(55)	Legis
	Allow legislature to transfer formation of corporation & sale of securities from corporation commission to other agencies (14/8, 17; 15/4, 5, 13)	Reject	326,630	(38)	526,439	(62)	Legis
	Provide for 5-member appointed corporation commission; 4 year terms (15/1)	Reject	291,622	(34)	575,301	(66)	Legis
	Provide for 5-member elected corporation commission, 4 year terms (15/1)	Reject	375,809	(50)	378,857	(50)	Legis
	Repeal "fair value" requirement for determining value of public service corporation property (repeal 15/14)	Reject	365,967	(48)	390,350	(52)	Legis
	Allow legislature to establish revenue limits on hospitals until 1991 (27/new 2)	Reject	385,724	(43)	511,013	(57)	Legis
	Allow legislature to comprehensively regulate health care institutions (27/new 2)	Reject	372,879	(39)	574,279	(61)	Init
	Prohibit strikes by public employees (new 28)	Reject	397,439	(44)	501,745	(56)	Legis
1986	Increase school district spending limits (9/21)	Adopt	445,661	(54)	380,154	(46)	Legis
	Allow local governments to propose adjusting spending limits every 2 rather than every 4 years (9/20)	Reject	338,397	(43)	451,749	(57)	Legis
	Corporation Commission telecommunication deregulation (15/2, 3, 9, 10, 14)	Reject	389,253	(46)	451,479	(54)	Legis
	Allow legislature to regulate damage awards (27/new2)	Reject	418,691	(49)	434,029	(51)	Init

TABLE 2 *(Continued)*

Year[1]	Subject[2]	Adopt/[3] Reject	Aye	(%)[3]	Nay	(%)[3]	Legis/[4] Init
1988	Runoff elections for executive offices where no candidate obtains majority (5/1)	Adopt	601,351	(56)	465,046	(44)	Legis
	Remove requirement that person be male to be eligible for state office (5/2)	Adopt	876,727	(81)	210,013	(19)	Legis
	Establish commission on judicial conduct (6.1/1 through 6.1/5)	Adopt	661,261	(64)	364,356	(36)	Legis
	Provide English as official language of state (new 28)	Adopt	584,459	(51)	572,800	(49)	Init
	Repeal 2 consecutive term limit for state treasurer (5/10)	Reject	440,359	(40)	649,041	(60)	Legis
	Relax local debt limit for streets and bridges (9/8)	Reject	457,222	(44)	584,671	(56)	Legis
	Repeal "fair value" method used to determine value of public service corporation property (15/14)	Reject	360,908	(34)	713,172	(66)	Legis
1990	Victim's rights (2/new 21)	Adopt	589,870	(57)	443,930	(43)	Init
	Raise monetary jurisdiction limit for justice of peace courts (6/32)	Adopt	543,944	(53)	473,111	(47)	Legis
	Authorize no-fault motor vehicle insurance (2/31; 18/6; new 29)	Reject	180,922	(17)	865,289	(83)	Init
	Higher municipal debt limit for streets, highways and bridges (9/8)	Reject	401,165	(39)	622,210	(61)	Legis
	Public education expenditure increase (9/21, 9/new 22; 11/new 11)	Reject	354,733	(34)	687,977	(66)	Init
	Authorize exchange of state lands without auction (10/new 12)	Reject	466,089	(45)	567,267	(55)	Legis
1992	Term limits for elected officials (4/2/21; 5/1, 5/10; 7/18; 15/1, 19)	Adopt	1.026,830	(74)	356,799	(26)	Init
	Restore plurality election for state executive officers (5/1, 7/7, 8/1/4)	Adopt	927,913	(67)	455,712	(33)	Legis

More public process for judicial appointments and evaluations (6/12; 18; 30; 35-38; 40; new 41 and 42)	Adopt	738,655	(58)	537,475	(42)	Legis
Allow more frequent elections to adjust local gov't spending limits 9/20)	Adopt	732,030	(55)	601,700	(45)	Legis
Require 2/3's vole to raise taxes (9/new 22)	Adopt	975,191	(72)	381,777	(28)	Init
Allow charter home rule for large urban counties (12/new 5-9)	Adopt	701,063	(54)	590,818	(46)	Legis
Four year term for mine inspector (19)	Adopt	745,091	(55)	615,306	(45)	Legis
Lethal injection as means of capital punishment (22/22)	Adopt	1,040,535	(77)	314,919	(23)	Legis
Increase elementary school district debt limit (9/8)	Reject	461,864	(56)	874,163	(64)	Legis
Authorize state land exchanges without auction (10/new 12)	Reject	631,737	(47)	720,650	(53)	Legis
Limit abortions (new unnumbered article)	Reject	447,654	(31)	975,251	(69)	Init

[1] Year voted on by electorate

[2] Subject matter of proposed amendment, with article and section of constitution affected in parenthesis; for example, an amendment to Article VIII, section 1 is shown as 8/1; an amendment to Article IV, part 1, section 1(10) is shown as 4/1/1(10), and an addition of section 22 to Article IX is shown as 9/new 22.

[3] Whether amendment was adopted or rejected by the voters, with the official voter tally of those voting on the proposed amendment (from *Arizona Blue Book 1986*, Office of Secretary of State, January 1986), pp. 148–58 (for elections through 1984); *Arizona Blue Book Supplement 1988–89* (Office of Secretary of State, 1989), pp. 36–37 (for 1986–88 elections); *State of Arizona Official Canvass* (looseleaf, Office of Secretary of State, 1990, 1992), pp. 10–11 (for 1990 and 1992 elections).

[4] Whether the proposed amendment was referred to the voters by the legislature or instead proposed by initiative petition (See Article IV, part 1, section 1(3) and Article XXI).

* An asterisk in the "adopt or reject" column means that the vote on the proposed amendment was taken at a special election rather than the regular general election in November.

TABLE 3 *Chronology of Arizona Constitutional Amendments*

Decade	Number of Proposed Amendments			Number of Amendments Adopted		
	Referred	Initiated	Total	Referred	Initiated	Total
1912–19	6	15	21	4	7	11
1920–29	17	4	21	4	0	4
1930–39	10	9	19	4	3	7
1940–49	10	6	16	6	3	9
1950–59	19	3	22	12	0	12
1960–69	19	5	24	16	5	21
1970–79	29	1	30	22	1	23
1980–89	40	4	44	20	1	21
1990–	10	7	17	7	3	10

Another method of grouping is by subject matter. The following discussion is not an exhaustive list but rather tries to capture the general flavor of amendment proposals. The politically sensitive questions of legislative reapportionment and salaries of public officials have been frequent subjects of amendment proposals—in 1916, 1918, 1924, 1930, 1932, 1946, 1950, 1953, 1956, 1958, 1968, 1970, and 1972. About half of these were successful. Proposed amendments on these subjects have disappeared since reapportionment became a mandate of the federal Constitution in the 1960s and since the Arizona voters in 1974 approved a statutory referendum process to fix legislative salaries (Article V, section 13).

Taxation, expenditures, and related fiscal measures have likewise often been the subject of proposed amendments—in 1912, 1916, 1920, 1922, 1928, 1930, 1932, 1938, 1944, 1946, 1950, 1952, and every second year beginning in 1964. About half of these were adopted, among them a 1992 amendment requiring a two-third's vote in both legislative houses to increase taxes. Proposals to amend provisions dealing with state land management (Article X) and state jurisdiction over Indians (part of Article XX) were made in 1918, 1927, 1940, 1950, 1954, 1990, and 1992, succeeding every time except the last two.

Only six proposals have been made to amend Article II's Declaration of Rights, all in relatively minor ways. All have succeeded, in 1912, 1970 (twice), 1972, 1982, and 1990. The 1912 amendment, authorizing the state and municipal corporations to engage in "industrial pursuits," was probably superfluous and its placement in the Declaration of Rights was dubious in any case. The other amendments to Article II were to the bail section in 1970 and 1982 (denying bail in narrow categories of cases); to the eminent domain section in 1970 (making a technical change); to the trial by jury section in 1972 (making minor changes); and by adding a "victim's bill of rights" in 1990. (A defeated 1980 proposal to amend Article XXII, section 16, to allow juveniles convicted of crimes as adults to be confined with adults in correctional facilities ought to be

mentioned here as well, even though its target was not organizationally part of the Declaration of Rights.)

The labor provisions were amended in important ways in 1925 (overhauling the workers' compensation section in Article XVIII) and 1946 (adding Article XXV forbidding the compulsory union shop), and in minor ways in 1930, 1960, 1972, and 1980. Earlier proposals on workers' compensation had failed in 1916 and 1918, as had a merit system for public employees in 1950 and a prohibition on public employee strikes in 1984. Alcohol prohibition was included by amendments in 1914 (manufacture and sale) and 1916 (possession), and repealed by amendment in 1932. Other alcohol prohibition proposals failed in 1914 and 1916.

Several amendments have significantly changed the structure or functioning of state government. A 1948 amendment reworked the method of gubernatorial succession in the event of a vacancy. A 1950 amendment authorized annual (as opposed to biennial) legislative sessions—a recognition of the state's population growth and the responsibilities of its government. On the other hand, a proposal to abolish the state senate was handily defeated in 1916. The terms of county officers were lengthened from two to four years in 1964, and the terms of state officers (except for legislators and the mine inspector) were similarly enlarged four years later. (Term enlargement proposals had previously been rejected in 1922, 1933, 1946, and 1950.) The mine inspector's term was lengthened to four years in 1992, the same year that term limits were adopted for state legislative and executive officers and members of Congress.

The judicial branch was thoroughly overhauled by the so-called modern courts amendment to Article VI in 1960. The constitutional offices of the state auditor and state examiner were abolished in 1968. In 1970 a new procedure for policing judicial performance, through a commission on judicial qualifications, was adopted. Merit selection of most state judges resulted from an amendment approved in 1974.

Following a long period of quiescence, the corporation commission has in modern times become a frequent subject of amendment proposals. Remarkably, only two have succeeded: a 1968 proposal shifting the commission's limited jurisdiction over the insurance business to a new department of insurance, and a 1992 proposal to limit commissioners to a single term. All other proposed reforms of the corporation commission have been thwarted by the voters, including proposals in 1968 and 1984 to make the commission appointive rather than elective, the latter also enlarging the commission; another proposal in 1984 simply to enlarge the commission; and 1984 and 1988 proposals to repeal the "fair value" property valuation standard for utility ratemaking. Still another proposal to abolish the commission and replace it with a public service commission with somewhat different powers (an effort led by, among others, then state senate majority leader and later first woman justice of the U.S. Supreme Court Sandra Day O'Connor) was defeated in 1972.

A few constitutional amendments could be said to overrule decisions of the Arizona courts. A 1940 amendment immunized irrigation districts from taxation, overruling a Supreme Court decision rendered only eight months earlier (*State v. Yuma Irrigation Dist.*). The "right to work" amendment in 1946 overturned a Supreme Court decision upholding collective bargaining agreements that created a compulsory union shop (*Corpuz v. Hotel & Restaurant Employees*). A 1948 amendment to the provision governing succession to the office of governor (Article V, section 6) overruled a Supreme Court decision of five months' standing (*State ex rel. DeConcini v. Garvey*). Article XXVI, adopted in 1962, rebuffed the Supreme Court's ruling a year earlier holding that executing documents closing the sale of property constituted the practice of law (*State Bar v. Arizona Land Title & Trust Co.*). This low number bears out J. Willard Hurst's observation that the number of instances where state constitutions were amended to overturn judicial judgments was, "[c]ompared with the influence that judicial review had upon United States law and politics, . . . not impressive."[48]

A few amendments defy easy categorization. The method for carrying out the death penalty was changed from hanging to "lethal gas" in 1933, and then to lethal injection in 1992. A 1988 amendment made English the official language of the state. Proposals the voters have rejected also include a grab bag of ideas, including a proposal on the ballot in both 1922 and 1924 to float a bond issue to build a highway between the Hassayampa and Colorado rivers (providing, among other things, that it have a "permanent hard surface . . . not less than eighteen feet wide, nor less than six inches thick"); a 1928 proposal protecting "any method of healing" that was billed as a "medical liberty" amendment; a 1944 proposal to pay annuities for the aged and disabled, financed by a 3 percent state income tax; a 1970 proposal to establish and constitutionalize a sweepstakes lottery; and a 1992 proposal to place severe limits on abortion.

Proposals for replacing the Arizona Constitution have never attracted widespread support. Article XXI, section 2, containing a mechanism for creating a constitutional convention, has never been invoked. A Town Hall Convocation held by the Arizona Academy in 1964 discussed extensive changes to the constitution, and occasionally a state legislator or one of the state's newspapers broaches the subject.[49] But the vast majority of the state's electorate, opinion leaders, and politicians appear generally satisfied with the charter.

This state of affairs was not significantly disturbed even amid the political tumult of the late 1980s. In less than one year, an elected governor (who had, ironically, campaigned on a pledge of "restoring constitutional government")

[48] Hurst, *The Growth of American Law*, 245.

[49] See Arizona Academy, *Fifth Arizona Town Hall on Revision of Arizona's Constitution* (Tempe: Arizona State University, 1964). A measure creating an eleven-member panel to study reforming the constitution failed in the state legislature in March 1992. See *Arizona Capitol Times* (Mar. 4, 1992), 3.

was made subject to a recall election and then, before it could be held, was impeached, convicted, and removed from office. The recall, the impeachment, and the succession process were all controlled by the state constitution, and the publicity that attended these events brought the state's charter into popular focus as never before. The political passions brought to bear on these events subjected the major institutions and constitutional processes of the state to some severe tests. Yet most observers agreed that the state constitution not only endured but earned a new measure of respect.[50]

Now more than three-quarters of a century old, the Arizona Constitution seems destined to continue to govern the state indefinitely. The postindustrial civilization that rapid population and economic growth are creating in the state's desert oases will no doubt place new challenges before the state constitution, its institutions and processes, and the individual freedoms it helps protect. So far the constitution has stood up rather well to challenges and to serious examination. Of course it has its shortcomings and blemishes, but these seem more than offset by its moments of eloquence, strokes of genius, and general sensibility and coherence. There is no doubt that it has proved to be quite supple and stable and still provides generally adequate service.

In short, the founders of the state of Arizona 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. It is a charter in which all Arizonans can justifiably take pride.

[50] This episode did spawn a constitutional amendment that proved short lived. Because the impeached governor had been elected in 1986 with about 40 percent of the vote in a three-way race, the constitution was amended in 1988 to require executive officers to obtain a majority of votes or a runoff election would be held. In 1990 a few thousand write-in votes for splinter parties in a razor-close gubernatorial election necessitated a runoff. In 1992 voters approved an amendment returning to the plurality requirement.

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PART TWO

The Arizona Constitution and Commentary

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PREAMBLE

> We, the people of the state of Arizona, grateful to almighty God for our liberties, do ordain this constitution.

No court decision addresses whether the preamble is part of the constitution itself. The framers drafted it by the same process that they used for other provisions; the committee that fashioned the Declaration of Rights (Article II) also drafted the preamble. This terse beginning is noteworthy perhaps only for its reference to a deity (earlier versions debated at the convention referred to a "Supreme Being" and "Supreme Ruler of the Universe").[1]

[1] John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20 (1988), 1, 83.

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Article I

State Boundaries

SECTION 1

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 west along and with said parallel of latitude and the south boundary of Utah to an intersection with the meridian of longitude one hundred fourteen degrees, two minutes, fifty-nine and twenty-five one-hundredths seconds west, being on the east boundary line of the state of Nevada; thence south along and with said meridian of longitude and the east boundary of said state of

Nevada, to the center of the Colorado River; thence down the mid-channel of said Colorado River in a southern direction along and with the east boundaries of Nevada, California, and the Mexican Territory of Lower California, successively, to the place of beginning.

SECTION 2

The legislature, in cooperation with the properly constituted authority of any adjoining state, is empowered to change, alter, and redefine the state boundaries, such change, alteration and redefinition to become effective only upon approval of the congress of the United States.

Influenced, no doubt, by the instability of its territorial boundaries,[2] Arizona followed several states in writing its geographic boundaries into its constitution. Section 2 was added in 1956, prompted by continuing uncertainty over the Arizona–California boundary stemming from the meanderings of the Colorado River.[3] Curiously, by authorizing the state legislature to consent to alterations in state boundaries, it effectively nullifies the first section's cementing of the state's boundaries in the constitution. Thus the net result of Article I is to recognize the authority of the state legislature (subject to congressional approval) over state boundaries, which leaves the matter where it would be without this article.

[2] See Henry P. Walker and Don Bufkin, *Historical Atlas of Arizona,* 2d ed. (Norman: University of Oklahoma Press, 1986), sees. 25, 35.

[3] See *Publicity Pamphlet,* 1956 Special Election, p. 9.

Article II

Declaration of Rights

The core of this article is its guarantees of individual rights, a number of which are similar to those in the Bill of Rights of the federal Constitution. At the time the Arizona Constitution was drafted in 1910, the U.S. Supreme Court had enforced but one of the federal Bill of Rights guarantees against state governments—the Fifth Amendment's protection against taking private property without just compensation (*Chicago B. & Q. R.R. v. Chicago*). Thus the framers of the Arizona Constitution assumed (as some delegates made clear in convention floor debates[4]) that this article would be the principal means of protecting individual freedoms. Here, as elsewhere, the Arizonans looked more to the constitutions of other states than to the federal Constitution for guidance. In fact, the Arizona Declaration of Rights followed that of the state of Washington, adopted at its statehood in 1889, quite closely.[5]

As this lineage suggests, the Arizona Declaration of Rights is far from a simple rescript of the federal Bill of Rights. It includes many provisions not found in the federal Constitution. Furthermore, those sections that do echo provisions of the federal Bill of Rights are almost all worded differently. The textual differences from the federal Constitution are particularly pronounced when considered in

[4] *The Records of the Arizona Constitutional Convention of 1910, ed.* John S. Goff (Phoenix: Supreme Court of Arizona, 1991), 758–62; Leshy, "The Making of the Arizona Constitution," 81.

[5] See Leshy, "The Making of the Arizona Constitution," 82.

the context of the federal "state action" doctrine. Nearly all the federal protections explicitly preserve individual freedoms only from governmental action. A number of provisions in this article, by contrast, are not specifically aimed at governmental action but instead simply, and affirmatively, set forth individual rights.

The Arizona Declaration of Rights is neither exclusively concerned with, nor comprehensive in its catalogue of, protected individual rights. Some of its provisions properly belong elsewhere in the constitution because they purport to grant powers to the government rather than to safeguard individual freedoms; for example, section 34 gives state and municipal governments the right to engage in "industrial pursuits." Conversely, additional protections of individual rights are scattered throughout the remainder of the document; for example, specific protections for liberty of conscience are also found in Article XI, section 7 and Article XX, sections 1 and 7.

Unlike the U.S. Constitution, whose framers left the question murky, there is little doubt that the Arizona framers understood that the judiciary would play an important role in enforcing the guarantees of this article, for more than a century of judicial enforcement of constitutional principles in federal and state courts prior to 1910 had led to widespread acceptance of the practice. The Supreme Court has occasionally offered general advice on construing individual rights provisions; for example, it has recently held that the Arizona courts should "first consult our constitution" whenever both state and federal constitutional guarantees are alleged to have been infringed (*Mountain States Tel. & Tel. Co. v. Arizona Corp. Commn.*, 1989; see also *State v. Melendez*). Further, the Court has said that in "all cases of constitutional provisions designed to safeguard the liberty of the person, every reasonable doubt should be resolved in favor of such liberty" (*Stone v. Stidham*).

SECTION 1

A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

This section identifies the basic purposes of the constitution—to establish a free government and to safeguard individual rights—and exhorts attention to fundamental principles. Similar language is found in other state constitutions as far back as the 1776 Virginia Declaration of Rights.[6] An early Supreme Court decision (written by a former constitutional convention delegate) cited this

[6] A. E. Dick Howard,"The Reemergence of State Constitutional Law," *Emerging Issues in State Constitutional Law* 1 (1988), 1, 19.

provision as reinforcing the guarantee in section 24 of this article of a fair criminal trial by an impartial jury (*Priestly v. State*).

SECTION 2

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

This section, containing language similar to that found in other state constitutions, sets out the premise of democratic governance, with an emphasis on the government's role in safeguarding individual rights. It has not been the subject of significant court attention.

SECTION 2.1

Victims' Bill of Rights. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules

be subject to amendment or repeal by the legislature to ensure the protection of these rights.

12. To be informed of victims' constitutional rights.

(B) A victim's exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.

(C) "Victim" means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.

(D) The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

(E) The enumeration in the constitution of certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims.

This section, added upon initiative petition in 1990, bestows a number of basically procedural rights on a victim of a crime. The Arizona legislature recently enacted laws to implement this section (Laws 1991, chapter 229), and the Arizona Supreme Court is expected to adopt additional rules on the subject.

Subsection 11, which vests the legislature with power to repeal or amend court rules on procedure and evidence to "ensure the protection" of victims' rights, has been construed to deal "only with procedural rules pertaining to victims" and nothing more (*Slayton v. Shumway*). Decided in advance of this measure being submitted to the voters, *Slay ton* turned on both the single subject principle for proposed constitutional amendments found in Article XXI, section 1, and separation of powers principles stemming from Article III and Article VI, section 5.

The Supreme Court has said, over a vigorous dissent, that this section's "plain language" must be applied so that a person who was a suspect but not formally charged, and who has received immunity in exchange for her testimony, can be a "victim" under this section (*Knapp v. Martone*). An emerging issue is how to reconcile the victim's constitutional rights as set out in this section with the constitutional rights of the criminally accused. Subsection B might be read as elevating the victim's right above any conflicting right of the criminally accused, but the election ballot informed voters that the proposal was not intended to amend "any of the constitutional provisions guaranteeing rights of criminal defendants."[7] Moreover, to the extent the accused's rights under the U.S. Constitution are

[7] See *Publicity Pamphlet,* 1990 General Election, p. 44; see also p. 40 (statement of Steven Twist). For commentary, see Thomas B. Dixon, "Arizona Criminal Procedure after the Victims' Bill of Rights

implicated, they would of course preempt the victim's constitutional rights under the state constitution by virtue of the supremacy clause of the U.S. Constitution, Article VI, clause 2.

A court of appeals reconciled this section's prohibition on the accused interviewing the victim in advance of trial with the defendant's right to confront witnesses against him on the ground that the latter can still be fully exercised at trial (*State v. Warner*, 1990). Another court of appeals opinion has suggested that, in cases of clear conflict, a defendant's federal and state constitutional right to due process of law would override the rights granted to the victim in this section, and thus a victim may be required to disclose medical records relevant to the accused's argument of self defense (*State ex rel. Romley v. Superior Court*, 1992). But this section controls over rules of criminal procedure, which should not be applied "to make an end run around" the victim's right to refuse discovery requests (*State v. O'Neil*). This section does not, however, prohibit the trial court from ordering the victim to appear and testify at a pretrial probable cause hearing (*State v. City Court*, 1992) or at the trial itself (*S.A. v. Superior Court*).

SECTION 3

The Constitution of the United States is the supreme law of the land.

This genuflection to federal supremacy is almost certainly superfluous because the supremacy clause of the federal Constitution (Article VI, clause 2) explicitly requires fealty from all state legislators and executive and judicial officers. Presumably Arizona's eagerness to throw off the yoke of territorial government counseled making its obedience to federal supremacy prominent.

SECTION 4

No person shall be deprived of life, liberty, or property without due process of law.

This section, like most in this article, was taken verbatim from the Washington State Constitution of 1889.[8] The idea of "due process," like that similarly ambitious constitutional guarantee of equal treatment (see, e.g., the commentary

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Amendment: Implications of a Victim's Absolute Right to Refuse a Defendant's Discovery Request," *Arizona State Law Journal* 23 (1991), 831–57.

[8] Stanley G. Feldman and David Abney, "The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution," *Arizona State Law Journal* 20 (1988), 115, 120–21; cf. Steven Twist and Len Munsil, "The Double Threat of Judicial Activism: Inventing New 'Rights' in State Constitutions," *Arizona State Law Journal* 21 (1989), 1005, 1016.

on section 13 of this article), is fundamental to our legal culture. It applies in a wide variety of situations; only a skeletal summary is set out in this commentary.

Unlike the due process clause of the Fourteenth Amendment of the federal Constitution ("nor shall any State deprive . . . "), this section does not expressly restrict its scope to action undertaken by state government or its subdivisions—so-called state action. Nevertheless, the Supreme Court has concluded without examination that this section applies only to state action (*Niedner v. Salt River Project Agric. Improvement & Power Dist.*; see also *Diamond v. Samaritan Health Serv.*). But the Court has also, without citing this section, held that some private organizations with an obligation to serve the public welfare may deny membership to persons "only on a showing of just cause . . . under proceedings embodying the elements of due process" (*Blende v. Maricopa County Medical Soc*).

Procedural Due Process

Criminal cases. A number of Arizona court decisions imply that this section is coterminous with its federal counterpart in the criminal area (e.g., *State v. Fowler; State v. Schreiber*). One commentator characterized those few criminal cases that the Supreme Court has resolved on the basis of this section as "not . . . of particular significance."[9] But attention is beginning to be paid; for example, the Supreme Court has said, over a dissent, that court decisions construing the Fourteenth Amendment "cannot account for the separate guarantees of the Arizona Constitution" (*Montano v. Superior Court*). Following this suggestion, a court of appeals has flatly stated that this section "provides greater protection [to an accused] than its federal counterpart" (*State v. Youngblood*). Another court of appeals has disagreed (*State v. Herrera-Rodriguez*). The dispute is currently before the Supreme Court.

Civil cases. The Supreme Court has recently said that whatever safeguards may be required by this section in criminal proceedings are not necessarily required in civil proceedings, even those that impose penalties such as punitive damages (*Olson v. Walker*). On the other hand, the Court has, without specifically citing this section, ruled that a lower court's refusal to let counsel for parents participate in a proceeding to declare a child a ward of the court denies due process (*Arizona State Dept. of Pub. Welfare v. Barlow*). The Court has also held that the "fundamental fairness" principle underlying this section is abridged when the state seeks to introduce, in a civil disciplinary proceeding against a prison inmate, testimony derived from communications between the inmate and his designated representative (another inmate, as permitted under Department of Corrections rules) (*State v. Melendez*). The Court explained that

[9] Paul Marcus, "State Constitutional Protection for Defendants in Criminal Prosecutions," *Arizona State Law Journal* 20 (1988), 151, 171.

if the testimony were allowed, the inmate's right to representation under the rules would be turned into a trap.

Substantive Due Process

The Arizona courts' substantive due process decisions fall into two general categories, examined separately here.

Economic rights of individuals. Around the turn of this century, the U.S. Supreme Court actively addressed economic regulation under the due process clause of the Fourteenth Amendment of the federal Constitution. This period is sometimes called the *Lochner* era, after the Court's 1905 decision striking down a New York statute forbidding bakers from working more than sixty hours per week or ten hours per day (*Lochner v. New York*). The Court's activist stance lasted until the 1930s (*Nebbia v. New York*).

The earliest cases decided under this section did not follow the U.S. Supreme Court's lead; instead, the Arizona Supreme Court rebuffed challenges under this section to various forms of governmental regulation (e.g., *Mosher v. City of Phoenix*, 1919). The Court's first use of this section as a sword against legislation occurred in 1927, when it struck down a state law that prohibited anyone but registered pharmacists from selling packaged medicines (*State v. Childs*). The Court became more cautious the following year, when it upheld a state law that regulated the location of urban mortuaries (*City of Tucson v. Arizona Mortuary*).

As a recent comprehensive review of Arizona substantive due process decisions shows,[10] this inconsistency was maintained for nearly four decades thereafter. In the space of one month in 1941, for example, the Court applied this section to uphold a statute prohibiting "below cost" sales of any commodity (*State v. Walgreen Drug Co.*) and to strike down a state law regulating commercial photography (*Buehman v. Bechtet*).

Over the last two decades, however, the Court has given the legislature increased deference in regulation of economic rights. The Court will now generally uphold legislation against attack under this section if it is "not unreasonable, arbitrary or capricious, and if the means selected in the statute have a real and substantial relation to the goals sought to be obtained" (*Bryant v. Continental Conveyor & Equip. Co.*). Economic regulation upheld under this test includes a fee for marriage dissolutions (*Browning v. Corbett*) and a city ordinance limiting parking in a residential area to residents and guests (*Smith v. City of Tucson).*

Other substantive rights. The Supreme Court has recently relied exclusively upon this section in ruling that a convicted prisoner has the right to refuse

[10] David Smith, "Economic Substantive Due Process in Arizona: A Survey," *Arizona State Law Journal* 20 (1988), 327–44.

governmental administration of dangerous psychotropic drugs unless administered for the purpose of managing his behavior in an emergency situation or for treatment "pursuant to professional judgment evidenced by a treatment plan" (*Large v. Superior Court*). A court of appeals has interpreted this section (along with section 13 of this article) as requiring "fair apportionment" in taxation to prevent units of local government from reaping "an undue windfall at the expense of the taxpayer or another community" (*City of Prescott v. Town of Chino Valley*).

SECTION 5

The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged.

This section resembles the last clause of the first amendment to the U.S. Constitution, but it omits the federal qualifier on the right to petition ("for a redress of grievances"), as well as the federal limitation on the object of the petition ("the Government"), suggesting that the Arizona Constitution contains a more generalized right. On the other hand, the Arizona text contains an apparent limitation on the right of peaceable assembly ("for the common good") that is absent from its federal counterpart.

The Arizona courts have paid little attention to this guarantee. One case cursorily rejected a church's attorney's broadside challenge, based on "freedom of association" allegedly protected by this section, to a subpoena to produce documents (*Helge v. Druke*). Another case suggested that this section puts the right of petition, such as to initiate a municipal annexation, on the same constitutional plane as voting (*Goodyear Farms v. City of Avondale*). The courts have not finally resolved whether this section protects against private infringements on the right of petition (see *Fiesta Mall Venture v. Mecham Recall Comm.*, discussed in the next section).

SECTION 6

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

This broadly expressed guarantee of freedom of speech is taken verbatim from the Washington State Constitution. Unlike the negative command of the U.S. Constitution's first amendment ("Congress shall make no law abridging the freedom of speech"), the guarantee of this section is stated affirmatively, suggesting it may restrain nongovernmental as well as governmental conduct. In a case involving the right to solicit signatures for a recall petition in a privately owned shopping mall, however, a court of appeals said that it had "found nothing" indicating the section was "intended to restrain private conduct," even though it did

agree that it "may be more extensive than" its federal counterpart (*Fiesta Mall Venture v. Mecham Recall Comm.*). Curiously, the court gave no special weight to a contrary decision from the state of Washington (*Alderwood Assocs. v. Washington Envtl. Council*), despite this section's ancestry.

The *Fiesta Mall* decision addressed the Arizona Constitution exclusively (as it had to, because the U.S. Supreme Court had previously decided that the First Amendment did not protect such activity; see *Lloyd Corp. v. Tanner*). Most free speech decisions rendered by Arizona courts, by contrast, either (1) have addressed only the First Amendment (e.g., *State v. Jacobs; State v. Chavez);* (2) have explicitly addressed both this section and the federal Constitution but grounded the discussion solely on cases construing the federal Constitution (e.g., *Planned Parenthood Comm. of Phoenix, Inc. v. Maricopa County)*; or (3) have discussed the First Amendment and this section without suggesting any difference between the two (e.g., *State v. Menderson*).

The first time the Supreme Court gave this section discrete attention, and the only time it did so before the U.S. Supreme Court applied the First Amendment of the U.S. Constitution to the states (see *Fiske v. Kansas*), the Court issued a ringing statement in favor of a broad interpretation (*Truax v. Bisbee Local No. 380*). In an opinion written by a former constitutional convention delegate, *Truax* held that speech and demonstrations by striking workers could not be restrained because of this section even where the workers' lack of assets rendered the last phrase of this section ("being responsible for the abuse of that right") nugatory, because the "matter of financial worth does not limit the constitutional right to speak, write, and publish on all subjects." A recent Supreme Court decision also addressed the meaning of this last phrase, relying on it as well as section 6 of Article XVIII (protecting the "right to recover damages for injuries"), to hold that, "whatever its scope of application in other areas," this section "provides no greater privilege for otherwise defamatory statements than the first amendment"; specifically: "Nothing in the text or history [of this section] tends to establish any absolute privilege for defamatory and malicious assertions of fact" (*Yetman v. English*).

A few other decisions have addressed the extent of this section's guarantee of free expression. Finding the words of this section "too plain for equivocation," the Supreme Court condemned a trial court order limiting the right of newspapers to publish reports on court proceedings open to the public as "censorship by the judiciary" that "strikes at the very foundation of freedom of the press" (*Phoenix Newspapers, Inc. v. Superior Court*). Another case protecting the right of the media to cover judicial proceedings linked the guarantee of this section with the admonition in section 11 of this article that "[j]ustice in all cases shall be administered openly," and noted the availability of alternative remedies (a continuance or change of venue) when publicity could jeopardize an accused's right to a fair trial (*Phoenix Newspapers, Inc. v. Jennings*). On the other hand, without referring to this section, a court of appeals distinguished *Jennings* and upheld

an outright exclusion of news media representatives from preliminary examinations in criminal proceedings (*State v. Meek*). A court of appeals has also held that this section does not require a newspaper to accept advertising (*Modla v. Tribune Publishing Co.*), nor does it prevent enjoining, as a public nuisance, a drive-in movie theater from showing an allegedly obscene film that would be visible from nearby neighborhoods and public highways (*Cactus Corp. v. State*).

The Supreme Court has facilitated enforcement of this section by according "any member of the public" standing to question exclusion from judicial proceedings in violation of this section (*Phoenix Newspapers, Inc. v. Jennings*). In the same vein, the Court has allowed persons to assert the rights of third parties in challenging overbroad regulation of speech, reasoning that "[n]o other rule on standing would protect the free flow and distribution of information and ideas" (*Mountain States Tel. & Tel. Co. v. Arizona Corp. Commn.*, 1989).

Mountain States applied this section to invalidate the corporation commission's order that a telephone company require its customers to subscribe specially and in advance to gain access to information services that the company offers. In so doing, the Court described this section as literally condemning all "major or minor impediments . . . [on] the right to 'freely speak,'" and therefore not easily yielding to arguments for governmental convenience or certainty. The Court suggested that narrowly drawn restrictions on the time, place, and manner of free expression might pass muster under this section.

SECTION 7

The mode of administering an oath, or affirmation, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

This protection for the diversity of individual beliefs, found in many constitutions,[11] permits persons to "either swear or affirm" regarding a matter "in a manner most consistent with and binding upon the[ir] conscience" (*Elfbrandt v. Russell*). It is conceptually related to the protections for liberty of conscience protected by section 12 of this article; together these sections mean that persons who do not believe in the existence of God may nevertheless be witnesses or serve on a jury, taking an oath or affirming "as their consciences dictate" (*State v. Albe*).

[11] Zechariah Chaffee, *Free Speech in the United States* (New York: Atheneum, 1969), 5, note 2. The federal Constitution, for example, refers several times to "oaths or affirmations" with the same objective; e.g., Art. II, sec. 1, cl. 8; Art. VI, cl. 3; Amendment IV.

SECTION 8

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

This provision, taken verbatim from the Washington State Constitution, speaks more broadly than the Fourth Amendment of the U.S. Constitution, which refers to the security of "persons, houses, papers, and effects, against unreasonable searches and seizures." Further, while the Fourth Amendment speaks of search warrants issued upon probable cause and meeting other requirements, the last phrase of this section speaks cryptically of the need for "authority of law" to make such intrusions. Finally, although the U.S. Supreme Court has in modern times found a right to privacy implicit in the U.S. Constitution (*Griswold v. Connecticut; Roe v. Wade*), the Fourth Amendment itself has been construed primarily in the context of searches and seizures relevant to criminal proceedings, while this section is, by contrast, not so limited. The commentary that follows is divided between search and seizure decisions and those addressing a more generalized right of privacy.

Search and Seizure

Early on, the Supreme Court described this section as, "although different in its language, . . . of the same general effect and purpose as the Fourth Amendment" (*Malmin v. State*). Ten years later, the Court cautioned that the two provisions did not necessarily have an identical meaning, for the Court would "give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions" (*Turley v. State*). For many years thereafter the Supreme Court did not consider further the notion that this section had a meaning independent of the federal one, but instead essentially married the two provisions (e.g., *State v. Pelosi*).

Not until 1954 did the Court finally, and by a most curious evolution, resolve whether evidence seized in violation of this section should be excluded from court proceedings (the so-called exclusionary rule). In 1932 the Court had noted "the custom" of the lower courts to "suppress such evidence on timely objection," following decisions of federal courts and appellate courts in many other states (*Thompson v. State*). Then in 1942 the Court construed the Fourth Amendment to the U.S. Constitution not to require exclusion of unlawfully seized evidence *(State v. Frye*). Remarkably, *Frye* did not address this section, nor did the Court explain how the Fourth Amendment was applicable because it had consistently held that it had "no application whatsoever to the trial of cases in the state courts" (e.g., *State v. Berg*). Finally, in 1954 the Court applied the result in *Frye* to evidence seized in violation of this section and also rejected without discussion the argument that, to be introduced, the evidence must be seized "in good faith although illegally" (*State v. Thomas*, 1954).

For two decades after the U.S. Supreme Court's application of the Fourth Amendment and the exclusionary rule to the states in 1961 (*Mapp v. Ohio*), the Supreme Court merely followed federal decisions. In the early 1980s, however, it began to look more closely at this section. Emphasizing that it is "specific in preserving the sanctity of homes and in creating a right of privacy," the Court suggested that, unless special circumstances existed, a warrantless, unconsented entry into a home would violate this section, regardless of whether the entry was permissible under the Fourth Amendment (*State v. Bolt*). The Court has continued to apply this section independently of the Fourth Amendment in subsequent cases testing the legality of police searches (e.g., *State v. Ault*), but the trend has not been unbroken; for example, the Court failed to examine this section in upholding roadblocks to deter drunken drivers (*State v. Superior Court*, 1984). And a court of appeals has said that this section, while "more expansive" than its federal counterpart, does not prevent introduction of a recorded telephone conversation where the alleged victim of child molestation confronted the defendant (*State v. Allgood*). Whatever the reach of this section, a defendant may waive her rights under it by freely consenting to an otherwise unlawful search (*Thompson v. State*).

The Court has noted that the rule excluding evidence seized illegally is, "as a matter of state law . . . no broader than the federal rule" (*State v. Bolt*), and a court of appeals has relied on this pronouncement to uphold a state statute making evidence admissible that is seized illegally but "as a result of a good-faith mistake or technical violation" (*State v. Coats*). In general, the lower courts are waiting for more guidance from the Supreme Court in applying this section (e.g., *State v. Calabrese*; but see *State v. Hanna*, concurring opinion).

Generalized Right of Privacy

The Supreme Court has cursorily rejected arguments that persons have a constitutionally protected privacy right to possess small amounts of marijuana in the home for personal use (*State v. Murphy*). Although the Court in *Murphy* acknowledged that this section provides "extra protection . . . to the home," it found that the legislature had a "reasonable, even though debatable," basis for its statute. A court of appeals has held that this section does not protect the right to possess child pornography in the home (*State v. Emond*).

The courts have begun to explore this section's applicability in a civil context only recently.[12] The Supreme Court first recognized a common law right to privacy in 1945, without referring to this section (*Reed v. Real Detective Publishing Co.*). A court of appeals several decades later said that this provision "was not

[12] See generally T. Stallcup, "The Arizona Constitutional 'Right to Privacy' and the Invasion of Privacy Tort," *Arizona State Law Journal* 24 (1992), 687–718.

intended to give rise to a private cause of action between private individuals" (*Cluff v. Farmers Ins. Exch.*). More recently, however, the Supreme Court has acknowledged some connection between this section and the common law action against invasion of privacy (*Godbehere v. Phoenix Newspapers, Inc.*), although the relationship remains to be fully explicated.

This section has also been used to support privacy protection in a variety of other contexts, including voting (*Huggins v. Superior Court*); telecommunications (*Mountain States Tel. & Tel. Co. v. Arizona Corp. Commn.,* 1989); and administration of drugs to mental patients (*Large v. Superior Court*, dissenting opinion). Most significantly, the Supreme Court recently applied this section in a "right-to-die" case, finding "no reason not to interpret 'privacy' or 'private affairs' as encompassing an individual's right to refuse medical treatment," because that decision "deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile" (*Rasmussen v. Fleming*). In situations where the person in question cannot make a conscious choice, the court will assume that the person wishes to continue receiving treatment, with a burden to prove otherwise, by clear and convincing evidence, on those seeking to terminate the treatment (*id.*).

"Without Authority of Law"

The Arizona courts have rarely addressed the meaning of the last phrase in this section; the decisions touching on the subject have referred to prevailing judicially determined standards as providing the requisite "authority of law" to satisfy this section (*Argetakis v. State; State v. Jeney*).

SECTION 9

No law granting irrevocably any privilege, franchise, or immunity shall be enacted.

This provision is one of several in the constitution limiting legislative power to confer special benefits in perpetuity. Other provisions with similar objectives include Article IV, part 2, section 19(13); Article IX, sections 1, 7; Article XIII, section 6; Article XIV, sections 2, 14, 15; and Article XV, section 3. Taken together, they seek to control damage caused by governmental bad judgment and corruption, by preventing government from binding itself permanently to a course of action. The key limitation is the lack of revocability; thus, in the principal decision construing this section, a court of appeals upheld a state statute protecting existing electricity supply monopolies because they remained subject to regulation and cancellation by the state corporation commission (*In re Dos Cabezas Power Dist.*; see also *Arizona Downs v. Arizona Horsemen's Found.*).

SECTION 10

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

This section is generally comparable to provisions in the Fifth Amendment to the U.S. Constitution, although there are some textual differences. The federal language prohibits compulsion "to be a witness" rather than "to give evidence" against oneself; and it speaks of "jeopardy of life or limb" rather than simply "jeopardy." The "self-incrimination" and "double jeopardy" components of this section are discussed separately below.

Self-Incrimination

Although copied from the Washington State Constitution, the language of the first clause of this section actually dates back to the Pennsylvania Constitution of 1776, and the "essential liberty" it protects against is "self-accusation" of an "involuntary nature" (*State v. Marsin*). The Court has also said that the guarantee should be liberally construed in favor of those to be protected and waiver of its protections not easily found (*State v. Smith*, 1966).

The privilege against self-incrimination "extends to all proceedings, civil or criminal, when the answer put to a witness may tend to incriminate him in future criminal proceedings" (*State v. Carvajal*). It reaches beyond obvious admissions of guilt to encompass statements that "may only *tend* to incriminate by furnishing one link in the chain of evidence required to convict" (*Flagler v. Derickson*) (emphasis in original). It protects not only the right to choose not to testify but also "to be free of any comment, direct or indirect, by design or accident, about a failure to take the stand" (*State v. Ikirt*). Where such comment is made, "prejudicial effect will be presumed and the error will be deemed fundamental," requiring reversal of a conviction (*State v. Smith*, 1966). Despite these emphatic statements, the Supreme Court has identified particular situations where prosecution comments do not violate this section; for example, the prosecution may comment on a defendant's failure to produce exculpatory evidence so long as it does not constitute a comment on the defendant's silence (*State v. Fuller*, see also *State v. Arredondo; State v. Marsin; State v. Still*).

It was not until 1964 that the U.S. Supreme Court incorporated the "self-incrimination" clause of the Fifth Amendment into the due process clause of the Fourteenth Amendment, thereby making it applicable to the states (*Malloy v. Hogan*). Even before that, however, the Arizona courts had never sharply distinguished this section from its federal counterpart. Thus this section's reference to "giv[ing] evidence" (rather than the federal "be[ing] a witness") against oneself did not prevent the Supreme Court from concluding in 1953 that the two provisions were the same "in substance" (*State v. Berg*). A later case reaffirmed that "the variations of wording in the federal and state constitutions do not lead to

different interpretations of the principle" (*State v. White*, 1967). A 1988 case suggested, however, that some differences might still be found between the two (*State v. Mauro*).

The Court has held that this section protects an accused from being compelled to provide the state with evidence of a "testimonial or communicative nature," but not where the suspect is "the source of real or physical evidence" (*State v. Stelzriede*). Thus it does not prevent the introduction of evidence obtained from hair samples (*State v. Brierly*) or fingerprints (*State v. White*, 1967). A court of appeals has described "testimonial or communicative evidence" as "that which reveals the subjective knowledge or thought processes of the subject," which does not include so-called field sobriety tests to determine alcohol impairment of driving ability (*State v. Theriault*).

The prosecution can introduce evidence of a defendant's refusal to take an intoxilyzer test without violating this section because the evidence is "not testimonial but physical" (*State v. Superior Court*, 1987). The refusal to consent may also be subject to a civil penalty, such as loss of a driver's license, without violating this section (*Smith v. Arizona Dept. of Transp.*). Similarly, if a defendant requests and obtains a breath sample for his own use, and challenges the accuracy of the state's test at trial without introducing the results of his own test, the prosecution does not violate this section by presenting evidence that the defendant was given a breath sample and commenting on his failure to produce evidence of the results (*State ex rel. McDougall v. Corcoran*).

This section extends to juveniles (*State v. Toney*). The right is personal, however, and cannot be asserted by an accused for the benefit of a third party (*State v. Cassady*). The privilege can only be invoked where the danger of self-incrimination is "real and appreciable" and not "imaginary and unsubstantial" (*State v. Verdugo*). Therefore where immunity from prosecution has been granted, such as under the general immunity statute (Ariz. Rev. Stat. 13–804), the immunized person cannot claim the right to remain silent under this provision (see *State v. Cookus*, not citing this section) (see also the commentary on section 19 of this article). Where the privilege does not apply, the defendant's refusal to testify is punishable by both civil and criminal contempt (*State v. Verdugo*).

Where an accused waives the privilege and chooses to be a witness, he is "subject to cross-examination as any other witness within the limits of the appropriate rules" and "must answer all relevant questions even though they may tend to convict him" (*State v. Taylor*, 1965). An ordinary witness, however, does not waive the privilege by taking the stand, for such a person has no privilege against answering nonincriminating questions (*id.*).

Double Jeopardy

This guarantee means that once a jury is sworn in at a criminal trial, jeopardy attaches and the accused cannot be retried for the same offense, unless the

jeopardy is "removed for some legal reason" (*Westover v. State*). It also means that the state may not, after an acquittal, seek an appeal to review the legality of orders made by the judge during the trial (*State v. Miller*, 1913). Double jeopardy is an affirmative defense that must be raised by the defendant; if not raised at a proper time, it is waived (*State v. Adamson*).

This section forbids successive prosecution and cumulative punishment for greater and lesser included offenses growing out of the same act, if that act "is relied upon for more than one conviction" (*State v. Harvey*). A new prosecution is barred even if the judgment on the lesser included offense was in a court that did not have jurisdiction to hear the greater offense (*State v. Mounce*). But this section does not forbid separate prosecutions for offenses that have different statutory elements, even though they arise from the same set of circumstances, such as aggravated assault and reckless driving (*State v. Seats*), or even driving under the influence of alcohol and driving with a blood alcohol level above 0.10 percent (*Anderjeski v. City Court*).

The double jeopardy principle applies to sentencing as well as conviction, so that multiple sentences cannot be imposed for the same crime (*State v. Watson*). But it does not prohibit the imposition of a harsher sentence upon retrial and conviction after reversal of a previous conviction (*State v. Ortiz*). And it does not preclude imposing both a criminal and a civil sanction for the same act or omission (*Haddad v. State*), even if the civil sanction is punitive damages (*Olson v. Walker*).

This section does not preclude a retrial for the same offense where sound legal reasons intervene, such as the illness or recusal of the trial judge, or the declaration of a mistrial under certain circumstances (*State v. Riggins*). Thus a defendant may be retried where the judge has, even without the defendant's consent, discharged the jury because it was unable to reach a verdict (*State v. Moore*). But this section prevents a retrial after a mistrial has been declared without the defendant's consent in circumstances where that consent was required (*McLaughlin v. Fahringer*); it also prevents a court from reconsidering its earlier acceptance of a guilty plea (*Campas v. Superior Court*).

The double jeopardy clause of the Fifth Amendment was applied to the states by the U.S. Supreme Court in 1969 (*Benton v. Maryland*). Prior to that time, the Arizona courts had occasionally interpreted this section differently from the U.S. Supreme Court's interpretation of the counterpart provision of the Fifth Amendment (see *State v. Thomas*, 1960, refusing to follow the U.S. Supreme Court decision in *Green v. United States*). Although the Arizona Supreme Court overruled *Thomas* after incorporation to conform to the federal standard (*State v. Moloney*), it has continued its independent course. For example, the Court rejected the standard adopted by a plurality of the U.S. Supreme Court (*Oregon v. Kennedy*) and instead construed this section to prevent retrial of an accused after a mistrial caused by the prosecutor's intentional improper conduct, regardless of whether the prosecutor specifically intended to provoke a mistrial

(*Pool v. Superior Court*). It explained that while it would "ordinarily" interpret this section in conformity with the U.S. Supreme Court's application of the Fifth Amendment, it had a "duty" not to "follow federal precedent blindly." In some other cases applying this section, however, the Arizona courts have applied federal precedent without referring to this section (e.g., *Klinefelter v. Superior Court*), or saying simply that the protection it offers a defendant is "similar" to that afforded by the federal Constitution (*Taylor v. Sherrill*).

SECTION 11

Justice in all cases shall be administered openly, and without unnecessary delay.

This is both an "open courts" and a "speedy trial" provision. The "open courts" component generally commands public judicial proceedings because "[d]emocracy blooms where the public is informed and stagnates where secrecy prevails" (*Phoenix Newspapers, Inc. v. Jennings*). As this suggests, the idea of "openness" in the administration of justice is closely related to the protection of a free press in section 6 of this article. The right to have justice administered "openly" operates in favor of the state as well as the defendant, so that neither has a right to a secret trial (*Phoenix Newspapers, Inc. v. Superior Court*). The Court has recognized the availability of other remedies, such as a continuance or change of venue, when press coverage threatens an accused's right of free trial (*Phoenix Newspapers, Inc. v. Winsor*), and the Court recently suggested that those may be the only constitutional remedies when a defendant's right to a fair trial is threatened (*Mountain States Tel. & Tel. Co. v. Arizona Corp. Commn.*).

Even when acknowledging the possibility that judicial proceedings may be closed to the public in special circumstances—such as where openness would endanger ongoing criminal investigations—the Court has cautioned that the veil of secrecy must be lifted when the danger of prejudice has dissipated; that is, "nondisclosure cannot last forever" (*Phoenix Newspapers, Inc. v. Superior Court*). Furthermore, a court ordinarily may not seal testimony taken in a pending court proceeding, at least "absent specific statutory authorization" (*State Bar v. Superior Court*). And the Court has relied on this section to reject the argument that Article VI, section 15 (requiring that some judicial examinations of juveniles must be held "in chambers") nullifies the trial judge's discretion to control the persons admitted to such examinations (*Wideman v. Garbarino*). Finally, the Court has also recognized the strong public interest in open courts, and the judicial obligation to protect it, by allowing "any member of the public" to challenge exclusion from a judicial hearing (*Phoenix Newspapers, Inc. v. Jennings*).

The "speedy trial" component of this section is primarily aimed at the judicial branch, although it would presumably prevent the legislature from interfering with its command, such as by failing to provide the judiciary with sufficient resources to avoid "unnecessary delay" in the administration of justice. It should

be compared with a clause in section 24 of this article granting the criminally accused the right to "a speedy public trial." Unlike section 24, this section is not confined to criminal prosecutions, but no published court decision addresses the "without delay" component of this section in a civil context, although its "open courts" guarantee has been enforced in civil proceedings (*State Bar v. Superior Court*). Sometimes referred to as a "speedy trial" provision interchangeable with section 24 (*State v. Thornton*), this component is discussed in the commentary on section 24.

SECTION 12

The liberty of conscience secured by the provisions of this constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

This section must be read in conjunction with other constitutional provisions dealing with the separation of church and state; for example, section 1 of Article XX contains a broad guarantee of religious freedom; section 7 of that article and section 7 of Article XI safeguard public educational institutions from sectarian control; and Article IX, section 10, prohibits taxing for religious purposes. The Supreme Court has construed this section as limiting the command in section 1 of Article XX, requiring "[p]erfect toleration of religious sentiment," but also as permitting state assertion of control over children where their mother's religious beliefs prevent her from securing medical care for them only where a "direct collision" exists between the rights of the children and the "religious practices" of the family (*In re Juvenile Action No. 5666–J*). The Court has said that Sunday closing laws in general do not interfere with the liberty of conscience protected by this section, being "within the police power of the state to provide for one day of rest at periodic intervals" (*Elliott v. State*).

The second sentence of this section prohibits the use of public funds for religious purposes. The Court has described its intent as "to prohibit the use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion," so that the state must be "absolutely impartial" (*Pratt v. Arizona Bd. of Regents*). This section does not, however, require "total non-recognition of the church by the state and of the state by the church" (*Community Council v. Jordan*). Therefore, a state agency's contribution of 40 percent of the money spent by a religious organization for

emergency assistance for the needy does not violate this provision (*id.*), nor does the leasing of state university facilities to a religious group, so long as the group pays fair rental value and the arrangement does not interfere with the "operation and orderly administration of the University" (*Pratt v. Arizona Bd. of Regents*).

The third sentence of this section has received the most judicial attention. Although it provides that no person shall be incompetent as a juror solely because of "his opinion on matters of religion," the Supreme Court has said that its effect is limited by Article II, section 24, which guarantees a defendant a right to a fair trial by an impartial jury. Thus this section does not prohibit excluding from a jury a person whose religious beliefs prevent her from being "fair and impartial" (*State v. Fisher*), nor does it prohibit the use of the phrase "so help you God" in the oath required of jurors and witnesses because of the option of making a "solemn affirmation" (see section 7 of this article) in lieu of the oath (*State v. Albe*).

The Supreme Court has described the last clause of the third sentence as "positive and explicit" language creating a "direct prohibition against questioning any witness as to his religious belief, for the purpose of affecting his credibility" (*Tucker v. Reil*). Thus a witness should not be asked questions designed to "test [her] belief in God" (*Fernandez v. State*). Neither a witness (*State v. Marvin*) nor the prosecution (*State v. Thomas*, 1981) can use evidence of religious beliefs to enhance a witness's credibility. *Tucker* applied this clause to forbid questions about the religious beliefs of a witness even where the witness was a member of a church that had a financial interest in the litigation. This result has been criticized for immunizing religious groups "from having the interest of their witnesses exposed."[13] On the other hand, questions about religion are permissible if they are probative of something other than veracity (*State v. Crum*); for example, a victim's testimony that the perpetrator was wearing certain religious garments at the time of the crime, which is probative for identification purposes, is admissible under this section (*State v. Stone*, 1986). And cross-examination of the accused may probe his religious beliefs when he volunteers a religious justification for his actions on direct testimony (*State v. West*).

This last clause does not apply to jurors (*State v. Fisher*), but the Supreme Court has upheld a trial judge's refusal to ask prospective jurors intrusive questions about their religious beliefs, so long as the accused was given sufficient opportunity to explore potential jurors' biases to "intelligently exercise" his right to challenge them (*State v. Via*).

[13] Morris K. Udall, Joseph M. Livermore, Patricia G. Escher, and Grace McIlvain, *Arizona Law of Evidence*, vol. 1, 3d ed. (St. Paul, Minn.: West Publishing Co., 1991), sec. 41, p. 69.

SECTION 13

No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Relationship to Federal Constitutional Provisions

The language of this section, borrowed from the Washington State Constitution (which in turn borrowed it from earlier state constitutions), actually predates the Fourteenth Amendment of the U.S. Constitution, adopted in 1868. That federal provision prohibits states from denying "equal protection of the laws" and from "abridge[ing] the privileges or immunities of citizens of the United States." Some commentators have argued that the framers sought to go beyond the "mere guarantee of equal protection to each citizen" provided in the Fourteenth Amendment of the U.S. Constitution and instead "chose to forbid the legislature absolutely from extending any special privileges to any person or group."[14] Under this reasoning, this section is partly a reflection of the distrust of the political influence of corporations (particularly railroads and mines) shared by many of the Arizona framers.[15] Other commentators have contended, conversely, that the Arizona and federal provisions should lead to similar results.[16]

Although the language of this section differs from the equal protection clause of the Fourteenth Amendment, the Supreme Court nevertheless essentially equated the two provisions in 1945, finding them to "have for all practical purposes the same effect" (*Valley Natl. Bank v. Glover*). More recently, however, the Arizona courts have taken a somewhat more independent view, as explained further below.

Relationship to Other Provisions of This Constitution

In an early decision construing this section (*State v. Childs*), the Supreme Court recognized that it bears a close resemblance to Article IV, part 2, section 19(13), which prohibits "special laws . . . [g]ranting to any corporation, association,

[14] Feldman and Abney, "Federalism," 140. Prominent constitutional law commentator Hans Linde compared a similar provision of the Oregon Constitution to the Fourteenth Amendment this way: "The difference in the two constitutional texts is not happenstance. They were placed in different constitutional texts at different times by different men to enact different historic concerns into constitutional policy." See Hans Linde, "Without 'Due Process': Unconstitutional Law in Oregon," *Oregon Law Review* 49(1970), 125, 141.

[15] Feldman and Abney, "Federalism," 139; James Byrkit, *Forging the Copper Collar: Arizona's Labor-Management War of 1901–1921* (Tucson: University of Arizona Press, 1982), 38–55; Leshy, "The Making of the Arizona Constitution," 11–13, 29, 88–91.

[16] Twist and Munsil, "Judicial Activism," 1052–56.

or individual, any special or exclusive privileges, immunities, or franchises ." The purpose of both provisions has been described as "to secure equality of opportunity and right to all persons similarly situated" (*Prescott Courier, Inc. v. Moore*). The Court has never addressed the fact that this section is limited to "citizens" while subsection 13 of Article IV, part 2, section 19 applies to "individuals."

In more recent cases the Court has begun to emphasize that, "[a]lthough similar constitutional policies are involved," the purposes of the two provisions are "distinguishable"; specifically, this section prohibits unreasonable discrimination *"against* a person or class," while the provision in Article IV prevents the state from "unreasonably and arbitrarily discriminate[ing] *in favor of* a person or class by granting them a special or exclusive immunity, privilege, or franchise" (*Arizona Downs v. Arizona Horsemen's Found.*, emphasis in original). The Court has emphasized the difference between these two provisions by holding that a law with a rational basis sufficient to withstand attack under this section may still run afoul of Article IV, part 2, section 19 (*Republic Inv. Fund v. Town of Surprise; State v. Levy's*).

Although many cases apply this section in conjunction with the due process clause in section 4 of this article, several decisions have applied these sections separately, one stating that the "areas of protection" each establishes are "not coterminous" (*State ex rel. Babbitt v. Pickrell*). While "due process" does have a substantive component, it speaks not so much toward classification and in equality as it does to the overall reasonableness of the legislation (*Bryant v. Continental Conveyor & Equip. Co.*).

In the taxation context, this section is similar to the requirement in Article IX, section 1 that taxes be "uniform upon the same class of property." The legislature satisfies this section in the taxing area if it makes "reasonable classifications" and "if all persons in a class are treated alike" (*Arizona State Tax Commn. v. Frank Harmonson Co. Metal Prods.*). For example, taxing the gross income of those furnishing living accommodations to tourists or transients, but not of those who rent offices or storerooms, does not offend this section (*White v. Moore*). A court of appeals has said more broadly that this section does not require that persons paying taxes receive equal benefits (*Lake Havasu City v. Mohave County*).

Scope

This section specifically applies to "laws"; therefore, "by its very terms" it is inapplicable to private conduct (*State Farm Fire & Casualty Co. v. Powers*). Nevertheless, a court of appeals has held that this section is enforceable against nonprofit organizations, such as an interscholastic association whose rules "have the direct effect of granting or denying participation in a part of the program of a tax-supported institution" (*Quimby v. School Dist. No. 21*). This result is different from that reached under the Fourteenth Amendment of the U.S. Constitution (*National Collegiate Athletic Assn. v. Tarkanian*). On the other hand, this section

does not apply to a private association that does not "exercise quasi-governmental powers or determine access to state-supported institutions" (*Aspell v. American Contract Bridge League*).

The courts have, however, applied this section to limit governmental actions other than by the state legislature; for example, it has been applied to actions by counties (*Prescott Courier, Inc. v. Moore*); to city ordinances (*Home Builders Assn. v. City of Scottsdale*); and to a city denial of a conditional use permit (*Behavioral Health Agency v. City of Casa Grande*). But this section expressly excludes municipal corporations from the scope of its protection; thus the state can treat a fire district (a quasi-municipal corporation) unequally without violating this section (*Picture Rocks Fire Dist. v. Pima County*), although other constitutional provisions (e.g., Article IV, part 2, section 19) may remain applicable.

Early Interpretations of This Section

Before 1970 almost all the cases discussing this section involved challenges to various forms of economic regulation. The Supreme Court applied it to invalidate various laws where it could not find a "reasonable basis" for the classifications made by the law (e.g., *Gila Meat Co. v. State*) or where it found the law bore "no reasonable relation to the general welfare, health, safety, or morals of the public" (*Killingsworth v. West Way Motors, Inc.*). Other decisions rejected such challenges; for example, a city ordinance prohibiting the distribution of unpasteurized milk was upheld because the health risks were an adequate justification (*City of Phoenix v. Breuninger*). Another case rejected the argument that a classification of articles subject to a luxury tax was arbitrary, the Court finding that the tax secured "[e]quality of opportunity . . . to all persons and corporations similarly situated, and that is all that [this section] undertakes to guarantee" (*Stults Eagle Drug Co. v. Luke*; see also *Valley Natl. Bank v. Glover*).

Modern Doctrine and Applications

In the last couple of decades, the Supreme Court has generally employed the doctrinal framework developed by the U.S. Supreme Court under the equal protection clause of the Fourteenth Amendment (e.g., *Arizona Downs v. Arizona Horsemen's Found.*).

"Strict scrutiny." Under "strict scrutiny" analysis formulated by the U.S. Supreme Court in equal protection cases (*San Antonio Indep. School Dist. v. Rodriguez*), and adopted by the Arizona courts for use in applying this section (e.g., *Kenyon v. Hammer*), the courts will uphold a statute only if they find a "compelling state interest" to be served and that the regulation is "necessary" to achieve this state objective. The "strict scrutiny" test is usually fatal to a statute; it is difficult to find both a "compelling state interest" and that the regulation in question is "necessary" to protect that interest. This hard look is confined to those cases in which

the statute imposes a burden on a "suspect class," such as race or religion, or impinges upon a "fundamental right."

Even though this section expressly applies to "citizens," a court of appeals has held that resident aliens are a "suspect class" in this analytical framework (*Arizona State Liquor Bd. v. Ali*). Other cases on "suspect classifications" have not squarely addressed this section but instead have relied on the U.S. Constitution; for example, the Supreme Court has held that age is not a suspect class, and therefore strict scrutiny did not apply to a statute setting a mandatory retirement age for primary and secondary school teachers (*Lewis v. Tucson School Dist. No. 1*).

The "fundamental right" that implicates strict scrutiny may be found elsewhere in the state constitution; for example, Article XVIII, section 6 has been held to create a fundamental right to recover damages for death or injury (*Kenyon v. Hammer*). Another case decided shortly after *Kenyon*, however, held (over a sharp dissent) that a statute requiring products liability lawsuits to be brought within twelve years of the date the product was sold, regardless of the date the injury occurred, did not impinge on the "fundamental right" of access to the courts because it did not deny access "in the constitutional sense" (*Bryant v. Continental Conveyor & Equip. Co.*).

"Intermediate scrutiny." This is also known as "means-scrutiny" analysis (*Kenyon v. Hammer*). The U.S. Supreme Court has said that to uphold a statute under the "intermediate" test, a court must find (1) an "important" state interest and (2) that the means adopted to serve that interest are "reasonable, not arbitrary" (e.g., *Reed v. Reed*). The U.S. Supreme Court has applied this test primarily to classifications based on gender and illegitimacy of birth (e.g., *Michael M. v. Superior Court*). The Arizona courts have not had occasion to consider or apply this test under this section.

"Rational basis." Under this test, courts will uphold a law as long as "(1) the court can find some legitimate state interest to be served . . . and (2) the facts permit the court to conclude that the . . . classification rationally furthers the state's legitimate interest" (*Kenyon v. Hammer*). Put another way, this test requires invalidation of a governmental classification only if it "rests on grounds wholly irrelevant to the achievement of the state's objectives" (*Bryant v. Continental Conveyor & Equip. Co.*).

The test defers heavily to the legislature and thus puts a difficult burden on challengers. Arizona courts have had little difficulty upholding laws such as one treating private clubs differently from other liquor license applicants (*Garcia v. Arizona State Liquor Bd.*). City ordinances have also fared well under the "rational basis" test; for example, a water charge levied only on new building permits does not violate this section (*Home Builders Assn. v. City of Scottsdale*), nor does an ordinance restricting parking on a residential street to residents and visitors only (*Smith v. City of Tucson*). Government in general is regarded as having a rational basis for requiring groups specially benefiting from or specially burdening

society to pay taxes in excess of those paid by taxpayers in general (*Apache County v. Atchison, T. & S.F. Ry.; Shaw v. State*).

Although decisions striking down statutes under the "rational basis" test are rare, they are not unknown. A recent Supreme Court decision struck down a state statute giving a 5 percent advantage in bids for municipal contracts to corporations who had paid property taxes (but not other kinds of taxes) in the state for two consecutive years (*Big D Constr. Corp. v. Court of Appeals*). The Court found the scheme "arbitrary and whimsical" in its unequal impact and concluded that it did not further any acceptable state interests, although a previous decision had concluded that an earlier version of the statute did have a rational basis (*Schrey v. Allison Steel Mfg. Co.*).

Poverty. A few decisions have interpreted this section to forbid denial of access to the judicial system on grounds of poverty, that is, to require that "all citizens of our State, regardless of financial status, must be afforded an equal opportunity to the courts" (*Hampton v. Chatwin*; see also *Eastin v. Broomfield*). Chronically mentally ill persons may bring a class action suit because this section's command of equal access to justice requires it (*Arnold v. Arizona Dept. of Health Servs.*). But this section is not violated by a statutory fee imposed on marriage dissolution actions, with the proceeds directed to a domestic violence shelter and child abuse prevention and treatment funds, if there is a provision for waiver of the fee for indigents (*Browning v. Corbett*).

SECTION 14

The privilege of the writ of habeas corpus shall not be suspended by the authorities of the state.

This section protects the right of persons to obtain judicial review of the legality of their confinement by governmental authorities. The Arizona framers soundly rejected a proposal on the floor of the convention to authorize suspension of the writ in times of emergency, as the counterpart provision in the U.S. Constitution does (Article I, section 9, clause 2).[17] Article VI, sections 5 and 18 vest the Supreme Court and superior courts with jurisdiction to issue the writ. This section has not been the subject of judicial attention in published cases.

SECTION 15

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

[17] See Goff, *Records*, 760–62.

This section is almost identical to the Eighth Amendment to the U.S. Constitution. The legislature as well as the courts are bound by this section (*State v. Mulalley*).

Excessive Bail

This part of the section relates to the more specific provision on bail found in Article II, section 22. The prohibition rests on the notion that an accused is presumed innocent and that the "sole purpose" of bail is to secure the accused's attendance in future court proceedings (*Gusick v. Boies*). Although the presumption of innocence is not expressed in the text of the Arizona Constitution, it was recognized in early poststatehood decisions (*In re Haigler*).

Bail should be set on the basis of individual circumstances, including the nature and gravity of the offense charged; the character, reputation, and previous criminal record of the accused; the potential penalties that may be levied; and the ability of the accused to give bail from her own resources or from those of relatives and friends (*Gusick v. Boies*). Denial of bail is improper if for punishment, and the amount should not be influenced by "an aroused state of public opinion" (*id.*), but bail is not deemed excessive merely because the accused cannot provide it (*State v. Norcross*). The amount of bail is generally within the discretion of the trial court or magistrate (*State v. Norcross*), but appellate courts can reduce bail, on a writ of habeas corpus, when they find clear abuse of this discretion (*Gusick v. Boies*).

Excessive Fines

This clause requires a fine "not out of proportion to the severity of the crimes committed"; ability to pay is "one factor to consider" but not itself dispositive (*State v. Wise*). Without referring to this section, the Supreme Court has adopted American Bar Association standards on setting the amount of fines (*In re Collins*). A court of appeals has struck down as excessive a fine of $137,000 for a crime that resulted in a loss of $500 (*State v. Marquez-Sosa*), but large fines in other circumstances have been deemed consistent with this section (*State v. Miller*).

Cruel and Unusual Punishment

Arizona courts have not considered the extent to which this section may differ from the counterpart provision in the Eighth Amendment since the U.S. Supreme Court held in 1962 that that clause applies to the states through the due process clause of the Fourteenth Amendment (*Robinson v. California*). Regarding capital punishment, the original version of the state constitution did not explicitly mention the death penalty. A proposal by one of the delegates to ban it never reached

the floor, and another delegate successfully insisted on changing the conjunction between cruel and unusual from "or" to "and" to prevent the Arizona courts from outlawing new methods of execution, such as electrocution, on the grounds that they were simply unusual rather than cruel.[18] As a result of amendments, the constitution now contains two explicit references to the death penalty (Article II, section 23; Article XXII, section 22) negating any inference that capital punishment is per se cruel and unusual in violation of this section.

Neither section requires the legislature to authorize a sentence of death or a court to impose it in any particular case, however. And neither section can fairly be said to represent a constitutional judgment that a sentence of death can never be, in a particular situation, cruel and unusual punishment. In several individual cases, the Arizona courts have ruled that the death sentence is not cruel and unusual punishment for the crime of murder (e.g., *State v. Endreson*), even when the defendant is sixteen years old (*State v. Valencia)*.[19] The Supreme Court has continued to engage in a review to determine whether death sentences are "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (*State v. Richmond*), although some justices have dissented from that practice (see *State v. White*, 1991).

In numerous noncapital cases, Arizona appellate courts have considered, and uniformly rejected, claims that particular sentences amount to cruel and unusual punishment under this section (e.g., *State v. Haley*). Although the Supreme Court has not fully settled the extent to which this section is identical to its federal counterpart (e.g., *State v. Bartlett*), it has demanded that sentences be "approximately proportionate to the type of crime and not so severe as to shock the moral sense of the community" (*State v. Taylor*, 1957) or offend "perceptions of decency . . . of contemporary society," which requires examining the "nature of the crime and of the offender," and comparing punishments for the same crime in other jurisdictions and for other crimes within Arizona (*State v. Mulalley*). The Court has upheld sentences (e.g., nine consecutive life terms) that exceed the defendant's life expectancy (*State v. Day*).

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[18] Goff, *Records,* 660–61, 1248 (proposition 98, sec. 6); see also Leshy, "The Making of the Arizona Constitution," 85. The president of the Constitutional Convention and first state governor, George W. P. Hunt, was a strong opponent of capital punishment. Largely at his instigation, the state voters in 1916 narrowly approved a statutory initiative outlawing the penalty (see *In re Welisch*), after a similar attempt two years earlier had met defeat. The death penalty was reinstated in 1918 by statutory initiative. See generally David L. Abney, "Capital Punishment in Arizona" (M.A. thesis, Arizona State University, 1988); see also C. McClennen, "Capital Punishment in Arizona," *Arizona Attorney* (October 1992), 17–21.

[19] The Arizona courts have also had several occasions to pass on the constitutionality of the state's death penalty statute (now found at Ariz. Rev. Stat. 13–703) under the Eighth Amendment to the U.S. Constitution (e.g., *State v. Watson; State v. Gillies*).

The constitutional prohibition applies not merely to the length of a sentence but also to treatment while incarcerated, and thus prevents subjecting prisoners to "unreasonable and harsh treatment" not necessary to their safe confinement (*Howard v. State*).

SECTION 16

No conviction shall work corruption of blood, or forfeiture of estate.

This provision bears some resemblance to, but is more expansive than, Article III, section 3, clause 2 of the U.S. Constitution. It rejects the idea that children must atone for the sins of their parents or that a person convicted of a crime should forfeit her property to the state. The second clause does not, however, prohibit attaching the property of a convicted murderer in order to satisfy a civil judgment for wrongful death (*Morrisey v. Ferguson*). This section has also been applied to mean that a convicted person retains certain judicially enforceable rights, such as to be free from unreasonably harsh treatment not necessary to his safe confinement (*Howard v. State*), such as forcible and arbitrary administration of dangerous medication (*Large v. Superior Court*).

SECTION 17

Eminent Domain; just compensation for private property taken; public use as judicial question. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

This section protects private property rights. Like most of the Declaration of Rights, it was drawn "almost exactly" from the Washington State Constitution (*Bugbee v. Superior Court*), and thus decisions from that state's courts have been

described as "peculiarly persuasive" in interpreting this section (*Solana Land Co. v. Murphey*). The Arizona courts have not always followed the Washington courts, however, as where the background of the constitutional provision in Arizona shows a different meaning was intended (*Desert Waters, Inc. v. Superior Court*). The text of this section is considerably more elaborate than the Fifth Amendment to the U.S. Constitution.

Taking Private Property for Private Use

The first sentence of this section is different from the Fifth Amendment (which allows private property to be taken only for public use), but the Supreme Court has held that its authorization to take private property for private use does not violate the federal Constitution (*Cienega Cattle Co. v. Atkins*). The private uses listed in this section (e.g., irrigation works) are those deemed economically important to the framers in 1910. The Court has held that the legislature "cannot enlarge" the right of private entities to take property for private uses not listed in this section (*Inspiration Consol. Copper Co. v. New Keystone Copper Co.*). The Court has, however, taken a broad view of what a public use is, as explained in the next subsection. The second half of the second sentence also forbids private entities (but not municipal corporations) from appropriating rights of way prior to a jury determination of the amount of compensation owed (*Hughes Tool Co. v. Superior Court*).

Public Use

The Arizona courts have generally viewed the requirement of "public use" quite flexibly. A case from the territorial era, decided in 1891, spoke of the "necessity of government's adapting itself to the existing conditions and wants and needs of society" in applying a "public use" limitation (*Oury v. Goodwin*). An early post-statehood decision criticized the judicial expansion of the notion of public use (*Inspiration Consol. Copper Co. v. New Keystone Copper Co.*), but in modern times the Court has harkened back to the original view. Citing this 1891 decision in 1965, the Court upheld, as for a public use, condemnation of land by a city for an auditorium and convention center (*City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Assn.*). Other cases have upheld municipal condemnation of land for redevelopment, even when the land was to be resold to profit-making private interests for leasing to tenants (*Humphrey v. City of Phoenix*), and of the property of a private water company, even if it is outside of the city and unconnected to it (*Citizens Util. Water Co. v. Superior Court*). A finding of the requisite public use in municipal condemnation for urban redevelopment, slum clearance, and historic preservation may properly be made on an area basis rather than piecemeal, lot by lot (*Cordova v. City of Tucson*).

The last sentence in this section is an interesting example of the framers' distrust of the legislature and their appreciation of the importance of an

independent judiciary. By contrast, the Fifth Amendment of the federal Bill of Rights has been interpreted not to make public use a judicial question (*Hawaii Hous. Auth. v. Midkiff*). While a legislative declaration of public use is "not conclusive upon the courts," it is nevertheless "of great weight" (*Humphrey v. City of Phoenix*). In the end, then, there may be little practical difference between this section and the Fifth Amendment on this issue. A similar question of public use comes into play in the construction of Article IX, section 7 (the so-called gift clause).

Compensation in Advance of Taking

The second sentence requires that compensation be made before private property is taken or damaged. It is one of very few provisions in the Declaration of Rights to be amended; in 1970 the middle of the sentence was changed to add the clauses allowing a taking where just compensation is "secured by bond . . . or paid into the State treasury," and the caption was added. Apparently, this amendment was intended to provide more flexibility to government to counter a 1959 decision of the Supreme Court (*State ex rel. Morrison v. Jay Six Cattle Co.*), which construed the original version of this section to require actual tender of compensation to the owner or to the court before the taking could be made. This sentence also vests in a jury the obligation to ascertain the amount of compensation, unless the jury is waived.

Damage

Unlike the federal Constitution, this section, like that of many other states,[20] requires that compensation be paid whenever property is "damaged" as well as "taken." But damage that is "not different in either degree or kind from those suffered by the public generally" is not compensable under this section (*Reese v. De Mund*). Indeed, the concept of "damage" is applied in a "highly artificial way" to mean damaged "in a constitutional sense"; that is, in a way that "by no means opens the gate to [property owners' claims] for all the many injuries [one] may suffer by virtue of an act of government" (*Uvodich v. Arizona Bd. of Regents*) (quoting a treatise on eminent domain).

Regulatory Takings

The Arizona courts have acknowledged that a taking of private property may occur when government regulates the use of private property so heavily as to

[20] See J. Dukeminier and J. Krier, *Property* (Boston: Little Brown, 1981), 1157; L. Francis, "Eminent Domain Compensation in Western States: A Critique of Fair Market Value," *Utah Law Review* (1984), 429, 431.

"preclude its use for any purpose to which it is reasonably adapted," but that dimunition of value alone—even, as in that case, of up to 50 percent of its previous worth—is not sufficient (*City of Phoenix v. Fehlner*) (quoting from a New York decision). In most regulatory takings cases, the Arizona courts have based their decisions on this section rather than on the U.S. Constitution, although some decisions rely on federal cases exclusively or a mixture of federal and state decisions. The Supreme Court has said that it "is quite appropriate" to look to the state constitution on such questions (*Corrigan v. City of Scottsdale*).

Deprivation of the most beneficial use of land by governmental action is not, standing alone, sufficient to constitute a taking of private property. Because the courts are "ill-equipped to sit as super-zoning commissions . . . where the reasonableness of a zoning ordinance is fairly debatable, it must be upheld" (*Rubi v. 49er Country Club Estates*; see also *City of Tucson v. Arizona Mortuary*). A court of appeals has said that compensation is owed if the regulation prevents the owner of property from using it for "any economically viable purpose" (*Ranch 57 v. City of Yuma*), and the Supreme Court has struck down a city decision rezoning property that rendered it "useless" and went "beyond [the city's] need to protect the health, safety, and welfare of the community while completely disregarding [the owner's] interest in using the property" (*Cardon Oil Co. v. City of Phoenix*). Similarly, a court of appeals has held that a city ordinance preserving hillside private property as open space constitutes a taking requiring compensation (*Corrigan v. City of Scottsdale*). The same case acknowledged that, for the purpose of determining whether a regulatory taking exists, a single parcel of land will generally not be divided into discrete segments, but this particular ordinance was unconstitutional because it prevented "any development whatsoever on the largest parcel" of the plaintiff's land.

On the other hand, the Supreme Court has held that government can destroy private property without compensation consistent with this section where the destruction is done pursuant to the state's police power, to prevent its use in a way injurious to the public welfare, as when a city destroys housing that has been deemed unfit for human habitation in violation of the city housing code (*Moton v. City of Phoenix*).

A court of appeals has held, over a dissent, that a city may place conditions on its rezoning of property for a more intensive use, such as by requiring dedication of rights of way to handle increased traffic, but only if the conditions are "reasonably conceived [for t]he fulfillment of public needs" (*Transamerica Title Ins. Co. v. City of Tucson*). This decision anticipated by a dozen years a U.S. Supreme Court decision construing the Fifth Amendment of the U.S. Constitution in similar fashion (*Nollan v. California Coastal Commn.*).

The Supreme Court has held that money damages may be awarded for tern porary takings of property that result from enforcement of a government regulation that is later held to be an unconstitutional taking; that is, the remedy for the regulation that goes too far is not simply to enjoin it (*Corrigan v. City of Scottsdale*).

The Court overruled a prior appellate decision to the contrary (*Davis v. Pima County*) and anticipated by one year a similar ruling from the U.S. Supreme Court interpreting the federal Constitution (*First English Evangelical Lutheran Church v. County of Los Angeles*). The *Corrigan* court cautioned, however, that only *"actual damages"* (emphasis in original) are to be awarded for a temporary taking; such damages must be "provable to a reasonable certainty" to avoid "windfalls to plaintiffs at the expense of substantial governmental liability."

Just Compensation

Cases interpreting this phrase are legion. It basically means that the owner of the property taken must be in as good a financial position as she would have been without the taking (*Defnet Land & Inv. Co. v. State*; see also *State ex rel. Miller v. Filler*). Although the determination of just compensation is a judicial function, the Supreme Court has deferred to the legislature's establishment of a statutory rate of interest upon a finding that it was not unreasonable (*id.*). But it has also struck down a statute that purported to give a county board of supervisors authority initially to determine the compensation to be paid to the owner of property taken for public use (*McCune v. City of Phoenix*), and a court of appeals has refused to apply a statute setting a date for determining fair market value where that would result in unjust compensation (*Uvodich v. Arizona Bd. of Regents*). A court of appeals has suggested that this section forbids compensation for a taking in the form of "density credits" or development rights transferable to other property owned by the plaintiff (*Corrigan v. City of Scottsdale*), even though the U.S. Supreme Court has held otherwise (*Penn Central Transp. Co. v. City of New York*).

SECTION 18

There shall be no imprisonment for debt, except in cases of fraud.

Like the parts of this article dealing with habeas corpus (section 14) and corruption of blood and forfeiture of estates (section 16), this is another constitutional provision with ancient roots, reflecting a reaction against medieval practices in England and elsewhere, where debtors' prisons flourished. The courts have applied it to statutes making it a crime, punishable by imprisonment, to fail to pay a debt, such as a municipal ordinance that criminalizes nonpayment of sewer fees—a debt based upon a contractual relationship (*State v. Bartos*). The provision is not violated, however, by imprisonment for failure to pay fines imposed in criminal proceedings (*In re Silvas*); for giving a worthless check with intent to defraud (*State v. Meek*); or for obtaining labor by false pretences in violation of state law (*Ex parte Morse, dictum*).

The validity of imprisonment in connection with the failure to satisfy property settlements or alimony orders in divorce decrees has required the Arizona

courts to draw some fairly subtle lines. In general, a valid alimony award in a divorce decree may be enforced by contempt proceedings, including imprisonment, because an alimony decree is not regarded as creating a debt (*Collins v. Superior Court*) but rather for the purpose of providing "necessities for support," because "[s]upport and alimony are based on the theory that there is a moral and social obligation to support one's child or former wife as well as a statutory duty imposed by law" (*Stone v. Stidham*). This includes an order for payment of attorney's fees in a divorce settlement (*Johnson v. Johnson*).

This section does, however, restrict the power of the courts to punish contempt by imprisonment where the underlying reason is the nonpayment of an ordinary debt, as in a division of community property upon a divorce (*Stone v. Stidham*). Thus, where the divorce decree merely incorporates preexisting contractual debts, this section prohibits its enforcement by criminal contempt (*Masta v. Lurie ex rel. Superior Court*; see also *Frese v. Superior Court*). And this is so even if the decree ordering the payment of the debt sets a lower alimony than it would have otherwise done (*Perkins v. Superior Court*). A divorce decree requiring one spouse to convey specific property to another can be enforced by imprisonment for criminal contempt without violating this section, even though a decree requiring payment of a sum of money cannot (*Proffit v. Proffit, dictum*).

SECTION 19

Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with bribery or illegal rebating, shall not be excused from giving testimony or producing evidence, when legally called upon to do so, on the ground that it may tend to incriminate him under the laws of the state; but no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may so testify or produce evidence.

This provision is a minor wrinkle on the general privilege of self-incrimination contained in section 10 of this article. It basically mandates testimony or production of evidence by those with knowledge of "bribery or illegal rebating," in return for which immunity is granted. This is similar to the procedure that can be employed to waive the immunity from self-incrimination provided in section 10 of this article. This section's application to cases of "bribery or illegal rebating" (the latter referring to the Gilded Age practice of monopolistic railroads giving unlawful price breaks or refunds to favored customers) suggests that the Arizona framers included this section to underscore the vigor with which they expected the state to fight such practices. The Supreme Court has indicated that this section and section 10 are self-executing and require no special claim of privilege to obtain immunity, but that this section is inapplicable to witnesses testifying before a grand jury because at that point no defendant has been "charged" within

the meaning of the first clause of this section (*State v. Chitwood*; see also *Chitwood v. Eyman*).

SECTION 20

The military shall be in strict subordination to the civil power.

This section emphasizes the enduring American tradition of civilian control of military power and is related to Article XVI, dealing with the militia or Arizona national guard. Given Arizona's lack of military strength, it is probably unnecessary today, although it may have had real meaning at statehood, given the more precarious position of the far Southwest in relation to federal military power. It has not been interpreted in any published court decision.

SECTION 21

All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

This provision underscores the importance of open and free elections and is effectively implemented by the more specific provisions found in Article VII. What is meant by "equal" elections is unclear. Perhaps it is a more terse form of the prohibition of discrimination in voting on account of race, color, or previous condition of servitude contained in section 7 of Article XX; or perhaps it incorporates a notion of equally weighted individual votes, as in a "one person/one vote" formula. This section has not been interpreted in any published court decision.

SECTION 22

Bailable offenses. All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses when the proof is evident or the presumption great.
2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.
3. Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.

This provision contains considerably more detail than the cryptic prohibition on "excessive bail" found in section 15 of this article (and also in the Eighth

Amendment of the U.S. Constitution). It announces the general principle that the criminally accused have a right to bail (though not at any particular amount), except in certain specified cases. The words "sufficient sureties" in the first clause have been interpreted to mean making "reasonable assurance" that the accused "will return as ordered" (*Rendel v. Mummert*). Bail can be granted on reasonable conditions, such as that the accused will "stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen" (*State v. Cassius*). Other questions on the amount of bail are discussed in the commentary on section 15 of this article.

This is one of the very few provisions of the Declaration of Rights to have been amended. The second exception in this section (as well as the caption) was added in 1970, and the third exception in 1982. Each is a relatively narrow inroad on the general right to bail contained in the original text.

The courts have enforced the notion of a general right to bail. The first major case addressing this section (in an opinion by a former constitutional convention delegate) read it straightforwardly as granting a "strict legal right" to bail, even in a capital case, unless the requirements for an exception were met (*In re Haigler*). The burden is on the state to show whether one of the exceptions applies, and the court must weigh all the evidence offered "in light of the presumption of innocence, and remembering that to grant bail is the rule and the refusal of it is the exception" (*id.*). While appellate courts are somewhat deferential to the judgments of the trial courts, reversal of judgments denying bail are not unheard of (e.g., *In re Haigler; Ex parte Johns*). Occasionally appellate courts have revoked bail granted by the trial court on a misapprehension of the law (*State v. Garrett*).

After conviction in the trial court, there is no right to remain free on bond, because in these circumstances the presumption of innocence that justifies a general right to bail has been overcome (*In re Welisch*). It is within the trial judge's discretion to determine whether to grant freedom pending appeal (*State v. Quinn*, not addressing this section), although the Court has said the legislature may enlarge the constitutional guarantee and create a right to bail pending appeal (*In re Welisch, dictum*). This section does not apply to proceedings to extradite a person facing charges in another jurisdiction because it applies only to crimes committed in the state (*Waller v. Jordan*).

SECTION 23

Trial by jury; number of jurors specified by law. The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Unlike the U.S. Constitution, which addresses the right to trial by jury in the criminal and civil contexts separately in the Sixth and Seventh amendments, respectively, this section unfortunately mixes the two together in a way that has confused the casual reader, code annotators, and even the courts. To compound the problem, this section overlaps somewhat with other parts of the constitution: Article VI, section 17 also addresses the right to jury trial in both contexts; section 24 of this article addresses the right in the criminal context; and Article XVIII, section 5 addresses the role of the jury in cases where contributory negligence or assumption of the risk is involved.

Responsibility for most of this confusion can be laid at the feet of the legislature, whose rewriting of this section was approved by the voters in the fall of 1972. Originally it consisted of what is now the first sentence, and went on to allow provision to be made "by law" for a jury of less than twelve in "courts not of record"; for a "verdict by nine or more jurors in civil cases in any court of record"; and for waiver of a jury in civil cases upon consent of the parties. The 1972 rewrite kept the first clause (now the first sentence) and rewrote the remainder (adding the caption). The last sentence of this section generally leaves the determination of jury size (with a minimum of six) and unanimity to the lawmaking process, and statutes (e.g., Ariz. Rev. Stat. 21–102) and court rules (e.g., Rules 48–49 of the Arizona Rules of Civil Procedure) address these questions.

The discussion of the right to trial by jury that follows is divided between the civil context and those parts of the criminal context addressed specifically by this section. Other issues concerning the right to trial by jury in criminal cases are found in the commentary on the next section.

Right to Trial by Jury in Civil Cases

The first sentence of this section, like the Seventh Amendment to the U.S. Constitution, preserves rather than universally grants a right to trial by jury. It protects, in other words, whatever right to trial by jury existed at the time this section was adopted (*Brown v. Greer*). Thus a court of appeals recently decided that the defendant in a paternity action had no right to a jury trial because there was no such right at common law when the constitution was adopted (*Hoyle v. Superior Court*; see also *Hays v. Continental Ins. Co.*). There is likewise no right to a jury trial in an action for the civil offense of failing to register a motor vehicle (*State v. Richey*).

Unlike the Seventh Amendment to the U.S. Constitution, this section does not speak of the right to trial by jury in cases of "law or equity." The concepts of "law" and "equity" are today largely anachronistic terms; equity refers to a separate body of rules and principles that evolved to grant justifiable relief where ordinary legal rules failed to provide it. At the common law, there was no right to trial by jury in equity actions, but a 1901 statute of the Arizona territory created

such a right on factual issues in "all cases, both at law and in equity" (Rev. Stat. Ariz. 1901, para. 1389). Shortly after statehood, the Supreme Court (speaking through a former constitutional convention delegate) decided that this statute created a right to trial by jury preserved by this section, in part on the basis that the right was a "most sacred" one (*Brown v. Greer*). Ten years later the Court reversed course and upheld a 1921 statute making a jury verdict in an equity action merely advisory to the court. Construing this section to protect only "a plain, permanent right made almost sacred by years of recognition and usage," it found that the 1901 statute "did not possess these qualities" (*Donahue v. Babbitt*).

The net result is that this section may continue to protect the right to trial by jury in at least some equity proceedings, but the legislature or presumably the court may make the jury's verdict advisory only. The jury's function in such a case is "only to advise the court and enlighten its conscience" (*id.*), and the court "need not heed" the jury's advice (*Stukey v. Stephens*). As a result of this evolution, one that a court of appeals has described as "curious" and "confusing" (*Hammontree v. Kenworthy*), there is some question whether the right to demand even an advisory jury in an equity action is protected by this section. The Supreme Court has said yes without analysis as recently as 1976 (*Shaffer v. Insurance Co. of N.A.*), but one justice in another case has suggested otherwise (*Weaver v. Weaver*, Gordon, J., concurring).

This section does not protect a right to trial by jury where there are no bona fide issues of fact (*U.S. Fidelity & Guar. Co. v. State*), such as where summary judgment is appropriate (*Morrell v. St. Luke's Medical Ctr.*). Where disputed facts exist, however, dismissal of the jury is improper (*Haynie v. Taylor*, overruling and reconciling prior decisions). This is so even where the resolution of the disputed factual issue ultimately determines whether the court has any jurisdiction to hear the matter (*Bonner v. Minico, Inc.*).

Although the 1972 amendment eliminated the express provision for waiver of the right to a jury trial in a civil cases, applicable court rules allow such waiver (Rule 39(a), Arizona Rules of Civil Procedure).

Special Requirements in Criminal Cases

This section's thirty-year sentence floor on the right to a twelve-person jury is calculated on the basis of the maximum potential sentence for the crimes charged, and not on the time to be served, considering eligibility for parole (*State v. Dixon*). Because this section speaks of "cases" rather than individual charges, the thirty-year floor is calculated on the basis of the cumulative possible sentence in a case involving multiple counts and not on the basis of individual counts (*State v. Buffum*). If a count is dismissed before the case is submitted to the jury, and the maximum possible sentence on the remaining counts is less than

thirty years, the defendant is no longer entitled to a twelve-person jury (*State v. Cook*; see also *State v. Prince*). A court of appeals has held that an eight-person jury's deliberation of charges carrying a maximum penalty of more than thirty years violates this section, even if the jury acquits on some charges, reducing the maximum sentence below the thirty-year standard (*State v. Luque*).

SECTION 24

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

This section, like the Sixth Amendment to the U.S. Constitution, contains basic rights for the criminally accused. But it differs from the Sixth Amendment, first in the expression of the rights both guarantee, and second by according the accused additional rights—specifically, to a copy of the accusation, to testify in his own behalf, to appeal in all cases, and to be free from compulsion to advance money or fees to secure the rights guaranteed by this section.

Providing a general guidepost for interpreting this section, the Supreme Court soon after statehood described the right to a speedy public trial by an impartial jury as "safeguards . . . essential for the perpetuation of free government," making it the "duty of the courts to see to it" that such rights are provided to every person accused of crime, "without fear or favor" (*Stephens v. State*). The discussion that follows separates out the individual rights contained in this section.

Accused's Right to Counsel

The Supreme Court has spoken of the right to counsel as a "basic constitutional right" (*State v. Juarez*) that "must be carefully guarded by the courts of this state" (*State v. Warner*, 1986). Most of the Arizona cases construing this right have done so in tandem with the federal constitutional provision (e.g., *State v. Lopez*). Rule 6 of the Arizona Rules of Criminal Procedure establishes specific requirements to safeguard the right to counsel established in this section and in the U.S. Constitution (*State v. Juarez*).

The Supreme Court has held that this section (along with section 4 of this article and the federal Constitution) requires that counsel appointed for indigent defendants be given adequate support to provide effective assistance

(*State v. Smith*, 1984), including "adequate time to prepare the case" (*State v. LeVar*), and the opportunity to confer privately with counsel without interference by the state (*State v. Warner*, 1986).

This section also expressly gives the accused the right to defend herself; a right the Court has described as "of equal stature with the right to the assistance of counsel" (*State v. Westbrook*). But this section's right to allow the accused to defend himself "in person, *and* by counsel" (emphasis added) has been read to mean that the defendant has a choice to represent himself or to be represented by counsel, "but not the right to have his case presented in court both by himself and by counsel, acting alternately or at the same time" (*State v. Stone*, 1979; but see *State v. Martin*, 1967). Only mentally competent persons may defend themselves without aid of counsel (*Burgunder v. State*). Such persons cannot be forced to accept representation by counsel (*State v. Carter*), unless they seriously disrupt the proceedings (*State v. Martin*, 1967). Exercise of the right to defend oneself, in other words, must be balanced against "the orderly administration of the judicial process" (*State v. De Nistor*).

The right to counsel in this section, like that in the Sixth Amendment, applies only to criminal proceedings and not to such inquiries as an internal affairs investigation in a sheriff's office (*Williams v. Pima County*). The right may be waived, so long as the waiver is made "in an intelligent, understanding and competent manner" (*State v. Martin*, 1967).

Accused's Right to Appear

This section does not forbid a trial court from requiring a defendant to wear restraints, especially those not visible to the jury, if the circumstances warrant (*State v. Hooper*). The defendant's right to be present may be waived, regardless of the seriousness of the charge (*State v. Goldsmith*), so long as the defendant's absence is knowing and voluntary (*State v. Taylor*, 1969).

Accused's Right to Know the Nature and Cause of the Accusation Against Him

This right was described in an early case as one that "cannot be ignored or treated lightly" (*State v. Benham*), but it does not require that the nature and cause of the accusation actually appear in the indictment or information that institutes the judicial proceedings, so long as the defendant has a right to a "bill of particulars" (*State v. Chee*).

Accused's Right to Testify in His Own Behalf

This right, like others, may be waived, but the decision is the defendant's, not her attorney's. The right being "revered," it should not be deemed waived "by reason

of an independent determination on the part of the defendant's counsel," and if a defendant does not acquiesce in her attorney's desire to keep her off the witness stand, she must be permitted to testify (*State v. Martin*, 1967).

Accused's Right to Confront Witnesses Against Him

The expression of this right in this section is not identical to the counterpart language of the Sixth Amendment—it speaks of meeting witnesses "face to face" rather than being "confronted" with witnesses. Most of the Arizona cases addressing the right of confrontation have construed only the Sixth Amendment.[21] While the Supreme Court has noted that this section is "more explicit in its assurance of the right to face-to-face confrontation" (*State v. Vincent*), it has not decided whether it substantively differs from its federal counterpart. It has said, however, that "wherever possible, eye-to-eye, face-to-face, jury-to-witness confrontation is required" because "[s]ociety's need to prosecute is no greater than its need to preserve the Constitution" (*State v. Robinson*).

The Court has construed this provision as a "right to face those persons whose testimony is offered at trial," so that a person filing the initial complaint need not testify (*State v. Mace*). The confrontation may occur at a preliminary hearing rather than a trial, so long as the defendant has full opportunity to cross-examine the witness, and the witness is unavailable for personal testimony at trial (*State v. Head*). But the right of confrontation ordinarily requires testimony at trial, so the prosecution must have "sufficient proof of a good faith effort" to produce a witness before a transcript of the testimony at the preliminary hearing can be used (*State v. Alexander*). This section does not require testimony from the victim of a crime, so long as the elements of the crime are otherwise established, because this section grants the "right to confront witnesses, not victims" (*State v. Boodry*). The right of confrontation also does not extend to witnesses who offer information on a defendant's competency to stand trial, because such witnesses are not "against" the accused within the meaning of this section (*State v. Correll*).

Much recent litigation over the right of confrontation has involved the testimony of children in prosecutions for child abuse. The Supreme Court has upheld state statutes allowing closed circuit or recorded testimony in child abuse cases, so long as "an individualized showing" is made that face-to-face testimony would "so traumatize a child witness as to prevent the child from reasonably communicating," because in those circumstances the witness would be deemed unavailable to testify (*State v. Vincent*; see also *State v. Wilhite*). Because this section protects not only the right to cross-examine, but also the jury's right to evaluate

[21] For discussions of whether the scope of this state constitutional right is different from the federal one, compare Feldman and Abney, "Federalism," 128–30, with Twist and Munsil, "Judicial Activism," 1037–40.

a witness's demeanor, a court of appeals has held that a child witness may testify by television away from the direct physical view of the jury only on a finding of "particularized" and "compelling need" (*State v. Vess*). Although a literal interpretation of this right would forbid the introduction of hearsay testimony under one of the many exceptions to the evidentiary rule against hearsay, the Arizona courts have followed the federal courts in holding that the right is not abridged by hearsay testimony, so long as it is reliable (e.g., *State v. Yslas*). Thus a child abuse victim's out-of-court statements are admissible only when they have great probative value on a material fact and a high degree of trustworthiness that outweighs the risk to the defendant of unreliable evidence (*State v. Robinson*).

Accused's Right to Compel Attendance of Witnesses in Her Behalf

The Arizona decisions on this question have generally followed the decisions under the Sixth Amendment. This section is implicated when the unavailability of a witness has resulted "from the suggestion, procurement, or negligence of the government" (*State v. Stewart*). But the state has no obligation to produce the victim of the crime in question if it was not responsible for his absence and it had made a good-faith effort to find him (*State v. Valdez*; see also *State v. Alexander*).

The courts may place reasonable limits on the accused's right to call witnesses (*State v. Dodd*), but this section requires the state to give the jury an "opportunity to weigh the demeanor" of a key witness if reasonably possible (*State v. Brady*). The state can refuse to disclose the name of a confidential informant in order to protect the public interest in effective law enforcement, but a defendant may compel disclosure if he makes a sufficient showing that the informant is a material witness (*State v. De La Cruz*, not citing this section).

Accused's Right to a Speedy Public Trial

This right substantially duplicates that of section 11 of this article. Although this section speaks only of the defendant's right, the Supreme Court has held that the prosecution also has a right to a speedy trial, "provided always that the accused be given a fair and reasonable opportunity to prepare for his trial" (*Cochrane v. State*). The accused's right attaches only upon the commencement of a criminal prosecution (*State v. Maldonado*), and the scope of the right "will vary with the facts of the case" (*State v. Hoffman*). Without expressly incorporating the federal standard into this section, the Arizona courts have followed U.S. Supreme Court Sixth Amendment decisions requiring consideration of four factors in deciding whether the right to a speedy trial is violated: length of delay, cause of delay, defendant's assertion of the right, and the prejudice to the defendant from the delay (e.g., *State v. Jones*). The defendant's right may be waived unless it is promptly assserted (*State v. Adair*), and it is waived by a plea of guilty (*State v. Rhodes*).

This section also requires a "public" trial, which must be considered in tandem with the "open courts" provision of section 11 of this article. In cases construing only this section, the Supreme Court has upheld restrictions on attendance at a trial "consistent with the rights of the accused in a proper case in the interest of public morals or safety" (*State v. White*, 1965), such as, in a decision rendered shortly after statehood, in a prosecution for contributing to the dependency of a young female (*Keddington v. State*).

Accused's Right to Trial by Jury

While section 23 of this article (as well as Article VI, section 17) essentially preserves whatever right to a trial by jury previously existed, this section (like the Sixth Amendment to the U.S. Constitution) grants a right to a jury in "criminal prosecutions." Remarkably, the Supreme Court has never clearly distinguished between the right to jury trial in this section from that contained in section 23. Indeed, it has implicitly held that the seemingly broader right in this section is limited by section 23 (*State v. Cousins*). It has, however, recently acknowledged that this section may guarantee a right to trial by jury in all cases, but postponed resolving that issue to a future day (*State ex rel. Dean v. Dolny*). To date, then, the net effect of combining this section with section 23 is, in criminal cases, to deny an accused person a right of trial by jury for so-called petty offenses.

The Court has identified three factors relevant to determining whether an offense is "petty," and thus triable without a jury, or "criminal," and thus subject to the right to jury trial under this section: the severity of the possible penalty, the moral quality of the act in question, and its relation to common law crimes (*Rothweiler v. Superior Court*). Its case-specific standard is in contrast to the standard the U.S. Supreme Court has adopted under the Sixth Amendment, where the right to a jury turns solely on whether the accused could be punished by more than six months incarceration (*Baldwin v. New York*).

Rothweiler held that driving under the influence of alcohol is serious enough to warrant giving the accused the right to a jury trial. The Court later reached a similar result (over a vigorous dissent) on the misdemeanor charge of possession of marijuana (*State ex rel. Dean v. Dolny*). This case expanded the *Rothweiler* test to include an assessment of the consequences of a conviction beyond the penalty, including loss of employment opportunities. Courts of appeals have applied the *Rothweiler* test to find a right to a jury trial on a shoplifting charge (*State v. Superior Court*, 1978), and on a charge of false reporting to a law enforcement agency (*Mungarro v. Riley*).

On the other hand, the Supreme Court has denied the right to a jury trial on a charge of simple assault, in part because of its melancholy doubt that such a crime involves "any appreciable degree of moral turpitude in American society today" (*Goldman v. Kautz*). Similar results have been reached for such criminal

charges as running a red light, failing to provide proof of insurance, and driving a motor vehicle in violation of license restriction requiring eyeglasses (*State v. Harrison*); driving without a proper license or vehicle registration (*State v. Richey*); disorderly conduct (*State ex rel. Baumert v. Superior Court*); drunken and disorderly conduct (*O'Neill v. Mangum*); sale of alcoholic beverages to minors (*Spitz v. Municipal Court*); carrying a concealed weapon (*City of Phoenix v. Jones*); and operating as a contractor without a license (*State v. Miller and Ortiz*).

A defendant has no right to a jury trial on factual issues that simply affect the severity of a sentence (*State v. Hurley*), so long as the fact is not itself an element of the crime charged (*State v. Powers*). The Supreme Court has held that, following a judgment of guilty, a defendant has no right to a jury trial on the imposition of the death penalty, even though by statute the death penalty was left to the jury at the time the constitution was adopted (*State v. Roscoe*). In resolving this issue the Court looked only to section 23, holding that it preserved only the common law right to have a jury determine guilt or innocence.

The right to a jury trial can be waived, so long as the waiver is voluntarily and intelligently made (*State v. Butrick*).

Accused's Right to an Impartial Jury

An early Supreme Court decision said that "[n]o higher duty rests upon the trial judge than to see that an unbiased, unprejudiced, and impartial jury should in every case be provided" (*Priestly v. State*). But this section does not entitle the accused to any particular jury, and ordinarily the decision whether to disqualify potential jurors for cause rests "in the sound legal discretion of the trial court based upon the evidence" (*Burnett v. State*). The defendant has the right to make reasonable and prudent inquiries of potential jurors in order to make intelligent decisions about whether to challenge their impartiality (*State v. Jordan*).

An "impartial" jury means, according to the Supreme Court, one that is not only "fair" but also "lawfully constituted"; even though an accused has no constitutional right to disqualify potential jurors without cause (by using so-called peremptory challenges), her conviction will be reversed where, because of a clerk's carelessness, the jury included three members she had peremptorily challenged (*State v. Thompson*, disapproving a prior decision). The "impartiality" requirement forbids the prosecution from making a "discriminatory use of peremptory challenges to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service" (*State v. Superior Court*, 1988, overruling an earlier decision). The same case also held that a white defendant has standing to object to the exclusion of African Americans from the jury, a result influenced by the state's "rich and diverse racial and ethnic composition" and the desirability of avoiding inquiry into the racial and ethnic makeup of particular jurors.

Other factors that may affect the impartiality of the jury—such as any communications between the jurors and others, and whether the jurors should be allowed to question witnesses—are resolved on a case by case basis. The Court has said that "every appearance of evil or misconduct should be avoided and every precaution taken to guard against matters tending to influence or corrupt the [jury's] verdict" (*State v. Byrd*). Although a trial judge's decision on such questions is given great deference, a new trial is required if circumstances show prejudice to the accused, even from a single juror, who "is in no position to be the sole judge of whether he was . . . influenced or prejudiced" (*Whitson v. State*).

Venue

Although this section guarantees the accused a right to an "impartial jury of the county in which the offense is alleged to have been committed," the Supreme Court has held that it guarantees a right of trial by an *"impartial jury in the county,"* rather than an "absolute right *to a trial in the county" (State ex rel. Sullivan v. Patterson*, emphasis in original). That is, the purpose of this section is not to establish a strict rule of venue but rather to "preserve the right to an unbiased jury" (*State v. Swainston*). While the prosecution could seek a change of venue out of the county, the trial court should grant the motion over defendant's objection only on a strong showing that a "fair and impartial trial cannot be had" (*Mast v. Superior Court*).

Accused's Right of Appeal

The right of appeal is separate from the right, under court rules, to seek post-conviction relief by other than a direct appeal; the latter is not protected by this section (*State v. Carriger*, see also *State v. Aguilar*). Without citing this section, the Supreme Court has held that the right to appeal "is not negotiable in plea bargaining, and that as a matter of public policy a defendant will be permitted to bring a timely appeal from a conviction nothwithstanding an agreement not to appeal" (*State v. Ethington*, overruling prior decisions of the court of appeals). This result was reversed by amendments to Rules 17.1, 17.2, and 27.8 of the Arizona Rules of Criminal Procedure, effective December 1, 1992.[22]

Accused's Right to Avoid Advancing Money or Fees to Secure Rights

The Supreme Court has said that this clause "mandates that the state may not impose a financial obstacle that would impair a criminal defendant's access to the legal system," but it does not prohibit the legislature from requiring an

[22] See C.R. Krull, "Eliminating Appeals From Guilty Pleas," *Arizona Attorney* (October 1992), 34–36; C. McClennen, "Eliminating Appeals From Guilty Pleas," *Arizona Attorney* (November 1992), 15–17, 30.

accused to pay so much of her attorney's fees as she "was able to contribute" (*Espinoza v. Superior Court*).

SECTION 25

No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall ever be enacted.

This terse section contains three important limitations on legislative power, all nearly identical to the limitations on state power found in Article I, section 10, clause 1 of the U.S. Constitution.

Bill of Attainder

A bill of attainder is a legislative action inflicting punishment on a person without the intervention of the judicial branch. It has, happily, not been judicially tested in Arizona, although one Arizona decision rejected such a claim based on the federal Constitution (*State v. Greenawalt*).

Ex Post Facto

Cases construing the ex post facto prohibition of this section generally apply it with the counterpart provision of the U.S. Constitution, without distinguishing between the two (e.g., *State v. Deddens*), or sometimes without acknowledging that cases construing the federal provision "provide a useful analytical framework" for interpreting this provision (*State v. Noble*). Thus this section has, like its federal counterpart, been held to apply only to criminal matters (*Fairfield v. Huntington*), and not to judicial disciplinary proceedings which are "neither criminal in nature nor penal in objective" (*In re Marquardt*). Under this approach, a sex offender registration statute has been held to be regulatory rather than punitive in nature, and thus it may be applied to offenses committed before the statute was adopted (*State v. Noble*). But this provision can apply to penalties imposed in juvenile court proceedings involving delinquent children, because though juvenile courts focus primarily on rehabilitation rather than punishment, the monetary assessments and restitution requirements they are authorized by statute to impose should be considered criminal for purposes of the clause (*In re Juvenile Action No. J–92130*).

This clause is textually limited to legislative actions, and thus does not prohibit application of a court ruling enlarging the admission of opinion evidence to the detriment of the defendant, when the crime occurred before the ruling (*State v. Steelman*). But it might prevent judicial decisions construing statutes that are "so unforeseeable" as to transgress the spirit of the clause (*State v. Deddens, dictum*), and a court of appeals has applied the clause to an executive branch

reinterpretation of existing legislation which lengthened the time an existing inmate must serve before being eligible for release (*State v. Thomas*, 1982).

The Arizona courts have followed the federal lead and held that the two important questions in applying this clause are whether the new law is retroactive, applying to events occurring before its enactment; and whether it disadvantages the offender affected by it (*State v. Yellowmexican*). The clause generally prohibits the legislature from changing the law after an offense has been committed to add new criteria for determining punishment to those that existed when the crime was committed, if the defendant is disadvantaged (*State v. Correll*); or to make it easier to convict the defendant or to exact a greater penalty than was provided for when the offense was committed (*State v. Valenzuela*). It also prohibits new legislation detrimentally affecting parole eligibility, because probation constitutes a penalty for purposes of applying this section (*State v. Mendivil*). But the legislature may apply a new law making a life sentence mandatory for serious felonies committed while on probation to persons already on probation, because this merely increases the penalties for crimes committed in the future (*State v. Cocio*).

Impairment of Contract Obligations

Arizona decisions applying this clause have generally followed decisions interpreting the U.S. Constitution. It applies only to existing contracts, and so is not implicated by legislation prospectively regulating home solicitation sales (*State v. Direct Sellers Assn.*). Similarly, it does not prohibit the legislature from imposing new taxes on the business of persons leasing or renting real property, even though payments made under already executed leases are effectively being taxed, because the tax does not "reach or affect any term" of the leases (*Tower Plaza Invs. Ltd. v. Dewitt*). But it does prevent the legislature from prohibiting recovery on existing construction contracts that fail to comply with a new legal requirement, although the court acknowledged that the state may destroy contractual obligations without violating this section if there is a strong showing of public "urgency and need" not found to exist in that case (*Earthworks Contracting Ltd. v. Mendel-Allison Constr. of Calif., Inc.*). It does not prohibit the legislature from altering remedies or modes of procedure for enforcing existing contracts, however, so long as "an efficacious remedy remains" (*Brotherhood of Am. Yeomen v. Manz*, citing federal cases). But it does prevent the legislature from affecting a judge's vested right to a retirement fund (*Krucker v. Goddard*).

SECTION 26

The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing

individuals or corporations to organize, maintain, or employ an armed body of men.

This section bears some resemblance to the right to bear arms in the Second Amendment to the U.S. Constitution, but, unlike the latter, it explicitly authorizes the bearing of arms in self-defense as well as defense of the state. An appellate court has held that it does not prohibit the legislature from outlawing concealed weapons, because it does not grant "an absolute right to bear arms under all situations" (*Dano v. Collins*). Its reference to "arms" includes only those weapons recognized in the seemingly oxymoronic concept of "civilized warfare," and not more exotic devices such as nunchakus (clubs or bars connected by ropes or chains and hurled) used by a "ruffian, brawler or assassin" (*State v. Swanton*). This section is also not violated by prohibiting a person on probation from carrying a deadly weapon or firearm (*State v. Rascon*).

The last clause, cautioning that the right to bear arms does not authorize private armies, reflects the labor influence on the Arizona convention. As industrial workers were attempting to organize for collective bargaining, some employers, in Arizona and elsewhere, resisted by employing "goon squads" of armed men to break up strikes. It has not been the subject of judicial attention.[23]

SECTION 27

No standing army shall be kept up by this state in time of peace, and no soldier shall in time of peace be quartered in any house without the consent of its owner, nor in time of war except in the manner prescribed by law.

This provision echoes two sections of the U.S. Constitution: Article I, section 10 (prohibiting standing armies in peacetime without congressional consent), and the Third Amendment (prohibiting quartering soldiers in houses). This section, which has not received any published judicial interpretation, is a further expression of the framers' concern with privacy (see section 8 of this article) and civilian control of the military see section 20).

SECTION 28

Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of

[23] One of the most famous organized efforts to break union activities in American history, the "Bisbee Deportation" of 1917, did not implicate this provision because it was formally conducted under the direction of the Cochise County sheriff, not the mining company. See Byrkit, *Forging the Copper Collar.*

treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

Except for minor word and punctuation changes, this provision is identical to that part of the U.S. Constitution dealing with treason against the United States (U.S. Constitution, Article III, section 3). It is not easy to imagine treason against Arizona that would not also be tantamount to treason against the United States; in any event, this provision has not been the subject of published judicial interpretation.

SECTION 29

No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this state.

This provision, which has not received published judicial scrutiny, was taken from earlier state constitutions that were closer in time to the feudal, monarchical practices it condemns. It endorses the democratic ideal of a free society in which all have equal opportunity.

SECTION 30

No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination.

The first half of this section embodies a fundamental principle of Anglo-American jurisprudence: that the criminally accused has the right to notice of the nature and cause of the accusation against her. The requisite notice can be provided either by information, which is a formal written accusation signed and filed by the prosecutor stating "the essential elements of the indicated crime" (*State v. Smith*, 1948); or by indictment, a written accusation endorsed by the vote of a grand jury of one's peers, after hearing evidence presented by the prosecutor. Either method is sufficient (*State v. Bojorquez*), but in either case facts sufficient to give the court subject matter jurisdiction over the offense must be stated (*State v. Smith*, 1948). On the other hand, because this section applies only to prosecutions "in any court of record," prosecutions for minor offenses may be brought in city courts and others not "of record" on the basis of a verified complaint (*Ex parte Coone*). The process outlined in this section has no application to civil proceedings such as bastardy prosecutions (*Skaggs v. State*).

The second half of this section seeks to control the unilateral power of the prosecutor to bring more serious criminal charges by way of information rather than indictment. Progressive social reformers thought this power was

subject to abuse because it lacked the check of the grand jury. This section provides the potential defendant with the opportunity to have a magistrate independently review felony charges at a preliminary examination, before the information could be filed. The prosecutor may still proceed by either information or indictment (*State v. Gonzales*), even in capital crimes (*State v. McClendon*), and can seek an indictment by a grand jury even when a complaint on the same charges has been dismissed (*State v. Woods*). But the prosecutor cannot file a complaint in superior court making the same charges that were dismissed in another court that had concurrent jurisdiction over the acts in question (*Wilson v. Garrett*). Moreover, if the prosecutor wishes to charge a different offense after the preliminary examination, a new hearing must be held if the defendant moves for one (*State v. Branham*).

The preliminary examination must offer due process, but not all the procedures of a full-blown trial are required (*State v. Lenahan*). Its purpose is to determine whether there is probable cause that the defendant committed the offense in the information (*State v. Pima County Superior Court*). The presiding magistrate at the hearing need not be a member of the state bar (*State v. Lynch*), but the legislature may designate superior court judges as the "magistrates" under this section (*Hoy v. State*).

The defendant may waive the right to a preliminary examination implicitly, by failing to object to its absence (*State v. Smith*, 1945); a guilty plea to an information waives any objection to any defect in the preliminary examination (*State v. Hansen*). The waiver is a binding acknowledgment of the existence of sufficient evidence to hold the accused to answer (*State v. Miranda*). But a waiver should be found only where the accused is informed of the charges, of her right to the assistance of counsel during the preliminary examination, and of her right to waive it (*State v. Brazeal*).

SECTION 31

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.

This provision is intimately related, in both origin and language, to Article XVIII, section 6, and is discussed in the commentary under that section.

SECTION 32

The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.

The Arizona courts have frequently referred to this section as underscoring the judicial obligation to give meaning to plain constitutional commands. In the

first major constitutional test after statehood, for example, the Supreme Court emphasized the mandatory nature of the constitution, characterizing it as "a command, hence obligatory," unless it provides otherwise by *"express words" (State v. Osborne*, emphasis in original). The Court has also said that it must follow the "mandate" of the constitution when it is "clear and unambiguous . . . regardless of the results" (*Taylor v. Frohmiller*), because "to allow the legislature to disregard it . . . would permit the exercise of a power by that body expressly witheld from it by the organic law of the state" (*McClintock v. City of Phoenix*). More recently the Supreme Court has cited this section as authority for its obligation to enforce the Declaration of Rights (*Mountain States Tel. & Tel. Co. v. Arizona Corp. Commn*, 1989), and for the attorney general's duty to enforce the constitution (*Fund Manager v. Corbin*). These pronouncements have been made in contexts where the constitution does not require affirmative acts by other branches, but instead places limits on their exercise of power.

On the other hand, the Arizona courts have sometimes expressed reluctance to enforce constitutional provisions that require action by other branches, such as the several sections explicitly requiring legislative action (e.g., Article XVIII, sections 1, 8; Article VII, section 16; see also Article XXII, section 21, requiring the legislature to " enact all necessary laws to carry [the constitution] into effect").[24] This has been justified on separation of powers grounds, namely, that the "form of our state government furnishes no means by which the legislature may be coerced into obeying such mandate" by the courts (*Inspiration Consol. Copper Co. v. Mendez, dictum*). Thus the legislature "may or may not, as it chooses, pass laws putting into effect a constitutional provision" (*Arizona Eastern R.R. Co. v. Matthews*). In a similar vein, the courts have sometimes interpreted particular constitutional provisions as not self-executing, and upheld only partial or limited legislative implementation of a constitutional command (e.g., *City of Phoenix v. Yates*, interpreting Article XVIII, section 1).

The net effect of judicial application is that this section, and specific seemingly mandatory provisions of the constitution, are judicially enforceable in some contexts but not others.

SECTION 33

The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people.

This provision resembles the Ninth Amendment to the federal Constitution. The Arizona courts have to date regarded it as an essentially superfluous

[24] At the constitutional convention, the delegates agreed that, regardless of whether such requirements for legislative action were judicially enforceable, they were susceptible to control at the ballot box. See Goff, *Records,* 544–45.

recognition of the plenary nature of state legislative power where not expressly limited by the constitution (*Earhart v. Frohmiller, Cox v. Superior Court; Adams v. Bolin,* 1952). Unlike courts of several other states, they have not addressed whether this kind of residual clause protects other "unenumerated" individual rights.[25]

SECTION 34

The state of Arizona and each municipal corporation within the state of Arizona shall have the right to engage in industrial pursuits.

This section was added to the original constitution upon legislative referral at the first general election after statehood in 1912. Expressing the power of, rather than limits on, government, it is misplaced in the Declaration of Rights. It was arguably unnecessary in any event, because in its first major state constitutional decision the Supreme Court made clear that the silence of the constitution on any particular question does not limit the ability of the legislature to deal with that question (*State v. Osborne*). Nothing elsewhere in the Arizona Constitution seems to forbid the state from engaging in industrial pursuits. While local government might have needed more express authority, another part of the original constitution (Article XIII, section 5) seemed to provide it.

Nevertheless, the courts have not regarded this section as superfluous, although they have manifested some confusion as to its nature. Several cases hold it not self-executing, but instead requiring legislative action to implement, because legislation would be necessary under Article IX, section 3 to provide any money and regulations to guide the industrial pursuit (*Bone v. Bowen*). A provision in a municipal charter (see Article XIII, section 2) may, however, supply the necessary authority (*Buntman v. City of Phoenix*).

At other times the courts have described this section as a specific grant of power to municipalities that is not subject to legislative modification (*City of Tucson v. Polar Water Co.*). Thus it removes the necessity "for the legislature to declare the forms of business in which municipalities might engage" (*City of Tombstone v. Macia*). This is true, moreover, whether the business is conducted inside or outside the corporate limits of a municipality, because such industrial pursuits are, as proprietary acts, "measured by rules governing private corporations" (*Crandall v. Town of Safford*).

A municipality engaging in "industrial pursuits" under this section is subject to excise taxes and other liabilities to the same extent as private enterprise engaging in the same activity, although municipal officers cannot be incarcerated for

[25] See generally Note, "Unenumerated Rights Clauses in State Constitutions," *Texas Law Review* 63 (1985), 1321–38.

failure to pay a tax (*City of Phoenix v. State ex rel. Conway*, see also the commentary on Article IX, section 2). But putting a governmental cloak on industrial pursuits does operate to exclude them from the definition of public service corporations subject to regulation by the corporation commission (see Article XV, section 2). Thus the addition of this section in 1912 has effectively been construed as an enlargement of the power of municipal corporations and a corresponding diminution in the regulatory reach of the corporation commission (City of Phoenix v. Wright).

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Article III

Distribution of Powers

> 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.

This article establishes the general principle of separation of powers familiar to American constitution making. The Arizona framers "were not satisfied with an implied limitation" on interferences by one branch with another (such as is found in the federal and some state constitutions), and therefore included this article (*Udall v. Severn*). Although this article speaks of only three separate departments of state government, the constitution vests some power elsewhere; for example, in an independently elected corporation commission (see the commentary on Article XV) and in a university board of regents (see Article XI, section 2; *Hernandez v. Frohmiller*). As a result, this Article should be interpreted so that the phrase "except as otherwise provided in this Constitution" modifies the preceding clause (dividing the government into three branches) as well as the succeeding clause (keeping the three branches separate and distinct).

Many other parts of the constitution provide specific checks on the relationships among the different branches of government: Article IV, part 2, section 17 limits the power of the legislature to coerce other branches by its control over salaries; section 4 of the same part limits dual office holding by legislators;

Article VI, section 28 prohibits dual office holding by judges; and Article II, section 31 and Article XVIII, section 6 limit the legislature's power over the judiciary's application of tort law. This commentary will discuss only generic issues of separation of powers.

Although the language of this article might seem to mandate strict separation of powers ("such departments shall be separate and distinct"), judicial application has not hewn a consistent line. Some cases have articulated such a strict view; for example, "[it is] very essential that the sharp separation of powers of government be carefully preserved by the courts" (*Giss v. Jordan*; see also *Ahearn v. Bailey*). Other cases have expressed more flexibility (e.g., *Southwest Eng. Co. v. Ernst*: "it does not invariably follow that an entire and complete separation of power of the three branches of government is desirable or was ever intended"). A frustrated court of appeals in 1984 decried this lack of consistency and adopted a generic test for separation of powers analysis used by the Kansas Supreme Court (*Hancock Enterprs. v. Ariz. State Registrar of Contractors*). This test has subsequently been cited with approval by the Arizona Supreme Court (*State v. Prentiss*). The *Hancock* "test" requires weighing such considerations as the "essential nature of the power being exercised," the "degree of control by the legislative branch in the exercise of the power," the "nature of the objective sought to be attained by the legislature," and the "practical result of the blending of the powers as shown by actual experience." Although it usefully channels the separation of powers inquiry, this test does not provide clear answers to what are irreducibly case and fact-specific issues. The following overview examines the results the courts have reached in specific contexts.

Delegation of Legislative Powers to Executive Branch Agencies

Several reported decisions apply the general principle that the legislature may not delegate its powers to the executive branch without meaningful limitation (e.g., *Crane v. Frohmiller*); but many others uphold broad delegations (e.g., *Peters v. Frye*). "The line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim. A clear guide for all situations is indeed difficult" (*State v. Marana Plantations, Inc.*). The key issue is usually whether the legislature has given the agency to which it is delegating power uncabined authority, or whether instead it has merely allowed the agency to apply, and fill in the details of, the basic policy decisions the legislature has made.

Two Supreme Court decisions involving statutes of similar breadth illustrate the difficulties of navigating between these two poles. In *Marana Plantations*, the Court struck down as violating this section a set of regulations adopted by the state board of health to protect the health and safety of agricultural workers. Six years later, the Court upheld regulations adopted by a state commission designed to keep crops free from pests or disease (*State v. Wacker*). *Marana Plantations* has

been followed in some cases (e.g., *State Compensation Fund v. De La Fuente*), but *Wacker* has been followed more often, leading to broad delegations of legislative power being sustained, such as one to adopt "necessary and feasible" rules to control air pollution (*State v. Arizona Mines Supply Co.*; see also *Lake Havasu City v. Mohave County, State v. Birmingham*, collecting Arizona decisions).

Broad delegations have been upheld in part by recognizing that legislative standards to guide administrative discretion "need not necessarily be set forth in express terms if [it] might reasonably be inferred from the statutory scheme as a whole" (*State v. Arizona Mines Supply Co.*). Furthermore, legislative acquiescence in the agency action "suggests . . . legislative approval . . . and acceptance" (*Manhattan–Dickman Constr. Co. v. Showier*). And delegation questions can sometimes be avoided by statutory interpretation, even to the extent of interpreting "shall" in a statute to mean "may" (*Arizona Downs v. Arizona Horsemen's Found.*). On the other hand, the courts may give stricter scrutiny to delegations where the resulting regulations are enforceable by criminal penalties (*State v. Phelps*).

Delegation of Legislative Powers to the Courts

The legislature may generally authorize the judiciary to "act in matters relating to its functioning," such as fixing the salaries of official court reporters (*Powers v. Isley*) or probation officers, (*Deddens v. Cochise County*), or appointing probation officers, "because such officers are part of the judicial function" (*Broomfield v. Maricopa County*). But the legislature may not give the judiciary unbridled power to determine whether property may be annexed to a municipality (*Udall v. Severn*), or penalties for crimes, because the task of defining crimes and fixing penalties for them is a legislative function (*State v. Wagstaff*). (These legislative-judicial interactions also sometimes involve the inherent power of the judiciary to regulate its own affairs, a matter discussed in subsection D below.)

Delegation of Legislative Power to Local Governments

The Supreme Court has occasionally treated delegations to units of local government more deferentially than delegations to parallel branches of state government, at least if the power delegated is of a purely local nature (e.g., *Maricopa County Mun. Water Conservation Dist. No. 1 v. LaPrade; City of Bisbee v. Cochise County*). Thus the legislature can delegate to local governments the power of annexation "upon such terms as [it] may think proper," so long as it does so by general laws (*Skinner v. City of Phoenix*); and the power to define what kind of conduct constitutes a public nuisance, "to the same extent as the legislature itself could do" (*Hislop v. Rodgers*). On the other hand, such delegations will be strictly construed if the subject matter (e.g., highways) is of statewide as opposed to purely local concern (*Clayton v. State*). Whether particular subjects are within

the power of the state legislature or units of local governments is discussed in the commentary under Article XIII, section 2.

Legislative Encroachments upon the Judiciary

A number of decisions wrestle with the problem of determining where the judiciary's power to make rules for the governance of the judicial function leaves off, and the legislature's power to shape that function begins. Like the courts in many other states, the Supreme Court has long held that the courts need no permission from the legislature in order to regulate the judicial process (*Burney v. Lee*). Although this power is often described as "inherent," it may more properly may be said to derive from the confluence of Article VI, section 1 (vesting the state's "judicial power" in the courts); Article VI, section 5 (granting the Supreme Court power to "make rules relative to all procedural matters in any court"); and this article (see, e.g., *Heat Pump Equip. Co. v. Glen Alden Corp.; Readenour v. Marion Power Shovel*). On the other hand, Article IV, part two, section 19(3) and (5)—prohibiting the legislature from enacting "local or special laws . . . [c]hanging the rules of evidence [or r]egulating the practice of courts of justice"—has been read as implying a legislative power to enact laws of general applicability in these areas (*In re Miller, State ex rel. Conway v. Superior Court*). As *Conway* put it:

> [The] rule-making power rests in both the courts and the legislature. When the legislature enters that field, the courts will bow to its judgment so long as these rules accord with the proper administration of justice. When, however, it appears that the legislative rule unduly hampers the court in the performance of the duties imposed upon it by the Constitution, the rules adopted by the court will prevail.

As this suggests, the judiciary has been somewhat willing to cooperate with the legislature in determining policy at the intersection of the judiciary's and the legislature's constitutional powers. Thus the Supreme Court has upheld a statute setting out an alternative procedure for the admission of intoxilyzer tests, finding it a "workable, reasonable method" (*State ex rel. Collins v. Seidel*). The Court will also try to interpret statutes on evidentiary matters to avoid constitutional questions, such as by deferring substantially to legislative judgment on public policy questions (*Readenour v. Marion Power Shovel*). The Court does claim the power to have the last word, as in a recent decision (*Barsema v. Susong*) striking down a legislative enactment forbidding introduction of liability insurance coverage in medical malpractice actions:

> Under the state constitution, we can neither allow the legislature to define what is relevant . . . nor allow it to substitute a different analytical framework or make special rules for a particular case, setting aside those evidentiary rules which over the centuries have been found necessary to ensure fair trials.

A court of appeals has upheld a statute creating a "good-faith" exception to the rule excluding illegally obtained evidence, finding both that it was not a rule of evidence, and that it was "reasonable and workable" (*State v. Coats*).

The legislature may not reverse a court decision construing a statute by amending the statute and providing that it is "declaratory of existing law," because that "usurps the functions of the court" and is tantamount to annuling a judgment of the courts (*Martin v. Moore*). The legislature could, however, prospectively change the statute upon which the prior court decision was based without violating this article (*Chevron Chemical Co. v. Superior Court*). The legislature may not pass a special act to deprive the courts of jurisdiction to hear particular suits, without repealing the general statute that gives rise to the cause of action, because this is an unwarranted "invasion of the rights of the judicial department" contrary to this article (*Puterbaugh v. Gila County*).[26]

Perhaps the sharpest interbranch disputes have involved regulation of the practice of law. Early on, the Supreme Court upheld a statute requiring lawyers admitted in other states to take an examination before being admitted to practice in Arizona (*In re Miller*). But the Court has also said that the legislature cannot compel the courts to admit persons to practice "unless the courts are themselves satisfied that [the person's] qualifications are sufficient," and the courts have "inherent power" to enact procedures to govern disbarment proceedings (*In re Bailey*). In 1961 the Court ruled that title company employees who fill in the blanks on standard form contracts to convey interests in real estate are practicing law and may be subject to judicial sanction if they are not attorneys licensed in Arizona (*State Bar of Arizona v. Arizona Land Title & Trust Co.*). This decision was swiftly overruled by constitutional amendment (see the commentary on Article XXVI).

Despite this setback, the Court has continued to guard its power against what it perceives to be legislative incursions. Sometimes turning its back on the more cooperative attitude manifested in its early decisions, it has stubbornly expressed "no hesitancy in stating that the practice of law is a matter exclusively within the authority of the judiciary" (*Hunt v. Maricopa County Employees Merit Sys. Commn.*). That judicial bark seemed worse than its bite, however, for in that case the Court deferred partially to a legislative enactment allowing nonlawyers to represent others without fee in certain kinds of quasi-judicial personnel hearings, but added its own qualification that the matter in question not exceed one thousand dollars. Courts of appeals have prevented nonlawyers from representing discharged workers in other kinds of personnel actions not covered by this statute (*State v. Kennedy*) and have rejected other statutes in the same area that would, if broadly interpreted, have contradicted rules adopted by the Supreme Court (*Anamax Mining Co. v. Arizona Dept. of Economic Sec*).

[26] Compare the U.S. Supreme Court's decision in *Ex Parte McCardle,* as discussed in William W. Van Alstyne, "A Critical Guide to *Ex Parte McCardle," Arizona Law Review* 15 (1973), 229.

Legislative Encroachments on Other Branches

The Supreme Court has struck down a legislative attempt to remove an incumbent executive officer by the strategem of reconstituting the commission on which he served (*Ahearn v. Bailey*). While the legislature might abolish the office outright, or prescribe the grounds for removal of the officer, it cannot directly oust the incumbent except through the impeachment process of Article VIII, part 2 (*id.*). The Court has also rejected the argument that "an appointment to office is [always] an executive function," and upheld, over a dissent, the right of the legislature to appoint the state capitol librarian, reasoning that where an office is "peculiarly identified or associated with the appointing power, whether it be judicial, legislative, or executive, the appointment properly belongs to that department" (*Dunbar v. Cronin*). On the other hand, the Court has also held that the legislature cannot transfer the responsibilities of a constitutional office to an office created by the legislature (*Hudson v. Kelly*; see also the commentary under Article V, section 1). And the Court has forbidden the legislature from extending the state civil service system to employees of the board of regents because of the latter's constitutionally granted supervisory power over the university system (*Hernandez v. Frohmiller*, see also *Arizona Bd. of Regents v. State Dept. of Admin.*).

The Court has invalidated a statute allowing the judicial branch to sentence a criminal to lifetime parole under conditions to be determined by the judiciary, because parole is an executive function (*State v. Wagstaff*). A statute allowing a sentence of lifetime probation does not violate this section, however, because probation is "solidly within the scope of the judiciary's authority," and the statute leaves the decision "solely within the discretion of the judicial branch" (*State v. Lyons*). A statute limiting the judiciary's role in sentencing a criminal defendant, based upon whether the prosecutor chooses to allege mitigating circumstances, violates this section because once the legislature gives the court discretion to sentence it cannot limit it "by empowering the executive branch to review that discretion" (*State v. Prentiss*). The general principle is, as stated by a court of appeals, that the legislature "cannot give the prosecuting attorney the authority, after a conviction, to decide what the punishment shall be. That is a judicial function" (*State v. Jones*; see also *State v. Patel*). On the other hand, a statute requiring a prosecutor's recommendation before dismissal of the misdemeanor offense of domestic violence has been sustained, because the question involved prosecution (an executive function) rather than sentencing (*State v. Larson*; see also *State v. Brooks*).

Avoiding Encroachments on the Legislature

The Supreme Court has forbidden the governor from indirectly abolishing a legislative office by vetoing the legislative appropriation for the officer's salary

(*Crawford v. Hunt*). More generally, the courts have imposed limits on their own power to review legislative acts for conformity with the constitution. The Supreme Court is given to some hyperbole in this area; for example, it has said that it will strike down a legislative act only when it is satisfied of its unconstitutionality "beyond reasonable doubt" (e.g., *State v. Davey*). This pronouncement of extreme deference almost certainly overstates the degree to which the judiciary shrinks from questioning legislative judgments.[27] The Supreme Court has, for example, recently struck down a bid preference statute as violating the equal privileges and immunities principle of Article II, section 13, observing among other things that the statute was "arbitrary, encourages subterfuge, is expensive to the public entities that must comply with it, and simply wastes the taxpayers' money" (*Big D Constr. Corp. v. Court of Appeals*).

Still, the Arizona courts do defer to the legislature in many areas. For example, the Supreme Court has held that restoration of civil rights to convicted criminals is a legislative matter, and courts have no inherent power to grant a "judicial certificate of rehabilitation" (*State v. Buonafede*). Similarly, the courts will generally not create a right of appeal where none is allowed by statute (*State v. Phelps*), will not supply a penalty when the statute prohibiting an act fails to provide one (*Davis v. Industrial Commn.*), and will not adopt a provision of the Model Penal Code that contradicts a judgment of the legislature (*State v. Schantz*).

Judicial restraint is most evident when the courts are asked to interfere with the internal workings of the legislature, by questioning some alleged defect in the process by which a statute was enacted. This reluctance usually takes the form of what is commonly known as the "enrolled bill rule," which expresses a general principle of refusing to go behind the results—the statute itself—to examine the process by which it became law (*Allen v. State*). (Judicial review of the initiative and referendum is discussed in the commentary on Article IV, part 1, section 1(15).) A similar result has been reached regarding the legislative process of impeachment (see Article VIII, part 2), where the Supreme Court has rejected an invitation to interfere on separation of powers grounds (*Mecham v. Gordon*).

In the end, however, the idea of avoiding review of internal legislative processes cannot be taken too literally. The courts do, for example, routinely review challenges to legislative processes under such provisions as Article IV, part 2, sections 13 and 20, and Article XXI, section 1 (see the commentary on these sections).

[27] This judicial formulation has been criticized as a "strange use of the term 'presumption,'" and the reference to proof beyond a reasonable doubt has been described as "even more troubling." See Udall et al., *Arizona Law of Evidence*, sec. 141, p. 315, note 5.

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Article IV

Legislative Department

PART I. INITIATIVE AND REFERENDUM

This part was, in popular view, the most prominent feature of the constitution as originally drafted. It contains the initiative and the referendum, two of the three processes of direct democracy (the third being the recall, found in Article VIII, part 1) that were the hallmarks of the progressive movement.[28] It was a "notorious fact that the choice of delegates to the constitutional convention was fought out primarily on this issue" of including the initiative and referendum (*Whitman v. Moore*). The delegates selected overwhelmingly favored these devices, making foregone the conclusion that the constitution would contain them, although there was considerable haggling over details.

The initiative has been aptly described as the "means by which voters can correct legislative sins of omission" and the referendum as the "means of correcting legislative sins of commission."[29] Each allows the voters to take the lawmaking

[28] In a vivid illustration of both the strength of the progressive movement and of constitutional cross-fertilization, of the twenty-six states that have some form of the initiative and referendum, twenty-two first adopted the idea between 1898 and 1918, and twelve of these acted within two years of the Arizona Constitutional Convention. See D. B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore, Md.: Johns Hopkins University Press, 1984), 38–39, table 3.1.

[29] G. Hahn and S. C. Morton, "Initiative and Referendum—Do They Encourage or Impair Better State Government?" *Florida State University Law Review* 5 (1977), 925, 927–29. For an excellent

power in their own hands, bypassing or overruling the actions of elected representatives in the legislature.[30] Like sixteen other states, Arizona allows for constitutional amendments, as well as ordinary laws, to be enacted through the initiative process. Arizonans have frequently used these devices; in fact, from 1950 through 1980 more propositions were put on the ballot by initiative and referendum in Arizona than in all but one of the 26 states that have one or both devices.[31] The legislature's power to adopt legislation under this part, and questions of judicial review of the initiative and referendum processes, are discussed in the commentary on subsection 15 of section 1, below.

SECTION 1

(1) The legislative authority of the state shall be vested in a legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

The Legislature

The first part of this section vests the state's "legislative authority" in a bicameral legislature (and is thus introductory to part 2 of this article). The reference to "legislative authority" incorporates the general principle, common to all state constitutions, that the state legislature has inherent power to act, so that the constitution is principally concerned with limitations on legislative power. The framers of the Arizona Constitution were well aware of this principle and of the contrasting idea, followed in the national government, that the U.S. Congress has only those powers that the U.S. Constitution awards it.[32]

From its earliest poststatehood decisions (*State v. Osborne*), the Supreme Court has consistently recognized that the legislature has "all power not expressly denied it or given to some other branch of the government" (*Turner v. Superior Court*), and therefore "the public policy of the state is entirely in the hands of the legislature, except as restrained by the Constitution" (*State v. Surety Fin. Co.*;

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overview of the structure and operation of the initiative and referendum among all the states that have them, see Magleby, *Direct Legislation.*

[30] Although the question has never been squarely presented, the Supreme Court has assumed that the initiative can be used to repeal a law that could have been, but was not, subjected to a referendum upon enactment (see *Hamilton v. Superior Court*).

[31] Magleby, *Direct Legislation,* 43, table 3.2.

[32] See Leshy, "The Making of the Arizona Constitution," 77–78.

see also *McBride v. Kerby; Giss v. Jordan*). Among other things, this means that one legislature cannot "limit or bind the acts of a future one," and any legislature may "alter, limit or repeal, in whole or part, any statute passed by a preceding one, unless there is some constitutional inhibition to the contrary" (*In re Hubbs*). Of course, where constitutional limits exist, the courts will generally enforce them, for "it would be absurd to say that the legislature, which is a creature of the people through their Constitution, could enact a law which would take precedence over constitutional provisions enacted by the people themselves" (*Windes v. Frohmiller*).

The Initiative and Referendum

The second part of this subsection sets out the basic concept of the initiative and referendum, by expressly reserving to the people the power to act "independently of the legislature" in making or unmaking laws and enacting constitutional amendments. It establishes the electorate as a "coordinate source of legislation" equivalent to the legislature (or to lawmaking bodies of local government; see subsection 8, below) (*Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors*; see also *Allen v. State*). This equivalency with representative legislative bodies is underscored by Article XXII, section 14. But the initiative cannot be used for subjects that are beyond the authority of the people in the relevant jurisdiction to adopt; thus a local initiative to dissolve an incorporated city is improper because dissolution is a state legislative responsibility (see Article XIII, section 1); the local initiative was therefore merely "a demand for a public opinion poll by election [and] not legislation" (*Saggio v. Connelly*).

> (2) The first of these reserved powers is the initiative. Under this power ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the constitution.

The signature percentage requirements for qualifying proposed statutes and amendments for the ballot were the subject of significant debate at the constitutional convention.[33] Compared to other states, the 10 and 15 percent requirements in this subsection are somewhat on the high side.[34] Subsection 7 below specifies that the percentages are calculated against the total number of votes cast for all candidates for governor at the last preceding general election. Because slightly more than one million voters cast ballots for governor in the fall 1990 general election, currently about 100,000 valid signatures are necessary to put

[33] See ibid., 64.

[34] Five percent is more common for the statutory initiative, and 10 percent is the typical figure for proposing constitutional amendments. See Magleby, *Direct Legislation,* 38–39, table 3.1.

a proposed statutory initiative on the ballot, and about 150,000 valid signatures are necessary to propose a constitutional amendment.

If an initiative proposal is for statutory rather than constitutional change, it cannot be transformed into a proposed constitutional amendment simply because 15 percent of the qualified voters (the number required for constitutional amendments) sign the petition (*Iman v. Bolin, dictum*). "Qualified electors" means persons who were registered to vote when they signed the petition (*Ahrens v. Kerby*). The Supreme Court has said that "requirements as to the form and manner in which citizens exercise their power of initiative should be liberally construed" (*Kromko v. Superior Court*).

> (3) The second of these reserved powers is the referendum. Under this power the legislature, or five per centum of the qualified electors, may order the submission to the people at the polls of any measure, or item, section, or part of any measure, enacted by the legislature, except laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the state government and state institutions; but to allow opportunity for referendum petitions, no act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure, except such as require earlier operation to preserve the public peace, health, or safety, or to provide appropriations for the support and maintenance of the departments of the state and of state institutions; provided, that no such emergency measure shall be considered passed by the legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative, and shall be approved by the affirmative votes of two-thirds of the members elected to each house of the legislature, taken by roll call of ayes and nays, and also approved by the governor; and should such measure be vetoed by the governor, it shall not become a law unless it shall be approved by the votes of three-fourths of the members elected to each house of the legislature, taken by roll call of ayes and nays.

The referendum allows the voters to "suspend or annul a law which has not gone into effect" (*Alabam's Freight Co. v. Hunt*; see also *McBride v. Kerby*). The 5 percent signature requirement for referendum petitions is a common standard.[35] Currently, about 50,000 valid signatures are necessary to put a referendum measure on the ballot.

The first part of the second sentence of this subsection allows the legislature itself to refer its enactments to popular vote. The legislature often has done just that, usually when it wants to confirm its judgment of the popular will or, put more cynically, when it wants to pass the buck. But this power of legislative referral exists only in the state legislature, and does not extend to municipal

[35] The percentage requirements in the twenty-four other states that have some kind of referendum range from 3 to 15 percent. See Magleby, *Direct Legislation*, 38–39, table 3.1.

legislative bodies (*City of Scottsdale v. Superior Court*), because subsection 8 below refers only to "the electors" as having the power of referral at the local level.

The referendum device need not be aimed at whole statutes, because this section explicitly allows an "item, section, or part of any measure" to be the target of a referendum. Therefore a part of a legislative act proposing a constitutional amendment requiring it to be submitted to the voters at a special election, and setting out the machinery for that election, is subject to the referendum process (*Clements v. Hall*). When only part of a law is challenged by referendum, the remainder may take effect (see last sentence of subsection 4 below).

Not all legislative acts are proper targets for the referendum, for this subsection contains two major exceptions. The first is for so-called emergency measures, which require the approval of two-thirds of the members elected to each house. The courts have consistently held that legislative declarations of emergency (including those made by local governments subject to the referendum by subsection 8 of this section) are not reviewable by the judiciary (*Orme v. Salt River Valley Water Users' Assn.; City of Phoenix v. Landrum & Mills Realty Co.*). This hands-off judicial attitude allows the legislature to thwart the possibility of a referendum if it can gather a two-thirds majority of its elected members (or three-fourths if the governor vetoes the measure), to support a declaration of emergency. Some observers have suggested that it has become a standard legislative practice, whenever strong support exists for a measure, to make it an emergency to avoid the possibility of a referendum.[36]

The Supreme Court once held that a statute containing an emergency declaration that fails to obtain the required two-thirds majority in one or both houses (as shown by the recorded vote on the bill in the legislative journal) did not become law even though it received a majority of votes in both houses and was signed by the governor (*Cox v. Stults Eagle Drug Co.*). The decision was overruled a scant year later, the Court concluding that such an act takes effect ninety days after the close of the legislative session because it was "passed with all the constitutional formalities required for an ordinary [nonemergency] law," and should be enforced as such, unless a referendum petition containing sufficient valid signatures was filed in the meantime (*State ex rel. La Prade v. Cox*).

The second exemption from the referendum process covers acts "for the support and maintenance of the departments of the state and of state institutions." The constitutional text here might seem better read—both textually and in light of the strong attachment of the framers to direct democracy—to exempt from the referendum only those laws "immediately necessary" for the support and maintenance of state agencies. The Arizona Supreme Court initially accepted this reading (*Warner v. White*), but later held that nonemergency measures for

[36] See Bruce B. Mason and Heinz R. Hink, *Constitutional Government in Arizona,* 7th ed. (Tempe, Ariz.: Cleber Pub. Co., 1982), 122.

the support of the principal departments of state government are not subject to the referendum process (*Garvey v. Trew*). *Garvey* read this subsection as creating "two separate and distinct classes" of exemption from the referendum: emergency measures and measures for the support and maintenance of governmental departments and institutions. Its reasoning was partly that otherwise a "small minority" could disrupt the functioning of government by filing referendum petitions against appropriation bills—not an unrealistic fear in the climate of hostility to government spending that has long permeated Arizona politics. On the other hand, *Garvey* left *Warner's* narrow holding intact, saying that where an appropriation is "incidental" to a measure that gives "new or additional power or functions to a department or institution," it is subject to a referendum unless passed as an emergency measure.

Another limit on the referendum process is found in subsection 14, providing that the initiative and referendum "shall not be construed to deprive the legislature of the right to enact any measure." If a nonemergency measure is enacted and subsequently challenged through the referendum process, the legislature may enact a different, conflicting measure as an emergency act. If this new measure effectively repeals the measure subject to the referendum challenge, the referendum election is voided because its object—the earlier statute—has disappeared. The Supreme Court has described this as the "only conceivable purpose" of subsection 14, namely, to preserve the legislature's power over "matters contained in acts referred to, but not approved or yet passed on by voters" (*McBride v. Kerby*). Unusual circumstances must exist for the legislature to snatch away the people's right to vote on the brink of its exercise, but politics is full of peculiarities, and this tactic has occasionally been used (*id.*).

To minimize disruption while providing meaningful opportunity for the referendum (as well as to provide an opportunity for the public to learn of the obligations of new laws, see *Law v. Superior Court*), this subsection provides that statutes do not take effect until the ninety-first day after the "close of the session of the legislature enacting such measure" unless they fall within the "emergency" or "state support" exceptions. A court of appeals has said that this date may be extended where more time is needed to verify the validity of signatures on a timely filed referendum petition (*Schwab v. Motley*).

If a statute falls within one of the exceptions to the referendum process, it takes effect on the date it is approved by the governor (*Clark v. Boyce, dictum*). This is true even if a law declared to be an emergency measure contains a later effective date, because the emergency declaration is judicially deemed to control (*Industrial Commn. v. Frohmiller*). If a bill containing an emergency declaration is vetoed by the governor, and the veto is overridden by the required three-fourths majority of members elected in each house, it becomes effective on the date it is filed with the secretary of state (*Clark v. Boyce, dictum*). Similarly, if the governor neither approves nor vetoes a bill designated as an emergency measure within the five days required by Article V, section 7, paragraph 2, or if the legislature has adjourned

and the governor has not filed the bill with the secretary of state with his objections within ten days as required by that section, the bill takes effect on the sixth or eleventh day, as the case may be (*id.*, overruling prior decisions). These so-called pocket vetoes are discussed in the commentary on Article V, section 7.

> (4) All petitions submitted under the power of the initiative shall be known as initiative petitions, and shall be filed with the secretary of state not less than four months preceding the date of the election at which the measures so proposed are to be voted upon. All petitions submitted under the power of the referendum shall be known as referendum petitions, and shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislature which shall have passed the measure to which the referendum is applied. The filing of a referendum petition against any item, section, or part of any measure shall not prevent the remainder of such measure from becoming operative.

This subsection sets out some details for the exercise of the initiative and referendum processes. Although it does not express a time limit for gathering signatures for an initiative, subsection 7 below uses the "last preceding" general election as the basis for determining the required number of signatures. Because such elections are held every two years (see Article VII, section 11), presumably the signature-gathering process cannot span more than two years, which is what the applicable statute currently provides (Ariz. Rev. Stat. 19–121 (D)).

This subsection gives initiative proponents considerable control over the timing of its submittal to the voters because it requires only that the initiative be filed not less than four months preceding the date of the applicable election. Failure to meet this deadline is ordinarily fatal, but if the late-submitted measure is nevertheless put on the ballot and approved, the courts will not thereafter entertain a challenge based upon the failure to comply with the deadline (*Searles v. Strauch*; see also the commentary under subsection 15 below).

In 1976 a court of appeals struck down a statute that would have required initiative petitions to be filed five months prior to the election (*Turley v. Bolin*). Although the court conceded that the phrase "not less than four months" could be interpreted to allow the legislature to move up the deadline, it relied on the framers' profound concern that these tools of direct democracy should not be "subordinate" to legislative power. In 1984 the legislature tried again, this time by proposing a constitutional amendment to this subsection that would have required initiative petitions to be filed six months prior to the election, but the voters rejected the idea.

Subsection 10 below requires that qualifying initiative and referendum measures be put on the ballot at the "next regular general election." Shortly after statehood, the Supreme Court held that this means the general election in November as fixed in Article VII, section 11 (*Allen v. State*). This instruction was not always followed, because two subsequent Supreme Court decisions struck down referendum measures that were approved by the voters at special rather than

general elections (*Tucson Manor Inc. v. Federal Natl. Mortgage Assn.; Estes v. State*). Both decisions voided laws passed in the 1933 legislative session that were then submitted to the voters at a special election called in the fall of 1933 to fill a vacancy in Congress. The *Tucson Manor* case was, remarkably, not decided until nearly two decades after the election. In another bizarre circumstance, the Court held that otherwise valid initiatives (proposing statutes and a constitutional amendment) could not be put on the 1938 general election ballot because they had been timely filed before the 1936 general election but not put before the voters at that election because of the inexcusable neglect of the secretary of state (*Sims Printing Co. v. Frohmiller*).[37]

The time period for signature gathering for a referendum petition is set by this subsection; petitions containing the requisite number of signatures must be filed with the secretary of state within ninety days after final adjournment of the legislative session at which the challenged law was enacted. That is, the trigger starting the clock to run is the date the legislature adjourns, not the effective date of the targeted statute (*Alabam's Freight Co. v. Hunt*). Because laws may be enacted throughout a legislative session, and there is no fixed limit on the length of such sessions, the amount of time challengers have to collect signatures is variable and subject to legislative control. If a law is enacted early in a lengthy legislative session, for example, challengers have considerably more than ninety days to gather signatures. Conversely, a legislature fearful of a referendum, but unable to garner a two-thirds vote necessary for a designation of emergency, may hold a controversial bill until the last day of the session, to give challengers the minimum of ninety days to gather signatures.

The final sentence of this subsection, when read with the following subsection, makes clear that the filing of a referendum petition against a measure or particular part of it prevents the measure, or the particular part challenged in the petition, from taking effect. The Supreme Court has in fact analogized it to a veto power and cautioned that it must be exercised strictly within the time frame provided so that, for example, a referendum petition cannot be amended after expiration of the ninety-day filing period (*Direct Sellers Assn. v. McBrayer*).

> (5) Any measure or amendment to the constitution proposed under the initiative, and any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the governor, and not otherwise.

This section confirms that legislative enactments properly challenged through the referendum process "become law" only when approved by the voters "and

[37] The case arose because the state auditor refused to pay the printing bill for that portion of the 1938 publicity pamphlet that included these measures. The circumstances of the secretary of state's failure to go forward in 1936 were described and resoundingly criticized in *Kerby v. Griffin.*

not otherwise." Only a majority of the votes "cast thereon" is required, whether the ballot proposition is an initiated statute, a referendum, or a constitutional amendment. This is in line with the practice of a majority of states.[38] Because there is usually a significant dropoff in the number of votes on ballot propositions compared to the more important offices being contested at general elections,[39] the requirement of approval by a majority of only those voting on the particular proposition can allow a minority of those voting in an election to carry the day on a proposition. In 1916 the voters narrowly defeated a legislatively proposed amendment to this subsection that would have required initiative and referendum measures to attain "a majority of the total vote cast" at the election, rather than a majority of those voting on the specific measure.

(6) The veto power of the governor, or the power of the legislature, to repeal or amend, shall not extend to initiative or referendum measures approved by a majority vote of the qualified electors.

This is the only provision of part 1 of Article IV to be amended. Originally it referred only to the veto power of the governor. In 1914 a group led by organized labor interests, who feared that their successes with the initiative and referendum at the polls could be undone by unsympathetic legislators, promoted its amendment to its current form by initiative petition. The sponsors' intent—to create a special category of "meta-legislation," enacted directly by the voters, that can be repealed or modified only by the same process by which it was created—is clear in both the pro and con arguments put to the voters.[40]

An important issue is whether all laws approved by the voters, or rather only some of them, reach this super-statutory status. Subsection 5 requires only a majority "of the votes cast thereon" for approval of ballot measures, while this subsection insulates from veto, repeal or amendment those initiated and referred measures "approved by a majority vote of the qualified electors." For four decades, the Supreme Court found no significance to the textual difference between the two subsections, and either said in *dictum* (*Willard v. Hubbs*; *McBride v. Kerby*; *State v. Coursey*; *Ward v. Industrial Commn.*) or held (*State ex rel. Conway v. Superior Court*; *State v. Pelosi*) that all laws approved by a majority of those voting thereon were made immune from legislative tinkering by the 1914 amendment. But in 1952 the Court, over a strong dissent, reversed course and interpreted this subsection to mean that only those laws approved by a majority of the registered voters, rather than by simply a majority of those voting on the proposition, were beyond legislative control (*Adams v. Bolin*, 1952). The result is

[38] See Magleby, *Direct Legislation,* 38–39, table 3.1.

[39] See generally Magleby, *Direct Legislation,* 77–99. Magleby's review of the data leads him to conclude that " [c]onsistently, 75–80 percent of those who turn out [in any statewide election] cast votes on statewide propositions" ibid., 99.

[40] See *Publicity Pamphlet,* 1914 General Election, pp. 40–42.

quite significant. Low voter turnouts and the fact that a significant number of voters casting ballots for live candidates do not go on to vote on propositions have meant that since 1914 no nonconstitutional ballot measure has ever gained a majority of those registered to vote at the time of the election. Thus none are protected from legislative act by this subsection.

The majority opinion in *Adams* has not escaped criticism.[41] As Justice Stanford pointed out in his dissent, the general understanding in the state at the time of the 1914 amendment to this section, and the general practice before *Adams* (a practice repeatedly blessed by the Court) was to the contrary. *Dictum* in a subsequent case ignored *Adams* (*Iman v. Bolin*), but more recently the Court has unanimously declined to reconsider *Adams*, in upholding a legislative reversal of an initiated statute, adopted in 1918, that gave juries rather than judges the power to levy the death penalty (*State v. Lopez*).

The decision in *Adams* raises another issue that has yet to be resolved, namely, whether the governor can veto a law approved by less than a majority of all registered voters. *Adams's* logic would seem to lead to the conclusion that such a veto is possible, because the 1914 amendment appears to have made the legislature's power to repeal or amend exactly congruent with the governor's power to veto. But other parts of the constitution do not readily admit the possibility of a gubernatorial veto in these circumstances (e.g., subsection 13 of this section and Article V, section 7). It would, of course, take a courageous governor or peculiar circumstances to justify vetoing a law just approved by the voters, and no such step has yet been taken.

> (7) The whole number of votes cast for all candidates for governor at the general election last preceding the filing of any initiative or referendum petition on a state or county measure shall be the basis on which the number of qualified electors required to sign such petition shall be computed.

This subsection establishes the baseline for calculating the percentage of registered voters whose signatures are needed to trigger the initiative or referendum process. A 1968 amendment to Article V, section 1 that required the election of the governor to be held in the even-numbered "off-year" from the U.S. presidential election (while lengthening the governor's term to four years) effectively lowered the signature requirements, because voter turnout tends to be heavier in presidential elections. A court of appeals has held that this section's reference to total votes cast for governor at the general election "last preceding the filing" of the initiative or referendum must be applied literally in the referendum context,

[41] The most comprehensive criticism is found in Neal Houghton, "Arizona's Experience with the Initiative and Referendum," *New Mexico Historical Review* 29 (1954), 183. *Adams* rejected out of hand a possible middle ground: that the legislature has no power unilaterally to repeal or amend laws approved by popular vote, but does have the power to propose and refer such repeals or amendments to the voters. In fact, the legislature had done just that in triggering the *Adams* litigation.

so that if an election intervenes between the time the petitions are taken out and when they are filed, that election should be used to calculate the signatures required (*Perini Land & Dev. Co. v. Pima County*).

> (8) The powers of the initiative and the referendum are hereby further reserved to the qualified electors of every incorporated city, town, and county as to all local, city, town, or county matters on which such incorporated cities, towns, and counties are or shall be empowered by general laws to legislate. Such incorporated cities, towns, and counties may prescribe the manner of exercising said powers within the restrictions of general laws. Under the power of the initiative fifteen per centum of the qualified electors may propose measures on such local, city, town or county matters, and ten per centum of the electors may propose the referendum on legislation enacted within and by such city, town, or county. Until provided by general law, said cities and towns may prescribe the basis on which said percentages shall be computed.

The framers of the Arizona constitution debated at some length whether to extend the initiative and referendum to political subdivisions of state government, in part because it raised politically delicate questions of "local home rule" and the relationship between cities and counties under the constitution.[42] This subsection sidesteps these questions by simply incorporating the general division of power between state and local government that is found in Articles XII (counties) and XIII (municipalities). It elevates the signature percentages required for exercise of both the initiative (15 percent as opposed to 10 percent for state legislative proposals) and the referendum (10 percent as opposed to 5 percent for state laws), apparently because fewer voters, and therefore fewer signatures, are involved.

State law now fixes the baseline for the referendum as the "whole number of votes cast at the city or town election at which a mayor or councilman were chosen last preceding the filing of a referendum petition" (Ariz. Rev. Stat. 19–142(A)), but is silent on the initiative baseline. The Supreme Court has filled the gap by holding that, in the absence of local law, the number of qualified electors is 15 percent of the entire vote cast for all candidates for mayor at the last preceding general municipal election (*City of Flagstaff v. Mangum*).

Local governmental legislative decisions of a "general character" are subject to referendum, such as a public works improvement declared by the city council to be for the general benefit of the community (*City of Globe v. Willis*), or a zoning decision, including a county's conditional approval of an application to rezone, which may be challenged before the rezoning ordinance is actually adopted (*Pioneer Trust Co. v. Pima County*). But city council decisions carrying out a street widening project with funds from street improvement bonds approved by the voters at a previous election are administrative rather than

[42] See Leshy, "The Making of the Arizona Constitution," 63–64.

legislative, and thus not subject to a referendum (*Wennerstrom v. City of Mesa*). Furthermore, a city charter cannot authorize a voter referendum on matters controlled by state rather than local law (*Cota-Robles v. Mayor & Council of Tucson*), and a city ordinance designed to promote a referendum will be struck down if it conflicts with the city charter (*Pointe Resorts v. Culbertson*). A charter can mandate that the city council submit a qualifying initiative petition to the voters (*Williams v. Parrack*), and in general initiative provisions in city charters "should be liberally construed," resolving ambiguities or conflicts in favor of the initiative (*Parrack v. City of Phoenix*).

In the absence of a contrary provision in the city charter or state law, subsection 4's filing deadline for an initiative petition (not less than four months prior to the applicable election) controls (*City of Flagstaff v. Mangum*). But because this subsection allows local governments to "prescribe the manner of exercising" the initiative and referendum at the local level, a city can set a referendum for vote at a special rather than a general election, even though subsection 10 requires statewide initiatives and referenda to be voted on at the next regular general election (*Dewey v. Jones*).

> (9) Every initiative or referendum petition shall be addressed to the secretary of state in the case of petitions for or on state measures, and to the clerk of the board of supervisors, city clerk, or corresponding officer in the case of petitions for or on county, city, or town measures; and shall contain the declaration of each petitioner, for himself, that he is a qualified elector of the state (and in the case of petitions for or on city, town, or county measures, of the city, town, or county affected), his post office address, the street and number, if any, of his residence, and the date on which he signed such petition. Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant and that in the belief of the affiant each signer was a qualified elector of the state, or in the case of a city, town, or county measure, of the city, town, or county affected by the measure so proposed to be initiated or referred to the people.

The details of the petition process set out in this section are straightforward. Each signer must include certain information, and each circulator of the petition must attest to the circulation and signature process. Signature sheets shall be attached to a "full and correct copy of the title and text of the measure" to be submitted to the voters. The Supreme Court has demanded strict compliance for referendum petitions, because the referendum allows "a small minority of voters . . . to suspend legislation enacted by the duly elected representatives of the people" (*Cottonwood Dev. v. Foothills Area Coalition of Tucson, Inc.*). Thus referendum petitions aimed at a municipal action fail where the signers were alleged to be qualified electors of Arizona rather than electors of the local government

"affected by the measure," as required by the last clause of this section (*Western Devcor, Inc. v. City of Scottsdale*).

This rationale does not apply with equal force to the initiative, which is a process used to challenge legislative inaction, not action (*Kromko v. Superior Court*). In fact, the courts do not apply the same title accuracy standard to initiative petitions that they apply to titles of legislative bills under Article IV, part 2, section 13 (*Iman v. Bolin*; see the discussion of *Barth v. White* in the commentary on subsection 15 below). Moreover, the Supreme Court has held that an initiative proposing a constitutional amendment need not "indicate other provisions in the constitution that would be affected by the amendment," because the political campaign on the merits of the proposal should ventilate the effect of the proposal on other parts of the Constitution (*Tilson v. Mofford*).

Neither this nor any other subsection of this article specifically directs the secretary of state to verify the validity of signatures (to ensure that the signers are in fact qualified voters, have only signed once, and so forth). The legislature first vested the secretary of state with that authority in 1913 (now found, as amended, in Ariz. Rev. Stat. 19–121, 19–122), and the Supreme Court has held that the secretary of state may properly reject signatures on an initiative petition that have technical defects, in the absence of a showing that the signer was a qualified elector (*Whitman v. Moore*). That case and several others (e.g., *Save Our Public Lands Coalition v. Stover*) have said that petitions circulated, signed, and filed are presumptively valid. Any deviation from constitutional requirements does not void a signature or petition, but makes it presumptively invalid, putting the burden on the proponent of the petition to prove otherwise. More recently, however, the Court has deemed absolutely void petitions and signatures verified as circulated by persons other than those actually doing the circulating, because "there is a real difference between mere omissions or irregularities and fraud" (*Brousseau v. Fitzgerald*). *Brousseau* involved statutory petitions of nomination for office rather than initiative or referendum petitions under this part, but its reasoning seems applicable here because it expressly disapproved of "any statement to the contrary in *Whitman.*" Other defects in the circulation process can be cured (e.g., *Direct Sellers Assn. v. McBrayer*; cf. *Western Devcor, Inc. v. City of Scottsdale*).

Initiative petition signature sheets with "short titles" and extraneous material not authorized by statute do not violate this section, at least so long as they are not "affirmatively false or fraudulent" and, although "incomplete," constitute "legitimate political debate" that "facilitate[s] the main purpose behind the signature requirement"; namely, to demonstrate sufficient interest among the electorate to justify submitting the measure to the people (*Kromko v. Superior Court*). The same approach has been applied to referendum petitions (*Pioneer Trust Co. v. Pima County*).

(10) When any initiative or referendum petition or any measure referred to the people by the legislature shall be filed, in accordance with this section, with the

secretary of state, he shall cause to be printed on the official ballot at the next regular general election the title and number of said measure, together with the words "Yes" and "No" in such manner that the electors may express at the polls their approval or disapproval of the measure.

This straightforward provision has not been the subject of reported judicial decision. The manner in which a ballot proposition is worded may be critical to voter understanding; for example, when the legislature referred the question of continuing a state automobile emissions inspection program to the voters in the 1976 general election, the wording of the ballot question ("Do you want to stop auto inspection?") required a negative vote to continue the program.[43]

(11) The text of all measures to be submitted shall be published as proposed amendments to the constitution are published, and in submitting such measures and proposed amendments the secretary of state and all other officers shall be guided by the general law until legislation shall be especially provided therefor.

This subection effectively gives the legislature power over the process of submitting measures to the voters, and the legislature has responded by adopting laws governing the submission process. The law requires the secretary of state (or appropriate officer of a political subdivision) to publish and distribute a publicity pamphlet that shows "a true copy of the title and text" of the proposed measure or amendment, along with an analysis of it by the state legislative council. A former requirement that the secretary of state also prepare "popular arguments," pro and con, on the measure was repealed in 1991, effective November 4, 1992. The publicity pamphlet also may contain pro or con arguments on each proposal from any person who pays a proportional share of the printing costs (Ariz. Rev. Stat. 19–123, 19–124).

(12) If two or more conflicting measures or amendments to the constitution shall be approved by the people at the same election, the measure or amendment receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict.

This sensible rule of priority in resolving conflicts among laws or amendments simultaneously adopted may not be easy to apply, because determining whether a conflict exists can be difficult. The Supreme Court once confronted two constitutional amendments adopted at the same election—one lengthened the terms of state officers, including the auditor, from two to four years; the other, which received fewer affirmative votes, abolished the office of the state auditor. It required two 3–2 judicial opinions to untangle, but in the end the

[43] See Bruce B. Mason, John P. White, and Russell B. Roush, A *Guide to the Arizona Constitution* (Scottsdale, Ariz., Cross Plains Publishers, 1982), 48. The repeal was defeated by a margin of 53 percent to 47 percent.

Court upheld both propositions, finding no conflict between them, even though the net effect was to give priority to the proposition that received fewer votes (*State ex rel. Nelson v. Jordan*). A court of appeals found "no serious conflict" when three different tax exemption amendments were approved by the voters at the same election, because even though there was "extensive repetition" among them, together they made a "consistent, workable" section (*Hood v. State*).

(13) It shall be the duty of the secretary of state, in the presence of the governor and the chief justice of the supreme court, to canvass the votes for and against each such measure or proposed amendment to the constitution within thirty days after the election, and upon the completion of the canvass the governor shall forthwith issue a proclamation, giving the whole number of votes cast for and against each measure or proposed amendment, and declaring such measures or amendments as are approved by a majority of those voting thereon to be law.

This subsection describes the final steps in the initiative/referendum process—canvassing the votes and proclaiming the results. The measure takes effect upon the proclamation of the governor (*State ex rel. Nelson v. Jordan*). One commentator has argued that the governor's duty of proclaiming the results is not discretionary;[44] whether the governor could veto a measure approved by the voters is discussed in the commentary on subsection 6 of this section.

(14) This section shall not be construed to deprive the legislature of the right to enact any measure.

This subsection preserves the legislature's power to enact laws concurrent with the right of the electorate to use the initiative and referendum. In effect, it allows the legislature to derail the initiative/referendum process by adopting a new statute as an emergency measure that conflicts with the target of the initiative or referendum. That effectively vacates the initiative/referendum process (*McBride v. Kerby*). This subsection cannot be read wholly literally, however, because it must be meshed with the express limit on the legislature's power to repeal or amend measures approved by a "majority vote of the qualified electors" expressed in subsection 6. As explained in the commentary on that subsection, however, it places only slight limits on the legislature's power.

(15) This section of the constitution shall be, in all respects, self-executing.

This is one of the few places where the Arizona Constitution expressly provides for self-execution (see also Article VI.I, section 6; Article IX, sections 2(1), 2.1, and 2.2). It underscores the devotion of the framers to the notion of popular sovereignty. When combined with subsection l's grant to the people of the right

[44] Russell B. Roush, "The Initiative and Referendum in Arizona: 1912–1978," (Ph.D. diss., Arizona State University, 1979). See also Ariz. Rev. Stat. 19–126.

to act "independently of the legislature," this subsection means "the will of the people" cannot be defeated by legislative inaction, such as by its failure to make a sufficient appropriation of money to implement this part (*Crozier v. Frohmiller*; see also *Kerby v. Griffin*). While the legislature may supplement the constitutional requirements, any such legislation must be scrutinized "in the context of the important legislative rights reserved in the people—rights which are not considered as being subordinate to any legislative rights vested in the legislature" (*Direct Sellers Assn. v. McBrayer*). While that case upheld a statutory requirement that referendum petition circulators be qualified electors, because it "reasonably supplements the constitutional purpose," the Court has struck down other statutory requirements deemed to be in conflict with this part (*Turley v. Bolin*). A court of appeals has ruled that although these constitutional devices of initiative, referendum, and recall are important, they express only a collective right of the people and do not entitle individuals to collect signatures from qualified electors on private property open to the public, such as a shopping mall (*Fiesta Mall Venture v. Mecham Recall Comm.*; see commentary on Article II, section 6).

General Commentary on Judicial Review of the Initiative/ Referendum Process

In a number of cases the courts have enjoined certification of propositions for the ballot upon their determination that the petitions were legally insufficient for various reasons (e.g., *Kerby v. Luhrs*; *Ahrens v. Kerby*; *Kerby v. Griffin*).[45] The Supreme Court has said that because the Arizona founders considered the initiative and referendum as "among the most important" principles in the constitution, the requirements of this part pertaining to the "form and manner" of the initiative and referendum should be given a "liberal construction," and noncompliance excused "unless the Constitution expressly and explicitly makes any departure therefrom fatal" (*Whitman v. Moore*).[46] Another case has, however, demanded "substantial compliance" with the constitutional provisions and statutes that implement them—especially those dealing with publicity for proposals going on the ballot (*Kerby v. Griffin*). In modern times the Court has given stricter scrutiny to referendum petitions than it has initiative petitions (see the commentary on subsection 9 above).

In examining exercises of the power of initiative, the courts have generally distinguished between challenges to the process employed in exercising the

[45] See generally Randall L. Hodgkinson, Comment, "Executive, Legislative, and Judicial Power over Direct Legislation in Arizona," *Arizona State Law Journal* 23 (1991), 1111–35.

[46] One of the holdings in *Whitman v. Moore* was that a petition not circulated by the same person who verified the signatures on it was not void per se. A more recent Supreme Court decision has disapproved this result, but in the context of (nonconstitutional) nominating petitions for public office rather than initiative or referendum petitions (*Brousseau v. Fitzgerald*).

initiative, and challenges to the substance of the legislation being proposed. Challenges to process ("conform[ing] with the requirements of the law as to form and signature," *State v. Osborn*) must ordinarily be brought and heard before the election; after the election is held, such challenges become unreviewable. Conversely, challenges to the substance of the legislation ordinarily may be brought only after the measure becomes law, because the "initiative petition [is] also a step in the process of legislation" (*State v. Osborn*), and earlier review creates the possibility of a premature decision on a measure that never may be approved by the voters (*Williams v. Parrack*). That is, because the initiative and referendum processes of this part involve the same kind of lawmaking power as that exercised by the legislature itself (*Adams v. Bolin*, 1952), "[p]roper respect" for separation of powers in Article III deprives the courts of "jurisdiction to restrain an initiative or referendum election on the grounds of alleged substantive illegality or unconstitutionality of the action proposed" (*Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors*).

A challenge to process must usually be heard before the election because the courts are generally reluctant to "go behind authenticated and approved statutes for the purpose of inquiring whether those statutes were passed in the manner prescribed by the constitution" (*Allen v. State*). Thus the courts will not, after an election where an initiative is approved, hear a challenge based on the fact that the initiative was filed fewer than four months prior to the election, in violation of section 1(4) of this part (*Searles v. Strauch*). The only exception to this is where a measure was not submitted at a proper election, that is, not at the "next regular general election" as required by section 1(10) of this part (*Estes v. State*). If a suit challenging the process is filed before the election, however, the courts may enjoin the initiative from appearing on the ballot if they find, for example, that the secretary of state has failed to fulfill statutory requirements of publicity (*Kerby v. Griffin*).

While the general principles are readily stated, it is not always easy to separate questions of process from questions of substance. For example, the Court has reviewed a local initiative petition to dissolve a city before the election, finding that it was a question of "form" whether it was in fact proposing a "law" as required by section 1(1) of this part (*Saggio v. Connelly*). Particularly close to the line are questions about whether a ballot proposition violates the principle that a legislative proposal should have only one subject (see Article IV, part 2, section 13; Article XXII, section 14). While the single-subject principle is a procedural restriction on the form of the measure to be put before the voters, it also frequently requires an inquiry into substance in order to determine whether in fact the parts of the measure all relate to the same subject.

Arizona court decisions in this area are a tangled web—at best confusing, and arguably unfaithful to the constitution. The Supreme Court applied the "single-subject" principle to initiatives proposing ordinary legislation in 1916 (*Board of Control v. Buckstegge*). Remarkably, the Court did not rely on Article XXII,

section 14 in *Buckstegge* (see the commentary on that section), and even more remarkably, the Court utterly ignored the precedent in subsequent cases. The difficulty started in 1932, when the Court said that initiative petitions proposing constitutional amendments did not need to have a single subject, but rather only "*some* title and *some* text" (*Barth v. White*, emphasis in original). *Barth*'s holding on constitutional amendment proposals was effectively reversed two years later (*Kerby v. Luhrs*), even though the *Kerby* opinion did not discuss *Barth*, despite the fact that both were written by the same judge. Although *Buckstegge* was to the contrary, and *Barth* itself had been nullified, the Supreme Court nevertheless applied *Barth*'s "some title—some text" principle to initiated statutes in 1965 (*Iman v. Bolin*). *Iman* held that the "single-subject" principle "is applicable only to acts of the legislature," and thus the secretary of state had a duty to place the proposed measure on the ballot if the petition was sufficient in form and bore a sufficient number of legal signatures (*id.*). The Court has continued to suggest, in *dictum*, that the single-subject rule may not apply to statutory as opposed to constitutional initiatives (*Tilson v. Mofford*).

Procedural Questions

Assuming that a challenge is to the form rather than the substance of an initiative, there remains the question of how to prosecute such litigation to decision in the relatively short time available before the election, particularly when the challenge could involve a lengthy, painstaking inquiry into the validity of tens of thousands of individual signatures on petitions. In 1942 the Supreme Court approved the practice of postponing completion of the judicial inquiry until after the election, so long as the suit was timely filed before the election (*Whitman v. Moore*) Five years later the Court abruptly reversed itself after organized labor interests had followed the *Whitman* suggestion in their challenge to the signature-gathering process on a proposed right-to-work constitutional amendment (now Article XXV) (*Renck v. Superior Court*). *Renck* held that such challenges must be completely heard before the election, and practical difficulties met by requiring challengers "to marshall evidence sufficient to make a highly persuasive preliminary showing of [such] facts . . . as would justify a court of equity in issuing a restraining order to keep the measure off the ballot until the hearing had been completed." If doubt existed about the strength of the preliminary showing, the Court suggested, the better result is to let the measure go to the ballot. While *Renck* is a defensible result, the Court's decision to apply the new rule to the challengers in that case, who had reasonably relied on the Court's approach in *Whitman* in not seeking to enjoin the election, seems indefensible.

In 1977 the legislature finally responded to *Renck* by codifying a process for resolving the dilemma of verifying large numbers of signatures (which mushroom with the state's population) in a compressed time. The statute requires that the secretary of state (through the county recorders) verify a random sample of

5 percent of the filed signatures. If the total number of valid signatures projected from the sample is greater than 105 percent of the number required, the proposition goes on the ballot. If it is less than 95 percent of the number required, the proposition does not go on the ballot. If the projected validity is between 95 and 105 percent, the secretary of state should instruct the county recorders to verify every signature. If there is not sufficient time to do that, the measure should be placed on the ballot because the signatures are presumed valid. The Supreme Court has subsequently approved this process (*Save Our Public Lands Coalition v. Stover*), but it has also held that the statutory scheme does not cure basic constitutional defects in the affidavits of petition circulators (*Western Devcor, Inc. v. City of Scottsdale*).

SECTION 2

The legislature shall provide a penalty for any wilful violation of any of the provisions of the preceding section.

This is another reflection of the framers' concern that the initiative and referendum process be safeguarded. The legislature has provided a range of penalties for willful violation of these provisions (Ariz. Rev. Stat. 19–114.01, 19–115, 19–116). This section has not been subject to reported judicial interpretation.

PART 2. THE LEGISLATURE

SECTION 1

Senate; house of representatives, members; special session upon petition of members. (1) The senate shall be composed of one member elected from each of the thirty legislative districts established by the legislature.

The house of representatives shall be composed of two members elected from each of the thirty legislative districts established by the legislature.

(2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting that he call a special session of the legislature and designating the date of convening, the governor shall forthwith call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

The first subsection of this provision creates a bicameral state legislature and fixes the size of each house. The state legislature has been bicameral from the beginning; a proposal for a unicameral legislature was rejected at the constitutional convention.[47] Four years after statehood, a proposed constitutional

[47] Goff, *Records*, 577, 579–80.

amendment to abolish the state senate was put on the ballot by citizen initiative, but failed by a margin of nearly two to one.

The second subsection, added in 1948, establishes a process by which the legislature, by agreement of two-thirds of the members of each house, can effectively call itself into a special session. This subsection should be contrasted with those provisions allowing the governor to call the legislature into special session on her own initiative (Article IV, part 2, section 3; Article V, section 4). Gubernatorially initiated special sessions are limited by the subject matter(s) specified in the governor's call, while a legislatively initiated special session is expressly not limited in subject matter. To date, the legislature has called itself into special session only once, in late 1981, to reapportion itself and to redraw Arizona's congressional districts.

In its original form, this section dealt with two subjects of extreme political sensitivity: the apportionment of legislative representatives across the state, and legislative salaries. As a result, it has been the most frequently amended section in the constitution. Regarding reapportionment, in 1966 a federal district court ruled that the system for apportioning both houses of the state legislature violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution (*Klahr v. Goddard*). The court adopted a temporary reapportionment plan that fixed the size of the house of representatives at sixty and the senate at thirty, to be elected from single districts (two members of the house and one from the senate from each district) drawn on a strict population basis. This framework was installed in this section (and the caption added) by legislatively referred amendment in 1972. Although this section contains no express mandate to draw districts on a strict population basis, nor requires that districts be redrawn after each decennial census, the U.S. Constitution has been interpreted to contain those requirements (e.g., *Reynolds v. Sims*; *Brown v. Thomson*).

Regarding the delicate subject of legislative salaries, after many trips to the voters to adjust constitutionally set salaries (many of them failures), in 1970 the voters approved a new process for adjusting legislative salaries, at the same time handing off to a special commission another politically sensitive task—setting the salaries of other public officials. This amendment added Article V, section 13, and repealed, among other sections, those portions of this section that had set legislative salaries.

SECTION 2

No person shall be a member of the legislature unless he shall be a citizen of the United States at the time of his election, nor unless he shall be at least twenty-five years of age, and shall have been a resident of Arizona at least three years and of the county from which he is elected at least one year before his election.

This statement of qualifications for membership in the legislature must be read with the more generic requirements for all elective officers of the state or its subdivisions found in Article VII, section 15. The Supreme Court has said that the time for determining eligibility under any of these requirements is the date of the election (*Nicol v. Superior Court, dictum*). A court of appeals has ruled that this section's three-year state residency requirement for legislators means the three years immediately preceding the election (*Bearup v. Voss*), making it comparable to other, more express constitutional provisions applicable to state executive and judicial officers (see Article V, section 2; Article VI, section 6).

The Supreme Court has ruled that the qualifications stated in Article V, section 2, for state executive offices are exclusive (*Campbell v. Hunt*), and the attorney general, following this teaching, has suggested that the constitutional requirements stated in this section for holding legislative office are likewise exclusive, and that any person meeting them is not otherwise disqualified (Op. Atty. Gen. 60–38; see also *Whitney v. Bolin*).

SECTION 3

The sessions of the legislature shall be held annually at the capitol of the state, and shall commence on the second Monday of January of each year. The governor may call a special session, whenever in his judgment it is advisable. In calling a special session, the governor shall specify the subjects to be considered, and at such special session no laws shall be enacted except such as relate to the subjects mentioned in the call.

Until 1950 this section provided that the legislature was to meet biennially. In that year, the voters approved an amendment calling for annual sessions, an important milestone marking ever-increasing legislative responsibilities as the state was transformed by rapid population growth.

The specification in the second and third sentences of the governor's power to call special sessions is a more elaborate statement of the power referred to in Article V, section 4. The courts have several times construed the requirement that laws enacted at such sessions must "relate to" the subjects specified in the call. The Supreme Court has struck down laws enacted during special sessions that were "foreign" (*McClintock v. City of Phoenix*) or not "fairly germane" to any subjects mentioned in the call (*State v. Pugh*). On the other hand, "it is not necessary that the call should go into great detail on the subjects included therein" (*State ex rel. Conway v. Versluis*), and the test is "very liberal," so that "every presumption will be made in favor of the regularity" of such legislation (*Board of Regents v. Sullivan*, quoting a legal treatise). Even if the *title* of a statute enacted at a special session exceeds the call, the statute itself will still be upheld if its substance is within the call (*Maricopa County Mun. Water Conservation Dist. No. 1 v. La Prade*).

Allowing the governor to call a special session "whenever in his judgment it is advisable" has been applied in practice to justify a call on very short notice, and also to give the governor the power to focus legislative attention by interrupting a regular session with a special session. The constitutionality of such actions has not been litigated.

SECTION 4

No person holding any public office of profit or trust under the authority of the United States, or of this state, shall be a member of the legislature; provided, that appointments in the state militia and the offices of notary public, justice of the peace, United States commissioner, and postmaster of the fourth class, shall not work disqualification for membership within the meaning of this section.

The thrust of this section (together with the following section 5) is to prevent legislators from serving in other branches of the state government or in federal offices, with the limited specified exceptions in the proviso. It is similar although not identical to Article I, section 6, clause 1 of the U.S. Constitution. This section thus rules out, for Arizona, any system like the British one of so-called parliamentary or responsible government, where executive branch officers serve simultaneously as members of the legislature. This section has not received published judicial interpretation.

SECTION 5

No member of the legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the state of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to employment as a teacher or instructor in the public school system.

This is a companion to (and somewhat overlaps) section 4 of this article, and is also related to section 17 of this part. In its original form, it prohibited an elected member of the legislature from being elected or appointed to any "civil office of profit" in the state that was created, or the "emoluments of which shall have been increased" during the term for which the legislator was elected. It was intended to minimize conflicts of interest between a legislator's responsibility and her expectations of future employment or profit at state expense. In 1938, upon an initiative petition, the voters approved its amendment to its current form, while maintaining its basic objective. The amendment broadens the previous prohibition on dual office holding, but exempts school teachers and trustees.

The prohibition does not prevent a member of the lower house from being appointed to fill a vacancy in the state senate, because the legislature is a unitary "office" for purposes of this section, and because the evil it targets—legislators creating positions for their own gain or coming under undue influence of the executive—is not possible under this kind of transfer (*State ex rel. Nelson v. Yuma County Bd. of Supervisors*). Furthermore, this section does not prevent a person elected to the legislature from being appointed as a judge before he was sworn into the legislature, because the evil aimed at is his participating in the legislative "deliberations and enactments pertaining to a public office which might subsequently be held by him" (*State ex rel. Pickrell v. Myers*). The kind of "office" that falls within the meaning of this section is one specifically created by law with definite duties required of the holder, that "must involve the exercise of some portion of the sovereign power," as opposed to a more ordinary employee or bureaucrat (*Winsor v. Hunt*, emphasis deleted). Several attorney general opinions apply this test to specific offices (e.g., Ops. Atty. Gen. 56–85, 77–221, 187–003).

SECTION 6

Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace, and they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

This limited legislative immunity is intended to prevent distraction of legislators during their terms of office, except in the categories of cases specifically indicated. It and the following section together have the same general purpose as, but are not identical to, Article I, section 6, clause 1 of the U.S. Constitution. This section has not been addressed by the courts in any published judicial opinion.

SECTION 7

No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate.

Along with the preceding section, this provision is a counterpart to the "speech or debate" clause in the U.S. Constitution, Article I, section 6, clause 1. The Arizona version is worded somewhat differently, however, explicitly extending civil and criminal immunity (the federal provision is silent on this point), but for "words spoken in debate" rather than "any Speech or Debate." It has not received any published judicial interpretation, but has been addressed in two somewhat

inconsistent opinions of the attorney general, one (Op. Atty. Gen. 58–38) taking a narrow and one (Op. Atty. Gen. 188–009) a broad view of the immunity.

SECTION 8

Each house, when assembled, shall choose its own officers, judge of the election and qualification of its own members, and determine its own rules of procedure.

SECTION 9

The majority of the members of each house shall constitute a quorum to do business, but a smaller number may meet, adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may prescribe. Neither house shall adjourn for more than three days, nor to any place other than that in which it may be sitting, without the consent of the other.

These provisions, giving each legislative house control of its own internal affairs, resemble parts of Article I, section 5, clauses 1,2, and 4 of the U.S. Constitution. Although a majority constitutes a quorum in each house, section 15 of this part requires a majority vote of all members *elected* to each house to enact legislation. Neither section has received any significant judicial attention.

SECTION 10

Each house shall keep a journal of its proceedings, and at the request of two members the ayes and nays on roll call on any question shall be entered.

This section resembles Article I, section 5, clause 3 of the U.S. Constitution. As in most states, the journals of the Arizona legislature record skeletal details of floor action, such as votes taken. The Supreme Court has taken judicial notice of pertinent facts appearing in them to determine whether a statute was "enacted in conformity to the constitution" (*Giragi v. Moore, dictum*), such as whether sufficient affirmative votes were cast to pass a bill as an emergency measure (*Cox v. Stults Eagle Drug Co.*). This type of inquiry should be contrasted with the "enrolled bill" rule, described in subsection F of the commentary under Article III.

SECTION 11

Each house may punish its members for disorderly behavior, and may, with the concurrence of two-thirds of its members, expel any member.

This self-explanatory provision is almost identical to Article I, section 5, clause 3 of the U.S. Constitution. Happily, it has never been addressed by the courts, and thus it remains untested whether any judicial review is available of legislative punishment, or what constitutes "disorderly behavior."

SECTION 12

Procedure on bills; approval or disapproval by governor. Every bill shall be read by sections on three different days, unless in case of emergency, two-thirds of either house deem it expedient to dispense with this rule. The vote on the final passage of any bill or joint resolution shall be taken by ayes and nays on roll call. Every measure when finally passed shall be presented to the governor for his approval or disapproval.

Originally this section required a full reading of every bill by sections "on its final passage." As bills became longer and more complex, and as legislators became busier (or their attention spans became shorter), the section was amended (and the caption added) in 1972 to delete the requirement for at least one full reading. Today reading bills is often dispensed with, and this section has not been subject to published judicial interpretation.

SECTION 13

Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

This provision is found, in one form or another, in the constitutions of nearly three-fourths of the states, but has no federal counterpart.[48] It is closely related to the prohibition against legislation by reference (section 14 of this part), to the "single-subject" limitation on appropriations legislation other than the general appropriations bill (section 20 of this part), and to the last sentence of Article XXI, section 1, which has been interpreted to contain a single subject requirement for constitutional amendments. In an early decision, the Supreme Court explained that this section was a response to the "legislative practice of including in the same bill wholly unrelated provisions, of enacting laws under false and misleading title, and of incorporating in meritorious bills provisions not deserving of

[48] See generally M. Ruud, "No Law Shall Embrace More Than One Subject," *Minnesota Law Review* 42 (1958), 389; Robert Williams, "State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement," *University of Pittsburgh Law Review* 48 (1987), 796.

general favor and which, standing alone, could not command the necessary support to pass them" (*In re Miller*; see also *Board of Control v. Buckstegge*). This section has given rise to a large volume of litigation. The result in any particular case turns on its own facts, so that generalization from the mass of reported decisions is hazardous, if not downright impossible.

The Supreme Court has characterized the judicial role in applying the single-subject principle as to follow "its spirit without being so narrowly technical on the one side as to substitute the letter for the spirit, or so foolishly liberal on the other as to render the constitutional provision nugatory" (*Taylor v. Frohmiller*). Many cases have described the test for singleness of subject in liberal terms; for example, an Arizona court of appeals has said (quoting from a Minnesota decision) that "subject" should

> be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. (*Litchfield Elementary School Dist. No. 79 v. Babbitt*).

Legislation does not violate the one subject principle just because it contains both civil and criminal provisions, if they are "reasonably related" (*Sample v. Sample*).

Once a violation of the single-subject rule has been found, the entire act is void because it is "infected by reason of the combination of its various elements rather than by any invalidity of one component" (*Litchfield Elementary School Dist. No. 79 v. Babbitt*).

The adequate title requirement is independent of the one-subject principle; that is, a title may contain as many subjects as necessary to convey the meaning of the act (*Sample v. Sample*). The Supreme Court does not demand that the title depict the legislation "minutely and in great detail," but it must not be "so meager as to mislead or tend to avert inquiry into the contents thereof" (*Board of Control v. Buckstegge*; see also *State v. Davey*). The scope of the title is controlled in substantial part by the nature of the legislation itself (*Taylor v. Frohmiller*). A title that is broader than the body of the act generally poses no constitutional problem, because the "mischief" sought to be avoided was a title "too narrow and not too broad" (*Maricopa County Mun. Water Conservation Dist. No. 1 v. La Prade*).

The last clause of this section clearly signals that portions of bills that are not fairly described in the title should, where possible, be severed from those parts adequately described, and the Arizona courts have applied this severability notion (e.g., *State v. Pelosi*). The application of this section to initiated statutes is discussed in the commentary under Article IV, part 1, section 1(15).

SECTION 14

No act or section thereof shall be revised or amended by mere reference to the title of such act, but the act or section as amended shall be set forth and published at full length.

Like the previous section, this one aims at combating legislative ignorance or inadvertence in enacting new laws, to "prevent amendments by merely striking out or adding sentences in a contextual vacuum" (*State v. Fridley*). (The last clause of Article IX, section 9 contains a similar prohibition, aimed specifically at taxation legislation.) Although the objective is salutary, the instrument chosen to achieve it is blunt, potentially inefficient, and can be difficult to enforce. A common problem is that, as laws become more complex and the collective web of statutes becomes more comprehensive, new laws may incidentally or implicitly alter or modify existing statutes.

In general, the courts have been quite hostile to claims that this section has been violated. The Supreme Court has held, for example, if the new act is "complete, comprehensive and independent," the fact that "some of its provisions have inevitably and naturally amended, modified, or altered" existing laws does not require incorporation of those other laws (*State Tax Commn. v. Shattuck*). The Court has taken the same approach to new laws that incidentally repeal, rather than simply amend, existing laws (*Mosher v. City of Phoenix*, 1932). The controlling idea is that the new law be "complete in itself [with] no tendency to mislead or deceive" (*State v. Pelosi*).

This section does not prohibit legislation that simply incorporates other statutes by reference (thus its caption in printed versions of the constitution—"legislation by reference prohibited"—is misleading). For example, the legislature may adopt an act of Congress by reference without violating this section (*In re Altmari*). This section has been held inapplicable to constitutional amendments (*Barth v. White*; see the commentary on Article XXI, section 1). But it has been applied to city charters submitted to voters for adoption pursuant to Article XIII, section 2, because "the necessity and reason of this requirement" is the same in the municipal as in the state legislative context (*Schultz v. City of Phoenix*).

SECTION 15

A majority of all members elected to each house shall be necessary to pass any bill, and all bills so passed shall be signed by the presiding officer of each house in open session.

By effectively making absent members negative votes, this provision differs from the longstanding practice of the U.S. Congress (although not specifically

provided in the U.S. Constitution, see Article I, section 7), that only a majority of those present and voting (assuming a quorum is present) is required for passage in each house.[49] Given the current size of the legislature, the affirmative votes of thirty-one house members and sixteen senators are required to pass legislation. The result is that legislation is somewhat more difficult to enact in Arizona, a result consistent with the Arizona framers' distrust of the legislature, and their zeal to promote democratic accountability.

If a bill passes one house and is amended in the other, it must return to the original house for final passage (*Cox v. Stults Eagle Drug Co.*). Addressing an odd circumstance resulting from a clerical error, a court of appeals held that the legislature did not validly enact a law when the senate amended and then approved a two-page bill that had previously passed the house, and then sent it back to the house, where it was approved but with the second page missing, because the bill (whether considered in its one or two-page form) had not gained final approval by each house (*State v. Fridley*).

SECTION 16

Any member of the legislature shall have the right to protest and have the reasons of his protest entered on the journal.

This provision, reflecting the framers' solicitude for free speech and minority opinion, has received no published attention from the courts or the attorney general. It is not clear whether it protects the airing of general grievances or merely those relating to legislative action or inaction.

SECTION 17

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer, other than a justice of the peace, be increased or diminished during his term of office; provided, however, that when any legislative increase or decrease in compensation of the members of any court or the clerk thereof, or of any board or commission composed of two or more officers or persons whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member or clerk of such court, or

[49] The same standard applies in the U.S. Congress in measuring the two-thirds of each house required to override a presidential veto (Art. I, sec. 7) (*Missouri Pac. Ry. v. Kansas*), and the two-thirds of each house required to propose constitutional amendments (Art. V) (*National Prohibition Cases*).

any member of such board or commission, it shall be effective from such date as to each thereof.

This section reflects the framers' acute concern about abuses of the legislative power of the purse. It seeks to combat several evils: corruption (paying extra for work already performed); the use of legislative control over salaries of public officials in other branches to influence their conduct; and entreaties to the legislature about salaries by officers in other branches. On this latter point, an early decision of the Supreme Court (authored by a former constitutional convention delegate) floridly described an objective of this section as to promote the public official's devotion to "his official duties, unembarrassed by any feeling that his worth is being niggardly rewarded in money, and the offspring of such a feeling which usually moves in the direction of increased compensation" (*County of Yuma v. Sturges*; see also *County of Greenlee v. Laine*).

The first objective has not been the subject of judicial attention; because salaries of public officials have long been controversial, however, this section has received considerable attention from the courts. In insulating public officers from salary adjustments during their terms of office, this section echoes similar protections in the U.S. Constitution for the president (Article II, section 1, clause 7) and federal judges (Article III, section 1). Besides being an offshoot of the separation of powers principle of Article III, this provision also complements two other sections: Article VI, section 33, which specifically protects justices and judges against salary reductions; and Article XXII, section 17, which provides that all state and county officers, with minor exceptions, shall be paid "fixed and definite salaries" and receive no fees for their own use. Although the constitution was amended in 1970 to overhaul the previous system for establishing the salaries of elected public officials (see Article V, section 13), the first sentence of that amendment expressly incorporated the limitations of this section.

This section has twice been amended in minor respects. A 1930 amendment added the proviso from the middle to the end of the section. This slightly altered the general prohibition on salary adjustment by allowing the salaries of all members of multimember bodies (such as courts) to be adjusted at one time, even when those members have different terms. The idea was to avoid the "obvious injustice" of compensating members of the same body different salaries for exercising the same authority and doing similar work (*Peterson v. Speakman*). Because the amendment expressly applies to decreases as well as increases in the salaries of multimember bodies, the Supreme Court has construed it to override the protection against salary reduction for judges during their terms of office found in Article VI, section 24 (formerly Article VI, section 33) (*County of Maricopa v. Rodgers*). The second amendment to this section, in 1953, exempted justices of the peace from the prohibition on salary adjustment.

While the first clause of this section is directed specifically at the state legislature, the Supreme Court has applied the second clause (beginning "nor shall the compensation of any public officer") to local governments as well, because it refused "to suppose that the framers . . . left other tax-paying units of the state . . . authority to play fast and loose with their officers' salaries as rewards or punishments" (*State Consol. Pub. Co. v. Hill*, see also *Gay v. City of Glendale*). It does not apply, however, to officers who serve the state without a "fixed and definite term of office" (*State ex rel. Colorado River Commn. v. Frohmiller*).

The prohibition on salary adjustment does not apply to changes in policy on reimbursement for expenses (*Earhart v. Frohmiller*); nor to liberalization of public employee pension benefits and qualifiers, even if based on past service (*Rochlin v. State*); nor to a law allowing governmental salaries to be garnished, because this does not "reduce" the officer's compensation in a constitutional sense (*State v. Surety Fin. Co.*). It also does not prevent an increase in salary during a term of office that results from a contingency (such as a specified amount of population growth) provided for by a law in effect at the beginning of the term, because the salary adjustment does not result from legislative action subsequent to the beginning of the officer's term (*County of Yuma v. Sturges*). Similarly, it allows the legislature to increase (*Bland v. Jordan*) or decrease an officer's salary by statute enacted before her term of office begins, even if the act does not take effect until after the term starts (*Moore v. Frohmiller*, 1935; see also *Kleindienst v. Jordan*).

SECTION 18

The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

This section is probably unnecessary because the legislature has the power to act unless restrained by some constitutional provision (see the commentary on Article IV, part 1, subsection 1). Although its text might be construed as giving the legislature exclusive authority to define the substantive limits of the state's sovereign immunity from lawsuits, the courts have not hesitated to issue decisions, without legislative guidance, that have curtailed or otherwise adjusted the state's common law sovereign immunity (e.g., *Stone v. Arizona Highway Commn.*; *Ryan v. State*, neither citing this section). While a court of appeals has described this section as giving the legislature broad power "to restrict an individual's right to sue the state and the manner in which a suit may be maintained" (*Landry v. Superior Court*), its reach must be considered in tandem with other constitutional restrictions, such as the obligation to provide "due process" (Article II, section 4) and "equal privileges and immunities" (Article II, section 13); limitations on local and special laws (section 19 of this part); and prohibitions on abolishing causes of action for injuries or limiting damages found in Article II, section 31, and Article XVIII, section 6 (*see Dunn v. Carruth*).

SECTION 19

No local or special laws shall be enacted in any of the following cases, that is to say:

1. Granting divorces.
2. Locating or changing county seats.
3. Changing rules of evidence.
4. Changing the law of descent or succession.
5. Regulating the practice of courts of justice.
6. Limitation of civil actions or giving effect to informal or invalid deeds.
7. Punishment of crimes and misdemeanors.
8. Laying out, opening, altering, or vacating roads, plats, streets, alleys, and public squares.
9. Assessment and collection of taxes.
10. Regulating the rate of interest on money.
11. The conduct of elections.
12. Affecting the estates of deceased persons or of minors.
13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises.
14. Remitting fines, penalties, and forfeitures.
15. Changing names of persons or places.
16. Regulating the jurisdiction and duties of justices of the peace.
17. Incorporation of cities, towns, or villages, or amending their charters.
18. Relinquishing any indebtedness, liability, or obligation to this state.
19. Summoning and empanelling of juries.
20. When a general law can be made applicable.

This section was a progeny of the Harrison Act, an 1886 federal statute that prohibited local or special laws in the territories.[50] As the Supreme Court once put it: "In 1912, the makers of the Constitution were convinced, after some 25 years of experience, that this was a wise and salutary policy, and wrote the same provision in this Constitution in even more stringent terms" (*Udall v. Severn*). Actually, the Arizona framers modified the federal language only slightly. Subdivisions 3, 6, and 18 of this section were not in the original federal law, and the federal version included six other provisions that the Arizona drafters did not adopt. The Harrison Act was itself, as introduced into Congress, "copied *verbatim* from the constitution of the State of Illinois"; similar provisions can be

[50] Act of July 30, 1886, ch. 818, 24 Stat. 170. The Harrison Act, which was codified at 48 U.S.C. § 1471, was not repealed until 1983. Act of Dec. 8, 1983, Pub. L. No. 98–213, § 16(w), 97 Stat. 1463 (1984).

found in most other states.[51] Arizona courts have sometimes looked to older cases construing the Harrison Act for guidance in interpreting this section (*State v. Levy's*).

Particular subparts of this section are echoed elsewhere in the Constitution; for example, Article XII, section 4 (county officers' salaries "shall remain in full force and effect until changed by *general* law"), and Article XIII, section 1 ("[m]unicipal corporations shall not be created by *special* laws") (emphases added).

Dozens of cases seek to apply parts of this section, most commonly the thirteenth and twentieth subsections. A number of the subsections have not been addressed in any published judicial decision. The Arizona courts have frequently been asked to apply this section in tandem with the equal privileges and immunities requirement of Article II, section 13 (e.g., *Coggins v. Ely*). Often the courts have simply considered the two sections together (e.g., *Big D Constr. Corp. v. Court of Appeals*), sometimes describing them as "essentially addressed to opposite sides of the same coin" (*Smith v. City of Tucson*; see also *Arizona Downs v. Arizona Horsemen s Found.*).

Recently, however, the Supreme Court has helpfully cut through the bramble bush of past decisions, aided by its determination that this section is designed "to avoid the evils created by a patchwork type of legal system where some laws applied in a few locations while others applied elsewhere" (*Republic Inv. Fund v. Town of Surprise*). Because this is a different objective from that of Article II, section 13, the Court in that case adopted a "different and heightened standard of review" for testing statutes against this section. Starting with the premise that, to be "general, a law need not operate on every person, place, or thing within the state," the Court adopted a tripartite test for measuring laws against the demands of this section: (1) whether the law's classification is rationally related to a legitimate legislative purpose (similar to the "rational basis" test most commonly applied under Article II, section 13); (2) whether it is sufficiently general to encompass "all members of the relevant class"; and (3) whether it is sufficiently "elastic" to allow members to move into and out of the class as circumstances change *id.*, approving the formulation of the court of appeals). The Court concluded that a law restricting deannexation of certain kinds of land to a closed class of twelve cities within one county in the state violated the third part of the test. A court of appeals has applied this reasoning to uphold a state decision to limit public funding for liver transplants to persons over eighteen years of age (*Salgado v. Kirschner*).

[51] 17 Cong. Rec. 4062 (daily ed. May 1, 1886) (statement of Rep. Springer, Illinois, who introduced the bill). See generally Robert F. Williams, "Equality Guarantees in State Constitutional Law," *Texas Law Review* 63 (1985), 1195–1224.

SECTION 20

The general appropriation bill shall embrace nothing but appropriations for the different departments of the state, for state institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bills, each embracing but one subject.

The Supreme Court has said that the purpose of this section is to discourage incorporating in an appropriations bill "all sorts of ill conceived, questionable, if not vicious, legislation," a tendency that is particularly acute because of the necessity of passing appropriations legislation every year (*Sellers v. Frohmiller*, quoting a Missouri decision). In fact, *Sellers* described the general appropriations bill as "not in the true sense of the term legislation," but rather "merely a setting apart of the funds necessary for the use and maintenance of the state government already in existence and functioning." The idea expressed in this section is not part of the U.S. Constitution (see, e.g., *Tennessee Valley Auth. v. Hill*), but is found in the constitutions of many other states. It should be considered with the general legislative power over the purse (see the commentary on Article IX, section 5) and is related to the exemption from the referendum process for legislation appropriating money for state institutions (Article IV, part 1, section 1(3)).

The General Appropriation Bill

Although this section refers to a single "general appropriation bill," a court of appeals has said that the legislature in fact "may enact more than one truly 'general' appropriations bill" in a single year (*Litchfield Elementary School Dist. No. 79 v. Babbitt*). Furthermore, although the textual command of this section is that the general appropriations bill shall contain "nothing but" appropriations, the courts have allowed it to contain "such other matters as are merely incidental and necessary to seeing that the [appropriated] money is properly expended for that purpose only" (*State v. Angle*). By thus allowing the legislature some leeway, the courts have left themselves with the task of drawing lines between that which is "incidental and necessary" to the appropriations process, and that which is prohibited substantive legislation. For example, an appropriations rider forbidding a husband and wife from both being employed by the state has been held not incidental and necessary, but rather an "attempt to enact far reaching legislation establishing a new qualification for all state employees whose salaries are paid under the general appropriation bill," and thus in violation of this section (*Caldwell v. Board of Regents*; see also *Sellers v. Frohmiller*). Where invalid provisions are included in the general appropriations bill, they may be severed without affecting the rest of the bill (*State Bd. of Health v. Frohmiller, dictum*).

The courts do not readily construe otherwise lawful incidental provisions in a general appropriations bill to repeal or modify existing general legislation

(*Carr v. Frohmiller*). An appropriations bill may, however, be considered in construing ambiguities in general law (*State v. Ash*). Also, while substantive legislation in an appropriations bill is discouraged, the failure of the legislature to pass an appropriations bill to fund a previously authorized program can, under some circumstances at least, effectively repeal the program, for it has not been considered a "use of the appropriations function for legislative purposes" (*Cochise County v. Dandoy*).

Individual Appropriations Bills

The last sentence of this section requires that all other appropriations on different subjects be made by separate and distinct bills, "each embracing but one subject." This comports with the general "single-subject" requirement of section 13 of this part; both are aimed at discouraging the time-honored legislative practice of "logrolling," or combining disparate legislative minorities into a majority by packaging unrelated legislative goals in a single bill. Accordingly, the Supreme Court has applied the same test regarding singleness of subject in both cases (*Black & White Taxicab Co. v. Standard Oil Co.*). Furthermore, the remedy for a violation in both cases necessarily must be to strike down the entire act, in order to serve the constitutional purpose of encouraging individual legislative subjects to be considered on their own merits; otherwise, the court would have to make a factual inquiry into whether "logrolling" had actually occurred, an inquiry that "injects the courts more deeply than they should be into the legislative process" (*Litchfield Elementary School Dist. No. 79 v. Babbitt*).

Determining what constitutes an "appropriation" has, however, proved somewhat difficult. The Supreme Court has suggested, for example, that this section applies to "state funds collected for state purposes," and not to a fund created for a special purpose and supplied by dedicated tax revenues (*Black & White Taxicab Co. v. Standard Oil Co.*). Similar issues are raised by the governor's veto power over "items of appropriations of money" found in Article V, section 7, and the commentary under that section is relevant here.

SECTION 21

Term limits of members of state legislature. The members of the first legislature shall hold office until the first Monday in January, 1913. The terms of office of the members of succeeding legislatures shall be two years. No state Senator shall serve more than four consecutive terms in that office, nor shall any state Representative serve more than four consecutive terms in that office. This limitation on the number of terms of consecutive service shall apply to terms of office beginning on or after January 1, 1993. No Legislator, after serving the maximum number of terms, which shall include any part of a term served, may serve in the same office until he has been out of office for no less that one full term.

The first sentence of this section smoothed the transition to statehood and is obsolete. The second sentence fixes the terms for both legislative houses to two years. The framers' zeal for democratic accountability discouraged them from even considering longer terms for one legislative house on the model of the U.S. Senate. The terms of all other state and county officers have since been changed to four years (see Article V, section 1; Article XII, section 3; Article XIX), except that charter counties may provide for different terms in their charters (see Article XII; section 8). Three times—in 1922, 1933, and 1950—the voters have been asked to lengthen legislators' terms to four years. Each time the voters have said no; the first two times by wide margins, and the last time by a very narrow margin. In 1992 the last three sentences (and the caption) were added after being put on the ballot by initiative as part of a package imposing term limits on all state and federal elective officers (see also Article V, sections 1, 10; Article VII, section 18; Article XV, section 1; and Article XIX).

SECTION 22

There is no section 22.

In the original constitution, this section set legislative salaries at seven dollars per day. It was repealed by initiative petition in 1932 and never replaced. Legislative salaries are now set by the process contained in section 13 of Article V, added in 1970.

SECTION 23

It shall not be lawful for any person holding public office in this state to accept or use a pass or to purchase transportation from any railroad or other corporation, other than as such transportation may be purchased by the general public; provided, that this shall not apply to members of the national guard of Arizona traveling under orders. The legislature shall enact laws to enforce this provision.

This section reflects the framers' preoccupation with potential governmental corruption by corporations, a realistic concern given the political dominance, exercised by means fair and foul, of large railroad and mining corporations during the territorial period.[52] The drafters cast the language of this section broadly enough ("transportation" and "other corporation[s]") for the provision to have continuing vitality in the air age; for example, the attorney general has construed it to prohibit free airline trips for public officials (Op. Atty. Gen. 190–077). The section applies to all public officers, including municipal ones (*State ConsoL Pub. Co. v. Hill*, *dictum*).

[52] See Leshy, "The Making of the Arizona Constitution," 10–16, notes 50–87 and accompanying text.

SECTION 24

The enacting clause of every bill enacted by the legislature shall be as follows: "Be it enacted by the Legislature of the State of Arizona," or when the initiative is used: "Be it enacted by the People of the State of Arizona."

This innocuous provision has not been the subject of reported judicial attention.

SECTION 25

The legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty to:

1. Provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices.
2. Adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations.

In the exercise of the powers hereby conferred, the legislature shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay.

This relic of the Cold War, fittingly approved by the voters just after the Cuban missile crisis in the fall of 1962, was urged upon Arizona by the federal civil defense authorities; happily, it has not been invoked.

Article V

Executive Department

SECTION 1

Term limits on Executive department and state officers; term lengths; election; residence and office at seat of government; duties. A. The executive department shall consist of the governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction, each of whom shall hold office for a term of four years beginning on the first Monday of January, 1971 next after the regular general election in 1970. No member of the executive department shall hold that office for more than two consecutive terms. This limitation on the number of terms of consecutive service shall apply to terms of office beginning on or after January 1, 1993. No member of the executive department after serving the maximum number of terms, which shall include any part of a term served, may serve in the same office until out of office for no less than one full term.

B. The person having the highest number of the votes cast for the office voted for shall be elected, but if two or more persons have an equal and the highest number of votes for the office, the two houses of the legislature at its next regular session shall elect forthwith, by joint ballot, one of such persons for said office.

C. The officers of the executive department during their terms of office shall reside at the seat of government where they shall keep their offices and the public records, books, and papers. They shall perform such duties as are prescribed by the constitution and as may be provided by law.

This section establishes the framework of the executive department. Despite its introductory language that the executive branch "shall consist of" the five named officials, in fact other offices established elsewhere in the constitution exercise some executive power. These include the elected state mine inspector (Article XIX), the three-person elected corporation commission (Article XV), and the state board of education and board of regents of the university (Article XI).

Five principal state elective offices are created by this section (unlike many other states, Arizona has no lieutenant governor). These officers are elected individually; that is, they need not be on a single ticket or members of the same political party. Until 1970 all the officers listed in this section served two-year terms. The terms were extended to four years (and the caption added) by an amendment to this section adopted in 1968. The original version of this section also included a state auditor as a constitutional office, but this position was abolished by a separate amendment to this section also adopted in 1968. The passage of these two amendments in the same election created a tangle that required unraveling by the Arizona Supreme Court (see *State ex rel. Nelson v. Jordan*, discussed in the commentary on Article IV, part 1, section 1(12)).

Subsection 1(A) was amended in 1992, principally by adding the last three sentences, to limit state executive officers to two consecutive terms of office. This was part of a package creating term limits for all federal and state executive officers (see also Article IV, part 2, section 21; section 10 of this Article; Article VII, section 18; Article XV, section 1; Article XIX).

Until 1988 the successful candidate for any of these offices needed only to garner more votes than any other candidate for that office. In 1988, shortly after the impeachment and conviction of Governor Evan Mecham (who had been elected in a three-way race with about 40 percent of the vote in 1986), paragraph B was amended to require the winner to obtain a majority of votes cast. Conforming amendments were made at the same time to Article VII, section 7 (dealing with elections generally) and Article VIII, part 1, section 4 (dealing with recall elections). In the first election after this amendment took effect, in the fall of 1990, a few thousand write-in votes for splinter candidates necessitated a runoff election for governor, delaying the transition for several months. As a result, the 1988 amendment to this and the two other sections were repealed in 1992, thus reinstating the plurality requirement that had prevailed since statehood.

While this section establishes the principal constitutional offices of the state executive department, it does not by implication prevent the legislature from establishing other state executive offices, such as a state tax commission (*Campbell v. Hunt*), an industrial commission (*Sims v. Moeur*), a commission on the Colorado River (*Shute v. Frohmiller*), the position of constable (*Barrows v. Garvey*), and a post auditor (*Lockwood v. Jordan*). The legislature may provide that such nonconstitutional executive offices be filled either by election or by executive or legislative appointment, and it may specify the qualifications of and

grounds for removing their occupants (*Sims v. Moeur*; *Holmes v. Osborn*). Being "creature[s] of the legislature," the Court has said, makes the legislature "all-powerful over [them] even to [their] abolition" (*Campbell v. Hunt*). This description should not be taken wholly literally, however, because separation of powers constraints arising out of Article III place some limits on the power of the legislature to interfere with executive branch offices (see, e.g., *Lockwood v. Jordan*; *Ahearn v. Bailey*, and the commentary on section 4 of this article). How far the legislature can go in creating new nonconstitutional offices that overlap with or invade the traditional functions of constitutional officers is discussed in the commentary on section 9 of this article.

Although this section appears to set fixed terms for the constitutional officers, Article XXII, section 13 has been interpreted to mean that they and other elected state officials hold office until the election and qualification of their successors. Furthermore, although the last sentence of paragraph C suggests that at least some of the duties of these officials are as "prescribed" by the constitution, in fact only the governor and the superintendent of public instruction have duties expressed in the constitution (the governor in the remainder of Article V, and the superintendent in Article XI, section 2). The other named officers have only those duties "as may be provided by law," although this may not be taken literally either (see the commentary on section 9 of this article).

SECTION 2

Eligibility to state offices. No person shall be eligible to any of the offices mentioned in section 1 of this article except a person of the age of not less than twenty-five years, who shall have been for ten years next preceding his election a citizen of the United States, and for five years next preceding his election a citizen of Arizona.

As originally adopted, this section limited eligibility to state offices to "male persons" who met the other qualifications stated. The constitutional framers had rejected, after heated debate, the principle of female suffrage and office holding, except for school elections (see the commentary on Article VII, section 8). At the first state general election in 1912, the voters approved an initiated amendment to Article VII, section 2, allowing women to vote and hold office, but, in a rather astonishing oversight, the drafters failed to amend this section. No formal attempt was made to reconcile the inconsistency for many years, and a number of women subsequently held state office. Finally, in 1988, with a woman occupying the office of governor, voters overwhelmingly (and doubtless with a touch of embarrassment) amended this section to eliminate the gender restriction (and add the caption).

The Supreme Court has held that the qualifications stated in the constitution for executive offices are exclusive, and the legislature "is therefore powerless to add to or detract from [them]" (*Campbell v. Hunt*, not specifically citing this

section). Thus a person serving on the state tax commission is not thereby ineligible to be elected to or hold the office of governor, and he would be deemed to vacate his office as tax commissioner when he became governor (*id.*). By the same reasoning, a statute requiring the attorney general to be a practicing attorney for five years immediately prior to taking office has no force and effect (*State ex rel. Sawyer v. LaSotd*). The same result has been reached regarding the qualifications forjudges under Article VI, section 18 (*Whitney v. Bolin*).

SECTION 3

The governor shall be commander-in-chief of the military forces of the state, except when such forces shall be called into the service of the United States.

This section echoes Article II, section 2 of the U.S. Constitution and is an adjunct to Article XVI, dealing with the state militia. Although the governor is in charge, the Supreme Court has said the state courts can exercise jurisdiction over an action by a local school district seeking to limit, on state common law nuisance grounds, the state air national guard's use of air space near a school (*Williams v. Superior Court*).

SECTION 4

The governor shall transact all executive business with the officers of the government, civil and military, and may require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices. He shall take care that the laws be faithfully executed. He may convene the legislature in extraordinary session. He shall communicate, by message, to the legislature at every session the condition of the state, and recommend such matters as he shall deem expedient.

This section contains, first, a general vesting of executive authority in the governor's office. A court of appeals has held, however, that this section does not grant the governor plenary power, such as would authorize him to select a site for a prison in the absence of legislative direction (*Litchfield Elementary School Dist. No. 79 v. Babbitt*). Furthermore, the governor has no right to spend money for public purposes "in the absence of either constitutional or statutory processes authorizing it" (*Le Febvre v. Callaghan*; see Article IX, section 5, and its commentary).

The second sentence of this section, requiring the governor to "faithfully execute" the laws, repeats language applicable to the president in Article II, section 3 of the U.S. Constitution. The Supreme Court has held that this phrase includes "the power to select subordinates and to remove them if they are unfaithful,"

because removal is an "executive function"; however, the legislature "may prescribe the grounds or causes" for it and may directly remove public officers through the impeachment process under Article VIII, section 2 (*Ahearn v. Bailey*). Furthermore, the legislature's "absolute power to abolish an office does not necessarily include the right to remove office-holders," and a law that shortens the terms of existing nonconstitutional officers and provides for the appointment of new ones violates this section and the separation of powers principle of Article III (*id.*).

The Court has also held that the governor's obligation to execute the laws means that, unless the legislature has provided otherwise, the governor "is responsible for the supervision of the executive department," including nonconstitutional agencies like the state land department, and the courts will restrain other officers, such as the state attorney general, from interfering with that supervision (*Arizona State Land Dept. v. McFate*). But the courts will, if necessary, order the governor to perform a duty "ministerial in its nature," such as signing checks to pay lawfully incurred governmental debts (*Winsor v. Hunt*). And the Supreme Court has recently held that the governor's obligation to "faithfully execute" laws means that she has no authority to "impound" or refuse to spend money lawfully appropriated by the legislature, unless the "legislature purpose of the appropriation [has been] carried out and funds remain" (*Rios v. Symington*). In that situation, the governor may impound the appropriated funds in the interest of prudent "fiscal management," but this does not permit the governor to substitute his "judgment for that of the Legislature on matters of appropriation" (*id.*).

The third sentence, giving the governor the power to call the legislature into extraordinary session, merely rescripts the second sentence of Article IV, part 2, section 3. The fourth sentence, dealing with communications and recommendations to the legislature, mimics language in Article II, section 3 of the U.S. Constitution. Neither has been the subject of published judicial interpretation.

SECTION 5

> The governor shall have power to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law.

This section gives the governor authority to overrule or limit punishment meted out by the judiciary after conviction, except for "treason and cases of impeachment." The authority is, however, limited by the last phrase: "as may be provided by law." In an early decision (and over a vigorous dissent), the Supreme Court interpreted that phrase as giving the legislature total control over the

pardon power, including the right to deny it to the governor (*Laird v. Sims*),[53] or to limit her power of commutation (*State v. Marquez*; see also *State ex rel. Arizona State Bd. of Pardons & Paroles v. Superior Court*). Covering only "reprieves, commutations, and pardons," this section does not give the governor any constitutional power over parole; by statute, that power rests with a state board (Ariz. Rev. Stat. 31–402; *State ex rel. Murphy v. Superior Court*).

SECTION 6

In the event of the death of the governor, or his resignation, removal from office, or permanent disability to discharge the duties of the office, the secretary of state, if holding by election, shall succeed to the office of governor until his successor shall be elected and shall qualify. If the secretary of state be holding otherwise than by election, or shall fail to qualify as governor, the attorney general, the state treasurer, or the superintendent of public instruction, if holding by election, shall, in the order named, succeed to the office of governor. The taking of the oath of office as governor by any person specified in this section shall constitute resignation from the office by virtue of the holding of which he qualifies as governor. Any successor to the office shall become governor in fact and entitled to all of the emoluments, powers and duties of governor upon taking the oath of office.

In the event of the impeachment of the governor, his absence from the state, or other temporary disability to discharge the duties of the office, the powers and duties of the office of governor shall devolve upon the same person as in the case of vacancy, but only until the disability ceases.

The first paragraph of this section establishes the line of succession to the governorship when the office is vacant or the governor is permanently disabled. Because Arizona has no lieutenant governor, the secretary of state is next in line to succeed to the office, if she has been elected as secretary of state. If not (as actually occurred in 1978), the attorney general becomes governor.

In its original form, this section somewhat inartfully provided that whenever the governor died, was removed from office, or was temporarily or permanently disabled or absent from the state, the "powers and duties" of the office "devolve upon" the secretary of state. Upon the death of incumbent governor Sidney Osborn in 1948, the Supreme Court construed this language to mean that secretary of state Dan Garvey was "ex officio or acting governor, invested by constitutional mandate with all the powers and duties of that high office," but not

[53] This law, passed over the governor's veto and thereafter approved by the voters at a referendum, was apparently triggered by the actions of Governor George W. P. Hunt, who had liberally exercised his power under this section to grant reprieves to persons sentenced to death, as part of his campaign to end the death penalty in Arizona. See the commentary on sec. 15 of Art. II and note 17 above.

"governor de jure or de facto," and not entitled to the governor's compensation (*State ex rel. De Concini v. Garvey*). Apparently dissatisfied with this legal hair-splitting, the voters approved an amendment within five months of this decision that rewrote the section to its present form (except for a 1968 amendment that deleted the state auditor from the line of succession at the same time it abolished that office). Garvey thus has the distinction of being Arizona's longest-serving "ex officio" governor.

As rewritten, this section now separates permanent succession (addressed in the first paragraph) from temporary disability (the second paragraph). The latter includes merely an absence from the territorial boundaries of the state, which means that it is possible for a governor of one political party who goes out of state to be temporarily displaced by a secretary of state of another political party.

The acts of the "acting" governor in that circumstance are "just as valid and binding as though they had been performed by the Governor himself" (*Mc-Cluskey v. Hunter*).

SECTION 7

Every bill passed by the legislature, before it becomes a law, shall be presented to the governor. If he approve, he shall sign it, and it shall become a law as provided in this constitution. But if he disapprove, he shall return it, with his objections, to the house in which it originated, which shall enter the objections at large on the journal. If after reconsideration it again passes both houses by an aye and nay vote on roll call of two-thirds of the members elected to each house, it shall become a law as provided in this constitution, notwithstanding the governor's objections. This section shall not apply to emergency measures as referred to in section 1 of the article of the legislative department.

If any bill be not returned within five days after it shall have been presented to the governor (Sunday excepted) such bill shall become a law in like manner as if he had signed it, unless the legislature by its final adjournment prevents its return, in which case it shall be filed with his objections in the office of the secretary of state within ten days after such adjournment (Sundays excepted) or become a law as provided in this constitution. After the final action by the governor, or following the adoption of a bill notwithstanding his objection, it shall be filed with the secretary of state.

If any bill presented to the governor contains several items of appropriations of money, he may object to one or more of such items, while approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefor, and such item or items shall not take effect unless passed over the governor's objections as in this section provided.

The veto power of the governor shall not extend to any bill passed by the legislature and referred to the people for adoption or rejection.

This section outlines the governor's power of veto, a fundamental check on the lawmaking power of the legislature. It applies to all laws, including those repealing previously enacted laws (*McDonald v. Frohmiller*). In the ordinary case, the governor may veto a proposed law within five days (Sundays excepted) of its being presented to her. Failure to act within that period allows the bill to become law without her signature. The governor's veto may be overridden upon a vote in each house of two-thirds of the members elected to that house, a more rigorous requirement than the practice under the U.S. Constitution (Article I, section 7), which requires just two-thirds of those voting on the question of override (*Missouri Pac. Ry. v. Kansas*).

If the legislature adjourns within five days of the bill being presented to the governor, she has ten days after such adjournment (Sundays excepted) to veto the bill, in which case there is no opportunity for override. If she does not act, the bill becomes law. The Arizona Constitution does not, in other words, allow for a "pocket veto" such as is practiced under Article I, section 7 of the U.S. Constitution.[54] A bill sent to the governor at the end of the legislative session that is neither vetoed nor signed by the governor within ten days after adjournment becomes law "from and after the tenth day from the date of adjournment," although it does not actually take effect until ninety days after the close of the legislative session unless it is deemed an emergency measure under Article IV, part 1, section 1(3) (*Dunbar v. Cronin*).

The veto power set out in this section is subject to two important limitations. First, according to the last paragraph of the section, it does not apply to proposed measures that the legislature enacts and refers directly to the people for popular vote for adoption or rejection. This power of legislative reference is contained in Article IV, part 1, section 1(3), and extends to any bill or "item, section, or part" thereof that is not deemed an emergency measure. Its net effect is to give the legislature and the people, in combination, a means of circumventing the governor's power of veto, subject to the possible gubernatorial power to veto initiative or referendum measures after the voters have acted upon them (see the commentary on Article IV, part 1, section 1(6)).

The second limitation on the governor's veto power is found in the last sentence of the first paragraph of this section, providing that "this section" does not apply to emergency measures. The text here is misleading, because Article IV, part 1, section 1(3) gives the governor power to veto emergency measures (subject to legislative override by vote of three-fourths of the members elected to each house). There remains the question whether the time limits in the second paragraph of this section apply to emergency measures, a question made particularly troublesome by the last sentence in the first paragraph. In a

[54] The pocket veto practiced under the U.S. Constitution prevents a bill passed at the end of the legislative session from becoming law even if the president does not formally veto it (see *The Pocket Veto Case*). A colloquy on the floor of the convention reflected a conscious decision not to follow the federal practice. See Goff, *Records,* 916.

sensible decision, the Supreme Court has harmonized this section with Article IV, part 1, section 1(3), and has held that the governor's veto should operate on the same time schedule with respect to both emergency measures and ordinary legislation (*Clark v. Boyce*). In effect, then, the last sentence of the first paragraph should be read as saying that this "paragraph" (rather than this "section") shall not apply to emergency measures. The net result of all this is that if a proposed bill contains an emergency clause, and is not vetoed by the governor within the time limits of the second paragraph of this section, or if his veto is overridden by the required three-fourths vote of the legislature under Article IV, part 1, section 1(3), it takes effect upon the date it is filed with the secretary of state (*id.*).

The penultimate paragraph of this section gives the governor a power—shared by the governors in more than forty other states—to veto individual items of proposed spending in appropriations bills. Such a power did not exist under territorial law (*Porter v. Hughes*). The idea behind this so-called line-item veto is to limit the legislature's power to coerce the governor to accept spending items she does not want in return for gaining other items she does want. It is a potentially significant transfer of power over spending from the legislature (which is granted general power over the public purse in Article IX, section 5, last sentence) to the executive branch.

While the item veto is limited to bills making appropriations of money, the power it vests in the governor is magnified by two other parts of the constitution. Article IV, part 2, section 20 limits the scope of the "general appropriation bill" and provides that "[a]ll other appropriations shall be made by separate bills, each embracing but one subject." Section 13 of the same part reiterates this one-subject requirement and extends it to all bills, whether making appropriations or substantive law. Taken together, these provisions are designed to ensure that the executive is given the opportunity to veto legislative action on discrete subjects. This reduces, though it scarcely eliminates, the possibility of the governor being forced to choose between rejecting a program she favors in order to veto one she finds unacceptable, or accepting one she opposes to obtain one she favors. The legislature may, of course, still extract concessions from the governor on spending decisions because of the practical imperative that both branches achieve some minimum level of cooperation.

The item veto does not allow the executive to scale down an individual appropriation by altering the amount appropriated, but simply gives the governor power to reject the item altogether, while leaving other separate items intact (*Fairfield v. Foster*). Allowing the governor to alter the amount "would transform the merely negative legislative power of the Governor into an affirmative one," which was not permitted by either the "plain language" of this section or "the purpose of its makers" (*id.*).

A key issue is determining what is an "item" of appropriation subject to the veto. The Supreme Court has described an "item" as a "distinct and separable part" of the general appropriation (*Callaghan v. Boyce*), or any part of an appropriation

bill referring to "a specified sum of money [to be] spent for a specified purpose" (*Clark v. Boyce*). A part of a highway bill that apportions money collected pursuant to a tax levied in another part of the same bill among state and local governments is not an "item of appropriation" under this section (*Black & White Taxicab Co. v. Standard Oil Co.*). And neither are parts of bills that authorize local governments to expend public money, because the veto extends only to items of appropriation "of the state's money levied and collected for the purposes of the state" (*id.*). Moreover, the governor may not veto a portion of an item that sought to repeal another statute, while leaving the amount appropriated intact, if the repealer "is clearly matter incidental to the appropriation and an inseparable part of the item" (*Callaghan v. Boyce*).

But the item veto does apply to a legislative appropriation that reduces a prior legislative appropriation, because its "obvious effect is to reduce the amount of the previous appropriation" for that purpose, and this section "does not permit such reductions free of gubernatorial oversight" (*Rios v. Symington*). The same case applied that principle to allow the governor to item veto a statutory transfer of funds previously appropriated by the legislature for a special purpose to the general fund. But it also held that a statutory transfer of certain funds from local to state government is not subject to the item veto, because the original legislative action recognizing the authority of local governments to spend those funds was not an appropriation, because it did not specify an "amount" or a "purpose." (See also the commentary on Article IX, section 5.)

SECTION 8

When any office shall, from any cause, become vacant, and no mode shall be provided by the constitution or by law for filling such vacancy, the governor shall have the power to fill such vacancy by appointment.

This section gives the governor residual power to fill vacancies in public offices, but only if the constitution or state law fails to provide a mechanism for filling the vacancy. It does not authorize the governor to fill offices that are already occupied (*McCall v. Cull*). Therefore, it is inapplicable to situations where an elected officeholder retains the office by operation of law after his term expires, until a successor is elected, which is the usual case because of Article XXII, section 13. But this section does apply where an office has become vacant by operation of law, and there is no statutory method for filling the vacancy; thus, when the attorney general was convicted of a felony, and a state statute mandated his automatic disqualification from office without specifying how the vacancy was to be filled, this section authorized the governor to appoint a replacement (*State ex rel. DeConcini v. Sullivan*).

Where the governor does act under this section to fill a vacancy in a nonconstitutional elective office, the legislature could provide by statute that the

appointee's term extends only to the first Monday in January following the next regular biennial election, even if the original occupant's term did not expire for two or more years, because "offices which are elective in their nature should, so far as practicable, be filled by election" (*State ex rel. Sullivan v. Moore*). But an appointee to a vacancy in a state constitutional office under this section fills out the remainder of the term, because the 1968 amendment to section 1 of this article, extending the terms of these state officers to four years, reflected a judgment that these officers should "hold office and seek election simultaneously" (*Londen v. Shumway*). The legislature might change this result by statute because this section operates only where a "mode" for filling the vacancy has not been provided "by law." For example, if the legislature provides that the senate must confirm a gubernatorial appointment to a particular office, senate confirmation is required for appointments made under this section (*Graham v. Lockhart*).

Filling vacancies in the Arizona delegation to the U.S. Congress is specially provided for in Article VII, section 17.

SECTION 9

The powers and duties of secretary of state, state treasurer, attorney general, and superintendent of public instruction shall be as prescribed by law.

This section should be read with the last sentence of section 1 of this article, referring to the "duties" of these officers. It is also related to several other sections of the constitution giving the legislature authority over the "powers and duties" of, for example, the state board of education (Article XI, section 3); the state superintendent of public instruction (Article XI, section 4); and county officers (Article XII, section 4). This section was amended in 1968 to delete the reference to the state auditor, as that office was abolished in that year.

In the leading case on the question, the Supreme Court has said that "by law" in this section means "by statute," and thus these offices have "no common-law powers or duties" (*Shute v. Frohmiller*). The legislature has "full and complete" power "to add to or take from" the power and duties of these offices, other than to impose on them duties "properly belonging to one of the other two branches" of government (*id.*). *Shute* has been followed in a long line of cases, such as one affirming that the attorney general cannot undertake any action that is not authorized by statute (*Gershon v. Broomfield*). The Supreme Court has not followed a consistent pattern of reading statutes authorizing these officers to take action either narrowly or broadly (cf. *Arizona State Land Dept. v. McFate* with *State ex rel. Corbin v. Pickrell* and *Westover v. State*).

In two decisions, the Supreme Court has limited the legislature's control over the powers and duties of these constitutional offices. One prevented the legislature from transferring certain auditing tasks from the state auditor to a

nonconstitutional executive agency, the board of finance (*Hudson v. Kelly*). The Court explained that *Shute* "was in error when it said that the *only* implied restriction on the legislature" (emphasis in original) in defining the powers of these officers was the separation of powers principle in Article III. Instead, said the Court in *Hudson*, the constitution implies that the legislature must prescribe "such powers and duties . . . as would enable [a constitutional officer] to perform the functions for which the office was created," and has "no power to take from a constitutional officer the substance of the office itself" (*id.*). Thus "a free and independent constitutional officer" cannot be made "subservient to the dictates of" a nonconstitutional officer. Four years later, the Court held that the legislature could not exempt its own expense accounts from review by the state auditor (*Giss v. Jordan*), because inherent in the constitutional office of auditor is the idea that accounts of public officials ought to be subject to an independent audit, and because the constitution made auditing an executive function that cannot be moved to the legislative branch.

The net effect of these cases is to leave somewhat unclear the extent to which these constitutional officers have any powers or duties beyond those prescribed, and not subject to limit, by the legislature. *Hudson* and *Giss* both involved the constitutional office of the state auditor, which was abolished in 1968. *Shute* and the other decisions on this question involved the power of the attorney general. This suggests that the legislature's power over constitutional officers could vary from office to office, although this seems at odds with the constitutional text, which is identical for all the offices listed in this section.

SECTION 10

There is no section 10.

This section originally prevented the state treasurer from succeeding himself at the end of what was then a two-year term, reflecting the framers' great concern about the temptations visited upon the state's chief financial officer. The treasurer's term was extended to four years by a 1968 amendment, and a 1980 amendment allowed the treasurer to serve two consecutive terms. In 1988 the voters soundly defeated a proposal to repeal this section outright, but in 1992 it was repealed. This was done only because section 1 of this article was amended to impose a two-consecutive-terms limit on all elected state executive officers, thus carrying forward the substance of this provision to that section.

SECTION 11

The returns of the election for all state officers shall be canvassed, and certificates of election issued by the secretary of state, in such manner as may be provided by law.

This section requires the secretary of state, following legislative direction, to report election returns and issue election certificates for state officers. In a 1917 decision growing out of a razor-close gubernatorial election, the Supreme Court held that this section is self-executing (*Campbell v. Hunt*, rejecting *dicta* to the contrary in *State v. Osborne*), and thus the legislature may not take this power from the secretary of state. Therefore, the issuance of the certificate of election by the secretary of state gives the winning candidate a *prima facie* right, where the election is contested, "to be admitted temporarily to the office until reversed or set aside by a court of proper jurisdiction in appropriate proceedings" (*id.*).[55] The rules governing contests for resolving disputed elections are "purely statutory" (*McCall v. City of Tombstone*); moreover, this section has been held to apply only to general elections, and does not restrict the legislature's plenary power over primary elections (*Brown v. Superior Court*).

SECTION 12

All commissions shall issue in the name of the state, and shall be signed by the governor, sealed with the seal of the state, and attested by the secretary of state.

This minor provision provides for the trappings of a commission, which is the formal embodiment empowering a person to perform the duties and exercise the authority of an office. It has not received any published judicial attention.

SECTION 13

Compensation of elective state officers; commission on salaries for elective state officers. The salaries of those holding elective state offices shall be as established by law from time to time, subject to the limitations of article 6, section 33 and to the limitations of article 4, part 2, section 17. Such salaries as are presently established may be altered from time to time by the procedure established in this section or as otherwise provided by law, except that legislative salaries may be altered only by the procedures established in this section.

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[55] In that case, the governor's chair was left in limbo for nearly a year, as the apparent losing incumbent in the November 1916 general election, George Hunt, refused to concede defeat. The Supreme Court rejected Hunt's first challenge, based on a state statute, that his opponent Campbell was ineligible for office because he ran for governor while serving as a state tax commissioner (*Campbell v. Hunt*). Eleven months later, in December 1917, after scrutinizing the voting tallies and resolving contested ballots, the Court found that Hunt had actually won the election by 43 votes out of more than 56,000 cast (*Hunt v. Campbell*). Campbell then stepped aside after more than a year of turmoil (but later did serve three years as governor). See John S. Goff, *George W. P. Hunt and His Arizona* (Pasadena, Calif.: Socio Technical Publications, 1973).

> A commission to be known as the commission on salaries for elective state officers is authorized to be established by the legislature. The commission shall be composed of five members appointed from private life, two of whom shall be appointed by the governor and one each by the president of the senate, the speaker of the house of representatives, and the chief justice. At such times as may be directed by the legislature, the commission shall report to the governor with recommendations concerning the rates of pay of elected state officers. The governor shall upon receipt of such report make recommendations to the legislature with respect to the exact rates of pay which he deems advisable for those offices and positions other than for the rates of pay of members of the legislature. Such recommendations shall become effective at a time established by the legislature after the transmission of the recommendation of the governor without aid of further legislative action unless, within such period of time, there has been enacted into law a statute which establishes rates of pay other than those proposed by the governor, or unless either house of the legislature specifically disapproves all or part of the governor's recommendation. The recommendations of the governor, unless disapproved or altered within the time provided by law, shall be effective; and any 1971 recommendations shall be effective as to all offices on the first Monday in January of 1973. In case of either a legislative enactment or disapproval by either house, the recommendations shall be effective only insofar as not altered or disapproved. The recommendations of the commission as to legislative salaries shall be certified by it to the secretary of state and the secretary of state shall submit to the qualified electors at the next regular general election the question, "Shall the recommendations of the commission on salaries for elective state officers concerning legislative salaries be accepted? [ ] Yes [ ] No". Such recommendations if approved by the electors shall become effective at the beginning of the next regular legislative session without any other authorizing legislation. All recommendations which become effective under this section shall supersede all laws enacted prior to their effective date relating to such salaries.

This section deals with the politically sensitive subject of salaries for elected officials. Tight-fistedness in public salaries has been an enduring strain in Arizona politics; the constitutional convention agonized over pegging the salaries of elected officials.[56] As originally adopted, this section fixed the salaries of state executive branch officers "[u]ntil otherwise provided by law," which presumably meant the legislature could change such salaries without constitutional amendment (*Amish v. City of Phoenix, dictum*). Other sections of the original constitution fixed salaries for legislators and judges.

[56] Some delegates worried about the possibility of a "roar" from the people on the subject, noting that if "there is anything which will excite the populace, it is this question of salaries." This concern even carried over to the salaries of convention aides, as a proposal was made to reduce the convention chaplain's stipend. See Goff, *Records,* 16, 386–90, 790–93.

In 1970, after six decades of debate on salaries, the voters approved an amendment that brought this section to its current form (with caption). The process is designed to put some distance between the salary-setting process for judges and executive officials and the ordinary political process. It creates a commission on salaries composed of five persons "from private life," two appointed by the governor and one each by the president of the senate, the speaker of the house, and the chief justice. The commission recommends salary rates for elected state officers to the governor, who then makes her own recommendations to the legislature. The governor's recommendations become effective without further legislative action within a time set by the legislature, unless in the meantime the legislature has set the salaries by statute, or unless either house disapproves "all or part" of the governor's recommendation. This process seems to have worked reasonably well. While the commission's recommendations are not binding on the governor, they do provide the governor (and ultimately the legislature) with some political cover on the delicate subject.

Judges' salaries have continued to be set by this process even though, four years after it was created, Article VI of the constitution was amended to provide for "merit selection" rather than election of most judges. This thus raises the potential question of whether those judges hold "elective office" subject to the salary-setting process of this section. This seems reasonable, especially in light of the first sentence of this section, which makes clear that the salary-setting process remains subject to the prohibitions, expressed elsewhere in the constitution, on reducing the salary of any justice or judge during his term of office (Article VI, section 33) and on enlarging or diminishing the salaries of any public officer during her term of office (Article IV, part 2, section 17).

This section leaves legislators' salaries fully subject to political whim and the penurious attitude of Arizona voters. The commission's recommendations on legislative salaries are not subject to gubernatorial review but instead go directly on the ballot at the next regular general election for a yes-no popular vote. The track record of the commission (and, implicitly, the legislature) is not particularly strong.[57]

[57] A recommended salary raise was approved by the voters in 1980, to the present level of $15,000 per year. Otherwise, commission proposals to raise the salaries were defeated in 1972, 1974, 1978, 1982, and every second year since 1986. The most recent proposal, to increase state legislators' salaries to almost $20,000 per year, went down to defeat by nearly a two-to-one margin.

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Article VI

Judicial Department

The current form of this article was put into the constitution as a result of a so-called modern courts amendment adopted in 1960. The amendment was put on the ballot by initiative petition promoted by the State Bar of Arizona after an attempt to persuade the legislature to refer it to the voters failed. Problems of court congestion and delay, particularly in the state's largest urban area, were the original impetus for reform. Morris Udall of Tucson, soon to embark on a long and distinguished career in Congress, chaired a State Bar committee that helped draft the proposed amendment.[58]

Prior to 1960 only two minor modifications had been made to the twenty-four sections of the original version of Article VI. The first, adopted in 1948, added a twenty-fifth section declaring the superior courts to be a single court covering the entire state (rather than separate courts organized along county lines); the other, adopted in 1958, added a twenty-sixth section allowing retired superior and supreme court judges to serve on specific cases in certain circumstances.

While the "modern courts" amendment completely replaced the existing article with a new one, it incorporated much of the structure and language from

[58] For a brief history of the court reform movement, see Heinz R. Hink, "Judicial Reform in Arizona," *Arizona Law Review* 6 (1964), 13–26; Morris K. Udall, "Modern Courts—Where Do We Go from Here?" *Arizona Law Review 2* (1960), 166; William O. Douglas, "Arizona's New Judicial Article," *Arizona Law Review 2* (1960), 159.

the existing constitutional provisions. The changes made are noted in the section-by-section commentary that follows. Where existing text was carried forward into the new version, judicial decisions interpreting the original provisions are still relevant, and the more important ones are noted in the commentary.

SECTION 1

The judicial power shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts.

The 1960 amendment rewrote this section by adding the reference to an "integrated judicial department," authorizing the legislature to establish intermediate appellate courts, and substituting "justice courts" for the prior reference to "justices of the peace." The "integrated judicial department" created by this section includes magistrate courts inferior to superior courts, because they had previously been created by the legislature (the phrase "as may be provided by law" being construed to apply to existing as well as new laws), and have always been considered part of the judicial department (*Winter v. Coor*). Several other sections of this article specifically allow the legislature to prescribe or add to the jurisdiction of various courts, including the supreme court (section 5(6)), intermediate appellate courts (section 9), superior courts (sections 14(11); 16), and inferior courts (section 32). Within this framework, the legislature may vest two different courts with concurrent jurisdiction over the same subject matter (*Morgan v. Continental Mortgage Investors*).

The "judicial power" referred to in this section, which has a counterpart in Article III of the U.S. Constitution, is largely defined by the courts themselves, informed by centuries of evolution of the proper role of courts in the Anglo-American legal system. The rules and principles that define and give meaning to the idea of judicial power are complex; some are governed by separation of powers principles discussed in the commentary under Article III, others are dealt with in this Article, and still others have evolved without specific reference to any constitutional text. For example, courts have "such powers as are necessary to the ordinary and efficient exercise of jurisdiction," such as the "power to maintain order; to secure the attendance of witnesses; to enforce process" (*State ex rel. Andrews v. Superior Court; Fenton v. Howard*, neither citing this section).

SECTION 2

The supreme court shall consist of not less than five justices. The number of justices may be increased or decreased by law, but the court shall at all times be constituted of

at least five justices. The supreme court shall sit in accordance with rules adopted by it, either in banc or in divisions of not less than three justices, but the court shall not declare any law unconstitutional except when sitting in banc. The decisions of the court shall be in writing and the grounds stated.

The court shall be open at all times, except on nonjudicial days, for the transaction of business.

The only significant changes made in this section by the 1960 rewrite were to increase the minimum size of the Supreme Court from three to five justices, to allow it to sit in divisions, and to provide that it may not declare any law unconstitutional except when sitting in banc. The latter change does not by implication deprive trial courts of the jurisdiction to hear and determine constitutional questions properly presented to them (*State v. Miller*, 1966). The 1960 amendment also changed the title of members of the Supreme Court from judge to justice.

The requirement that the Supreme Court's decisions be in writing with stated grounds does not mean that such decisions must treat all arguments made or points advanced, but it does require the Court to indicate "the reasons persuading [it] to its conclusion," and to enlarge upon those grounds "where areas of genuine dispute exist," but where prior decisions control the result, a case can be "disposed of summarily" (*Phelps Dodge Corp. v. Industrial Commn.*). Further, in light of the limitation in section 27 of this article that a case may not be reversed for mere technical error, the Court need not discuss individually all allegations of error in the lower courts if they concern matters that do not justify reversal, even if error was committed (*Arizona Livestock Co. v. Washington*).

SECTION 3

Supreme Court; administrative supervision; chief justice. The supreme court shall have administrative supervision over all the courts of the state. The chief justice shall be elected by the justices of the supreme court from one of their number for a term of five years, and may be reelected for like terms. The vice chief justice shall be elected by the justices of the supreme court from one of their number for a term determined by the court. A member of the court may resign the office of chief justice or vice chief justice without resigning from the court.

The chief justice, or in his absence or incapacity, the vice chief justice, shall exercise the court's administrative supervision over all the courts of the state. He may assign judges of intermediate appellate courts, superior courts, or courts inferior to the superior court to serve in other courts or counties.

The original version of this section dealt with the election and terms of members of the Supreme Court. The 1960 amendment rewrote it to its current form, except for a 1974 amendment (put on the ballot by initiative petition) that added the caption and the last two sentences of the first paragraph. Unlike the

practice under the U.S. Constitution, the justices of the Arizona Supreme Court elect the chief justice. The custom since 1960 has been for the position to rotate among the justices every five years, on the basis of seniority.

This section carries out the integration of the state courts into one judicial department, as provided in section 1 of this article. The power of "administrative supervision" over all the courts of the state is the authority "to regulate the orderly procedure of the inferior courts" (*Johnson & Douglas v. Superior Court*). It includes such matters as fixing fees for court-appointed attorneys representing the indigent (*id*), and assigning cases to individual judges (*Zuniga v. City of Tucson*). See also the commentary under section 7 of this article.

SECTION 4

Supreme Court; term of office. Justices of the supreme court shall hold office for a regular term of six years except as provided by this article.

The original version of section 4 dealt with the Supreme Court's jurisdiction, now addressed in section 5. The 1960 "modern courts" amendment retained in this section the system of electing Supreme Court justices for terms of six years found in section 3 of the original version. One of the early drafts of the amendment had proposed appointing rather than electing judges, but the idea was dropped before the proposal was put on the ballot. In 1974 the election system was changed to one of merit selection (see the commentary on sections 35–40 of this article). At the same time, this section was amended to add the caption and to delete references to elections, while retaining the six-year term that had prevailed since statehood. No published judicial decision interprets this section.

SECTION 5

The supreme court shall have:

1. Original jurisdiction of habeas corpus, and quo warranto, mandamus, injunction and other extraordinary writs to state officers.
2. Original and exclusive jurisdiction to hear and determine causes between counties concerning disputed boundaries and surveys thereof or concerning claims of one county against another.
3. Appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impost, assessment, toll, statute or municipal ordinance.
4. Power to issue injunctions and writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.

5. Power to make rules relative to all procedural matters in any court.

6. Such other jurisdiction as may be provided by law.

Each justice of the supreme court may issue writs of habeas corpus to any part of the state upon petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself, the supreme court, appellate court or superior court, or judge thereof.

This section is a substantial but not complete rewrite of what was formerly section 4 of this article. Paragraphs 1–4 and the last paragraph are similar but not identical to provisions in the original version; paragraphs 5 and 6 are completely new.

Subsection 1. This subsection, vesting the Supreme Court with original jurisdiction to issue certain "extraordinary" writs, has been construed as incorporating "the power to issue extraordinary writs as under the common law of England" (*State ex rel. Sawyer v. LaSota*). Prior to 1960, this subsection did not refer to injunctions or "other extraordinary writs"; the 1960 rewrite's addition of this language nullified two earlier cases limiting the kinds of writs the Supreme Court could issue to state officers (*Smoker v. Bolin; Lindsey v. Duncan*). The latter case had itself overruled an earlier decision where the Court, without considering its power to do so, had issued a writ of prohibition against a state officer (*City of Phoenix v. Lane*).

The broadening of the Supreme Court's power to issue extraordinary writs in its original jurisdiction under this subsection, and in its appellate and revisory jurisdiction under subsection 4, make unimportant whether the particular writ applied for is labeled correctly, because the courts "look to substance, not to form" (*Goodman v. State*, not citing this section). Section 18 of this article deals with the power of superior courts to issue extraordinary writs, and the commentary on that section briefly considers the different kinds of writs.

The "state officers" against which the Supreme Court has original jurisdiction to issue extraordinary writs include state legislators (*State ex rel. Jones v. Lockhart*), the governor and auditor (*Community Council v. Jordan*), the secretary of state (*Adams v. Bolin*, 1954), lower court judges (*Tovrea v. Superior Court*), and administrative officers, such as tax commissioners (*State ex rel. Sullivan v. Moore*).

Subsection 2. This subsection has not been interpreted in any reported judicial decision. Jurisdiction under it has been exercised by the Supreme Court in connection with the creation of La Paz County, the first new county created since statehood, out of a portion of Yuma County in the early 1980s (*La Paz County v. Yuma County*)

Subsection 3. This subsection limits the Supreme Court's appellate jurisdiction over appeals from actions originating in courts not of record. It means that superior courts are the courts of last resort on appeals from nonrecord courts, unless the matter involves the "actual validity" of a measure of "general application,"

such as a statute or ordinance, where an "authoritative ruling" is required (*State v. Kelsall*). The term "municipal ordinance" in this subsection is used in a "broad sense" to include all regulations "of those political bodies in the state exercising governmental functions," such as those of a county health department (*id.*). The power to review cases involving the "validity" of taxes, imposts, assessments, or tolls is the power only to test their "legal sufficiency," and not to determine whether they were properly construed or applied (*Boehringer v. Yuma County*). Appellate jurisdiction is limited to "actions and proceedings," which incorporates the notion of judicial power found in section 1 of this article, and excludes matters that are by statute "conferred on administrative or executive officers," such as whether the general counsel of a state labor board properly refused to issue a complaint on a charge of unfair labor practices (*United Farm Workers v. Arizona Agric. Employment Relations Bd.*).

Subsection 4. The 1960 rewrite added the power "to issue injunctions" to this subsection; otherwise, it made no change. The "revisory jurisdiction" referred to in this subsection is "wholly independent of appellate jurisdiction" governed by subsection 3, and a trial court cannot require a petitioner to post a bond as a condition to the exercise of revisory jurisdiction by the Supreme Court (*Terrazas v. Superior Court*).

In 1970 the Supreme Court adopted so-called Special Action Rules to simplify the procedure for seeking extraordinary relief in the superior courts, courts of appeal, and the supreme court. Relief formerly sought by writs of prohibition, certiorari, and mandamus is now sought by means of a "special action."[59]

Generally, the Court will accept jurisdiction on a petition for a special action "if the issues raised are of sufficient importance to justify the review requested" (*Western Waste Ser. Sys., Inc. v. Superior Court*), such as an apparent conflict between a lower court's ruling and prior decisions of the Supreme Court (*Ryan v. Superior Court*). Other cases grant special action review where "substantial revenues of the state are involved" (*Tower Plaza Invs. Ltd. v. DeWitt*); or to correct a "plain and obvious error" in lower court proceedings that would otherwise result in "substantial delay" in the administration of justice (*State ex rel. Collins v. Superior Court*), or result in unnecessary costs and the question is a "clear issue

[59] See Special Action Rules of the Arizona Supreme Court, vol. 17A, Arizona Revised Code, pp. 278–80. See generally Charles M. Smith, *Arizona Civil Trial Practice* (St. Paul, Minn. West Publishing Co., 1986), sees. 679–86, pp. 561–604; John W. Nelson, "The Rules of Procedure for Special Actions: Long-A waited Reform of Extraordinary Writ Practice in Arizona," *Arizona Law Review* 11 (1969), 413–42. The special action rules do not enlarge the scope of relief traditionally granted under the writs named in this section, Special Action Rule 1(a). Caselaw provides guidance on the requirements for issuing various writs such as mandamus (e.g., *Board of Education v. Scottsdale Educ. Assn.*); certiorari (e.g., *Batty v. Arizona State Dental Bd.; Hunt v. Norton*); prohibition (e.g., *Dean v. Superior Court*); and habeas corpus (*e.g., Eyman v. Deutsch; Charboneau v. Superior Court*). For criticism of prior law, see Ray Jay Davis, "Administrative Mandamus," *Arizona Law Review* 9 (1967), 1–25; Robert O. Lesher, "Extraordinary Writs in the Appellate Courts of Arizona," *Arizona Law Review* 7 (1965), 34–49.

of law with obvious statewide significance" (*Summerfield v. Superior Court*). But the exercise of special action jurisdiction is "highly discretionary" and generally done only where the issues raised are such that "justice cannot be satisfactorily obtained by other means" (*King v. Superior Court*).

Subsection 5. Added by the 1960 amendment, this grant of power to make rules relative to all procedural matters in any court raises important separation of powers questions that are considered in the commentary on Article III. This subsection has been limited by a 1990 constitutional amendment vesting the legislature with authority to make rules to implement the "victims' bill of rights" in Article II, section 2.1 (*Slayton v. Shumway*). Only those rulemaking questions that concern the judicial branch alone, and not other branches, are discussed in what follows.

The Supreme Court's rulemaking authority includes the power to promulgate rules of procedure in juvenile matters (*In re Juvenile Action No. J–84536–S*); to adopt portions of the American Bar Association's recommendations on sentencing alternatives and procedures pertaining to the imposition, amount, and method of paying fines (*In re Collins*); and to determine the procedure by which it establishes rules of procedure (*Jones v. Lopez Plascencia*). While the Court's rules "may not diminish or augment substantive rights," such as the right of appeal, they may control the manner in which these rights are exercised (*State v. Birmingham*).

In general, orders establishing general policy for all the courts of a county are local rules regardless of how they are styled, and they must be approved by the Supreme Court before taking effect (*Mitchell v. Superior Court; State v. City Court*, 1986). By the same token, the Supreme Court's rules may not be supplemented, annulled, or superseded by an inferior court (*Anderson v. Pick-rell*).

Subsection 6. This subsection, also added by the 1960 amendment, has not been interpreted in any reported court decision. Presumably it gives the legislature broad power (within separation of powers and other constitutional limits) to expand the original and appellate jurisdiction of the Supreme Court. As such it probably nullifies one holding in the early case of *State v. Osborne*, where the Supreme Court, in a decision reminiscent of the U.S. Supreme Court's landmark opinion in *Marbury v. Madison*, voided a statute giving the Court "original jurisdiction" to hear and determine all election contests involving state officers, on the ground that the original constitution's specific enumeration of the classes of cases in which the Court could exercise original jurisdiction did not cover the question, and lacked a catch-all provision like this subsection.

Last sentence. This provision gives the individual justices of the Court broad power to issue writs of habeas corpus statewide, and to require lower courts as well as the Supreme Court to review wrongful custody issues raised by an application for the writ. It is related to Article II, section 14 (preventing the "authorities of the state" from ever suspending the writ), and section 18 of this Article (giving the superior courts authority to issue the writ), as well as the first subsection of this section. It has not been interpreted in any reported judicial decision.

SECTION 6

A justice of the supreme court shall be a person of good moral character and admitted to the practice of law in and a resident of the state of Arizona for ten years next preceding his taking office.

This section is drawn from what was the first paragraph of section 13 in the original version, although that version required a minimum age of thirty, residency and bar membership for five years, and being "learned in the law" as opposed to "of good moral character." The latter qualification is now presumably taken into account by the commission on appellate court appointments provided in section 36 of this article.

In a case decided one year before adoption of the modern courts amendment, the Supreme Court held that the qualifications stated in the constitution for membership on the Court were exclusive, so that the legislature lacked power to add new ones (*Whitney v. Bolin*). The same notion that constitutional qualifications for office are exclusive has been applied to offices in the executive department (see the commentary on Article V, section 2).

SECTION 7

The supreme court shall appoint a clerk of the court and assistants thereto who shall serve at its pleasure, and who shall receive such compensation as may be provided by law.

The supreme court shall appoint an administrative director and staff to serve at its pleasure to assist the chief justice in discharging his administrative duties. The director and staff shall receive such compensation as may be provided by law.

The original version (in what was then section 17 of this article) provided for the appointment only of a clerk. The second paragraph of this section adds considerably to the administrative capability of the Supreme Court, and supplements section 3's vesting of "administrative supervision over all the courts of the state" in the Supreme Court. The Court has recently held that this section prevents the legislature from giving the state personnel board jurisdiction over "whistle-blowing" complaints filed by employees of the Supreme Court (*McDonald v. Campbell*).

SECTION 8

Provision shall be made by law for the speedy publication of the opinions of the supreme court, and they shall be free for publication by any person.

This section repeats, with minor alterations in wording, what was section 16 in the original version. It has not been addressed by the courts.

SECTION 9

The jurisdiction, powers, duties and composition of any intermediate appellate court shall be as provided by law.

For nearly a half century after statehood, the Supreme Court was the only appellate court above the superior court. This section was added in 1960, and supplements section 1 of this article, which gives the legislature authority to establish intermediate appellate courts. In 1964 the legislature created a court of appeals with two divisions, one in Phoenix and one in Tucson. Although both divisions began with three judges, the caseload and population growth, especially in the Phoenix area, has necessitated steady enlargement. Currently, the Phoenix division has fifteen judges and the Tucson division six.

The court of appeals is a creature of statute rather than the constitution and therefore has "only jurisdiction specifically given to it by statute" (*Campbell v. Arnold*). Moreover, being intermediate, it cannot overrule or modify decisions of the Supreme Court (*McKay v. Industrial Commn.*), nor declare unconstitutional a rule of procedure adopted by the Supreme Court (*State v. Meek*). Like all other courts, the court of appeals has "inherent power to make any orders necessary to carry out [its] functions" (*Rodriquez v. Williams*), but it cannot issue orders in matters where applicable statutes do not give it the power to act (*Goodrich v. Industrial Commn.*). For example, where it is without appellate jurisdiction (as in some juvenile proceedings), it cannot, without statutory authorization, issue an extraordinary writ in review of orders entered by juvenile court (*Morrison v. Superior Court*). Because section 5 of this article gives the Supreme Court the power to make procedural rules in "any court," the court of appeals lacks rulemaking authority (*Hart v. Superior Court*), but the legislature may give the court of appeals concurrent jurisdiction with the Supreme Court in certain matters (*Arizona Podiatry Assn. v. Director of Ins.*).

SECTION 10

There shall be in each county at least one judge of the superior court. There shall be in each county such additional judges as may be provided by law, but not exceeding one judge for each thirty thousand inhabitants or majority fraction thereof. The number of inhabitants in a county for purposes of this section may be determined by census enumeration or by such other method as may be provided by law.

This section is loosely drawn from the first paragraph of section 5 of the original version of this article; interestingly, the ceiling of no more than one superior court judge per "thirty thousand inhabitants or majority fraction thereof" also appeared in the original version. Once a county's population reaches 45,000 or more, it is up to the legislature to decide whether to create an additional superior court judgeship (*Collins v. Krucker*). The last phrase of the last sentence of this

section did not appear in the original version, and it was apparently designed to nullify a Supreme Court decision construing the phrase "census enumeration" to mean "singly counting up . . . the population" (*State ex rel. Morrison v. Nabours*).

SECTION 11

There shall be in each county a presiding judge of the superior court. In each county in which there are two or more judges, the supreme court shall appoint one of such judges presiding judge. Presiding judges shall exercise administrative supervision over the superior court and judges thereof in their counties, and shall have such other duties as may be provided by law or by rules of the supreme court.

Added in 1960, this section is another reflection of the concern of the framers of the "modern courts" amendment with strengthening the administration of the judicial process. Among other things, it gives the presiding judge of the superior court authority to set the salaries of court reporters (*Milburn v. Burns*), and to request a court employee to continue in service for one year after reaching the age of seventy, pursuant to a state statutory procedure, and the county board of supervisors must approve the request unless there is a "clear showing" that the presiding judge acted "unreasonably, arbitrarily and capriciously" (*Mann v. County of Maricopa*). *Milburn* and *Mann* must both be read with sensitivity to separation of powers considerations (see the commentary on Article III).

SECTION 12

Superior Court; term of office. Judges of the superior court in counties having a population of less than two hundred fifty thousand persons according to the most recent United States census shall be elected by the qualified electors of their counties at the general election. They shall hold office for a regular term of four years except as provided by this section from and after the first Monday in January next succeeding their election, and until their successors are elected and qualify. The names of all candidates for judge of the superior court in such counties shall be placed on the regular ballot without partisan or other designation except the division and title of the office.

The governor shall fill any vacancy in such counties by appointing a person to serve until the election and qualification of a successor. At the next succeeding general election following the appointment of a person to fill a vacancy, a judge shall be elected to serve for the remainder of the unexpired term.

Judges of the superior court in counties having a population of two hundred fifty thousand persons or more according to the most recent United States census shall hold office for a regular term of four years except as provided by this article.

Much of this section appeared in section 5 of the original version of this article. The term of office of a superior court judge, for example, was not changed by the 1960 "modern courts" amendment. In 1974 this section was modified (and the caption added) by the merit selection amendment, making merit selection mandatory only in counties with more than 150,000 population, which as of now includes Maricopa (Phoenix) and Pima (Tucson) counties. A 1992 amendment to the first and third paragraphs elevated the county population cutoff for mandatory merit selection to 250,000 and added the express direction to use the "most recent" census. Conforming changes were made in sections 28 and 30 of this article. These were all part of a package of amendments added to provide a more public process for judicial selection and evaluation (see also sections 35–38 and 41–42 of this article). Superior court judges in the smaller counties continue to be elected on a nonpartisan ballot, as they have been since statehood (see the commentary on section 40 of this article).

SECTION 13

The superior courts provided for in this article shall constitute a single court, composed of all the duly elected or appointed judges in each of the counties of the state. The legislature may classify counties for the purpose of fixing salaries of judges or officers of the court.

The judgments, decrees, orders and proceedings of any session of the superior court held by one or more judges shall have the same force and effect as if all the judges of the court had presided.

The process of the court shall extend to all parts of the state.

The first sentence of the first paragraph of this subsection is substantially the same as section 25 of this article before the 1960 "modern courts" amendment. It had been added to the original constitution by amendment adopted in 1948. Its unification of the superior courts, which echoes section 1's creation of an "integrated" judicial department, means that there is but one superior court in the state (*Massengill v. Superior Court*). This altered the prior structure, where each of the counties of the state were considered to have separate superior courts (see *Faires v. Frohmiller*). One significant consequence of a unitary superior court is that, by Article IV, part 2, section 17, statutes increasing the salaries of superior court judges are effective as to all such judges throughout the state simultaneously (*Coconino County v. Lewis*). But the unification of the superior courts is not without limit; for example, a superior court judge in one county has no jurisdiction to interfere in an action pending in a superior court in another county (*Ward v. Stevens*; see also *Leiby v. Superior Court*).

The second paragraph was drawn from section 5 and the third paragraph from section 6 of the original constitution; neither has been the subject of significant judicial attention.

SECTION 14

Superior Court; original jurisdiction. The superior court shall have original jurisdiction of:

1. Cases and proceedings in which exclusive jurisdiction is not vested by law in another court.
2. Cases of equity and at law which involve the title to or possession of real property, or the legality of any tax, impost, assessment, toll or municipal ordinance.
3. Other cases in which the demand or value of property in controversy amounts to one thousand dollars or more, exclusive of interest and costs.
4. Criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for by law.
5. Actions of forcible entry and detainer.
6. Proceedings in insolvency.
7. Actions to prevent or abate nuisance.
8. Matters of probate.
9. Divorce and for annulment of marriage.
10. Naturalization and the issuance of papers therefor.
11. Special cases and proceedings not otherwise provided for, and such other jurisdiction as may be provided by law.

This section is drawn almost entirely, with minor modifications, from section 6 of the original version of this article; only the last clause of subsection 11 was newly added. In the original constitution, subsection 3's monetary floor for superior court jurisdiction was $200; the 1960 amendment raised it to $500; and a 1972 amendment, added upon legislative referral, raised it to $1,000 (and added the caption). The following summarizes significant decisions, by particular subsections.

Subsection 1. Superior courts are courts of "general original jurisdiction" that can deal with all cases not exclusively vested by law in another court (*Bowen v. Chemi-Cote Perlite Corp.*). If the legislature gives another court jurisdiction over a matter by statute, the superior courts retain concurrent jurisdiction over it unless the "grant of jurisdiction to such other court [is] exclusive" (*Miami Copper Co. v. State*), and the legislature must so indicate "explicitly and clearly"; that is, doubt is resolved in favor of retention of superior court jurisdiction (*Daou v. Harris*). Being courts of general jurisdiction, superior courts may exercise jurisdiction (concurrent with federal courts) over cases brought under federal law (*New Times, Inc. v. Arizona Bd. of Regents*). The "[c]ases and proceedings" referred to in this subsection mean suits instituted under regular judicial procedure, and therefore this subsection does not open the courts to generalized requests unconnected with some recognized proceeding (*State ex rel. Andrews v. Superior Court*).

Subsection 2. This subsection blends law and equity jurisdiction in the actions specified, so that the superior courts may award damages and grant equitable relief in the same proceeding (*Pinkerton v. Pritchard*, not citing this section).

Subsection 3. The monetary jurisdictional limit in this subsection may be met by aggregating individual claims in a class action (*Judson School v. Wick*). It may also be met when fines for separate repeated violations of a law, each less than the jurisdictional amount, are aggregated above the amount in a single complaint (*Miami Copper Co. v. State*). Superior courts have no jurisdiction if the case involves an amount under this floor (*Ahee v. Sornberger*). The monetary floor applies to property forfeiture proceedings as well as actions involving money judgments (*State v. Brown*).

Subsection 4. Although the Supreme Court has said that the superior courts have "exclusive" original jurisdiction over felonies (*State v. Jacobson*, 1970, *dictum*), the legislature may vest inferior courts with jurisdiction over felonies for purposes of commencing actions and conducting preliminary hearings (*State ex rel. Corbin v. Murry*). Article II, section 30 requires a preliminary examination before a "magistrate" in such cases.

Subsection 5. Actions of forcible entry and detainer are summary proceedings for restoring possession of land to the rightful owner; primarily, they involve disputes between owners and renters. The legislature may vest inferior courts with concurrent jurisdiction over such actions, within the monetary jurisdictional limit in section 32 of this article (*Morgan v. Continental Mortgage Investors*).

Subsection 8. Although for a long time the Arizona courts "were careful to distinguish between" the superior court's exercise of probate jurisdiction versus other kinds of jurisdiction, the legislature's 1974 adoption of the Uniform Probate Code "intended to confer upon the Superior Court sitting in probate its full constitutional jurisdiction in matters which might arise affecting estates" (*Gonzalez v. Superior Court*).

Subsection 11. This "catch-all" provision allows the legislature, "unless a limitation appears within the constitution," to "expand the jurisdiction of the superior court" (*Davis v. Brittain*; see also *In re Juvenile Action No. JS–4997*), such as by giving them appellate jurisdiction over decisions of administrative agencies and units of local government like a county board of supervisors (*Cox v. Superior Court*, inexplicably citing section 16 of this article, dealing with the superior court's appellate jurisdiction over inferior courts, rather than this subsection).

SECTION 15

The superior court shall have exclusive original jurisdiction in all proceedings and matters affecting dependent, neglected, incorrigible or delinquent children, or children accused of crime, under the age of eighteen years. The judges shall hold examinations in chambers for all such children concerning whom proceedings are brought, in advance of any criminal prosecution of such children, and may, in their discretion, suspend criminal prosecution of such children. The powers of the judges to control such children shall be as provided by law.

This section is, with minor editorial changes, taken from the third paragraph of section 6 of the original version of this article. It manifests a progressive-era concern with the treatment of juveniles in the social service and criminal justice systems. The Supreme Court described it as a recognition that many cases involving transgressions by "youthful offenders" give the state "both a responsibility and an opportunity . . . through special treatment in a noncriminal proceeding, to redirect and rehabilitate these young people" (*State v. Shaw*). At the same time, such "special treatment is futile" for some, who may therefore be subject to the ordinary criminal process (*id.*).[60] Superior courts acting under this section function as "juvenile courts" (*In re Juvenile Action No. J–74275*), but this is more label than anything else; these are considered proceedings in superior court for most purposes (*Anonymous v. Superior Court*).

When a person under eighteen is suspected of a crime, the matter must come before the juvenile side of the superior court and may be prosecuted criminally only if, after a hearing, the juvenile court transfers the matter to the "adult side" for prosecution (*McBeth v. Rose*; see also *State v. Martin*, 1971). Among other things, this means that the time for calculating compliance with speedy trial rules starts running upon the transfer to the adult side (*State v. Myers*). The adult side may be a city court or the superior court, depending upon the nature of the offense, but because the superior court's juvenile jurisdiction is "exclusive [and] original" under this section, the superior court may not, without formal order, allow the prosecutor to first proceed in city court and then hear the matter upon appeal (*Flynn v. Superior Court*). The juvenile court's power to "suspend" criminal prosecution under this section means "temporary cessation; i.e., a holding in abeyance," and thus can be reconsidered, because juvenile court judges have continuing supervision over minors (*Anonymous v. Superior Court*). The juvenile court's decision to transfer a matter to the adult side is discretionary and exclusive; the court is not bound to make the transfer even when the juvenile and the state have agreed to it (*State ex rel. Romley v. Superior Court*, 1991).

Once an offender reaches the age of eighteen, the juvenile court loses jurisdiction and the person may be tried as an adult, even for offenses committed before the person reached the age of eighteen (*McBeth v. Rose*). Therefore juvenile court proceedings may be dismissed without a hearing on whether to transfer the matter to adult court and then, once the person turns eighteen, a prosecution may be initiated on the adult side (*id.*).

The last sentence of this section gives the legislature authority to establish guidelines for juvenile court supervision of children (*In re Juvenile Action No. J–86843*); for example, the legislature may, within limits found elsewhere in the

[60] See generally John J. Molloy, "Juvenile Court—A Labyrinth of Confusion for the Lawyer," *Arizona Law Review* 4 (1962),1. The landmark decision of the U.S. Supreme Court applying federal constitutional protections to juveniles originated as a case brought under this section (*In re Gault*).

constitution, authorize the court to order a juvenile offender to pay a monetary penalty or provide restitution (*In re Juvenile Action No. J–92130*). Because this section gives superior courts exclusive jurisdiction in juvenile proceedings, the legislature may not vest other courts with jurisdiction in juvenile matters covered by this section, but it may exercise its powers under the "catch-all" provision of section 14(11) of this Article to vest superior courts with jurisdiction over other matters affecting children, not covered by this section, such as termination of the parent–child relationship (*In re Juvenile Action No. JS–4997*). The legislature may not, however, extend the superior court's juvenile jurisdiction beyond a person's eighteenth birthday (*In re Juvenile Action No. J–85871*).

SECTION 16

The superior court shall have appellate jurisdiction in cases arising in justice and other courts inferior to the superior court as may be provided by law.

This section repeats, with minor editorial changes, the second sentence of the second paragraph of section 6 of the original constitution. It allows the superior court to sit as an appellate court in review of judgments of inferior courts. The superior court in such cases has jurisdiction only if the court from which the appeal was taken had jurisdiction (*Rojas v. Kimble*); if it did not, the superior court must dismiss the appeal even if it could have heard the action in its original jurisdiction had it been brought there first, and even if it would have heard the appeal *de novo* (*Ex parte Coone*).

SECTION 17

The superior court shall be open at all times, except on nonjudicial days, for the determination of non-jury civil cases and the transaction of business. For the determination of civil causes and matters in which a jury demand has been entered, and for the trial of criminal causes, a trial jury shall be drawn and summoned from the body of the county, as provided by law. The right of jury trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause or by the parties with the consent of the court in any criminal cause. Grand juries shall be drawn and summoned only by order of the superior court.

The first two sentences of this section are taken from the fourth paragraph of section 6 of the original version of this article. The only significant change was to substitute "as provided by law" for the previous instruction to draw a jury "at least three times a year." The third sentence was added in the 1960 rewrite. It refers to the right to jury trial found in Article II, sections 23 and 24, and allows its waiver under certain circumstances. The fourth sentence is the same as the

last sentence in section 6 of the original version. It is the only specific mention of the grand jury in the constitution, although section 30 of Article II speaks of prosecution upon indictment, which assumes a grand jury.

The admonition in the first sentence that the court be open "at all times" has occasionally been taken literally; an early case cited it in upholding the fixing of 2 A.M. as a reasonable time to hear a petition for adoption, finding it "unusual . . . perhaps unseasonable [but not] impossible . . . unlawful or unreasonable" (*In re Soderberg*).

Regarding jury trials, the Supreme Court has noted that the "qualifications of jurors in the state of Arizona are not prescribed by the Constitution" (*Denison v. State*), and several decisions have upheld jury lists that exclude some persons in the county, such as persons not registered to vote, who may qualify to serve as jurors (e.g., *State v. Narten*; see also *Lawrence v. State*). In 1945 the Supreme Court upheld a territorial-era statute forbidding women to serve as jurors despite the requirement in the second sentence of this section that juries be drawn "from the body of the county" (*McDaniels v. State*). The Court reasoned that (1) this section was not self-executing; (2) its framers did not intend to overrule territorial law limiting juries to men; (3) the extension of the right to vote and hold office to women in 1912 (by amendment to Article VII, section 2) did not mention jury service and did not overrule territorial law; and (4) this section incorporated the common law, which was that "a jury was not jury unless it was composed of men." The statutory limitation to males was not repealed until 1970; currently the applicable statute provides only that jurors must be at least eighteen years old and meet statutory qualifications for voter registration (Ariz. Rev. Stat. 21–201).

The third sentence's acknowledgment of waiver of a jury in a criminal case requires both parties to consent; if the prosecution does not consent, the court may require a jury trial over the defendant's objection (*State v. Webb*). The court must also consent, although the failure of the record to show the express consent of the trial judge is cured if the judge proceeds to try the case to a jury (*State v. Skinner*). The Supreme Court has held that in a criminal case the defendant's waiver must be fairly, expressly, and intelligently made (*State v. Little*, citing federal decisions), and the validity of the waiver must turn on the "unique circumstances of each case" (*State v. Smith*, 1975).

Although the last sentence of this section may appear to give the superior court sole authority over summoning a grand jury, the Supreme Court has upheld a statute requiring grand juries to be called three times a year in counties with greater than 100,000 population, because it viewed the statute as merely setting a minimum, and under it the superior court "is still the agency which draws and summons the grand jury" (*State v. Jackson*). A court of appeals has also held that keeping a single grand jury empaneled for ten months does not violate this section, although it suggested holding a grand jury in existence for "inordinately long periods of time" might be a problem (*State v. Superior Court*, 1967, *dictum*).

SECTION 18

The superior court or any judge thereof may issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of a person held in actual custody within the county. Injunctions, attachments, and writs of prohibition and habeas corpus may be issued and served on legal holidays and non-judicial days.

This section is essentially the same as language that appeared in the fifth paragraph of section 6 of the original version of this article. Section 5(4) of this article gives the Supreme Court very similar powers to issue writs, and some of the commentary there is relevant here. (The writ of habeas corpus is also protected by section 14 of Article II.) The two courts share concurrent jurisdiction over such matters, and in the absence of extraordinary circumstances the proper procedure is to apply first to the superior court (*State ex rel. Bullard v. Jones*).

SECTION 19

A judge of the superior court shall serve in another county at the direction of the chief justice of the supreme court or may serve in another county at the request of the presiding judge of the superior court thereof.

This section is drawn from section 7 of the original version of this article, modified by the 1960 "modern courts" amendment to allow the chief justice (rather than the governor) to order reassignment for any reason (rather than simply because of the inability of the local judge to serve). This section elaborates on section 13 of this article, which unifies all superior courts in the state in a single court, and on section 3, giving the Supreme Court administrative supervision over all courts in the state. Even before the 1960 amendment, it had been held that the visiting judge "has the same powers and jurisdiction" as the regular judge (*Arizona Mut. Auto Ins. Co. v. Bisbee Auto Co.*).

SECTION 20

Retirement and service of retired justices and judges. The legislature shall prescribe by law a plan of retirement for justices and judges of courts of record, including the basis and amount of retirement pay, and requiring except as provided in section 35 of this article, that justices and judges of courts of record be retired upon reaching the age of seventy. Any retired justice or judge of any court of record who is drawing retirement pay may serve as a justice or judge of any court. When serving outside his county of residence, any such retired justice or judge shall receive his necessary traveling and subsistence expenses. A retired judge who is temporarily called back to the active duties of a judge is entitled to receive the same compensation and expenses

as other like active judges less any amount received for such period in retirement benefits.

This section derives from section 26 of this article, which had been added in 1958. The original amendment, put forward as a way to deal with the burgeoning case load spurred by rapid population growth,[61] allowed any retired superior or supreme court judge drawing retirement pay to serve as a judge in those courts, "with the consent of the litigants involved." It was revised and renumbered as section 20 in the 1960 "modern courts" amendment, to include judges on intermediate appellate courts and, significantly, to drop the requirement of obtaining the consent of the litigants. It was amended to its current form (and the caption added) when the merit selection amendment was approved by the voters in 1974. The mandatory retirement at age seventy is reiterated in section 39, also added in 1974. This section has not been interpreted in any reported judicial decision.

SECTION 21

Every matter submitted to a judge of the superior court for his decision shall be decided within sixty days from the date of submission thereof. The supreme court shall by rule provide for the speedy disposition of all matters not decided within such period.

The sixty-day limit was found in section 15 of the original version of this article; the second sentence was added by the 1960 amendment. In 1926 the Supreme Court held that the time limit was directory rather than mandatory, so that the failure to decide a matter within sixty days of submission does not deprive the superior court of jurisdiction, because it is not appropriate to "punish the litigant for the wrongs of the court which he has no power to prevent" (*Williams v. Williams*). But superior courts have been admonished to meet the time limit "in all but the most extraordinary circumstances" (*Wustrack v. Clark*; see also *Itule v. Farley*).

SECTION 22

Superior and other courts; qualifications of judges. Judges of the superior court, intermediate appellate courts or courts inferior to the superior court having jurisdiction in civil cases of one thousand dollars or more, exclusive of interest and costs, established by law under the provisions of section 1 of this article, shall be at

[61] See *Publicity Pamphlet,* 1958 Special Election, p. 6.

least thirty years of age, of good moral character and admitted to the practice of law in and a resident of the state for five years next preceding their taking office.

This section is a rewrite of the second paragraph of section 13 of the original version of this article. The 1960 amendment extended its coverage from superior court judges to the other judges stated; raised the minimum age from twenty-five to thirty; lengthened the residency and bar membership period from two to five years; and substituted the requirement of "good moral character" for that of being "learned in the law." (Similar changes were made at the same time in the qualifications of Supreme Court justices in section 6 of this article.) The 1960 amendment applied to judges of courts inferior to superior courts with jurisdiction over civil cases of at least $500; the floor was raised to $1,000 (and the caption added) by a 1972 amendment referred by the legislature.

The Supreme Court has said, without elaboration, that justices of the peace are not judges of courts "inferior to the superior court" within the meaning of this section; instead, they are "county offices" within the meaning of a statute establishing qualifications for such offices (*Nicol v. Superior Court*). This conclusion is supported by the fact that a number of other sections in this article speak of "justice courts" separately from "courts inferior to the superior court" (e.g, sections 1, 26, and 32); but compare section 16's reference to "justice and other courts inferior to the superior court."

SECTION 23

There shall be in each county a clerk of the superior court. The clerk shall be elected by the qualified electors of his county at the general election and shall hold office for a term of four years from and after the first Monday in January next succeeding his election. The clerk shall have such powers and perform such duties as may be provided by law or by rule of the supreme court or superior court. He shall receive such compensation as may be provided by law.

This section is drawn from section 18 of the original version of this article; the only significant change made in 1960 was to give the supreme and superior courts concurrent power with the legislature to define the powers and duties of the clerk. The superior court clerk is part of the judicial branch, and "from time immemorial has been considered an officer of the court and as such endowed with certain judicial authority to aid and promote the judicial process" (*U.S. Fidelity & Guar. Co. v. State*). The clerk may appoint deputy clerks, which the county board of supervisors must accept unless the clerk acts "unreasonably, arbitrarily, and capriciously" (*Roylston v. Pima County*). The relationship between the judicial branch, including clerks, and the other branches of government is discussed in more detail in the commentary on Article III.

SECTION 24

Judges of the superior court may appoint court commissioners, masters and referees in their respective counties, who shall have such powers and perform such duties as may be provided by law or by rule of the supreme court. Court commissioners, masters and referees shall receive such compensation as may be provided by law.

This section is drawn from section 19 of the original version of this article, which referred only to court commissioners, whose powers and duties were to be provided by law. The amendment expands the scope to include masters and referees, and gives the Supreme Court concurrent power with the legislature over their powers and duties. A court of appeals has described a commissioner as having jurisdiction "narrower than that of a regular superior court judge, but within the confines of that authority, he acts as a superior court judge"; therefore, a superior court judge cannot issue a writ of prohibition against these officials because the court does not sit in appellate review of their decisions (*Green* v. *Thompson*).

SECTION 25

The style of process shall be "The State of Arizona", and prosecutions shall be conducted in the name of the state and by its authority.

With minor editorial changes, this section repeats section 20 of the original version of this article. Despite its seemingly straightforward and innocuous character, this section has actually been the subject of several reported decisions. For example, a "prosecution" within this section refers to "offenses required to be prosecuted by indictment or information," and does not include a criminal contempt proceeding (*Van Dyke v. Superior Court*; see also *Miller v. Heller; Rodriguez v. Sims*).

SECTION 26

Each justice, judge and justice of the peace shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the constitution of the state of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

The oath of all judges of courts inferior to the superior court and the oath of justices of peace shall be filed in the office of the county recorder, and the oath of all other justices and judges shall be filed in the office of the secretary of state.

This section is drawn from section 21 of the original version of this article, and echoes the requirement of the supremacy clause of the U.S. Constitution,

Article VI, clause 2, that "judges in every State" swear fealty to the U.S. Constitution. The 1960 amendment extended the requirement to take an oath to all judges and justices of the peace (the original version required an oath only of superior court and supreme court judges) and added the requirement that the oath of judges inferior to the superior court be filed with the county recorder. This section has not been the subject of interpretation in any published court decision.

SECTION 27

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.

The first sentence of this section repeats nearly verbatim the first sentence of section 12 of the original version of this article, and the second sentence repeats nearly verbatim the second sentence of section 22 of the original version of this article. Because this section contains two important, though somewhat disparate, principles governing all civil and criminal litigation, it has been the frequent subject of judicial application. The following commentary is organized around the two sentences in this section.

First Sentence; Judges' Instructions to Juries and Commenting on the Evidence

The first sentence underscores the exalted role of the jury under the Arizona Constitution, and it is related to the trial by jury provisions in the Declaration of Rights (Article II, sections 23–24) and to the special provision on the role of the jury in tort cases involving the defenses of contributory negligence and assumption of risk (Article XVIII, section 5). Numerous reported Arizona decisions deal with various aspects of the judge's duty to "declare the law" to juries. These cases generally do not refer to this section but rather rest on customary, common law (e.g., *State v. Betts*). Jury instructions need not be given in any particular form (*Kingsbury v. State*), but they "should state the law as applicable to the facts which the jury is warranted in finding from the evidence" (*Henderson v. Breesman*; see also *State v. Elias*). In reviewing their correctness on appeal, instructions are "considered as a whole, not piecemeal" (*State v. Eisenstein*).

The prohibition of trial judge "comment" on the evidence to the jury is designed to avoid interfering with the proper role of the jury in deciding cases; that is, the judge, "shrouded with authority by virtue of his position in presiding at a trial, will, if he is permitted to comment on the evidence, unduly influence

the jury" (*Eastin v. Broomfield*).[62] Thus the jury should be permitted to weigh the evidence "without any comment from the court tending in the slightest degree to interfere with [it]" (*Security Benefit Ass'n v. Small*). A forbidden "comment" is an expression of the judge's "opinion of what the evidence shows or does not show" (*State v. Godsoe*), whether made in the judge's formal instructions to the jury after all evidence has been presented or at any other time (*Beasley v. State*).

A court's ruling on an objection of counsel is not a comment on the evidence (*State v. Copley*), however, and neither is an explanation by the judge of his ruling on evidentiary matters (*State v. Owen*). Conditional statements in a judge's instructions to the jury such as "if you believe" or "if you find" are not foreclosed by this section, because the trial court is not forbidden to refer to the evidence, only to comment on it (*State v. Willits*). But this section forbids a judge from singling out or unduly emphasizing a particular part of the evidence to the exclusion of the rest (*State v. Godsoe*), or from suggesting that the accused's testimony is to be viewed more skeptically than other testimony, because that touches on "matters of fact" (*Erickson v. State*; see also *Babb v. State*).

Harmless Error in Jury Instructions or Judge's Comments

In one important respect the two sentences of this section overlap. If a judge has violated the first sentence by commenting on the evidence, the second sentence mandates setting aside the jury's verdict only if the comment prejudiced the party who opposed it (*State v. Diaz*). The same goes for erroneous jury instructions; that is, they are "not reversible when not prejudicial" (*State v. Eisenstein*). A finding of prejudice requires a judgment that there is a "reasonable probability that the verdict might have been different if the error had not been committed" (*State v. Dutton*).

The Substantial Justice Standard

As introduced in the constitutional convention, the second sentence (section 22 in the original version) would have applied only to criminal cases, and would have required affirmance on appeal "except for substantial error." It was changed to its current form in committee, and provoked sharp floor debate over whether the standard merely reflected existing law, or instead reflected a "lynch mentality" or an invitation to "mob rule."[63] In its first decision addressing this provision, the Supreme Court construed it to support sustaining a trial court judgment where it "can reasonably be done, and thus put an end to litigation" (*Albert Steinfeld & Co. v. Wing Wong*). In the first criminal case applying this section, the

[62] See generally Charles E. Davis, "Judge's Inability to Comment on the Evidence in Arizona," *Law and the Social Order* (1973), 119–40.

[63] See Goff, *Records,* 249–50, 364–67; Leshy, "The Making of the Arizona Constitution," 85–86.

Court said it was "undoubtedly inserted for the express purpose of avoiding the many miscarriages of justice occasioned by strict adherence to the old rule of presumption that error is prejudicial," and therefore, "prejudice will not be presumed, but must appear probable on the record" (*Lawrence v. State*).

This sentence has been addressed in numerous reported cases, each of which fundamentally turns on specific circumstances; only the broad outlines are summarized here. The test for what is a reversible error has been variously expressed, but the decisions boil down to whether the errors "prejudiced the jury in passing on the real issues which they were to try" (*Tucker v. Reil*) so that, without the errors, there is "a reasonable probability that the verdict of the jury might have been different," which requires appellate judges to put themselves "as nearly as possible in the position of the jury [and] determine whether, as reasonable men, the errors committed probably affected the result" (*Turley v. State*).

Some errors are so fundamental, however, that the "substantial justice" rule of this section simply does not apply, even if the error was not raised at trial (see *State v. Gendron*). Thus error in allowing jurors properly challenged by defendant to sit on the case is not rendered harmless by the sufficiency of evidence to sustain a conviction, because the defendant was not given a "fair and impartial trial guaranteed to him by the constitution" (*State v. Thompson*).

The "substantial justice" standard of the second sentence of this section is not limited to jury verdicts but applies to "the whole case"; thus a judge's failure to supply the accused with all information necessary for an intelligent decision on whether to plead guilty has been held prejudicial and a reversible error (*State v. Rios*, overruling an earlier decision).

SECTION 28

Justices and judges; dual office holding; political activity; practice of law. Justices and judges of courts of record shall not be eligible for any other public office or for any other public employment during their term of office, except that they may assume another judicial office, and upon qualifying therefor, the office formerly held shall become vacant. No justice or judge of any court of record shall practice law during his continuance in office, nor shall he hold any office in a political party or actively take part in any political campaign other than his own for his reelection or retention in office. Any justice or judge who files nomination papers for an elective office, other than for judge of the superior court or a court of record inferior to the superior court in a county having a population of less than two hundred fifty thousand persons according to the most recent United States census, forfeits his judicial office.

The first sentence is a modest rewrite of section 11 of the original version of this article. The first clause of the second sentence is substantially the same as the second sentence in section 12 of the original version of this article (except that it

is a flat prohibition on practicing law, not limited, as the original version was, to practice "in any court in this State"). The second clause in the second sentence (referring to political activity) and the third sentence were added in 1974, as part of the set of revisions calling for merit selection of judges, referred to the voters by initiative petition. The 1974 amendment also made minor changes in the first sentence and added the caption. A 1992 amendment raised the county population cutoff for mandatory merit selection (see the commentary on section 12 of this article).

The thrust of this section is twofold: to promote an unbiased judiciary, and to protect the separation of powers. In an early decision, the Supreme Court held that a statute requiring the chief justice to sit on a canvassing board for certifying election returns violated the prohibition on judges holding nonjudicial offices (*State ex rel. Davis v. Osborne*). Similarly, a city charter provision requiring local superior court judges to submit a list of nominees for the position of city magistrate violates this section (*City of Phoenix v. Pensinger*). But a sitting superior court judge may run for the U.S. Congress, because the federal Constitution's qualifications for members of Congress would prevail over this section (*Stockton v. McFarland*). Although this section prohibits a sitting judge from practicing law during his term, it does not prevent disbarment of a judge for an act he committed as a judge that, if committed by an ordinary attorney, was grounds for disbarment (*In re Spriggs*).

SECTION 29

There is no section twenty-nine.

This section, added by the modern courts amendment in 1960, dealt with the salaries of judges. (The same subject had been addressed in section 10 of the original version of this article.) It was repealed upon legislative referral in 1970 as part of the amendment that added section 13 to Article V, which created a commission for setting salaries for most elected state officials, including judges.

SECTION 30

Courts of record. The supreme court, the court of appeals and the superior court shall be courts of record. Other courts of record may be established by law, but justice courts shall not be courts of record.

All justices and judges of courts of record, except for judges of the superior court and other courts of record inferior to the superior court in counties having a population of less than two hundred fifty thousand persons according to the most recent United States census, shall be appointed in the manner provided in section 37 of this article.

The first paragraph of this section is drawn from the first paragraph of section 10 of the original version of this article. (The 1960 rewrite renamed the "justice of the peace courts" as "justice courts.") An amendment in 1974, part of the package that created the merit selection system for judges, added the caption and the reference to the court of appeals (authorized by the rewrite of section 1 of this article in 1960) in the first paragraph, and added the second paragraph. A further amendment, in 1992, raised the county population cutoff for mandatory merit selection (see the commentary on section 12 of this article). Acknowledging that the term "court of record" is not "amenable to easy definition," the Supreme Court has held that a statute authorizing an appeal based on a justice court transcript did not convert justice courts into courts of record, in violation of this section (*Palmer v. Superior Court*).

SECTION 31

The legislature may provide for the appointment of members of the bar having the qualifications provided in section 22 of this article as judges pro tempore of courts inferior to the supreme court. When serving, any such person shall have all the judicial powers of a regular elected judge of the court to which he is appointed. A person so appointed shall receive such compensation as may be provided by law. The population limitation of section 10 of this article shall not apply to the appointment of judges pro tempore of the superior court.

This self-explanatory section (once it is understood that "pro tempore" means temporary) was added by the "modern courts" amendment in 1960; it had no counterpart in the original constitution. A court of appeals has held that this section's reference to "courts inferior to the supreme court" includes city courts, but that this section did not give the legislature exclusive authority to provide for the appointment of pro tempore judges on these courts; instead, a city charter (see Article XIII, section 2) may reserve the power of appointment to the city (*State v. Metcurio*).

SECTION 32

Justices of the peace and inferior courts; jurisdiction, powers and duties; term of office; salaries. The number of justices of the peace to be elected in precincts shall be as provided by law. Justices of the peace may be police justices of incorporated cities and towns.

The jurisdiction, powers and duties of courts inferior to the superior court and of justice courts, and the terms of office of judges of such courts and justices of the peace shall be as provided by law. The legislature may classify counties and precincts for the purpose of fixing salaries of judges of courts inferior to the superior court and of justices of the peace.

> The civil jurisdiction of courts inferior to the superior court and of justice courts shall not exceed the sum of ten thousand dollars, exclusive of interest and costs. Criminal jurisdiction shall be limited to misdemeanors. The jurisdiction of such courts shall not encroach upon the jurisdiction of courts of record but may be made concurrent therewith, subject to the limitations provided in this section.

This section is drawn, with some substantive changes, from section 9 of the original version of this article. It was amended in 1990 to add the caption and raise the jurisdictional cap in civil cases in courts inferior to the superior court from $2,500 to $10,000.

The office of justice of the peace was described in an early Supreme Court decision as "one of great antiquity," which, because of its ready accessibility to all of the people and its expeditious dispatch of business and the informality of its proceedings, was made a "constitutional office" (*High v. State*). Nevertheless, it is "local in character and . . . a county office" rather than a state office for at least some purposes (*Heilman v. Marquardt*; see also the commentary on section 22 of this article). City courts are "inferior" to the superior court within the meaning of the second paragraph of this section, and thus the subject matter jurisdiction of these courts is limited by that paragraph (*Bruce v. State*).

Generally, the legislature has control over the "jurisdiction, powers and duties" of these inferior courts, although this section limits the civil jurisdiction by monetary amount, and limits criminal jurisdiction to misdemeanors. Within these limits, these inferior courts have only such jurisdiction "as may affirmatively be conferred on them by law" (*Miami Copper Co. v. State*). The last sentence allows the legislature to give inferior courts and courts of record concurrent jurisdiction over particular matters; where it has done so, the two different courts cannot both proceed against the same criminal defendant for the same acts because the judicial power of both courts "spring from the same organic law" (this constitution) and therefore would violate the double jeopardy prohibition of Article II, section 10 (*State v. Laguna*).

SECTION 33

> No change made by the legislature in the number of justices or judges shall work the removal of any justice or judge from office. The salary of any justice or judge shall not be reduced during the term of office for which he was elected or appointed.

With minor word changes, this section repeats what was section 24 in the original version of this article. This section must be read with Article IV, part 2, section 17, which generally prohibits increasing or diminishing the compensation of any public officer (other than a justice of the peace) during her term of office. Thus, while this section prohibits only a reduction in a judge's salary during her term, the Supreme Court has held, over a dissent, that it does not

implicitly authorize an increase in salary, so as to defeat the other section's prohibition against such an increase (*Greenlee County v. Laine*). Article IV, part 2, section 17 was amended in 1933 to allow both increases and decreases in salaries of all members of multimember courts to be effective for all members simultaneously, regardless of whether some members are in the middle of their terms; as amended, it nullifies the prohibition in this section against reduction of a judge's salary during his term of office (*County of Maricopa v. Rodgers*).

SECTION 34

Any judicial officer except a retired justice or judge who absents himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office, but the governor may extend the leave of absence for such time as reasonable necessity therefor exists.

This self-explanatory section is substantially the same as section 8 of the original version of this article. It has not been interpreted in any reported judicial decision.

SECTION 35

Continuation in office; continued existence of offices; application of prior statutes and rules. A. All justices, judges, justices of the peace and officers of any court who are holding office as such by election or appointment at the time of the adoption of this section shall serve or continue in office for the respective terms for which they are so elected or for their respective unexpired terms, and until their successors are elected or appointed and qualify or they are retained in office pursuant to section 38 of this article; provided, however, that any justice or judge elected at the general election at which this section is adopted shall serve for the term for which he is so elected. The continued existence of any office heretofore legally established or held shall not be abolished or repealed by the adoption of this article. The statutes and rules relating to the authority, jurisdiction, practice and procedure of courts, judicial officers and offices in force at the time of the adoption of this article and not inconsistent herewith, shall, so far as applicable, apply to and govern such courts, judicial officers and offices until amended or repealed.

B. All judges of the superior court holding office by appointment or retention in counties with a population of two hundred fifty thousand persons or more according to the most recent United States census at the time of the adoption of this amendment to this section shall serve or continue in office for the respective terms for which they were appointed. Upon an incumbent vacating the office of judge of the superior court, whether by failing to file a declaration for retention, by rejection by the qualified electors of the county or resignation, the appointment shall be pursuant to section 37 of this article.

Subsection A of this section was substantially the same as when it was first adopted in 1960. It is a transitional provision, included to insure that the replacement of the former Article VI with the 1960 "modern courts" amendment would not inadvertently abolish any office, repeal any rule or statute, or otherwise affect the functioning of the courts except as necessary to carry out the amendment; that is, except to the extent the previous rule or practice was "inconsistent" with the new provisions. (Similar transitional guidance was found in sections 3, 5, and 23 of the original version of Article VI, and sections 1–9 of Article XXII contain general provisions governing the transition from territorial status to statehood.) The Supreme Court has interpreted this section straightforwardly, to avoid creating any "hiatus" in court jurisdiction (*King v. Uhlmanri*).

In 1974 the caption was added and the first sentence rewritten to reflect the change from election to "merit selection" as the way most judges in the state are chosen. In 1992, subsection B was added as part of a package of amendments to provide a more public process for judicial appointments and evaluations. It provides that vacancies in the superior court in the larger counties be filled by appointment pursuant to the process created by amendments adopted that same year to sections 37 and 41.

SECTION 36

Commission on appellate court appointments and terms, appointments and vacancies on commission. A. There shall be a nonpartisan commission on appellate court appointments which shall be composed of the chief justice of the supreme court, who shall be chairman, five attorney members, who shall be nominated by the board of governors of the state bar of Arizona and appointed by the governor with the advice and consent of the senate in the manner prescribed by law, and ten nonattorney members who shall be appointed by the governor with the advice and consent of the senate in the manner prescribed by law. At least ninety days prior to a term expiring or within twenty-one days of a vacancy occurring for a nonattorney member on the commission for appellate court appointments, the governor shall appoint a nominating committee of nine members, not more than five of whom may be from the same political party. The makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state. Members shall not be attorneys and shall not hold any governmental office, elective or appointive, for profit. The committee shall provide public notice that a vacancy exists and shall solicit, review and forward to the governor all applications along with the committee's recommendations for appointment. Attorney members of the commission shall have resided in the state and shall have been admitted to practice before the supreme court for not less than five years. Not more than three attorney members shall be members of the same political party and not more than two attorney members shall be residents of any

one county. Nonattorney members shall have resided in the state for not less than five years and shall not be judges, retired judges or admitted to practice before the supreme court. Not more than five non-attorney members shall be members of the same political party. Not more than two nonattorney members shall be residents of any one county. None of the attorney or nonattorney members of the commission shall hold any governmental office, elective or appointive, for profit, and no attorney member shall be eligible for appointment to any judicial office of the state until one year after he ceases to be a member. Attorney members of the commission shall serve staggered four-year terms. Vacancies shall be filled for the unexpired terms in the same manner as the original appointments.

B. No person other than the chief justice shall serve at the same time as a member of more than one judicial appointment commission.

C. In making or confirming appointments to the appellate court commission, the governor, the senate and the state bar shall endeavor to see that the commission reflects the diversity of Arizona's population. In the event of the absence or incapacity of the chairman the supreme court shall appoint a justice thereof to serve in his place and stead.

D. Prior to making recommendations to the governor as hereinafter provided, the commission shall conduct investigations, hold public hearings and take public testimony. An executive session as prescribed by rule may be held upon a two-thirds vote of the members of the commission in a public hearing. Final decisions as to recommendations shall be made without regard to political affiliation in an impartial and objective manner. The commission shall consider the diversity of the state's population, however the primary consideration shall be merit. Voting shall be in a public hearing. The expenses of meetings of the commission and the attendance of members thereof for travel and subsistence shall be paid from the general fund of the state as state officers are paid, upon claims approved by the chairman.

E. After public hearings the supreme court shall adopt rules of procedure for the commission on appellate court appointments.

F. Notwithstanding the provisions of subsection A, the initial appointments for the five additional nonattorney members and the two additional attorney members of the commission shall be designated by the governor for staggered terms as follows:

1. One appointment for a nonattorney member shall be for a one-year term.
2. Two appointments for nonattorney members shall be for a two-year term.
3. Two appointments for nonattorney members shall be for a three-year term.
4. One appointment for an attorney member shall be for a one-year term.
5. One appointment for an attorney member shall be for a two-year term.

G. The members currently serving on the commission may continue to serve until the expiration of their normal terms. All subsequent appointments shall be made as prescribed by this section.

This section and the four that follow were adopted (with captions) in 1974 after having been placed on the ballot by initiative petition. Together these five sections create a form of the so-called Missouri plan for merit selection of judges, largely although not completely replacing the system of electing judges that had prevailed since statehood. Specifically, all appellate judges and all superior court judges in those counties of the state with a population greater than 250,000 (currently, Maricopa [Phoenix] and Pima [Tucson]) are subject to merit selection. Superior court judges in the other counties are still elected, although section 40 of this article gives the people of those counties the option to adopt merit selection by a referendum election called by the county's board of supervisors.[64]

The original constitution called for electing judges, with the names of candidates competing for the same position placed on the ballot in "alphabetical order without partisan or other designation except the title of the office" (Article VI [original version], section 3, clause 7 [supreme court]; and section 5, clause 4 [superior court]). Superior court judges in counties not subject to merit selection still stand for election. Their names are listed on the ballot "without partisan or other designation" (section 12, paragraph 1 of this article), although the former requirement for alphabetical listing was deleted by the modern courts amendment in 1960.

Despite the prohibition on partisan designation, the common practice was, and remains in those counties where superior court judges are still elected, for judges to win nomination by running in partisan primaries of the political party of their choice. Thus it is not difficult to determine the political affiliation of most candidates,[65] a result probably anticipated by the framers of the Arizona Constitution because they had mandated a "direct primary" by which political parties nominate candidates for "all elective state, county, and city offices" (see Article VII, section 10). At the same time merit selection was approved in 1974, the voters also amended section 28 of this article to make clear that judges may not "hold office in any political party or actively take part in any political campaign other than [their] own for [their] reelection or retention in office."

The campaign for merit selection in Arizona began in 1959, when proposals were being drafted for what ultimately became adopted as the "modern courts" amendment in 1960. Debate continued over the next fifteen years, and various proposals for a merit selection constitutional amendment were introduced into the legislature. Upon the failure of the legislature to refer any of these to the ballot, an initiative campaign was begun that eventually gathered sufficient

[64] Currently no other county has opted for merit selection, and the most populous of them, Pinal, had a population of 116,379 in the 1990 census, well below the 250,000 qualifying figure for mandatory merit selection.

[65] See John H. Roll, "Merit Selection: The Arizona Experience," *Arizona State Law Journal* 22 (1990), 837, 857.

signatures to place the measure on the November 1974 ballot, where it was approved by a margin of 54–46 percent.[66]

The shift from election to appointment of judges was not as momentous as might first appear. Although calling for election of judges, the original constitution also allowed the governor to fill any vacancy that occurred until the next general election.[67] Because most vacancies on the bench occurred between general elections, most judgeships in Arizona (as in other states that elect judges) were initially filled by appointment even prior to the adoption of merit selection. Once in office, appointed incumbents often ran unopposed in succeeding elections and had the advantage (especially powerful in a low-visibility contest) of incumbency even if they attracted an opponent; as a result, ouster of incumbent judges was rare.[68] The upshot was that when merit selection was adopted in the fall of 1974, more than two-thirds of all judges on the bench in Arizona had initially assumed their posts by appointment.

The merit selection process remains in place, but it has not escaped modification. A minor amendment in 1976 added the words "in the manner prescribed by law" to the requirement for senate confirmation of gubernatorial appointment to members of the judicial appointments commission. Merit selection has not gained universal favor; opponents have repeatedly introduced bills to repeal or modify it. In 1981–82 a petition drive failed to gather enough signatures to place repeal on the ballot.[69]

In 1992 significant modifications were made in this and related sections. Originally this section provided not only for a statewide commission on appellate court appointments, but also for county wide commissions for superior court appointments in those counties with merit selection of superior court judges (see sections 12 and 37 of this article). The 1992 amendment limited this section to a commission on appellate court appointments; provisions dealing with trial court appointments were modified and moved to a new section 41 of this article. Also, the original composition of the appellate court appointments commission included the chief justice, three attorney members, and five

[66] For commentary on merit selection prior to its adopting, see Stephen E. Lee, "Judicial Selection and Tenure in Arizona," *Law and the Social Order* (1973), 51; Comment, "Merit Selection Plan for Arizona?" *Arizona Law Review* 9 (1967), 297. For a thorough description of the campaign for merit selection in Arizona (including arguments pro and con) and the record of experience with it since 1974, and including a useful sketch of the history of judicial selection processes in the United States, see Roll, "Merit Selection," 837–94. See also James Duke Cameron, "Merit Selection in Arizona—The First Two Years," *Arizona State Law Journal* 3 (1976), 425–35.

[67] See Goff, *Records* 1411–13; Art. VI (original version), sec. 3, para. 4 (supreme court); sec. 5, para. 4 (superior court).

[68] Between 1958 and 1972, for example, only five of fifty superior court judges who had initially been appointed were defeated for reelection. See Roll, "Merit Selection," 855–56, 868, note 219; see also J. Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown, 1950), 123.

[69] Roll, "Merit Selection," pp. 885–90.

nonattorney members. The 1992 amendment enlarged the commission to include five attorney members and ten nonattorney members, and it made conforming adjustments to the numbers in the second paragraph of subsection A. It left intact the previous requirement that the governor appoint the attorney members nominated by the board of governors of the state bar. (The attorney general had earlier opined that the governor has the power to reject the state bar's nominees for membership because otherwise the governor's role would be "useless . . . or trivial," No. 187–043.)

The 1992 amendment also created a nominating committee to advise on vacancies on the commission by adding the sentences after the first one in subsection A. Members of both the nominating committee and the commission must be balanced as to political party affiliations. The 1992 amendment did not affect the previous requirement that the commission members serve staggered, four year terms, but it did add what are now subsections C, E, F, and G, as well as considerable language to what is now subsection D.

The thrust of all these changes is to establish a more formal procedure (by subsection E's authorizing the Supreme Court to adopt "rules of procedure" for the commission) and to place more emphasis on "the diversity of Arizona's population," public hearings, public participation, and nonattorney involvement in the process of nominating judges. That process had been gradually moving more into the open even prior to the 1992 amendment—first, with disclosure of the names of the applicants and then, in 1988, televising the commission's interviews of applicants for a vacancy on the Supreme Court.[70]

The 1992 amendment also changed the governing standard for judicial nominations (now found in subsection D); specifically, "merit" has become the "primary" rather than the sole consideration, and the commissions are now admonished to act "in an impartial and objective manner." The caution not to weigh "political affiliation" remains from the original version; it is made more concrete in section 37, which requires the commission to recommend at least three names to the governor for each vacancy, "no more than two of whom shall be members of the same political party." This section has not been interpreted in any reported judicial decision.

SECTION 37

Judicial vacancies and appointments; initial terms; residence; age. A. Within sixty days from the occurrence of a vacancy in the office of a justice or judge of any court of record, except for vacancies occurring in the office of a judge of the superior court or a judge of a court of record inferior to the superior court, the commission on appellate court appointments, if the vacancy is in the supreme court or an intermediate

[70] Ibid., 866–67.

appellate court of record, shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy, no more than two of whom shall be members of the same political party unless there are more than four such nominees, in which event not more than sixty per centum of such nominees shall be members of the same political party.

B. Within sixty days from the occurrence of a vacancy in the office of a judge of the superior court or a judge of a court of record inferior to the superior court except for vacancies occurring in the office of a judge of the superior court or a judge of a court of record inferior to the superior court in a county having a population of less than two hundred fifty thousand persons according to the most recent United States census, the commission on trial court appointments for the county in which the vacancy occurs shall submit to the governor the names of not less than three persons nominated by it to fill such vacancy, no more than two of whom shall be members of the same political party unless there are more than four such nominees, in which event no more than sixty per centum of such nominees shall be members of the same political party. A nominee shall be under sixty-five years of age at the time his name is submitted to the governor. Judges of the superior court shall be subject to retention or rejection by a vote of the qualified electors of the county from which they were appointed at the general election in the manner provided by Section 38 of this article.

C. A vacancy in the office of a justice or a judge of courts of record shall be filled by appointment by the governor without regard to political affiliation from one of the nominees whose names shall be submitted to him as here inabove provided. In making the appointment, the governor shall consider the diversity of the state's population for an appellate court appointment and the diversity of the county's population for a trial court appointment, however the primary consideration shall be merit. If the governor does not appoint one of such nominees to fill such vacancy within sixty days after their names are submitted to the governor by such commission, the chief justice of the supreme court forthwith shall appoint on the basis of merit alone without regard to political affiliation one of such nominees to fill such vacancy. If such commission does not, within sixty days after such vacancy occurs, submit the names of nominees as hereinabove provided, the governor shall have the power to appoint any qualified person to fill such vacancy at any time thereafter prior to the time the names of the nominees to fill such vacancy are submitted to the governor as hereinabove provided. Each justice or judge so appointed shall initially hold office for a term ending sixty days following the next regular general election after the expiration of a term of two years in office. Thereafter, the terms of justices or judges of the supreme court and the superior court shall be as provided by this article.

D. A person appointed to fill a vacancy on an intermediate appellate court or another court of record now existing or hereafter established by law shall have been a resident of the counties or county in which that vacancy exists for at least one year prior to his appointment, in addition to possessing the other required qualifications. A nominee shall be under sixty-five years of age at the time his name is submitted to the governor.

This section contains the mechanics of the appointment process. The pertinent commission (county or appellate) has sixty days from the occurrence of a vacancy in a judgeship subject to merit selection to submit at least three names to the governor. (There must be an actual vacancy, not just an impending one, according to the attorney general; Op. No. 186–117; see also No. 187–071.) If names are not submitted to the governor within that time, the governor may appoint "any qualified person" to fill the vacancy, although the governor must appoint off the commission's list if the commission submits names more than sixty days after a vacancy occurs, but before the governor makes the appointment. The 1992 amendment struck language in subsection A referring commissions on trial court appointments and added the new subsection B to address those commissions separately.

The governor has sixty days from the date the names are submitted to her by the commission to make the appointment. Consistent with its changes in the previous section, the 1992 amendment dropped the "merit alone" standard applicable to the governor's appointment in subsection C (formerly subsection B). While "merit" remains the "primary consideration," the governor is also required to consider the "diversity" of the population of the state (or county, in the case of a superior court appointment). Surveys made since the advent of merit selection have, not unexpectedly, shown that Democratic governors tend to select Democrats for judgeships, and Republican governors tend to select Republicans, although there are exceptions.[71]

The person appointed holds office until sixty days following the next general election after the judge has served two years. Because general elections are held every two years (see Article VII, section 11), this means in effect that appointees serve for a minimum of two and a maximum of four years before having to stand for a retention election. The retention election process is described in the commentary under section 38.

Before the 1992 amendment, the last subsection of this section required all appointees to lower courts to be residents of the district in which the vacancy existed (county for superior court judgeships or multicounty districts for appellate judgeships) for one year prior to appointment. That amendment dropped the residency requirement for superior court appointments in the counties with merit selection. (Additional qualifications for lower court judges are found in section 22 of this article.) The 1992 amendment left intact the requirement that all nominees be under sixty-five years of age when their names are submitted to the governor, but it moved this requirement for superior court appointments from the last subsection to the newly added subsection B. Neither section 22 (lower courts) nor section 6 (Supreme Court) contains a maximum qualifying age. Section 39 of this article, however, calls generally for judges to retire at age

[71] Ibid., 866–67.

seventy, subject to holdover under section 35 of this article until a successor is "elected or appointed and qualif[ies]".

This section has not been interpreted in any reported court decision.

SECTION 38

Declaration of candidacy; form of judicial ballot, rejection and retention; failure to file declaration. A justice or judge of the supreme court or an intermediate appellate court shall file in the office of the secretary of state, and a judge of the superior court or other court of record including such justices or judges who are holding office as such by election or appointment at the time of the adoption of this section except for judges of the superior court and other courts of record inferior to the superior court in counties having a population of less than two hundred fifty thousand persons, according to the United States census, shall file in the office of the clerk of the board of supervisors of the county in which he regularly sits and resides, not less than sixty nor more than ninety days prior to the regular general election next preceding the expiration of his term of office, a declaration of his desire to be retained in office, and the secretary of state shall certify to the several boards of supervisors the appropriate names of the andidate or candidates appearing on such declarations filed in his office.

The name of any justice or judge whose declaration is filed as provided in this section shall be placed on the appropriate official ballot at the next regular general election under a nonpartisan designation and in substantially the following form:

Shall _____ (Name of Justice or Judge), of the _____ Court be retained in Office?

Yes _____ No _____ (Mark X after one).

If a majority of those voting on the question votes "No," then, upon the expiration of the term for which such justice or judge was serving, a vacancy shall exist, which shall be filled as provided by this article. If a majority of those voting on the question votes "Yes," such justice or judge shall remain in office for another term, subject to removal as provided by this constitution.

The votes shall be counted and canvassed and the result declared as in the case of state and county elections, whereupon a certificate of retention or rejection of the incumbent justice or judge shall be delivered to him by the secretary of state or the clerk of the board of supervisors, as the case may be.

If a justice or judge fails to file a declaration of his desire to be retained in office, as required by this section, then his office shall become vacant upon expiration of the term for which such justice or judge was serving.

Toward the end of the term of their initial appointment, within no less than two nor more than four years, those appointees who desire to continue in office must face the voters on the general election ballot in a "retention" election. This is neither a partisan nor a contested election; a judge runs on her record, not against any opponent. The voters answer yes or no to the question whether each

judge should be retained in office. At least 50 percent of those voting on the question must vote yes for the judge to serve another term; failing that, the judge must step down sixty days after the election (see section 37, third paragraph), and the vacancy is filled by the mechanism established in the two preceding sections.

This section does not specifically define the electorate that votes on the retention of different categories of judges. In practice, sensibly, Supreme Court justices run statewide, and superior court judges run only in their counties. Court of appeals judges, who sit in multicounty districts, have somewhat different requirements, by statute. Specifically, if a court of appeals judge resides in either Pima or Maricopa Counties (the two most populous ones), she is on the ballot only in the county in which she resides. If a court of appeals judge resides in any other, less populated county, she is on the ballot in all counties (other than Pima or Maricopa) served by her appellate division (Ariz. Rev. Stat. 12–120).

The results of the retention elections held since 1974 show that the overwhelming majority of judges are retained by the voters, though there have been some notable exceptions. This high retention rate is consistent with the experience in other states with similar systems.[72] Presumably in response to the perception that voters have some difficulty making informed decisions on individual judges, section 42 was added to this article to create a "process" for "evaluating judicial performance," with the results to be disseminated to the voters (see the commentary on that section). The 1992 amendment also made minor editorial changes in this section and modified the population cutoff for superior court merit selection to conform to the amendment to section 12 of this article.

SECTION 39

Retirement of justices and judges; vacancies. On attaining the age of seventy years a justice or judge of a court of record shall retire and his judicial office shall be vacant, except as otherwise provided in section 35 of this article. In addition to becoming vacant as provided in this section, the office of a justice or judge of any court of record becomes vacant upon his death or his voluntary retirement pursuant to statute or his voluntary resignation, and also, as provided in section 38 of this article, upon the expiration of his term next following a general election at which a majority of those voting on the question of his retention vote in the negative or for which general election he is required, but fails, to file a declaration of his desire to be retained in office.

This section is alternative to and cumulative with the methods of removal of judges and justices provided in parts 1 and 2 of article 8 and article 6.1 of this constitution.

This section, added as part of the merit selection package of amendments in 1974, sets a mandatory retirement age of seventy for all state supreme court,

[72] See ibid., 880–83.

court of appeals, and superior court judges. (These are the courts of record specified in section 30 of this article.) The reference in the first sentence to section 35 of this article means that a judge who reaches the age of seventy may serve until her successor is named and qualifies for office. The last sentence preserves the recall and impeachment processes of Article VIII, and the process for suspension and removal specified in Article VI.I, below.

Taking all these together, there are numerous ways for a judgeship to become vacant: (1) upon the death or retirement of the judge, including mandatory retirement at age seventy; (2) upon impeachment; (3) upon recall; (4) upon being defeated in a retention election; or (5) if one is a superior court judge in a county that still follows the contested election system, upon being defeated in a partisan primary or a nonpartisan general election.

This section has not been interpreted in any published court decision.

SECTION 40

Option for counties with less than two hundred fifty thousand persons. Notwithstanding any provision of this article to the contrary, any county having a population of less than two hundred fifty thousand persons, according to the most recent United States census, may choose to select its judges of the superior court or of courts of record inferior to the superior court as if it had a population of two hundred fifty thousand or more persons. Such choice shall be determined by vote of the qualified electors of such county voting on the question at an election called for such purpose by resolution of the board of supervisors of such county.

If such qualified electors approve, the provisions of sections 12, 28, 30, 35 through 39, 41 and 42 shall apply as if such county had a population of two hundred fifty thousand persons or more.

This section was part of merit selection adopted in 1974, which permits smaller counties to opt for merit selection of their superior court judges. Originally the minimum population for mandatory merit selection was 150,000 or more; this was changed by the 1992 amendment to 250,000 (see the commentary on section 12 of this article). The question is put to popular vote of the qualified electors, but only if proposed by resolution of the county board of supervisors. To date, none of the smaller counties has adopted merit selection. This provision has not been interpreted in any reported court decision.

SECTION 41

Superior court divisions; commission on trial court appointments; membership; terms. A. Except as otherwise provided, judges of the superior court in counties having a population of two hundred fifty thousand persons or more according

to the most recent United States census shall hold office for a regular term of four years.

B. There shall be a nonpartisan commission on trial court appointments for each county having a population of two hundred fifty thousand persons or more according to the most recent United States census which shall be composed of the following members:

1. The chief justice of the supreme court, who shall be the chairman of the commission. In the event of the absence or incapacity of the chairman the supreme court shall appoint a justice thereof to serve in his place and stead.
2. Five attorney members, none of whom shall reside in the same supervisorial district and not more than three of whom shall be members of the same political party, who are nominated by the board of governors of the state bar of Arizona and who are appointed by the governor subject to confirmation by the senate in the manner prescribed by law.
3. Ten nonattorney members, no more than two of whom shall reside in the same supervisorial district.

C. At least ninety days prior to a term expiring or within twenty-one days of a vacancy occurring for a nonattorney member on the commission for trial court appointments, the member of the board of supervisors from the district in which the vacancy has occurred shall appoint a nominating committee of seven members who reside in the district, not more than four of whom may be from the same political party. The make-up of the committee shall, to the extent feasible, reflect the diversity of the population of the district. Members shall not be attorneys and shall not hold any governmental office, elective or appointive, for profit. The committee shall provide public notice that a vacancy exists and shall solicit, review and forward to the governor all applications along with the committee's recommendations for appointment. The governor shall appoint two persons from each supervisorial district who shall not be of the same political party, subject to confirmation by the senate in the manner prescribed by law.

D. In making or confirming appointments to trial court commissions, the governor, the senate and the state bar shall endeavor to see that the commission reflects the diversity of the county's population.

E. Members of the commission shall serve staggered four year terms, except that initial appointments for the five additional nonattorney members and the two additional attorney members of the commission shall be designated by the governor as follows:

1. One appointment for a nonattorney member shall be for a one-year term.
2. Two appointments for nonattorney members shall be for a two-year term.
3. Two appointments for nonattorney members shall be for a three-year term.
4. One appointment for an attorney member shall be for a one-year term.
5. One appointment for an attorney member shall be for a two-year term.

F. Vacancies shall be filled for the unexpired terms in the same manner as the original appointments.

G. Attorney members of the commission shall have resided in this state and shall have been admitted to practice in this state by the supreme court for at least five years and shall have resided in the supervisorial district from which they are appointed for at least one year. Nonattorney members shall have resided in this state for at least five years, shall have resided in the supervisorial district for at least one year before being nominated and shall not be judges, retired judges nor admitted to practice before the supreme court. None of the attorney or nonattorney members of the commission shall hold any governmental office, elective or appointive, for profit and no attorney member is eligible for appointment to any judicial office of this state until one year after membership in the commission terminates.

H. No person other than the chief justice shall serve at the same time as a member of more than one judicial appointment commission.

I. The commission shall submit the names of not less than three individuals for nomination for the office of the superior court judge pursuant to section 37 of this article.

J. Prior to making recommendations to the governor, the commission shall conduct investigations, hold public hearings and take public testimony. An executive session as prescribed by rule may be held upon a two-thirds vote of the members of the commission in a public hearing. Final decisions as to recommendations shall be made without regard to political affiliation in an impartial and objective manner. The commission shall consider the diversity of the county's population and the geographical distribution of the residences of the judges throughout the county, however the primary consideration shall be merit. Voting shall be in a public hearing. The expenses of meetings of the commission and the attendance of members thereof for travel and subsistence shall be paid from the general fund of the state as state officers are paid, upon claims approved by the chairman.

K. After public hearings the supreme court shall adopt rules of procedure for the commission on trial court appointments.

L. The members of the commission who were appointed pursuant to section 36 of this article prior to the effective date of this section may continue to serve until the expiration of their normal terms. All subsequent appointments shall be made as prescribed by this section.

This section was added by the 1992 amendment, and it describes the composition and terms of the commissions on trial court appointments for those counties with merit selection of superior court judges. It replaces and expands considerably what was originally section 36(B). Formerly these commissions were composed of three attorney members and five nonattorney members (in addition to the chief justice); now they have five and ten, respectively. Formerly only county residency was required; the 1992 amendment mandated equal geographical representation for each of the county's supervisorial districts, for both attorney and nonattorney members. Subsection C requires creation of a bipartisan nominating committee to select nonattorney members of the commission.

The principal thrust of this section, like that of the 1992 changes to section 36 (the commission on appellate court appointments)—and, indeed, the entire package of 1992 amendments—is to make the nomination process more formal, open, widely consultative, and representative. Thus here is found repeated emphasis on reflecting the "diversity" of the population of the county or district (see subsections C, D, and J). Like the counterpart amendments to sections 36 and 37, subsection J here makes "merit" the "primary consideration" of judicial nominations, but it also requires consideration of not only the county's population "diversity" but also the "geographical distribution" of judges' residences "throughout the county." This section has not been subject to reported judicial decision.

SECTION 42

Retention evaluation of justices and judges. The supreme court shall adopt, after public hearings, and administer for all justices and judges who file a declaration to be retained in office, a process, established by court rules for evaluating judicial performance. The rules shall include written performance standards and performance reviews which survey opinions of persons who have knowledge of the justice's or judge's performance. The public shall be afforded a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters and any other methods as the court deems advisable.

This section was also added by the 1992 amendment package. It requires the Supreme Court to create and administer a "process" for "evaluating judicial performance," to help guide the voters' decisions in the judicial retention/rejection elections described in section 38 of this article. As such it is a tacit recognition that voters have difficulty reaching informed decisions in voting on individual judges (see the commentary on section 38).

By calling for surveys of persons with knowledge of individual judge performance, this section builds upon a practice, followed by the state bar for several decades, of surveying lawyers in the county for their opinions on individual judges. The survey results have been published in newspapers in advance of elections involving judges, and they seem to have had some influence on the election results. The process created by this section goes considerably beyond simple surveys, however, because it also calls for the development of "written performance standards" and offers the public a "full and fair opportunity for participating in the evaluation process."

Article VI.I

Commission on Judicial Conduct

This article (with captions) was added by the voters in 1970. It creates a constitutional mechanism for policing the conduct and performance of sitting judges in the state, including justices of the peace, superior and appellate court judges, and supreme court justices.[73] Originally called the commission on judicial qualifications, it was given the more accurate name of commission on judicial conduct by a 1988 amendment (which made other changes discussed in the commentary on particular sections).

SECTION 1

Composition; appointment; term; vacancies. A. A commission on judicial conduct is created to be composed of eleven persons consisting of two judges of the court of appeals, two judges of the superior court, one justice of the peace and one municipal court judge, who shall be appointed by the supreme court, two members of the state bar of Arizona, who shall be appointed by the governing body of such bar association, and three citizens who are not judges, retired judges nor members of the state bar of Arizona, who shall be appointed by the governor subject to confirmation by the senate in the manner prescribed by law.

[73] See generally Donald P. Roelke, "Discipline and Removal of the Judiciary in Arizona," *Law and the Social Order* (1973), 85–94.

B. Terms of members of the commission shall be six years, except that initial terms of two members appointed by the supreme court and one member appointed by the state bar of Arizona for terms which begin in January, 1991 shall be for two years and initial terms of one member appointed by the supreme court and one member appointed by the state bar of Arizona for terms which begin in January, 1991 shall be for four years. If a member ceases to hold the position that qualified him for appointment his membership on the commission terminates. An appointment to fill a vacancy for an unexpired term shall be made for the remainder of the term by the appointing power of the original appointment.

This section was amended in 1976 by adding "in the manner prescribed by law" at the end of the first paragraph, so as to give the legislature flexibility in the senate confirmation process. It was further amended in 1988 to expand the commission from nine to eleven persons. The additional members are a municipal court judge appointed by the Supreme Court and an additional citizen from the general public (raising the number of citizen members from two to three), appointed by the governor and confirmed by the senate.

The 1988 amendment also rewrote the second paragraph to lengthen the term of commission members from four to six years, and to create a mechanism for staggering the terms of the members appointed by the Supreme Court and state bar. This section has not been interpreted in any reported judicial decision.

SECTION 2

Disqualification of judge. A judge is disqualified from acting as a judge, without loss of salary, while there is pending an indictment or an information charging him in the United States with a crime punishable as a felony under Arizona or federal law, or a recommendation to the supreme court by the commission on judicial conduct for his suspension, removal or retirement.

To protect the integrity of the judicial process, this section effectively suspends any judge from "acting as a judge" when formally accused of a felony under state or federal law, or when the commission on judicial conduct created in section 1 of this article has recommended her suspension, removal, or retirement. A 1988 amendment added the reference to "suspension" in the last clause. The disqualification seems automatic, especially considering section 6, below, making the provisions of this article self-executing. Unlike the next section, however, disqualification as a result of formal accusation of a crime (by information or indictment) must involve a felony rather than a misdemeanor. Finally, the charge must be brought in the United States; foreign felonies are not covered.

SECTION 3

Suspension or removal of judge. On recommendation of the commission on judicial conduct, or on its own motion, the supreme court may suspend a judge from office without salary when, in the United States, he pleads guilty or no contest or is found guilty of a crime punishable as a felony under Arizona or federal law or of any other crime that involves moral turpitude under such law. If his conviction is reversed the suspension terminates, and he shall be paid his salary for the period of suspension. If he is suspended and his conviction becomes final the supreme court shall remove him from office.

This section is a companion to the preceding one, but differs in significant respects. First, it allows for suspension "from office" without salary, rather than mere disqualification from "acting as a judge" while retaining salary. Second, the suspension can occur only upon conviction, rather than mere formal accusation, of a crime. Third, the suspension is not automatic, but must be by order of the Supreme Court, which has discretion not to suspend. Fourth, the crime involved may either be "punishable as a felony" or involve "moral turpitude." The Supreme Court recently decided that where a judge was convicted of a misdemeanor in another state for a crime that could (but under current practice may not) have been punished as a felony in Arizona, the judge could be suspended and removed under this section, because what controls is the "maximum punishment imposable under Arizona law for the conduct involved, and not speculation" as to what charges might have been filed in Arizona (*In re Marquardi*).

The same case confirmed (over a dissent) that, upon the judge's conviction of the crime but before it becomes final (i.e., if an appeal is pending), the Supreme Court has discretion either to suspend the judge without salary, or to maintain the disqualification under section 2 of this article, with salary. The choice impacts not only salary, but also the ultimate question of whether removal of the judge is mandatory if the conviction becomes final. In *Marquardt* the Court held that if the judge is suspended without pay and the conviction becomes final, the last sentence in this section results in the judge being summarily removed from office. But if the judge had only been disqualified under section 2 with pay pending appeal of the conviction, the judge is not automatically removed from office upon conviction. Instead, the Court may impose other sanctions under section 4 of this article, and will determine the sanction by considering the inherent nature of the offense, and whether the facts of the particular case warrant summary removal. In *Marquardt*, the Court weighed these factors and suspended the judge effectively without pay for one year, over a dissent that advocated his outright removal from the bench.

SECTION 4

Retirement of judge. A. On recommendation of the commission on judicial conduct, the supreme court may retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and may censure, suspend without pay or remove a judge for action by him that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

B. A judge retired by the supreme court shall be considered to have retired voluntarily. A judge removed by the supreme court is ineligible for judicial office in this state.

This section gives the Supreme Court, upon recommendation by the commission, power not only to retire a judge for disability, but also (despite its misleading caption) to penalize a judge who misbehaves. A 1988 amendment added the possible penalty of suspension without pay to those of censure or removal in the last half of subsection A. Although subsection B provides that a judge retired by the Supreme Court "shall be considered to have retired voluntarily," the last sentence of section 5 of this article speaks of "involuntary" retirement of judges.

Judicial disciplinary proceedings, like attorney disciplinary proceedings, "are neither criminal nor civil, but are *sui generis*"; their goal "is not to punish the judge but to protect the public and the judiciary's integrity" (*In re Marquardt.*) "[W]ilful misconduct in office" includes dismissing traffic citations for personal or political reasons, filing complaints in his own court to recover money owed to a business he owned, and altering the court's docket after notice that his judgments of dismissal were being questioned (*In re Haddad*); or giving a prisoner being held in a case assigned to another judge special visitation and telephone privileges with a court clerk, making improper statements to a criminal defendant prior to sentencing, and allowing a court reporter to delete matters from a trial transcript (*In re Hendrix*). Driving under the influence of alcohol has been held to constitute conduct "prejudicial to the administration of justice" within the meaning of this section (*In re Biggins*); such conduct need not be willful (*In re Walker*; see also *In re Lockwood*).

This section has been construed to permit the Court to penalize a sitting judge in part for his conduct as a lawyer before he took office, because "misconduct will often follow a judge from practice to the bench," and can "bring the judicial office into disrepute" (*In re Rubi*). Although this subjects a judge to both disciplinary proceedings by the bar and judicial misconduct proceedings, the Court saw no problem with the overlap because it exercises final authority over both proceedings (*id.*).

Possible penalties for violating this section include censure, suspension without pay, or removal from office. Censure has been a common remedy (and indeed is the only remedy if the person is no longer in office; see *In re Lehman*), but the Court has said that removal would be the normal penalty and censure

the exception (*In re Haddad*). The Court retains jurisdiction to find misconduct and to levy penalties even if the judge resigns prior to final disposition, because the judge is deemed unable to moot the case by his own voluntary conduct (*In re Weeks*).

SECTION 5

Definitions and rules implementing article. The term "judge" as used in this article shall apply to all justices of the peace, judges in courts inferior to the superior court as may be provided by law, judges of the superior court, judges of the court of appeals and justices of the supreme court. The supreme court shall make rules implementing this article and providing for confidentiality of proceedings. A judge who is a member of the commission or supreme court shall not participate as a member in any proceedings hereunder involving his own censure, suspension, removal or involuntary retirement.

This section was amended in 1988 to broaden the applicability of this article to judges in "courts inferior to the superior court"; therefore, this article now applies to all courts in the state. The 1988 amendment also made the technical change of substituting "in this article" for "in this constitutional amendment" in the first line. Implementing the rulemaking direction of this section, the Supreme Court has adopted the Code of Judicial Conduct of the American Bar Association to govern the conduct of the judiciary (Ariz. Rev. Stat. vol. 17A, Rule 81), and has also adopted rules of procedure for the Commission on Judicial Conduct (Ariz. Rev. Stat. vol. 17B). The procedural rules combine the functions of investigation, prosecution, and adjudication (with an additional power to recommend sanctions) in the commission on judicial conduct; the Court has rejected the claim this amalgamation violates the due process clause of the Fourteenth Amendment of the U.S. Constitution (*In re Davis*).

The commission has broad power to use information from its files acquired in a previous investigation of allegations of similar misconduct by the same justice of the peace, at least where it is not used as the basis for an independent new charge (*In re Ackel*). Members of the commission may vote on a matter without attending all the proceedings, so long as they review the transcripts of unattended meetings prior to voting; if they have not, they should not vote (*id.*).

SECTION 6

Article self-executing. The provisions of this article shall be self-executing.

This self-explanatory provision has not been interpreted in any published decision.

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Article VII

Suffrage and Elections

Although this article contains most of the constitutional guidance on suffrage and elections, other parts of the constitution address the subject as well; for example, Article II, section 21 ("free and equal" elections and no interference with the "free exercise of the right of suffrage"); Article XX, section 7 (forbidding laws "restricting or abridging" the right to vote on account of race, color, or previous condition of servitude); and Article XIV, section 18 (prohibiting corporations from making contributions to influence elections).

SECTION 1

All elections by the people shall be by ballot, or by such other method as may be prescribed by law; provided, that secrecy in voting shall be preserved.

This section adopts the Australian import, the secret ballot, that had been approved by the territorial legislature nearly twenty years before statehood.[74] The Supreme Court has suggested that this commitment to secrecy in voting (as well as the general protection for privacy in Article II, section 8) requires courts to explore alternatives to disclosure of ballots in a judicial inquiry into a

[74] See Leshy, "The Making of the Arizona Constitution," 68.

contested election (*Huggins v. Superior Court*, disapproving a court of appeals decision that had ignored this section).

SECTION 2

No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the state one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

As originally adopted, this section contained three qualifications for voters in all elections except "school elections" (see section 8): a minimum age of twenty-one, a minimum state residency of one year, and male gender. The constitutional framers debated at length whether to include a literacy test for voting, a particularly sensitive subject because the U.S. Congress had specifically denounced the Arizona territory's literacy test in the statehood enabling act.[75] In the first general election after statehood, in 1912, the voters approved an initiated constitutional amendment that rewrote this section substantially to its current form, eliminating the gender discrimination, and adding the third paragraph as well. In 1962 the first paragraph of this section was amended, upon legislative referral, to vest the legislature with authority to prescribe voter qualifications for presidential electors. Of course, federal law may and in some cases has superseded the requirements of this section; for example, the twenty-one-year minimum age has been superseded by the adoption of the Twenty-Sixth Amendment to the U.S. Constitution in 1971 (see also *Dunn v. Blumstein; Marston v. Lewis.*)

Although this section is self-executing (*Roberts v. Spray,*) it does not prevent the legislature from adopting additional qualifications for voters, in part because of its power under section 12 of this article to "secure the purity of elections" (*Ahrens v. Kerby*). The basic voter qualifications in the first paragraph have been held inapplicable to elections to select the board of a special governmental

[75] Ibid., 19–21, 66, 68.

district, so the legislature may authorize nonresident corporations to vote in such elections (*Porterfield v. Van Boening*). They also do not apply to signing petitions to initiate a municipal annexation, because the petition only begins the process of annexation, and the state has broad power over municipal corporations under Article XIII (*Gorman v. City of Phoenix*). In 1948 the Supreme Court overruled an earlier decision and held that reservation-residing Native Americans were not persons "under guardianship" within the meaning of the third paragraph of this section (*Harrison v. Laveen*, overruling *Porter v. Hall*).[76]

SECTION 3

For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or while a student at any institution of learning, or while kept at any almshouse or other asylum at public expense, or while confined in any public jail or prison.

This section and section 6, below, deal with the subject of residency for voting purposes of federal employees, students, institutionalized persons, and members of the military. Taken together, they basically provide that such status neither qualifies nor disqualifies a person as a resident for voting purposes. Although this section is limited specifically to residency for voting purposes, the Supreme Court has construed it to govern domicile for all purposes, including residency requirements for divorce (*Clark v. Clark*).

SECTION 4

Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at any election, and in going thereto and returning therefrom.

This section provides a limited protection to electors in exercising their right to vote. The Supreme Court has suggested that it extends only to the act of voting, and only to those who have registered and are otherwise qualified to vote (*Ahrens v. Kerby, dictum*).

SECTION 5

No elector shall be obliged to perform military duty on the day of an election, except in time of war or public danger.

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[76] The *Harrison* opinion was authored by Justice Levi Udall, father of noted national politicians Stewart and Morris Udall.

Presumably this section can only be applied to members of the state militia or national guard under state control, rather than to those soldiers under the paramount control of the national government. As with the preceding section, the Supreme Court has suggested that it applies only to individuals who have registered and are otherwise qualified to vote (*Ahrens v. Kerby*).

SECTION 6

No soldier, seaman, or marine, in the army or navy of the United States shall be deemed a resident of this state in consequence of his being stationed at any military or naval place within this state.

This section overlaps with, and is discussed in the commentary under, section 3 of this article.

SECTION 7

Highest number of votes received as determinative of person elected. In all elections held by the people in this state, the person, or persons, receiving the highest number of legal votes shall be declared elected.

This section sets out the general requirement that winning candidates at ordinary elections need receive only the most votes of any candidate, rather than an absolute majority. From 1988 until 1992, this section and Article v, section 1 required an absolute majority in votes for governor and four other state executive offices (see the commentary on that section).

This section does not prevent the courts in an election contest from dedsuycting invalid votes proportionally from each candidate in certain circumstances, and allowing the election result to stand if such proportionate reduction does not change the result (*Huggins v. Superior Court*). Adopted substantially to preserve secrecy in voting protected by section 1, this "imperfect [but] sensible screening device" will sometimes permit avoiding the "cost and delay of a second election" (*id.*). The Supreme Court has also held that this section prohibits declaring the election of the person with the second-highest vote total when the person with the highest vote total is deceased or otherwise ineligible to hold the office; instead, the election is a nullity (*Tellez v. Superior Court*).

SECTION 8

Qualifications for voters at school elections shall be as are now, or as may hereafter be, provided by law.

This section was originally included in the constitution to preserve the territorial practice of denying the franchise to women except in school elections.[77] The rationale disappeared within a few months of statehood, when section 2 of this article was amended to extend the franchise to women.

SECTION 9

For the purpose of obtaining an advisory vote of the people, the legislature shall provide for placing the names of candidates for United States senator on the official ballot at the general election next preceding the election of a United States senator.

This section is also an anachronism. It reflected the national political movement early in this century to elect U.S. senators directly, rather than through the state legislatures. An "advisory" election was an indirect way to that result; presumably the state legislature, while retaining the ultimate power of choice, would be heavily influenced by the popular will. Adoption of direct election of senators in the Seventeenth Amendment to the U.S. Constitution in 1913 made this section superfluous.

SECTION 10

The legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective state, county, and city offices, including candidates for United States senator and for representative in congress.

This section's requirement for a direct primary to select candidates for all elective offices was a distinctly progressive innovation, recognizing that general elections could be made meaningless if political machines hand-picked the candidates. Membership in the state legislature is a state "office" within the meaning of this section (*Brown v. Superior Court*); the last clause extends the primary to congressional offices (*Herless v. Lockwood*).[78] A city charter may, without violating this section, provide that a candidate with the most votes in a primary is elected to office (*Maxwell v. Fleming*), and may also forbid primary candidates from bearing the label of a political party, despite state law to the contrary,

[77] This modest recognition of female suffrage (first found in the 1901 Civil Code, para. 2176) was probably influenced by the fact that, when the constitution was drafted, more than 80 percent of the public school teachers in the state were women. See Leshy, "The Making of the Arizona Constitution," 67.

[78] The fact that the last clause refers to congressional "representative" in the singular was accurate in 1912, when Arizona had but one representative in Congress. As a result of population growth and reapportionment among the states, Arizona elected six representatives in the fall of 1992.

because this section does not limit Article 13, section 2's grant of power to qualifying cities to govern themselves (*Strode v. Sullivan*).

This section does not make the primary the exclusive method of qualifying for the general election ballot; the legislature has provided other mechanisms to put a candidate's name before the voters in a general election, such as by petition, convention, or party designation in certain circumstances (see Ariz. Rev. Stat. 16–341, 342, 343). Losing a party's primary election does not preclude a candidate from securing a place on the ballot using one of these statutory methods (*Cavender v. Board of Supervisors*).

SECTION 11

There shall be a general election of representatives in congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to statehood and biennially thereafter.

The main import of this section is to require biennial general elections, and to pinpoint the date of those elections. Not all state officers are elected at these elections, because of the varied terms these officers hold; see, for example, Article XV, section 1 (corporation commissioners, six-year terms); Article IV, part 2, section 21 (state legislators, two-year terms); Article V, Section 1(A) (governor and some other state executive officers, four-year terms); and Article XIX (mine inspector, four-year term). Reference in the initiative and referendum section of the constitution to "the next regular general election" (see Article IV, part 1, section 1(10)) refers to the election specified in this section (*Estes v. State*). This section does not, however, apply to city elections, because they are not named (*Maxwell v. Fleming*).

The Supreme Court has said that for an election to be "general" within the meaning of this section, it must be statewide, recur at fixed intervals, and be designated as general by the law that provides for it (*Hudson v. Cummard, dictum*). This section's call for the state's first general election to be held in the first even-numbered year *after* statehood led the Supreme Court, in its first major test of enforcing the constitution, to issue a dramatic decision in July 1912 that enjoined the election set by the legislature for November of that year for state, county, and precinct officers, allowing those officers who had been elected in fall 1911 to serve for an additional two years (*State v. Osborne*).[79] The Court did allow the fall

[79] When the constitution was drafted in the fall of 1910, the framers fully expected statehood to follow the next year, so that this section would have set the first general election in the fall of 1912. Because of controversy over the original constitution's provision for recall of judges, however, the proclamation of statehood was delayed until February 1912. Despite the plain terms of this section, the state

1912 election to be held to select members of Congress and presidential electors, because that date had been fixed by Congress and could not be altered by the state (*id.*, citing the U.S. Supreme Court's decision in *McPherson v. Blacker*). The Court later decided that the fall 1912 general election was also a valid election for purposes of a referendum on a legislative enactment, because it was the "next regular general election" under the initiative and referendum provision, Article IV, part 1, section 1(10) (*Allen v. State*).

SECTION 12

There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.

This section should be read with section 2 of this article, setting out minimum qualifications for Arizona voters. The Arizona legislature has set out numerous statutory requirements for voter registration to prevent fraud (Ariz. Rev. Stat. 16–101 through 191). Such requirements have been upheld (*Ahrens v. Kerby*), although federal law can preempt them in particular contexts, as explained in the commentary under section 2 of this article.

SECTION 13

Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this state, and of the political subdivision thereof affected by such question.

This section sets out a property qualification for voting on bond issues or special assessments. Property qualifications for voting were common in the first century of the country's existence, but most had gradually been abandoned in the move for more universal democracy.[80] The Arizona framers heatedly debated whether to include such a requirement, not only for the limited purpose here of

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legislature enacted a statute in June 1912 setting the state's first general election for the fall of 1912. The Court's lengthy *per curiam* opinion found a number of constitutional defects in the legislature's action, the most fundamental being that it offended the plain requirement of this section. The case unaccountably misspells the name of secretary of state (and constitutional convention delegate) Sidney Osborn. A leading newspaper described the decision as being met with "an air of relief among practically all the members of the 'official family' of Arizona," and quoted Michael Cunniff, president of the state senate and prominent convention delegate: "The court couldn't have done anything else. It was a plain provision of the constitution, which I helped write, and there was only one construction to be placed upon it"; *Arizona Republican* (July 16, 1912), p. 1, col. 1.

[80] See, e.g., Lawrence Friedman, *A History of American Law,* 2d ed. (New York: Simon & Schuster, 1985), 119–21.

voting on bonds and special assessments, but also for drafting city charters (see Article XIII, section 2).[81] Still another part of the constitution, Article IX, section 8, requires the assent of a majority of the "property taxpayers" in order to increase local government indebtedness above a specific amount. Finally, this section is also closely related to Article IX, section 6, which authorizes the legislature to vest cities and towns with "power to make local improvement by special assessments, or by special taxation of property benefited."

All these provisions reflected the framers' concern that property owners should collectively decide whether their property should be specially pledged as security for governmental debt; as the Supreme Court put it three years after statehood, the idea was to leave "to those, and those only, who bear the burdens, the right, in the first instance, to say whether the [governmental] obligation shall be assumed" (*City of Globe v. Willis*).

As originally adopted, this section referred only to "property tax payers," but it was amended upon legislative referral in 1930 to apply only to "real property tax payers," perhaps in response to confusing Supreme Court decisions on the extent to which the vote on bond issues could be limited to what kind of taxpayers (see *Kinne v. Burgess; Bethune v. Salt River Valley Water Users' Assn.*). This section may require an election for a bond issue even if the resulting municipal indebtedness would not exceed the debt amount triggering an election under Article IX, section 8 (*Tucson Transit Auth., Inc. v. Nelson*).

To some extent this section has been superseded by federal law; in 1970 the U.S. Supreme Court held that its restriction of the franchise to property owners in elections to approve general obligation bonds conflicted with the equal protection clause of the Fourteenth Amendment, because the difference between property owners and other citizens was deemed not substantial enough to justify denying the franchise to the latter (*City of Phoenix v. Kolodziejski*).[82]

A person may qualify as a "real property tax payer" if she has a partial tax exemption (*Barcon v. School Dist. No. 40*), but not if she has a complete exemption (*Morgan v. Board of Supervisors*). A person is a "real property tax payer" even if she does not have legal title to the property, so long as she is legally obliged to pay the real estate taxes on it (*Junker v. Glendale Union High School Dist.*). The last two clauses require "real property tax payers" to meet the general qualifications for voting found in section 2 of this article (*Roberts v. Spray*).

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[81] See Goff, *Records,* 515–16, 570–71; Leshy, "The Making of the Arizona Constitution," 67–68.

[82] An attempt was made in the Arizona legislature to counter the *Kolodziejski* decision by increasing the margin of voter approval to 60 percent in such bond elections, but the proposal died in committee. See 1972 Journal of the House at 1501; Op. Atty. Gen. No. 72–11–L. More recently, the U.S. Supreme Court has held (in a case originating in Arizona) that the federal Constitution does not prevent restricting the franchise to property owners in voting for officers of governmental units that have narrow, specialized functions, such as a water and power district (*Ball v. James*).

The most common issue arising in the numerous, confusing, and difficult-to-reconcile cases decided under this section is whether a particular measure is a "bond issue or special assessment" under this section. For example, if a measure does not "become a direct charge against a municipality," and does not "increase its indebtedness," this section does not require it to be submitted to a vote (*City of Globe v. Willis*). Thus special assessments against certain property owners for street improvements do not require an election (*Ainsworth v. Arizona Asphalt Paving Co.*; but compare *City of Tucson v. Corbin*). Furthermore, this section does not apply to revenue bonds, which are repaid from a stream of future revenues and where general property taxes are not in any way dedicated or pledged to their repayment (*Tucson Transit Auth., Inc. v. Nelson*; see also *Arizona State Highway Commn. v. Nelson*).

SECTION 14

No fee shall ever be required in order to have the name of any candidate placed on the official ballot for any election or primary.

This section is designed to level the playing field for potential candidates for office, to promote the widest possible participation in the political process. It has not been the subject of reported judicial interpretation.

SECTION 15

Qualifications for public office. Every person elected or appointed to any elective office of trust or profit under the authority of the state, or any political division or any municipality thereof, shall be a qualified elector of the political division or municipality in which such person shall be elected.

Originally, this section was considerably broader, applying to any elective or appointive "office of trust or profit" in the state or "any political division" of the state, and to any "deputy" of such office holder. It also limited the eligibility for such offices to "male persons," a limit removed by the women's suffrage amendment in 1912. The same amendment eliminated the reference to "deputies" and added "or municipality" after "political division."[83] A 1948 amendment exempted city managers from the "qualified elector" requirement. A 1972 amendment added the caption and limited the section to "elective" offices of trust or profit; by so constricting its applicability, the exemption for city managers could be and was deleted at the same time.

[83] See Goff, *Records, 1417,* for the original version.

The 1972 narrowing to elective office holders has rendered anachronistic some litigation under the earlier version attempting to define the differences between "public officers" and ordinary employees of government (e.g., *Juliani v. Darrow*). A candidate for elective office must be a qualified elector under this section prior to the election rather than simply prior to taking office; this section precludes "such political carpetbagging" (*State v. Macias*). A Native American who is a qualified elector under this section is eligible for elective office even if federal law provides him with certain immunities from state law (*Shirley v. Superior Court*, not citing this section).

By requiring that state legislators be qualified electors of the "political division or municipality" from which they are elected, this section is potentially in conflict with Article IV, part 2, section 2, requiring only that a state legislator reside in "the county from which he is elected for one year before his election." Legislative districts were uniformly drawn on county lines in the original constitution, but the demands of one-person, one-vote reapportionment have rendered that impracticable. The attorney general has opined that this section would control if there is any conflict, so that a legislator must be a registered voter in her district (Op. Atty. Gen. 62–77-L).

SECTION 16

The legislature, at its first session, shall enact a law providing for a general publicity, before and after election, of all campaign contributions to, and expenditures of campaign committees and candidates for public office.

This section, which demands legislative action requiring public disclosure of campaign contributions and expenses, has not been the subject of reported judicial attention. The legislature first enacted such a disclosure law in 1912 (now found, as amended, in Ariz. Rev. Stat. 16–901 through 924).

SECTION 17

There shall be a primary and general election as prescribed by law, which shall provide for nomination and election of a candidate for United States senator and for representative in congress when a vacancy occurs through resignation or any other cause.

This section was added in 1962. Under prior statutory law, vacancies in the U.S. Senate were filled by gubernatorial appointment until a special election could be held; vacancies in the House of Representatives could only be filled by special election (Ariz. Rev. Stat., 1956, 16–704, 16–722). Although the publicity pamphlet on this amendment is silent on its origin, this proposal may have been

prompted by concern in the Democratic legislature that the venerable Democratic Senator Carl Hay den, then well over eighty years of age, might die or resign and allow the Republican governor to appoint his successor until a special election could be held. Current law requires vacancies in Congress to be filled at the next general election, unless it is more than six months away from the occurrence of the vacancy, in which case a special election shall be held (Ariz. Rev. Stat. 16–222).

SECTION 18

Term limits on ballot appearances in congressional elections. The name of any candidate for United States Senator from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for two consecutive terms, and the name of a candidate for United States Representative from Arizona shall not appear on the ballot if, by the end of the current term of office, the candidate will have served (or, but for resignation, would have served) in that office for three consecutive terms. Terms are considered consecutive unless they are at least one full term apart. Any person appointed or elected to fill a vacancy in the United States Congress who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this section. For purposes of this section, terms beginning before January 1, 1993 shall not be considered.

This section was added in 1992 as part of a term limits package (see also Article IV, part 2, section 21; Article V, sections 1, 10; Article XV, section 1; and Article XIX). It prohibits U.S. senators from Arizona from serving more than two consecutive terms (twelve years), and U.S. representatives from serving more than three consecutive terms (six years). Part of a reformist wave that swept through several states in 1992, this section's constitutionality is open to question. Article I of the U.S. Constitution establishes the qualifications for these federal offices and may be construed to prohibit states from enacting additional qualifications such as those in this section.

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Article VIII

Removal from Office

PART 1. RECALL OF PUBLIC OFFICERS

SECTION 1

Every public officer in the state of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole state. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a recall petition, demand his recall.

This section first acquired a measure of fame when it prompted an unprecedented presidential veto that delayed Arizona statehood for several months.[84] Because the recall applied to holders of all "elective" offices, and because the original constitution made all judgeships elected offices, this section allowed the recall of judges. Following President Taft's veto, Arizona voters dutifully agreed in December 1911 to amend this section to add the words "except members of the judiciary" to the first sentence. After Arizona was admitted in February 1912, with newly elected Governor Hunt leading the charge, the Arizona legislature

[84] See generally Leshy, "The Making of the Arizona Constitution," 56–58, 101–6, 111.

proposed an amendment to delete the words that had just been added, and at the fall 1912 election the proposal passed overwhelmingly.

Arizona was the second state to adopt the recall, following Oregon by two years. The Arizona provision differs somewhat from that in Oregon, principally by collapsing into a single election Oregon's requirement of an initial election on the question of recalling an official and, if necessary, a second election to choose a replacement.[85] Being for the benefit of the public rather than the targeted officials, this section is construed liberally in favor of permitting recall elections (*Johnson v. Maehling*). It is "self-executing" and applicable to all elected offices (such as justices of the peace) even if they are not listed in the implementing legislation (*Miller v. Wilson*).[86]

To trigger a recall election, proponents must obtain signatures of qualified electors equivalent to 25 percent of the votes cast for that office in the last preceding general election. When voters can vote for more than one candidate for a single office (such as in elections for multimember boards) the requisite number of signatures is calculated by dividing the total number of votes by the number of persons elected (*Johnson v. Maehling*).

No statewide officer or legislator has been recalled under this provision; sufficient signatures were collected in 1987 to trigger an election to recall Governor Evan Mecham, but he was impeached, convicted, and removed from office before the recall election could be held. The recall does apply to elected officers at the local level, and has been the subject of some use in that context, because the 25 percent signature requirement in local areas is not so daunting. Despite the statehood-era brouhaha about applying the recall to judges, only one judge, from the superior court, has been recalled (see *Abbey v. Green*). *A 191A* amendment creating a "Missouri-plan" merit selection and retention election system for judges explicitly preserved the judicial recall (see Article VI, section 39, last sentence).

SECTION 2

Every recall petition must contain a general statement, in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which

[85] See Leshy, "The Making of the Arizona Constitution," 65.

[86] The recall may not extend to Arizona's representatives in the U.S. Congress (perhaps because of federal law or because they are not "in the state of Arizona"), but the first state legislature in 1912 enacted an ingenious statutory process for an advisory recall of congressional representatives and federal district judges, which remains on the books (Ariz. Rev. Stat. 19–221, 222, 231–234). Such an advisory recall election has never been held. Disgruntled hardrock miners failed to gather enough signatures to trigger an election to unseat Congressman Morris Udall in the late 1970s for supporting legislation to reform the federal mining law. See John D. Leshy, *The Mining Law: A Study in Perpetual Motion* (Washington, D.C.: Resources for the Future, 1987), 304.

petitions for nominations to the office held by the incumbent are required to be filed. The signatures to such recall petition need not all be on the one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street and number, if any, should he reside in a town or city. One of the signers of each sheet of such petition, or the person circulating such sheet, must make and subscribe an oath on said sheet, that the signatures thereon are genuine.

This section sets out the procedural mechanics of the recall. Because the process is political rather than legal, the statement of grounds for recall need not charge specific misconduct in office (*Abbey v. Green*). The Supreme Court and the attorney general have issued opinions setting out various grounds for challenging signatures and petitions (*Johnson v. Maehling*; Ops. Atty. Gen. 73–15, 187–145).

SECTION 3

Resignation of officer; special election. If such officer shall offer his resignation it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a recall petition is filed as provided by law, a special election shall be ordered to be held as provided by law, to determine whether such officer shall be recalled. On the ballots at such election shall be printed the reasons as set forth in the petition for demanding his recall, and, in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of such election shall have been officially declared.

In its original form, this section provided that a recall election would be held within twenty to thirty days after the order to have an election was issued. A 1974 amendment eliminated this rigid time frame and instead gave the legislature discretion to set the timing of the election (and added the caption). The first part of this section allows the target of the recall to avoid an election by resigning. If the officer chooses not to resign within five days after the petition is filed (which in practice means after the secretary of state determines that a sufficient number of valid signatures of qualified electors have been obtained; see Ariz. Rev. Stat. 19–208.03, 19–209), a recall election will ordinarily be held. The Supreme Court recently ruled, however, that if the officer is removed from office by other means (e.g., by impeachment and conviction under part 2 of this article) before the recall election, it should be cancelled because the removal "accomplished [its] primary purpose" (*Green v. Osborne*).[87]

[87] This decision, which rejected a contrary opinion of the attorney general (No. 188–015), grew out of the extraordinary events marking the tenure of former Governor Evan Mecham. Following

The second part of this section gives the targeted official the opportunity to make her case for remaining in office, so that both pro and con arguments (in no more than two hundred words each) appear on the recall ballot. The last sentence allows the official to remain in office until the election results are declared.

SECTION 4

Special election; candidates; results; qualification of successor. Unless the incumbent otherwise requests, in writing, the incumbent's name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidate who receives the highest number of votes shall be declared elected for the remainder of the term. Unless the incumbent receives the highest number of votes, the incumbent shall be deemed to be removed from office, upon qualification of the successor. In the event that the successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law.

While the target of the recall is automatically put on the ballot unless he formally withdraws, the ballot is open to any other nominee who may qualify under applicable law (see section 6 of this article). Now and as originally drafted, this section required only a plurality of votes cast in the recall election to win. From 1988 to 1992 this section required that candidates for governor and other offices listed in Article V, section 1 obtain a majority of all votes cast to win or face a runoff election. (See the commentary on Article V, section 1).

SECTION 5

No recall petition shall be circulated against any officer until he shall have held his office for a period of six months, except that it may be filed against a member of the legislature at any time after five days from the beginning of the first session after his election. After one recall petition and election, no further recall petition shall be filed against the same officer during the term for which he was elected, unless petitioners signing such petition shall first pay into the public treasury which has paid such election expenses, all expenses of the preceding election.

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his impeachment, conviction, and removal from office, he was indicted and then acquitted of several criminal charges relating to his tenure in office. For a Mecham partisan's view of these events, see Ronald J. Watkins, *High Crimes and Misdemeanors: The Term and Trials of Former Governor Evan Mecham* (New York: Morrow, 1990).

This section gives officers other than state legislators six months of protection before the recall signature-gathering process may be initiated; the framers evidently assumed that voters needed only five days to evaluate the fitness of state legislators to remain in office. The Supreme Court found this grace period significant in calling off a recall election when the target of the recall had already been removed from office and his replacement had not served six months (*Green v. Osborne*). This section also gives opponents only one bite out of the recall apple per term, unless they are willing to pay for a second opportunity. It has not received any reported judicial interpretation.

SECTION 6

The general election laws shall apply to recall elections in so far as applicable. Laws necessary to facilitate the operation of the provisions of this article shall be enacted, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer.

Recall elections are generally subject to the same requirements regarding voter registration, nominating petitions and the like, as other elections. Thus to vote in a recall election, a person must be currently registered to vote (*Citizens' Comm. for Recall of Jack Williams v. Marston*); presumably this is also true for signing a recall petition, although there are no published decisions on this point. The second sentence, allowing the legislature to pay the recall target's reasonable campaign expenses, is not self-executing, but requires implementation by the legislature (*Mecham v. Arizona House of Representatives*; see also Op. Atty. Gen. I88–035).[88]

PART 2. IMPEACHMENT

SECTION 1

The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and, when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence, and shall be presided over by the chief justice of the supreme court.

[88] The first Arizona legislature enacted a statute that established dollar limits on reimbursement of expenditures ($500 maximum for a state elective officer; $200 for a member of the legislature or county elective officer; and $150 for a municipal elective officer) and created a process for reimbursement, but this was repealed in 1973 and has not been replaced (Laws 1913, 3rd Spec. Sess., ch. 91, sees. 12–14; repealed by Laws 1973, 1st Reg. Sess., ch. 159, sec. 23).

Should the chief justice be on trial, or otherwise disqualified, the senate shall elect a judge of the supreme court to preside.

Impeachment is a much more common constitutional device for removal than the recall addressed in part 1 of this article. The process set out in this part is quite close to that in the U.S. Constitution, Article I, sections 2–3, and Article II, section 3. The first step is for the house of representatives to bring charges against an officer (requiring a majority vote of "all the members"), followed by a trial in the state senate, presided over by the chief justice of the Supreme Court. The Court has characterized the impeachment process as one of improving public service rather than punishment (*State ex rel. DeConcini v. Sullivan, dictum*).

SECTION 2

No person shall be convicted without a concurrence of two-thirds of the senators elected. The governor and other state and judicial officers, except justices of courts not of record, shall be liable to impeachment for high crimes, misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit in the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to trial and punishment according to law.

The Supreme Court has said that the impeachment process applies only to "elective constitutional officers," other than judges of courts not of record specifically exempted in the text (*Holmes v. Osborn, dictum*). The legislature may provide other remedies for removing elective officers subject to impeachment and recall; that is, a statute automatically removing an elected official who has been convicted of serious crimes does not conflict with this section (*State ex rel. DeConcini v. Sullivan*). Whether this result would apply to a sitting governor is less clear, because Article V, section 6 contains a special process for succession to that high office that may control. A related question is whether a governor who has been impeached by the house may remain in office pending trial in the senate; the Supreme Court has suggested that Article V, section 6 commands temporary removal (*Mecham v. Gordon, dictum*)[89]

[89] A state statute (Ariz. Rev. Stat. 38–322) may be read to provide a contrary result. See J. Weinstein, "The Language of Impeachment," *Arizona State Law Journal* 20 (1988), 209–25. Most of the judicial attention given this part arose out of the Mecham impeachment experience. Only one other impeachment trial involving state officials has ever been held: in 1964 the state senate acquitted two corporation commissioners after the house had impeached them. This episode gave rise to no reported judicial decisions addressing this part but was notable because William Rehnquist (now Chief Justice of the United States) was the chief prosecutor for the house.

This section also sets out a standard for impeachable offenses ("high crimes, misdemeanors, or malfeasance in office"), the last phrase not found in the counterpart provision of the U.S. Constitution, Article II, section 3. The Supreme Court has held that the legislature has sole responsibility for determining impeachable offenses, and the Court is without jurisdiction to review the impeachment proceedings so long as the legislature follows the constitutional procedures, and this part does not require or authorize reimbursement of the impeachee's expenses (*Mecham v. Arizona House of Representatives*). The remedy upon conviction includes removal from office and disqualification to hold any other office of "honor, trust, or profit in the state"; although the text might be read to mandate both removal and disqualification, the state senate may limit the penalty to removal (*Ingram v. Shumway*).

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Article IX

Public Debt, Revenue, and Taxation

SECTION 1

The power of taxation shall never be surrendered, suspended, or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only.

The Supreme Court has repeatedly spoken of the legislature's broad power to levy taxes (e.g., *Pacific Fruit Express Co. v. City of Yuma*), describing it as "essential to the stability of state government" (*Smotkin v. Peterson*). Taxation must be provided by statute (*City of Mesa v. Home Builders Assn.*) in a way that is "certain, clear, and unambiguous" (*Climate Control Inc. v. Hill*). Although the courts have sometimes described the taxing power as inhering in the sovereignty of the state, so that only the state legislature may exercise it (*Home Owners' Loan Corp. v. City of Phoenix*), the courts have also recognized that the legislature may delegate the power to tax to a political subdivision (*Terrell v. McDonald*); in fact, section 6 of this article specifically authorizes such a delegation (see *Kaufman v. City of Tucson*).

The first sentence of this section, reflecting the framers' concern with legislative corruption, is designed to leave the legislative ability to tax "unencumbered" (*Switzer v. City of Phoenix, dictum*). It forbids an executive branch agency from granting tax exemptions without specific legislative authorization; if the

executive does so, the state is not prevented from collecting taxes that would be due absent the exemption (*Crane Co. v. Arizona State Tax Commn.*).

But this section applies only to taxes, which the Court has defined as an "enforced contribution . . . levied by authority of the state for the support of the government and for all public needs" (*Hunt v. Callaghan*). Taxes do not include license or filing fees, which are voluntary and based upon administrative costs (*Stewart v. Verde River Irrigation & Power Dist.*). A court of appeals has noted that it is "virtually impossible to set forth a rigid definition of a tax and a fee" (*Kyrene School Dist. No. 28 v. City of Chandler*); the same issue is raised by section 9 of this article, placing procedural limits on the legislature's ability to tax. Nor do taxes include special assessments, such as those levied against specific property benefited by improvement projects (*Barry v. School Dist. No. 210*). This section does not limit the power of the legislature to create special districts and authorize them to levy assessments against property benefited by their works (*Maricopa County Mun. Water Conservation Dist. No. 1 v. La Prade*).

The second sentence of this section contains three separate ideas. The first is uniformity, a notion closely linked to two other parts of the constitution: Article II, section 13's guarantee of "equal privileges and immunities" to citizens and corporations; and Article IV, part 2, section 19(9)'s prohibition of "local or special laws" for the "[a]ssessment and collection of taxes." The uniformity requirement applies only to property taxation and not to excise taxes (*Gila Meat Co. v. State*) nor to taxes "on an occupation or business" (*Home Accident Ins. Co. v. Industrial Commn.*). Numerous reported decisions address the uniformity issue. The legislature has "broad discretion" in classifying property for taxation (*People's Fin. & Thrift Co. v. Pima County*) and may adopt any classification that is "reasonable" (*Brophy v. Powell*), such as putting similar property into different taxing categories based upon its ownership and use; thus real and personal property of railroads may be put in a separate taxing class (*Apache County v. Atchison, T. & S.F. Ry.*). On the other hand, an arbitrary classification violates this section and will be struck down by the courts (e.g., *Powell v. Gleason; State Tax Commn. v. Shattuck*), as will a "[d]eliberate and systematic undervaluation" in assessing property (*McCluskey v. Sparks*).

The second sentence also requires that the property taxed be within the territorial jurisdiction of the taxing authority. While the state may levy taxes only on property inside the state (*Oglesby v. Pacific Fin. Corp.*), it may tax all the revenue and income that results from business activity within the state (*Arizona State Tax Commn. v. Ensign*).

The third requirement is that taxes shall be collected only for "public purposes." This is related to the idea found in section 7 of this article, that government should not subsidize private entities. The Arizona courts have long recognized that the idea of public purpose is incapable of an exact, unvarying definition, because it can change to "suit industrial inventions and developments

and to meet new social conditions" (*City of Tombstone v. Macia*; see also *City of Glendale v. White*).

SECTION 2

Property subject to taxation; exemptions. (1) There shall be exempt from taxation all federal, state, county and municipal property. Property of educational, charitable, and religious associations or institutions not used or held for profit may be exempt from taxation by law. Public debts, as evidenced by the bonds of Arizona, its counties, municipalities, or other subdivisions, shall also be exempt from taxation. All household goods owned by the user thereof and used solely for noncommercial purposes shall be exempt from taxation, and such person entitled to such exemption shall not be required to take any affirmative action to receive the benefit of such exemption. Stocks of raw or finished materials, unassembled parts, work in process or finished products constituting the inventory of a retailer or wholesaler located within the state and principally engaged in the resale of such materials, parts or products, whether or not for resale to the ultimate consumer, shall be exempt from taxation. This subsection shall be self-executing.

(2) There shall be further exempt from taxation the property of each honorably discharged airman, soldier, sailor, United States marine, member of revenue marine service, the coast guard, nurse corps or of any predecessor or of the component of auxiliary of any thereof, resident of this state, in the amount of:

(a) One thousand five hundred dollars if the total assessment of such person does not exceed three thousand five hundred dollars.

(b) One thousand dollars if the total assessment of such person does not exceed four thousand dollars.

(c) Five hundred dollars if the total assessment of such person does not exceed four thousand five hundred dollars.

(d) Two hundred fifty dollars if the total assessment of such person does not exceed five thousand dollars.

(e) No exemption if the total assessment of such person exceeds five thousand dollars.

No such exemption shall be made for such person unless such person shall have served at least sixty days in the military or naval service of the United States during World War I or prior wars and shall have been a resident of this state prior to September 1, 1945.

(3) There shall be further exempt from taxation as herein provided the property of each honorably discharged airman, soldier, sailor, United States marine, member of revenue marine service, the coast guard, nurse corps or of any predecessor or of the component of auxiliary of any thereof, resident of this state, where such person has a service-connected disability as deter mined by the United States veterans administration or its successor. No such exemption shall be made for such person unless he

shall have been a resident of this state prior to September 1, 1945 or unless such person shall have been a resident of this state for at least four years prior to his original entry into service as an airman, soldier, sailor, United States marine, member of revenue marine service, the coast guard, nurse corps or of any predecessor or of the component of auxiliary of any thereof. The property of such person having a compensable service-connected disability exempt from taxation as herein provided shall be determined as follows:

(a) If such person's service-connected disability as determined by the United States veterans administration or its successor is sixty per cent or less, the property of such person exempt from taxation shall be determined by such person's percentage of disability multiplied by the assessment of such person in the amount of:

(i) One thousand five hundred dollars if the total assessment of such person does not exceed three thousand five hundred dollars.

(ii) One thousand dollars if the total assessment of such person does not exceed four thousand dollars.

(iii) Five hundred dollars if the total assessment of such person does not exceed four thousand five hundred dollars.

(iv) Two hundred fifty dollars if the total assessment of such person does not exceed five thousand dollars.

(v) No exemption if the total assessment of such person exceeds five thousand dollars.

(b) If such person's service-connected disability as determined by the United States veterans administration or its successor is more than sixty per cent, the property of such person exempt from taxation shall be in the amount of:

(i) One thousand five hundred dollars if the total assessment of such person does not exceed three thousand five hundred dollars.

(ii) One thousand dollars if the total assessment of such person does not exceed four thousand dollars.

(iii) Five hundred dollars if the total assessment of such person does not exceed four thousand five hundred dollars.

(iv) Two hundred fifty dollars if the total assessment of such person does not exceed five thousand dollars.

(v) No exemption if the total assessment of such person exceeds five thousand dollars.

(4) There shall be further exempt from taxation the property of each honorably discharged airman, soldier, sailor, United States marine, member of revenue marine service, the coast guard, nurse corps or of any predecessor or of the component of auxiliary of any thereof, resident of this state, where such person has a nonservice-connected total and permanent disability, physical or mental, as so certified by the United States veterans administration, or its successor, or such other certification as provided by law, in the amount of:

(a) One thousand five hundred dollars if the total assessment of such person does not exceed three thousand five hundred dollars.

(b) One thousand dollars if the total assessment of such person does not exceed four thousand dollars.

(c) Five hundred dollars if the total assessment of such person does not exceed four thousand five hundred dollars.

(d) Two hundred fifty dollars if the total assessment of such person does not exceed five thousand dollars.

(e) No exemption if the total assessment of such person exceeds five thousand dollars.

No such exemption shall be made for such person unless he shall have served at least sixty days in the military or naval service of the United States during time of war after World War I and shall have been a resident of this state, prior to September 1, 1945.

(5) There shall be further exempt from taxation the property of each widow, resident of the state, in the amount of:

1. One thousand five hundred dollars if the total assessment of such widow does not exceed three thousand five hundred dollars.

2. One thousand dollars if the total assessment of such widow does not exceed four thousand dollars.

3. Five hundred dollars if the total assessment of such widow does not exceed four thousand five hundred dollars.

4. Two hundred fifty dollars if the total assessment of such widow does not exceed five thousand dollars.

5. No exemption if the total assessment of such widow exceeds five thousand dollars.

In order to qualify for this exemption, the income from all sources of such widow, together with the income from all sources of all children of such widow residing with the widow in her residence in the year immediately preceding the year for which such widow applies for this exemption, shall not exceed:

1. Seven thousand dollars if none of the widow's children under the age of eighteen years resided with her in such widow's residence; or

2. Ten thousand dollars if one or more of the widow's children residing with her in such widow's residence was under the age of eighteen years, or was totally and permanently disabled, physically or mentally, as certified by competent medical authority as provided by law.

Such widow shall have resided with her last spouse in this state at the time of the spouse's death if she was not a widow and a resident of this state prior to January 1, 1969.

No property shall be exempt which has been conveyed to evade taxation. The total exemption from taxation granted to the property owned by a person who qualifies for any exemption in accordance with the terms of subsections (2), (3), (4) or (5) shall not exceed one thousand five hundred dollars. The provisions of this section shall be self-executing.

(6) All property in the state not exempt under the laws of the United States or under this constitution or exempt by law under the provisions of this section shall be subject to taxation to be ascertained as provided by law.

This section was, as originally adopted, much shorter, consisting of (1) the first three sentences of what is now subsection 1, (2) what is now subsection 6, and (3) a tax exemption for the first $1,000 of the property of resident widows whose total property did not exceed $2,000. A 1928 amendment granted a limited exemption to military personnel and raised the exemption for widows, in both cases exempting the first $2,000 of property where the total assessment did not exceed $5,000. A 1946 amendment extended the exemption for military personnel. A 1964 amendment, adopted pursuant to initiative petition, added the last sentence in subsection 1, creating an exemption for the inventory of wholesalers. Further amendments in 1968 and 1980 resulted in substantial additions (the latter also adding the caption) to bring the section to its current form.

The principal reason for this frequent revisiting is found in subsection 6. Part of the original version, it sets out the fundamental principle that all property in the state is subject to taxation unless exempt by federal law, by this constitution, or by legislative act authorized by this section. The core idea—so dear to the Arizona framers emerging from a territorial period where large industrial enterprises were thought to escape their fair share of taxation[90]—is that all property in the state "should bear its just burden of the taxes" (*Brophy v. Powell*). Thus the Arizona courts have frequently held that the legislature cannot grant tax exemptions except as specifically authorized in this section (e.g., *State v. Yuma Irrigation Dist.*). Moreover, even where the legislature is authorized to create exemptions, it must supply an "unmistakable expression of intent" to do so (*Weller v. City of Phoenix*).[91] The burden of establishing the claim for exemption is on the person seeking it (*McElhaney Cattle Co. v. Smith*). A related idea is that tax exemptions should be interpreted strictly; because the "presumption is against the exemption, . . . every ambiguity in the statute will be construed against it" (*Conrad v. County of Maricopa*). The legislature can establish reasonable procedures for claiming an exemption, and failure to comply with them waives the right to it (*State v. Allred*, overruling prior decisions).

The second sentence of this section "does not itself exempt any property from taxation" (*Conrad v. County of Maricopa*) but merely permits the legislature to exempt property of the listed institutions from taxation (*Verde Valley School v. Yavapai County*); in other words, the legislature "cannot grant more but it may

[90] See generally Chester H. Johnson, "Real Property Exemptions in Arizona," *Law and the Social Order* (1972), 241–63.

[91] Donald W. Jansen, "Arizona's Constitutional Restraints on the Legislative Powers to Tax and Spend," *Arizona State Law Journal* 20 (1988), 181, 183–84.

give much less than the exemption permitted" by this sentence (*Conrad v. County of Maricopa*).

Numerous reported judicial decisions interpret the specific exemptions this section provides for widows and military personnel in particular circumstances. By permanently limiting the entitlement to these exemptions to those widows and military personnel who had resided in the state upon a specific date, however, these provisions may violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution (see *Benjamin v. Arizona Dept. of Revenue*, construing the U.S. Supreme Court decision in *Hooper v. Bernalillo County Assessor*). Although *Benjamin* dealt only with disabled veterans, the same federal constitutional problem would seem to exist with other subsections of this section, as well as with section 2.1 of this article.

SECTION 2.1

Exemption from tax; property of widowers. There shall be further exempt from taxation the property of each widower, resident of this state, in the amount of:

1. One thousand five hundred dollars if the total assessment of such widower does not exceed three thousand five hundred dollars.
2. One thousand dollars if the total assessment of such widower does not exceed four thousand dollars.
3. Five hundred dollars if the total assessment of such widower does not exceed four thousand five hundred dollars.
4. Two hundred fifty dollars if the total assessment of such widower does not exceed five thousand dollars.
5. No exemption if the total assessment of such widower exceeds five thousand dollars.

In order to qualify for this exemption, the income from all sources of such widower, together with the income from all sources of all children of such widower residing with the widower in his residence in the year immediately preceding the year for which such widower applies for this exemption, shall not exceed:

1. Seven thousand dollars if none of the widower's children under the age of eighteen years resided with him in such widower's residence; or
2. Ten thousand dollars if one or more of the widower's children residing with him in such widower's residence was under the age of eighteen years, or was totally and permanently disabled, physically or mentally, as certified by competent medical authority as provided by law.

Such widower shall have resided with his last spouse in this state at the time of the spouse's death if he was not a widower and a resident of this state prior to January 1, 1969.

No property shall be exempt which has been conveyed to evade taxation. The total exemption from taxation granted to the property owned by a person who qualifies

for any exemption in accordance with the terms of this section shall not exceed one thousand five hundred dollars. This section shall be self-executing.

This section was added in 1980. In the spirit of gender equality, it supplies an exemption for widowers as a companion to the exemption for widows set forth in section 2(5). The latter dated back to the original constitution, though it has been modified several times. This section has not been interpreted by the courts in any published decision; it may conflict with the federal Constitution, as explained in the commentary on the previous section.

SECTION 2.2

Exemption from tax; property of disabled persons. There shall be further exempt from taxation the property of each person who, after age seventeen, has been medically certified as totally and permanently disabled, in the amount of:

1. One thousand five hundred dollars if the total assessment of such person does not exceed three thousand five hundred dollars.
2. One thousand dollars if the total assessment of such person does not exceed four thousand dollars.
3. Five hundred dollars if the total assessment of such person does not exceed four thousand five hundred dollars.
4. Two hundred fifty dollars if the total assessment of such person does not exceed five thousand dollars.
5. No exemption if the total assessment of such person exceeds five thousand dollars.

The legislature may by law prescribe criteria for medical certification of such disability.

The income from all sources of such disabled person, and his spouse, together with the income from all sources of all children of such disabled person residing with him in his residence in the year immediately preceding the year for such disabled person applies for this exemption shall not exceed:

1. Seven thousand dollars if none of the disabled person's children under the age of eighteen years resided with him in his residence; or
2. Ten thousand dollars if one or more of the disabled person's children residing with him in his residence was under the age of eighteen years or was totally and permanently disabled, physically or mentally, as certified by competent medical authority as provided by law.

No property shall be exempt which has been conveyed to evade taxation. The total exemption from taxation granted to the property owned by a person who qualifies for any exemption in accordance with the terms of this section shall not exceed one thousand five hundred dollars. This section shall be self-executing.

This section, added in 1980, creates a limited exemption from property taxes for disabled persons, modeled loosely on the exemptions for widows (section 2(5)) and widowers (section 2.1). Because it does not contain the fixed date of residency for eligibility that the other two sections do, it may withstand federal constitutional scrutiny. It has not been interpreted by the courts in any published decision.

SECTION 2.3

Exemption from tax; increase in amount of exemptions, assessments and income. The legislature may by law increase the amount of the exemptions, the total permissible amount of assessments or the permissible amount of income from all sources prescribed in sections 2, 2.1 and 2.2 of this article.

This section was added in 1980. By empowering the legislature to adjust the terms of the exemptions in sections 2, 2.1, and 2.2 in light of inflation and changing social policy, it sensibly seeks to limit the necessity for future constitutional amendments. It has not been interpreted by the courts in any published decision.

SECTION 3

The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying an annual tax sufficient to pay the annual interest and the principal of such debt within twenty-five years from the final passage of the law creating the debt.

No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the tax, to which object only it shall be applied.

All taxes levied and collected for state purposes shall be paid into the state treasury in money only.

The first sentence of this section requires that the state's annual budget generally be in balance. In the only reported decision addressing this requirement, the Supreme Court has held that the unfunded liability of the public safety personnel retirement system is not part of the "necessary ordinary expenses of the State" for that fiscal year (*Rochlin v. State*). Further discussion of constitutional limits on state taxing and spending authority is found in the commentary under sections 20 and 21 of this article. The second sentence, requiring any state debt to be retired within twenty-five years of its creation, is related to section 5 of this article, and has not been addressed by the courts.

The second paragraph, requiring tax laws to "state distinctly" the object of the tax, has been held to apply only to property taxes (*City of Glendale v. Betty*); a similar but not identical provision is found in section 9 of this article. The requirement that taxes apply only to their stated "object" does not prevent applying tax revenues to other purposes when the object of the particular tax has been achieved (*Glendale Union High School Dist. v. Peoria School Dist. No. 11*), but if the object is still unmet the legislature could not apply the tax revenues to some other purpose (*Carr v. Frohmiller*). The third paragraph, requiring taxes to be paid in money only, does not prevent paying taxes by check (*General Petroleum Corp. v. Smith*).

SECTION 4

The fiscal year shall commence on the first day of July in each year. An accurate statement of the receipts and expenditures of the public money shall be published annually, in such manner as shall be provided by law. Whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for levying a tax for the ensuing fiscal year sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of the ensuing fiscal year.

This section is a companion to the first paragraph of the preceding section. Besides constitutionalizing the state's fiscal year, it creates a mechanism for carrying out the balanced budget principle and recognizes the reality that debt may be created when actual receipts fall short of expenditures. Curiously, it does not expressly require a level of taxation to recover any shortfall in the subsequent fiscal year, but rather simply permits the legislature to do so.

The leading commentator on the fiscal provisions of the Arizona Constitution has noted that this section's "invitation to raise taxes to cover a deficit may have been viable seventy-five years ago when the major source of state revenue was the property tax and the tax rate was set annually after the budget had been adopted."[92] The dramatic growth in the state's population and government, and the move away from reliance on the property tax, have made the task much more difficult; a variety of stratagems have evolved to comply with the constitutional limitations.[93]

SECTION 5

The state may contract debts to supply the casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts,

[92] See generally Leshy, "The Making of the Arizona Constitution," 10–15.

[93] See ibid.

direct and contingent, whether contracted by virtue of one or more laws, or at different periods of time, shall never exceed the sum of three hundred and fifty thousand dollars; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained or to repay the debts so contracted, and to no other purpose.

In addition to the above limited power to contract debts the state may borrow money to repel invasion, suppress insurrection, or defend the state in time of war; but the money thus raised shall be applied exclusively to the object for which the loan shall have been authorized or to the repayment of the debt thereby created. No money shall be paid out of the state treasury, except in the manner provided by law.

This section is a companion to the two preceding sections, which together seek to limit the state's ability to go into debt. (Sections 8 and 8.1 of this article are counterpart provisions limiting debts of units of local government.) Like the others, this section recognizes that balancing the state's budget is a practical impossibility, because of unpredictable "failures in revenues" and other circumstances creating "casual deficits." Nevertheless, it seeks to impose a flat maximum debt of $350,000 (invasion and insurrection excepted), a figure that, like the rest of this section, has not changed since statehood.

The debt limit expressly applies to all "direct and contingent" debts. Such debts do not include unfunded liability of public personnel retirement plans because they are "not due to borrowing funds" (*Rochlin v. State*). Nor do they include revenue bonds payable not from general tax revenues, but rather solely from the revenues of the borrowing institution (*Board of Regents v. Sullivan*).[94] (The same result has also been reached in the context of municipal debt; see the commentary under section 8 of this article.)

The last sentence of this section provides that state money shall not be spent "except in the manner provided by law." This provision echoes Article I, section 9, clause 7 of the U.S. Constitution, and confirms the legislature's important power of the purse; that is, the legislature is generally "supreme in matters relating to appropriations" (*Crane v. Frohmiller*). This means that no money can be paid from the state treasury unless it has been appropriated by law, and the money so appropriated can only be used for the purposes specified by the appropriation (e.g., *Proctor v. Hunt; Webb v. Frohmiller*).

The Arizona courts have, however, also recognized a category of constitutional appropriations not subject to legislative curtailment, such as appropriations necessary to pay state officers whose salaries are fixed either by the constitution (*Windes v. Frohmiller*), or by law, at least when the office is for a definite term (*Moore v. Frohmiller*, 1935). The act creating the office and fixing its

[94] The Court has also suggested, in this connection, that the general revenues of the state cannot be used to retire highway right-of-way bonds when the pledged revenues of the state highway fund prove insufficient (*Arizona State Highway Commn. v. Nelson, dictum*).

salary "is an appropriation of the amount necessary to pay the salary" (*Crawford v. Hunt*). The principle has its limits, however; for example, the corporation commission does not have the benefit of a constitutional appropriation even though it has "exclusive and supreme power and responsibility" in an important area (*Millett v. Frohmiller*).

The legislature may appropriate lump sums to be apportioned by department or institution heads (e.g., *State Bd. of Health v. Frohmiller; LeFebvre v. Callaghan*) In the same vein, the practical workings of government justify the legislature giving the governor authority to appropriate money temporarily from an "emergency or contingency fund" (*Prideaux v. Frohmiller*). But the executive cannot, where no legislative appropriation has been made, issue a certificate of indebtedness to cover expenses of a state board (*Eide v. Frohmiller*).

Funds granted to the state for the administration of federal programs are not subject to legislative control where the state is a "mere custodian or conduit" (*Navajo Tribe v. Arizona Dept. of Admin.*), although the extent to which this decision extends to federal funds made available to state government with no or few strings attached is not clear. In 1984 the Arizona voters rejected, by a 60-40 margin, a proposed amendment that would have given the legislature authority to approve "expenditures and appropriations of federal fund monies available to this state and any of its budget units."[95] Even had this amendment been adopted, of course, it could not have permitted the legislature to control these funds in any way that conflicted with federal law.

The Supreme Court has said that "no special form of language is required" to make a legislative appropriation (*Crawford v. Hunt*); the test is one of legislative intent (*Windes v. Frohmiller*), and an appropriation "may be implied from the language of the statute" (*O'Neil v. Goldenetz*). In general, an appropriation requires a "certain sum," the "specified object," and the "authority to spend" (*Rios v. Symington*, quoting the dissenting opinion in *Black & White Taxicab Co. v. Standard Oil Co.*). While a legislative appropriation from the state's general fund must specify a maximum amount (*Eide v. Frohmiller; Cock-rill v. Jordan*), if it is out of a special fund, no limit need be stated in the act (*Crane v. Frohmiller*) because the amount in the special fund "may be ascertained at any given time" (*Rios v. Symington*).

SECTION 6

Incorporated cities, towns, and villages may be vested by law with power to make local improvements by special assessments, or by special taxation of property

[95] The proposal would have added a new sec. 26 to Art. IV, pt. 2. At that time, between 20 and 30 percent of the state's budget was comprised of federally granted funds. *Publicity Pamphlet,* 1984 General Election, p. 9.

benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes.

This section permits municipalities to make special assessments or levy special taxes where particular property is benefited, and otherwise to tax for "all corporate purposes." As explained in the commentary on Article VII, section 13, the distinction between a general tax and a special assessment is a slippery one. This section has been interpreted not to vest municipalities with the power to tax; also necessary is either delegation of the power by the legislature (*City of Glendale v. Betty*), or reservation of the power in a city charter, unless the power has been preempted by state law (*City of Phoenix v. Arizona Sash, Door & Glass Co.*). See the commentary on Article XIII, section 2. A municipality may not impose a tax on a state instrumentality without the consent of the state (*City of Tempe v. Arizona Bd. of Regents*). This section applies only to incorporated cities, towns, and villages and does not prevent the legislature from creating other units of state or local government (such as irrigation or electrical districts) and giving them the power to levy taxes and special improvements (*Brown v. Electrical Dist. No. 2*), because the legislature possesses general power "not expressly or by necessary implication forbidden by some provision of the Constitution" (*Bethune v. Salt River Valley Water Users' Assn.*).

SECTION 7

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, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law.

This much-litigated section, found in one form or another in many state constitutions, grew out of reactions to excessive state subsidy of private enterprise in the nineteenth century.[96] It is closely related to the "equal privileges and immunities" provision of Article II, section 13, and the prohibition on various kinds of "local or special laws" in Article IV, part 2, section 19; practices that violate this section may violate these other sections as well (e.g., *Graham County v. Dowell*). Similarly, a law forgiving interest payments owed by borrowers of state school land trust funds violates not only this section, but also Article X, section 2

[96] See David E. Pinsky, " State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach," *University of Pennsylvania Law Review* 111 (1963), 265, 277–82; Note, "State Constitutional Prohibitions Against the Lending of State Credit," *American University Law Review* 26 (1977), 669.

(*Rowlands v. State Loan Bd.*). While this section appears to apply to the state and all of its political subdivisions, Article XIII, section 7 exempts a number of special governmental districts from this section and section 8 of this article. Section 10 of this article contains a more specific limitation on subsidies to particular institutions.

In its most recent major explication of this section, the Supreme Court has described its purpose as "preventing governmental bodies from depleting the public treasury by giving advantage to special interests or by engaging in non-public enterprises" (*Wistuber v. Paradise Valley Unified School Dist.) Wistuber* requires governmental aid to private enterprise to meet a two-part test: first, the transaction must serve a public purpose; and second, the government must receive "'consideration' which is not 'so inequitable and unreasonable that it amounts to an abuse of discretion'" (quoting *City of Tempe v. Pilot Properties, Inc.). Wistuber* limited some earlier decisions by emphasizing that the courts must scrutinize the "reality of the transaction, both in terms of purpose and consideration . . . [and thus] a panoptic view of the facts . . . is required." Reviewing courts should not be "overly technical" in their review, but instead must "give appropriate deference to the findings of the governmental body" making the grant, and the burden is on the challenger to show a violation of this section.

A brief review of some of the leading decisions applying this section furnishes a flavor of its application. *Wistuber*, for example, upheld a school district's agreement to give a teachers' association president released time from teaching duties while still paying a portion of her salary, finding that the president's activities were to the benefit of the district. Similarly, a special governmental district may issue bonds to loan money to private corporations for pollution control measures (*Industrial Dev. Auth. v. Nelson*). A municipal contribution to the private non-profit Arizona Municipal League has a sufficient public purpose to meet the requirements of this section (*City of Glendale v. White*, overruling prior contrary decision). Subsidies to private entities may be justified under this section if they fulfill "a moral obligation resting upon the state and founded upon equity and justice" (e.g., *Fairfield v. Huntington; Udall v. State Loan Bd.*). On the other hand, this section would be violated by the expenditure of public money to improve a private right-of-way without corresponding public benefit (*Graham County v. Dowell*, see also *State ex rel. Corbin v. Superior Court*).

SECTION 8

Local debt limits; assent of taxpayers. (1) No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding six per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors,

therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for state and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken from the last assessment for city or town purposes; provided, that under no circumstances shall any county or school district become indebted to an amount exceeding fifteen per centum of such taxable property, as shown by the last assessment roll thereof; and provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding twenty per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality, and for the acquisition and development by the incorporated city or town of land or interests therein for open space preserves, parks, playgrounds and recreational facilities.
(2) The provisions of section 18, subsections (3), (4), (5) and (6) of this article shall not apply to this section.

This section establishes debt limits, expressed as a percentage of the assessed valuation of taxable property, for various units of local government. It also contains some substantive limits on the purposes for which debt can be incurred, and generally requires the assent of a majority of the "property taxpayers" for incurring higher levels of debt. The latter was, along with a similar limit in Article VII, section 13, struck down by the U.S. Supreme Court in 1970 as conflicting with the equal protection clause of the Fourteenth Amendment to the U.S. Constitution (*City of Phoenix v. Kolodziejski*).

As originally adopted, this section placed a debt limit on local governmental units of 4 percent of the taxable property without approval by a majority of the "property taxpayers," except that cities and towns could, with taxpayer approval, incur up to 5 percent additional debt to supply "water, artificial light, or sewers." In 1912 it was amended to allow counties and school districts to become indebted up to 10 percent of the taxable property, and the city and town additional debt limit was raised from 5 to 15 percent above the 4 percent ceiling in the first clause. In 1972 the caption and the last clause of the first subsection were added, to allow cities and towns to incur a higher level of indebtedness to acquire and develop open space and recreational facilities. In 1980 the applicable percentages were raised from 4 to 6 percent for the base debt; from 10 to 15 percent for the county and school district debt; and from 15 to 20 percent "additional" debt for cities and towns for specified purposes. In 1988 the voters defeated a proposed amendment to add the acquisition of rights-of-way for streets and bridges to the category of expenditures subject to the higher debt limits, and in 1992 they defeated a proposal to raise the elementary school district debt limit from 15 to 20 percent.

Because this section establishes a limitation for city and town debt for water, light, sewer, and recreational facilities that is separate and apart from the base

debt limit, the two classes must be considered separately in calculating allowable indebtedness (*Buntman v. City of Phoenix; Allison v. City of Phoenix*). Similarly, in calculating school district indebtedness, grade school and high school districts are to be treated separately if they are separate entities, even if they cover the same geographic area (*Morgan v. Board of Supervisors*). See also, in this connection, the commentary on section 8.1 of this article.

This section applies only to the categories of local governmental units listed in the opening clause; several categories of special governmental districts are specifically exempted by the terms of Article XIII, section 7 (see *Ramirez v. Electrical Dist. No. 4*). Certain kinds of local government indebtedness do not count toward the debt limit of this section, such as indebtedness mandated by the state (*Rochlin v. State*); and municipal obligations payable from excise taxes (*City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Assn.*) or from other streams of revenue (e.g., *Humphrey v. City of Phoenix; Crawford v. City of Prescott*), where the general fund is not liable for the debt. This exempts local bonds paid from general revenues (*Guthrie v. City of Mesa*), a result similar to the treatment of state revenue bonds (see the commentary on section 5 of this article). Issuing new bonds to retire old ones does not count as an increase in indebtedness under this provision (*Allison v. City of Phoenix*). A taxpayer has standing to sue to enjoin the issuance of municipal bonds that would violate the debt limits of this section (*Morgan v. Board of Supervisors*).

SECTION 8.1

Unified school district debt limit. (1) Notwithstanding the provisions of section 8 of this article a unified school district may become indebted to an amount not exceeding thirty per cent of the taxable property of the school district, as shown by the last assessment roll thereof. For purposes of this section, a unified school district is a single school district which provides education to the area within the district for grades kindergarten through twelve and which area is not subject to taxation by any other common or high school district.

(2) The provisions of section 18, subsections (3), (4), (5) and (6) of this article shall not apply to this section.

This section was added in 1974; it was amended in 1980 to increase the original debt limit of 20 percent to 30 percent and to add subsection 2. Giving "unified" school districts (those serving grades kindergarten through twelve) higher debt limits than those provided in section 8 is to encourage the consolidation of elementary and high school districts. This section has not been interpreted in any published judicial decision.

SECTION 9

Every law which imposes, continues, or revives a tax shall distinctly state the tax and the objects for which it shall be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

The procedural limit this section creates on the legislature's power to levy taxes is broadly similar, although not identical, to that contained in the second paragraph of section 3 of this article. As with section 3, this provision has been held not to apply to excise taxes such as gasoline taxes, but rather to "annual recurring taxes known at the time of the adoption of the Constitution and imposed generally upon the entire property of the state" (*Hunt v. Callaghan*). The same reasoning excludes graduated license taxes (*City of Glendale v. Betty*). In determining whether a tax is a property tax subject to this section or an excise tax exempt from it, the courts will give substantial but not complete deference to the legislative declaration as to the nature of the tax (*Stults Eagle Drug Co. v. Luke*). The last clause echoes the limitation on incorporation by reference found in Article IV, part 2, section 14.

SECTION 10

No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

This section's prohibition on public financial aid to religious institutions substantially overlaps with Article XI, section 7 and Article II, section 12, and is also related to Article XX, section 1. Unlike the others, however, this section also prohibits public aid to private nonsectarian schools and to public service corporations (the latter defined in Article XV, section 2.) In this respect, it is a more targeted (and potentially more stringent) specification of the prohibition against subsidies to private entities contained in section 7 of this article.

This section's prohibition against state aid to religious institutions has not been read so strictly as to apply to state money given to a religious group to provide emergency assistance for the indigent, because the "doctrine of separation of church and state does not include the doctrine of total nonrecognition of the church by the state" (*Community Council v. Jordan*).

SECTION 11

Taxing procedure; license tax on registered vehicles. From and after December 31, 1973, the manner, method and mode of assessing, equalizing and levying taxes in the state of Arizona shall be such as is prescribed by law.

From and after December 31, 1973, a license tax is hereby imposed on vehicles registered for operation upon the highways in Arizona, which license tax shall be in lieu of all ad valorem property taxes on any vehicle subject to such license tax. Such license tax shall be collected as provided by law. To facilitate an even distribution of the registration of vehicles and the collection of the license tax imposed by this section, the legislature may provide for different times or periods of registration between and within the several classes of vehicles.

In the event that a vehicle is destroyed after the beginning of a registration year, the license tax paid for such year on such vehicle may be reduced as provided by law.

From and after December 31, 1973, mobile homes, as defined by law for tax purposes, shall not be subject to the license tax imposed under the provisions of this section but shall be subject to ad valorem property taxes on any mobile homes in the manner provided by law. Distribution of the proceeds derived from such tax shall be as provided by law.

From and after December 31, 1973, the legislature shall provide for the distribution of the proceeds from such license tax to the state, counties, school districts, cities and towns.

Originally this section created a state board of equalization, and counterpart boards in each county, to "adjust and equalize the valuation of the real and personal property among the several counties of the state." Second thoughts about this approach were quick to arise, for it was amended at the first state general election in 1912 to read: "The manner, method and mode of assessing, equalizing and levying taxes in the State of Arizona shall be such as may be prescribed by law." It was further amended upon initiative petition in 1940 to bring the first three paragraphs substantially to their current form, except that a specific formula for calculating the vehicle license tax was included. A 1968 amendment added the fourth paragraph, dealing with the taxation of mobile homes, and a 1972 amendment brought it to its current form, with caption. It has not been subject to significant judicial interpretation; the reported cases simply apply the first paragraph's recognition of the legislature's power to provide for the orderly administration of the tax laws (e.g., *Santa Fe Trail Transp. Co. v. Bowles*).

SECTION 12

The law-making power shall have authority to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes, also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes, stamp, registration, production, or other specific taxes.

This section was originally the concluding section in this article. It is a catch-all provision designed to ensure that the legislature has ample power to impose

a nearly unlimited range of taxes on all forms of property and economic activity. The framers were also careful to provide that income and inheritance taxes could be "graduated"; that is, imposed at progressively higher rates on larger holdings. This adjective was added on the floor of the convention to counter the notion that the requirement of uniformity of taxation in section 1 of this article might be construed to prohibit graduated taxes.[97]

This section does not authorize the legislature to exempt classes of property from taxation (*Miners & Merchants Bank v. Board of Supervisors*), but it does allow it to be selective in enacting excise taxes; that is, it may levy such taxes only on "certain classes of privileges, businesses, or occupations, and leave others untaxed" without violating this section (*Stults Eagle Drug Co. v. Luke*). The legislature may tax a municipality engaged in a business the same as it may tax a private entity (*City of Phoenix v. State ex rel. Conway*).

This section's reference to the "law-making power" does not include city and town councils (*Home Builders Assn. v. Riddel*). This is not as important as it might seem, however, because section 6 of this article allows the legislature to delegate taxing power to municipalities, and charter cities may reserve the power to tax in their charters under Article XIII, section 2.

SECTION 13

No tax shall be levied on raw or unfinished materials, unassembled parts, work in process or finished products, constituting the inventory of a manufacturer or manufacturing establishment located within the state and principally engaged in the fabrication, production and manufacture of products, wares and articles for use, from raw or prepared materials, imparting thereto new forms, qualities, properties and combinations, which materials, parts, work in process or finished products are not consigned or billed to any other party.

This section was added in 1950. Designed to encourage the location or relocation of manufacturing establishments in the state, it creates a tax exemption for their inventories. It is closely related to the tax exemption added to section 2 of this article upon initiative petition in 1964, which eliminated an inventory tax on raw materials, work in process, or finished materials of retailers or wholesalers. As with other tax exemptions, the burden is on the claimant to establish a right to the exemption, and the legislature may provide a process for securing the exemption that, if not followed, results in its waiver (*Fry v. Mayor & City Council of Sierra Vista*). The Supreme Court has held the exemption applicable to lumber mills and lumber products (*Apache County v. Southwest Lumber Mills*) but inapplicable to cattle in feedlots (*McElhaney Cattle Co. v. Smith*).

[97] See Goff, *Records,* 465–67, 485; Leshy, "The Making of the Arizona Constitution," 95–96.

SECTION 14

Use and distribution of vehicle, user, and gasoline and diesel tax receipts. No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets shall be expended for other than highway and street purposes including the cost of administering the state highway system and the laws creating such fees, excises, or license taxes, statutory refunds and adjustments provided by law, payment of principal and interest on highway and street bonds and obligations, expenses of state enforcement of traffic laws and state administration of traffic safety programs, payment of costs of publication and distribution of Arizona Highways Magazine, state costs of construction, reconstruction, maintenance or repair of public highways, streets or bridges, costs of rights of way acquisitions and expenses related thereto, roadside development, and for distribution to counties, incorporated cities and towns to be used by them solely for highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county, city and town roads, streets, and bridges and payment of principal and interest on highway and street bonds. As long as the total highway user revenues derived equals or exceeds the total derived in the fiscal year ending June 30, 1970, the state and any county shall not receive from such revenues for the use of each and for distribution to cities and towns, fewer dollars than were received and distributed in such fiscal year. This section shall not apply to moneys derived from the automobile license tax imposed under section 11 of article IX of the Constitution of Arizona. All moneys collected in accordance with this section shall be distributed as provided by law.

This section, added in 1952, effectively dedicates revenues from vehicle registration, licensing, use, and fuel fees and taxes (other than the automobile license tax imposed under section 11 of this article) to street and highway construction, maintenance, and related costs. As originally adopted, it provided a formula for allocating vehicle-related tax revenues between the state and local governments (counties and incorporated cities and towns), by providing that the local government share should be "an amount not less than as provided by law on July 1, 1952." It was substantially rewritten (and the caption added) in 1970 to adjust the floor on the allocation to local governments, principally to give the legislature authority to increase aid to the rapidly growing urban areas of the state.[98] In 1974 the voters rejected an amendment that would have allowed vehicle-related revenues to be used for "public transportation, bicycle pathways and facilities, overpasses, underpasses, parkways, foot pathways [and] equestrian trails."

[98] *Publicity Pamphlet,* 1970 General Election, p. 19 (ballot argument of Phoenix Chamber of Commerce in support of proposed amendment).

City taxes on motor vehicle fuels to produce revenues for a local street and highway fund are preempted by this section (*City of Phoenix v. Popkin*). A helpful description of its practical effect is found in a recent law journal article."[99]

SECTION 15

Commencing January 1, 1965, a license tax is imposed on aircraft registered for operation in Arizona, which license tax shall be in lieu of all ad valorem property taxes on any aircraft subject thereto, but nothing in this section shall be deemed to apply to:

1. Regularly scheduled aircraft operated by an air line company for the primary purpose of carrying persons or property for hire in interstate, intrastate, or international transportation.
2. Aircraft owned and held by an aircraft dealer solely for purposes of sale.
3. Aircraft owned by a nonresident who operates aircraft for a period not in excess of ninety days in any one calendar year, provided that such aircraft are not engaged in any intrastate commercial activity.
4. Aircraft owned and operated exclusively in the public service by the state or by any political subdivision thereof, or by the civil air patrol.

The amount, manner, method and mode of assessing, equalizing and levying such license tax and the distribution of the proceeds therefrom shall be prescribed by law.

This section, added in 1964, substitutes a licensing tax for all other ad valorem property taxes on aircraft, with the four exceptions stated. It has not received any published judicial interpretation.

SECTION 16

Commencing January 1, 1967, all watercraft registered for operation in Arizona, excluding watercraft owned and operated for any commercial purpose, is exempt from ad valorem property taxes. Watercraft exempt from ad valorem property taxes shall be subject to or exempt from a license tax, as may be prescribed by law.

"Watercraft", used in this section, shall be defined as provided by law.

This section, added in 1966, in general does for boats what the previous section did for aircraft. The previous section affirmatively requires a licensing tax for aircraft (with the amount determined by the legislature), while this section merely authorizes the legislature to levy a licensing tax on noncommercial watercraft. Commercial watercraft remain subject to ad valorem taxes.

[99] Jansen, "Arizona's Constitutional Restraints," 181, 199–201.

This section has not been interpreted in any reported judicial decision. The subjects specially treated for taxing purposes in this article—military personnel, widows and widowers, motor vehicles, aircraft and boats—offer illuminating insight into Arizona's history and culture. Lest one think that the subject of this section ("watercraft") is an anachronism in a modern desert state, Arizona is believed to have more miles of artificial lake shoreline than California has natural coastline, and more motorboats per capita than any other state.

SECTION 17

Economic estimates commission; appropriation limitation; powers and duties of commission. (1) The economic estimates commission shall be established by law, with a membership of not to exceed three members, and shall determine and publish prior to February 1 of each year the estimated total personal income for the following fiscal year. By April 1 of each year the commission shall determine and publish a final estimate of the total personal income for the following fiscal year, which estimate shall be used in computing the appropriations limit for the legislature. For the purposes of this section, "total personal income" means the dollar amount that will be reported as total income by persons for the state of Arizona by the U.S. department of commerce or its successor agency.

(2) For purposes of this section, "state revenues":

(a) Include all monies, revenues, fees, fines, penalties, funds, tuitions, property and receipts of any kind whatsoever received by or for the account of the state or any of its agencies, departments, offices, boards, commissions, authorities, councils and insitutions [sic] except as provided in this subsection.

(b) Do not include:

(i) Any amounts or property received from the issuance or incurrence of bonds or other lawful long-term obligations issued or incurred for a specific purpose. For the purpose of this subdivision long-term obligations shall not include warrants issued in the ordinary course of operation or registered for payment by the state.

(ii) Any amounts or property received as payment of dividends or interest.

(iii) Any amounts or property received by the state in the capacity of trustee, custodian or agent.

(iv) Any amounts received from employers for deposit in the unemployment compensation fund or any successor fund.

(v) Any amounts collected by the state for distribution to counties, cities and towns without specific restrictions on the use of the funds other than the restrictions included in section 14 of this article.

(vi) Any amounts received as grants, aid, contributions or gifts of any type, except voluntary contributions or other contributions received directly or indirectly in lieu of taxes.

(vii) Any amounts received as the proceeds from the sale, lease or redemption of property or as consideration for services or the use of property.

(viii) Any amounts received pursuant to a transfer during a fiscal year from another agency, department, office, board, commission, authority, council or institution of the state which were included as state revenues for such fiscal year or which are excluded from state revenue under other provisions of this subsection.

(ix) Any amounts attributable to an increase in the rates of tax subsequent to July 1, 1979 on vehicle users, gasoline and diesel fuel which were levied on July 1, 1979.

(x) Any amounts received during a fiscal year as refunds, reimbursements or other recoveries of amounts appropriated which were applied against the appropriation limitation for such fiscal year or which were excluded from state revenues under other provisions of this subsection.

(3) The legislature shall not appropriate for any fiscal year state revenues in excess of seven per cent of the total personal income of the state for that fiscal year as determined by the economic estimates commission. The limitation may be exceeded upon affirmative vote of two-thirds of the membership of each house of the legislature on each measure that appropriates amounts in excess of the limitation. If the legislature authorizes a specific dollar amount of appropriation for more than one fiscal year, for the purpose of measuring such appropriation against the appropriation limitation, the entire amount appropriated shall be applied against the limitation in the first fiscal year during which any expenditures are authorized, and in no other fiscal year.

(4) In order to permit the transference of governmental functions or funding responsibilities between the federal and state governments and between the state government and its political subdivisions without abridging the purpose of this section to limit state appropriations to a percentage of total personal income, the legislature shall provide for adjustments of the appropriation percentage limitation consistent with the following principles:

(a) If the federal government assumes all or any part of the cost of providing a governmental function which the state previously funded in whole or in part, the appropriation limitation shall be commensurately decreased.

(b) If the federal government requires the state to assume all or any part of the cost of providing a governmental function the appropriation limitation shall be commensurately increased.

(c) If the state assumes all or any part of the cost of providing a governmental function and the state requires the political subdivision, which previously funded all or any part of the cost of the function to commensurately decrease its tax revenues, the appropriation percentage limitation shall be commensurately increased.

(d) If a political subdivision assumes all or any part of the cost of providing a governmental function previously funded in whole or in part by the state, the appropriation percentage limitation shall be commensurately decreased.

> Any adjustments made pursuant to this subsection shall be made for the first fiscal year of the assumption of the cost. Such adjustment shall remain in effect for each subsequent fiscal year.

This section was first added (by a margin of better than three to one) in 1978, and was rewritten a scant two years later. Originally, it left the definition of "state tax revenues" to the legislature; the 1980 amendment broadened the phrase by shortening it to "state revenues" and added the elaborate definition in subsection 2. In a nutshell, it offers a "seven per cent solution" to the perceived problem of big government; that is, it limits state appropriations in any fiscal year to 7 percent "of the total personal income of the State for that fiscal year," unless two-thirds of the membership of each house approve a higher rate of expenditure. A proposal to reduce the 7 percent limit to 6.5 percent was defeated by the voters in 1984.

Because this section intends to place an absolute cap on state appropriations, as measured against total state personal income, it differs from the "balanced budget" requirement of section 3 of this article. The limitation is, however, on state appropriations (the amounts authorized to be spent by the legislature), and not on actual state expenditures, which may vary according to a multitude of factors over the course of a fiscal year. The attorney general has opined that surplus state revenues accruing during a fiscal year are "subject to the spending limitation if appropriated during a subsequent fiscal year" (No. 178–283).

The 7 percent limitation is not absolute; subsection 4 of this section allows the legislature to adjust the percentage limit in light of "transference of governmental functions or funding responsibilities" among federal, state, and local governments. Thus a 1982 transfer of part of the cost of indigent health care from the counties to the state resulted in increasing the state spending percentage limit to 7.18 percent.[100] Another important qualification on the percentage limit in this section is that it comes into play only if state revenues (based upon the taxing effort of the state) exceed the percentage limit. That is, it applies only if there is money in the state's coffers that the legislature could spend, consistent with a balanced budget, above this percentage limit. To date, there have been only two years (1979–80 and 1980–81) in which revenues were available to spend, had it not been for this section.[101]

Although this section's purpose is simply described, its implementation is complex, largely because of the difficulty of determining the constantly moving target of total personal income in the state and the similarly complicated task of determining total state revenues. The section addresses the income determination problem by using the federal definition of personal income and by creating

[100] See ibid., 194, text accompanying note 83.

[101] Ibid.

a three-person "economic estimates commission" to estimate the total personal income in the state for the next fiscal year.

This section has been the subject of numerous opinions of the attorney general, but it has not been addressed by the courts in any published decision.

SECTION 18

Residential ad valorem tax limits; limit on increase in values. (1) The maximum amount of ad valorem taxes that may be collected from residential property in any tax year shall not exceed one per cent of the property's full cash value as limited by this section. For the purpose of this section, "residential property" includes all owner occupied real property and improvements thereto and all owner occupied mobile homes used for residential purposes. For the purpose of this section, "owner" includes any purchaser under a contract of sale or under a deed of trust.

(2) The limitation provided in subsection (1) does not apply to:

(a) Ad valorem taxes or special assessments levied to pay the principal of and interest and redemption charges on bonded indebtedness or other lawful long-term obligations issued or incurred for a specific purpose.

(b) Ad valorem taxes or assessments levied by or for property improvement assessment districts, improvement districts and other special purpose districts other than counties, cities, towns, school districts and community college districts.

(c) Ad valorem taxes levied pursuant to an election to exceed a budget, expenditure or tax limitation.

(3) Except as otherwise provided by subsections (5) and (6) of this section the value of real property and improvements and the value of mobile homes used for all ad valorem taxes except those specified in subsection (2) shall be the lesser of the full cash value of the property or:

(a) For tax year 1980, an amount ten per cent greater than the full cash value determined for tax year 1979.

(b) For tax years 1981 and 1982, an amount ten per cent greater than the value of property determined pursuant to this subsection for the prior year.

(c) For tax year 1983 and each tax year thereafter, an amount ten per cent greater than the value of property determined pursuant to this subsection for the prior year or an amount equal to the value of property determined pursuant to this subsection for the prior year plus one-fourth of the difference between such value and the full cash value of the property for current tax year, whichever is greater.

(4) The legislature shall by law provide a method of determining the value, subject to the provisions of subsection (3), of new property and of property changed since or not taxed in 1979, which results in value for tax purposes for such property, equivalent to the value for tax purposes for similar property which was in existence and unchanged since 1979.

(5) The limitation on increases in the value of property prescribed in subsection (3), paragraphs (a), (b) and (c) does not apply to equalization orders which the legislature specifically exempts by law from such limitation.
(6) Subsection (3) does not apply to: property used in the business of patented or unpatented producing mines and the mills and the smelters operated in connection with the mines; producing oil, gas and geothermal interests; real property, improvements thereto and personal property used thereon used in the operation of telephone, telegraph, gas, water and electric utility companies; aircraft which is regularly scheduled and operated by an airline company for the primary purpose of carrying persons or property for hire in interstate, intrastate or international transportation; standing timber; property used in the operation of pipelines; and personal property regardless of use except mobile homes.
(7) The legislature shall provide by law a system of property taxation consistent with the provisions of this section.

This section, the three that follow, and the rewrite of the previous section were all adopted at a special election in June 1980, having been referred to the voters by the legislature as part of the property tax limitation movement spawned by the adoption of proposition 13 in California in 1978. This section limits ad valorem taxes (whether levied by state or local government) on residential property to 1 percent of the property's full cash value.[102] It also contains, in the third subsection, a limit on the rate of increase in the valuation of real property—generally fixed at 10 percent per year, subject to limitations specified in subsections 3–6. Finally, subsection 2 contains important exemptions from the stated limits for certain specified ad valorem taxes and special assessments. These include special district taxes and assessments (except those levied by school districts), taxes and assessments to pay "long-term obligations . . . incurred for a specific purpose," and ad valorem tax overrides approved by voters.

This section has not been addressed in any reported judicial decision; its net effect (together with the next section) is that the state relies much more heavily on regressive sales taxes than on property taxes.

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[102] The political appeal of the limits on property taxes created by this section and the one that follows has been well summarized by Donald Jansen ("Arizona's Constitutional Restraints," 196–97):

> No other tax receives such extensive treatment in the Arizona Constitution. Sales and income taxes, for instance, can be levied without any constitutional limit on the amount raised. The reason that the property tax is singled out for special treatment is [because it] is assessed as an annual lump sum bill which can amount to several hundred dollars or several thousand dollars to typical taxpayers [and] is applied as a lien on a person's home. [P]roperty tax[payers] are perceived by legislators as more likely to participate in government affairs and more likely to register their displeasure with elected officials at the ballot box. A revenue raising system could hardly be designed to be more visible or irritating.

SECTION 19

Limitation on ad valorem tax levied; exceptions. (1) The maximum amount of ad valorem taxes levied by any county, city, town or community college district shall not exceed an amount two per cent greater than the amount levied in the preceding year.

(2) The limitation prescribed by subsection (1) does not apply to:

(a) Ad valorem taxes or special assessments levied to pay the principal of and the interest and redemption charges on bonded indebtedness or other lawful long-term obligations issued or incurred for a specific purpose.

(b) Ad valorem taxes or assessments levied by or for property improvement assessment districts, improvement districts and other special purpose districts other than counties, cities, towns and community college districts.

(c) Ad valorem taxes levied by counties for support of common, high and unified school districts.

(3) This section applies to all tax years beginning after December 31, 1981.

(4) The limitation prescribed by subsection (1) shall be increased each year to the maximum permissible limit, whether or not the political subdivision actually levies ad valorem taxes to such amounts.

(5) The voters, in the manner prescribed by law, may elect to allow ad valorem taxation in excess of the limitation prescribed by this section.

(6) The limitation prescribed by subsection (1) of this section shall be increased by the amount of ad valorem taxes levied against property not subject to taxation in the prior year and shall be decreased by the amount of ad valorem taxes levied against property subject to taxation in the prior year and not subject to taxation in the current year. Such amounts of ad valorem taxes shall be computed using the rate applied to property not subject to this subsection.

(7) The legislature shall provide by law for the implementation of this section.

This section is a companion to the previous one. It limits increases in ad valorem taxes by local governments (including community college districts) to 2 percent annually, which subsection 4 allows to be carried forward; for example, a local government may increase ad valorem taxes by 4 percent in the second year if it has not increased taxes in the previous year. Counties may levy increases above the limit for support of schools (subsection 2(c)); furthermore, similar exemptions are made from this limit as are made in the previous section (for long-term obligations and special districts). The exemption for special district assessments and taxes in these two sections means in effect that the state has a "complex dual property tax system in which property is assessed both 'primary property taxes,' and 'secondary property taxes,' each on a different valuation formula."[103] A county's contribution to a special fire district would not count

[103] Jansen, "Arizona's Constitutional Restraints," 196.

against the ad valorem tax limitation imposed by this section, even though it came from the county's general fund, because its effective source was a special district tax (*Mountain States Legal Found, v. Apache County*).

Subsection 5 allows voters in any local governmental unit to approve tax increases in excess of the state limit by so-called "override" elections. Subsection 6 addresses the problem of annual variations in the amount of taxable property within a district; the Supreme Court has applied it to allow a county to increase its tax levy upon completion of a large power plant by the difference between the value of the plant when the construction work was in progress and its value as put in service (*Salt River Project Agric. Improvement & Power Dist. v. Apache County*).

SECTION 20

Expenditure limitation; adjustments; reporting. (1) The economic estimates commission shall determine and publish prior to April 1 of each year the expenditure limitation for the following fiscal year for each county, city and town. The expenditure limitations shall be determined by adjusting the amount of actual payments of local revenues for each such political subdivision for fiscal year 1979–1980 to reflect the changes in the population of each political subdivision and the cost of living. The governing board of any political subdivision shall not authorize expenditures of local revenues in excess of the limitation prescribed in this section, except as provided in subsections (2), (6) and (9) of this section.

(2) Expenditures in excess of the limitations determined pursuant to subsection (1) of this section may be authorized as follows:

(a) Upon affirmative vote of two-thirds of the members of the governing board for expenditures directly necessitated by a natural or man-made disaster declared by the governor. Any expenditures in excess of the expenditure limitation, as authorized by this paragraph, shall not affect the determination of the expenditure limitation pursuant to subsection (1) of this section in any subsequent years. Any expenditures authorized pursuant to this paragraph shall be made either in the fiscal year in which the disaster is declared or in the succeeding fiscal year.

(b) Upon the affirmative vote of seventy per cent of the members of the governing board for expenditures directly necessitated by a natural or man-made disaster not declared by the governor, subject to the following:

(i) The governing board reducing expenditures below the expenditure limitation determined pursuant to subsection (1) of this section by the amount of the excess expenditure for the fiscal year following a fiscal year in which excess expenditures were made pursuant to this paragraph; or

(ii) Approval of the excess expenditure by a majority of the qualified electors voting either at a special election held by the governing board or at a regularly scheduled election for the nomination or election of the members of the governing board, in the manner provided by law. If the excess expenditure is not

approved by a majority of the qualified electors voting, the governing board shall for the fiscal year which immediately follows the fiscal year in which the excess expenditures are made, reduce expenditures below the expenditure limitation determined pursuant to subsection (1) of this section by the amount of the excess expenditures. Any expenditures in excess of the expenditure limitation, as authorized by this paragraph, shall not affect the determination of the expenditure limitation pursuant to subsection (1) of this section in any subsequent years. Any expenditures pursuant to this paragraph shall be made either in the fiscal year in which the disaster occurs or in the succeeding fiscal year.

(c) Upon affirmative vote of at least two-thirds of the members of the governing board and approval by a majority of the qualified electors voting either at a special election held by the governing board in a manner prescribed by law, or at a regularly scheduled election for the nomination or election of the members of the governing board. Such approval by a majority of the qualified electors voting shall be for a specific amount in excess of the expenditure limitation, and such approval must occur prior to the fiscal year in which the expenditure limitation is to be exceeded. Any expenditures in excess of the expenditure limitation, as authorized by this subdivision, shall not affect the determination of the expenditure limitation pursuant to subsection (1) of this section, in subsequent years.

(3) As used in this section:

(a) "Base limit" means the amount of actual payments of local revenues for fiscal year 1979–1980 as used to determine the expenditure limitation pursuant to subsection (1) of this section.

(b) "Cost of living" means either:

(i) The price of goods and services as measured by the implicit price deflator for the gross national product or its successor as reported by the United States department of commerce or its successor agency.

(ii) A different measure or index of the cost of living adopted at the direction of the legislature, by concurrent resolution, upon affirmative vote of two-thirds of the membership of each house of the legislature. Such measure or index shall apply for subsequent fiscal years, except it shall not apply for the fiscal year following the adoption of such measure or index if the measure or index is adopted after March 1 of the preceding fiscal year.

(c) "Expenditure" means any authorization for the payment of local revenues.

(d) "Local revenues" includes all monies, revenues, funds, fees, fines, penalties, tuitions, property and receipts of any kind whatsoever received by or for the account of a political subdivision or any of its agencies, departments, offices, boards, commissions, authorities, councils and institutions, except:

(i) Any amounts or property received from the issuance or incurrence of bonds or other lawful long-term obligations issued or incurred for a specific purpose, or collected or segregated to make payments or deposits required by a contract concerning such bonds or obligations. For the purpose of this subdivision

long-term obligations shall not include warrants issued in the ordinary course of operation or registered for payment, by a political subdivision.

(ii) Any amounts or property received as payment of dividends or interest, or any gain on the sale or redemption of investment securities, the purchase of which is authorized by law.

(iii) Any amounts or property received by a political subdivision in the capacity of trustee, custodian or agent.

(iv) Any amounts received as grants and aid of any type received from the federal government or any of its agencies.

(v) Any amounts received as grants, aid, contributions or gifts of any type except amounts received directly or indirectly in lieu of taxes received directly or indirectly from any private agency or organization or any individual.

(vi) Any amounts received from the state which are included within the appropriation limitation prescribed in section 17 of this article.

(vii) Any amounts received pursuant to a transfer during a fiscal year from another agency, department, office, board, commission, authority, council or institution of the same political subdivision which were included as local revenues for such fiscal year or which are excluded from local revenue under other provisions of this section.

(viii) Any amounts or property accumulated for the purpose of purchasing land, buildings or improvements or constructing buildings or improvements, if such accumulation and purpose have been approved by the voters of the political subdivision.

(ix) Any amounts received pursuant to section 14 of this article which are greater than the amount received in fiscal year 1979–1980.

(x) Any amounts received in return for goods or services pursuant to a contract with another political subdivision, school district, community college district or the state, and expended by the other political subdivision, school district, community college district or the state pursuant to the expenditure limitation in effect when the amounts are expended by the other political subdivision, school district, community college district or the state.

(xi) Any amounts expended for the construction, reconstruction, operation or maintenance of a hospital financially supported by a city or town prior to January 1, 1980.

(xii) Any amounts or property collected to pay the principal of and interest on any warrants issued by a political subdivision and outstanding as of July 1, 1979.

(xiii) Any amounts received during a fiscal year as refunds, reimbursements or other recoveries of amounts expended which were applied against the expenditure limitation for such fiscal year or which were excluded from local revenues under other provisions of this subsection.

(xiv) Any amounts received collected by the counties for distribution to school districts pursuant to state law.

(e) "Political subdivision" means any county, city or town. This definition applies only to this section and does not otherwise modify the commonly accepted definition of political subdivision.

(f) "Population" means either:

(i) The periodic census conducted by the United States department of commerce or its successor agency, or the annual update of such census by the department of economic security or its successor agency.

(ii) A different measure or index of population adopted at the direction of the legislature, by concurrent resolution, upon affirmative vote of two-thirds of the membership of each house of the legislature. Such measure or index shall apply for subsequent fiscal years, except it shall not apply for the fiscal year following the adoption of such measure or index if the measure or index is adopted after March 1 of the preceding fiscal year.

(4) The economic estimates commission shall adjust the base limit to reflect subsequent transfers of all or any part of the cost of providing a governmental function, in a manner prescribed by law. The adjustment provided for in this subsection shall be used in determining the expenditure limitation pursuant to subsection (1) of this section beginning with the fiscal year immediately following the transfer.

(5) The economic estimates commission shall adjust the base limit to reflect any subsequent annexation, creation of a new political subdivision, consolidation or change in the boundaries of a political subdivision, in a manner prescribed by law. The adjustment provided for in this subsection shall be used in determining the expenditure limitation pursuant to subsection (1) of this section beginning with the fiscal year immediately following the annexation, creation of a new political subdivision, consolidation or change in the boundaries of a political subdivision.

(6) Any political subdivision may adjust the base limit by the affirmative vote of two-thirds of the members of the governing board or by initiative, in the manner provided by law, and in either instance by approval of the proposed adjustment by a majority of the qualified electors voting at a regularly scheduled general election or at a nonpartisan election held for the nomination or election of the members of the governing board. The impact of the modification of the expenditure limitation shall appear on the ballot and in publicity pamphlets, as provided by law. Any adjustment pursuant to this subsection, of the base limit shall be used in determining the expenditure limitation pursuant to subsection (1) of this section beginning with the fiscal year immediately following the approval, as provided by law.

(7) The legislature shall provide for expenditure limitations for such special districts as it deems necessary.

(8) The legislature shall establish by law a uniform reporting system for all political subdivisions or special districts subject to an expenditure limitation pursuant to this section to insure compliance with this section. The legislature shall establish by law sanctions and penalties for failure to comply with this section.

(9) Subsection (1) of this section does not apply to a city or town which at a regularly scheduled election for the nomination or election of members of the governing board

of the city or town adopts an expenditure limitation pursuant to this subsection different from the expenditure limitation prescribed by subsection (1) of this section. The governing board of a city or town may by a two-thirds vote provide for referral of an alternative expenditure limitation or the qualified electors may by initiative, in the manner provided by law, propose an alternative expenditure limitation. In a manner provided by law, the impact of the alternative expenditure limitation shall be compared to the impact of the expenditure limitation prescribed by subsection (1) of this section, and the comparison shall appear on the ballot and in publicity pamphlets. If a majority of the qualified electors voting on such issue vote in favor of the alternative expenditure limitation, such limitation shall apply to the city or town. If more than one alternative expenditure limitation is on the ballot and more than one alternative expenditure limitation is approved by the voters, the alternative expenditure limitation receiving the highest number of votes shall apply to such city or town. If an alternative expenditure limitation is adopted, it shall apply for the four succeeding fiscal years. Following the fourth succeeding fiscal year, the expenditure limitation prescribed by subsection (1) of this section shall become the expenditure limitation for the city or town unless an alternative expenditure limitation is approved as provided in this subsection. If a majority of the qualified electors voting on such issue vote against an alternative expenditure limitation, the expenditure limitation prescribed pursuant to subsection (1) of this section shall apply to the city or town, and no new alternative expenditure limitation may be submitted to the voters for a period of at least two years. If an alternative expenditure limitation is adopted pursuant to this subsection, the city or town may not conduct an override election provided for in section 19, subsection (4) of this article, during the time period in which the alternative expenditure limitation is in effect.

(10) This section does not apply to any political subdivision until the fiscal year immediately following the first regularly scheduled election after July 1, 1980 for the nomination or election of the members of the governing board of such political subdivision, except that a political subdivision, prior to the fiscal year during which the spending limitation would first become effective, may modify the expenditure limitation prescribed pursuant to subsection (1) of this section, by the provisions prescribed by subsections (2) and (6) of this section, or may adopt an alternative expenditure limitation pursuant to subsection (9) of this section.

A county may conduct a special election to exceed the expenditure limitation prescribed pursuant to subsection (1) of this section for the fiscal years 1982–1983 and 1983–1984, on the first Tuesday after the first Monday in November in 1981.

(11) "City", as used in this article, means city or charter city.

This section, added in June 1980, is a companion to the limitations on state expenditures contained in section 17 of this article. This section uses the same general technique—expenditure limitations calculated by the state economic estimates commission—to attempt to limit the expenditures of local governments. The governments covered include cities, counties, or towns (see subsection 3(e))

but not special governmental districts, whose expenditures are limited only to the extent the legislature "deems necessary" (see subsection 7).

The first subsection sets out the basic standard: local governmental units may increase local expenditures above the base level of actual payments (see subsection 3(a)) made in the 1979–80 fiscal year only to reflect "changes in the population . . . and the cost of living." The section goes on to provide—in a bewildering (and arguably constitutionally inappropriate) level of detail—numerous definitions, limitations, exemptions, and methods of overriding these limits. In general, the limits may be overridden upon a super-majority vote of the applicable governing board if approved by a majority of the voters as a special election (see, e.g., subsections 6, 9). Before 1992, voter approval of a proposal to adjust the base limit could only be sought at the same election at which local government officers were selected, which was every four years in many jurisdictions. In that year, subsection 6 was amended to give the electorate the opportunity to vote on such questions at general elections held every two years. Subsection 9 allows a voter initiative ("in the manner provided by law") or a two-thirds majority of the appropriate city or town (but not county) governing board to propose an alternative expenditure limitation and refer it to the electorate. If a majority approves, it shall become the applicable limitation but is good only for the four succeeding fiscal years.

The level of specificity in this section often reaches absurd heights. For example, in order to spend money over the limit to deal with a "natural or man-made disaster" declared by the governor, a two-thirds vote of the members of the applicable governing board is necessary. But if the governor has not declared the disaster, a 70 percent margin is necessary, subject to certain further limitations (cf. subsection 2(a) with 2(b)). One can only pity the economic estimates commission, the cities, towns, counties, and courts of the state as they grapple with the complexities of this section. Its definitions have been used by a court of appeals in determining that a county's contribution to a fire district fund is not an expenditure under section 19 of this article (*Mountain States Legal Found. v. Apache County*), and it was also addressed to calculate expenditure limits when a new county was created out of part of an existing one (*La Paz County v. Yuma County*). The attorney general has issued a number of opinions construing this section.

SECTION 21

Expenditure limitation; school districts and community college districts; adjustments; reporting. (1) The economic estimates commission shall determine and publish prior to April 1 of each year the expenditure limitation for the following fiscal year for each community college district. The expenditure limitations shall be determined by adjusting the amount of expenditures of local revenues for each such

district for fiscal year 1979–1980 to reflect the changes in the student population of each district and the cost of living. The governing board of any community college district shall not authorize expenditures of local revenues in excess of the limitation prescribed in this section, except in the manner provided by law.

(2) The economic estimates commission shall determine and publish prior to May 1 of each year the aggregate expenditure limitation for all school districts for the following fiscal year. The aggregate expenditure limitation shall be determined by adjusting the total amount of expenditures of local revenues for all school districts for fiscal year 1979–1980 to reflect the changes in student population in the school districts and the cost of living, and multiplying the result by 1.10. The aggregate expenditures of local revenues for all school districts shall not exceed the limitation prescribed in this section, except as provided in subsection (3) of this section.

(3) Expenditures in excess of the limitation determined pursuant to subsection (2) of this section may be authorized for a single fiscal year upon affirmative vote of two-thirds of the membership of each house of the legislature.

(4) As used in this section:

(a) "Cost of living" means either:

(i) The price of goods and services as measured by the implicit price deflator for the gross national product or its successor as reported by the United States department of commerce, or its successor agency.

(ii) A different measure or index of the cost of living adopted at the direction of the legislature, by concurrent resolution, upon affirmative vote of two-thirds of the membership of each house of the legislature. Such measure or index shall apply for subsequent fiscal years, except it shall not apply for the fiscal year following the adoption of such measure or index if the measure or index is adopted after March 1 of the preceding fiscal year.

(b) "Expenditure" means any amounts budgeted to be paid from local revenues as prescribed by law.

(c) "Local revenues" includes all monies, revenues, funds, property and receipts of any kind whatsoever received by or for the account of a school or community college district or any of its agencies, departments, offices, boards, commissions, authorities, councils and institutions, except:

(i) Any amounts or property received from the issuance or incurrence of bonds, or other lawful long-term obligations issued or incurred for a specific purpose, or any amounts or property collected or segregated to make payments or deposits required by a contract concerning such bonds or obligations. For the purpose of this subdivision long-term obligations shall not include warrants issued in the ordinary course of operation or registered for payment, by a political subdivision.

(ii) Any amounts or property received as payment of dividends and interest, or any gain on the sale or redemption of investment securities, the purchase of which is authorized by law.

(iii) Any amounts or property received by a school or community college district in the capacity of trustee, custodian or agent.

(iv) Any amounts received as grants and aid of any type received from the federal government or any of its agencies except school assistance in federally affected areas.

(v) Any amounts or property received as grants, gifts, aid or contributions of any type except amounts received directly or indirectly in lieu of taxes received directly or indirectly from any private agency or organization, or any individual.

(vi) Any amounts received from the state for the purpose of purchasing land, buildings or improvements or constructing buildings or improvements.

(vii) Any amounts received pursuant to a transfer during a fiscal year from another agency, department, office, board, commission, authority, council or institution of the same community college or school district which were included as local revenues for such fiscal year or which are excluded from local revenue under other provisions of this subsection.

(viii) Any amounts or property accumulated by a community college district for the purpose of purchasing land, buildings or improvements or constructing buildings or improvements.

(ix) Any amounts received in return for goods or services pursuant to a contract with another political subdivision, school district, community college district or the state and expended by the other political subdivision, school district, community college district or the state pursuant to the expenditure limitation in effect when the amounts are expended by the other political subdivision, school district, community college district or the state.

(x) Any amounts received as tuition or fees directly or indirectly from any public or private agency or organization or any individual.

(xi) Any ad valorem taxes received pursuant to an election to exceed the limitation prescribed by section 19 of this article or for the purposes of funding expenditures in excess of the expenditure limitations prescribed by subsection (7) of this section.

(xii) Any amounts received during a fiscal year as refunds, reimbursements or other recoveries of amounts expended which were applied against the expenditure limitation for such fiscal year or which were excluded from local revenues under other provisions of this subsection.

(d) For the purpose of subsection (2) of this section, the following items are also excluded from local revenues:

(i) Any amounts received as the proceeds from the sale, lease or rental of school property as authorized by law.

(ii) Any amounts received from the capital levy as authorized by law.

(iii) Any amounts received from the acquisition, operation, or maintenance of school services of a commercial nature which are entirely or predominantly self-supporting.

(iv) Any amounts received for the purpose of funding expenditures authorized in the event of destruction of or damage to the facilities of a school district as authorized by law.

(e) "Student population" means the number of actual, full-time or the equivalent of actual full-time students enrolled in the school district or community college district determined in a manner prescribed by law.

(5) The economic estimates commission shall adjust the amount of expenditures of local revenues in fiscal year 1979–1980, as used to determine the expenditure limitation pursuant to subsections (1) and (2) of this section, to reflect subsequent transfers of all or any part of the cost of providing a governmental function, in a manner prescribed by law. The adjustment provided for in this subsection shall be used in determining the expenditure limitation pursuant to subsections (1) and (2) of this section beginning with the fiscal year immediately following the transfer.

(6) The economic estimates commission shall adjust the amount of expenditures of local revenues in fiscal year 1979–1980, as used to determine the expenditure limitation pursuant to subsection (1) of this section, to reflect any subsequent annexation, creation of a new district, consolidation or change in the boundaries of a district, in a manner prescribed by law. The adjustment provided for in this subsection shall be used in determining the expenditure limitation pursuant to subsection (1) of this section beginning with the fiscal year immediately following the annexation, creation of a new district, consolidation or change in the boundaries of a district.

(7) The legislature shall establish by law expenditure limitations for each school district beginning with the fiscal year beginning July 1, 1980. Expenditures by a school district in excess of such an expenditure limitation must be approved by a majority of the electors voting on the excess expenditures.

(8) The legislature shall establish by law a uniform reporting system for districts to insure compliance with this section. The legislature shall establish by law sanctions and penalties for failure to comply with this section.

(9) This section is not effective for any community college district until the fiscal year beginning July 1, 1981.

(10) Subsections (2), (3), (5) and (6) of this section do not apply to school districts until the fiscal year beginning July 1, 1981.

This section is a companion to the previous one. It limits expenditures by school districts and community college districts, and provides for similar definitions and exceptions, as modified by the particular necessities of schools and colleges. Subsection 1 requires the economic estimates commission to set a spending limit for individual community college districts using the actual expenditure level for the fiscal year 1979–80 as a base and adjusting to reflect "changes in the student population of each district and the cost of living." The aggregate expenditure limits for all school districts in subsection 2 are calculated in a similar fashion, with the important difference that these limits apply statewide, rather than restricting expenditures of individual school districts.

As a result, there is only a single method to override these aggregate limits—upon an "affirmative vote of two-thirds of the membership of each house of the legislature" (subsection 3). The override is effective only for a single fiscal year.

Four key terms used are defined in elaborate detail in subsection 4. Subsection 5 requires the commission to make adjustments in the limits to "reflect subsequent transfers of . . . the cost of providing a governmental function, in a manner prescribed by law." Subsection 6 requires adjustment upon changes in the local districts themselves, such as through consolidation. Subsection 7 requires the legislature to establish expenditure limits each year for each school district. The majority of voters in any school district may authorize expenditures over this limit.

This section was amended in 1986 to raise the school district spending limit by 10 percent, by simply adding the words "and multiplying the result by 1.10" to the end of the second sentence in subsection 2. This section has not been addressed in any reported judicial decision, although it has been the subject of a few attorney general opinions.

SECTION 22

Vote required to increase state revenues; application; exceptions. (A) An act that provides for a net increase in state revenues, as described in Subsection B is effective on the affirmative vote of two-thirds of the members of each house of the legislature. If the act receives such an affirmative vote, it becomes effective immediately on the signature of the governor as provided by Article IV, Part 1, Section 1. If the governor vetoes the measure, it shall not become effective unless it is approved by an affirmative vote of three-fourths of the members of each house of the legislature.

(B) The requirements of this section apply to any act that provides for a net increase in state revenues in the form of:

1. The imposition of any new tax.
2. An increase in a tax rate or rates.
3. A reduction or elimination of a tax deduction, exemption, exclusion, credit or other tax exemption feature in computing lax liability.
4. An increase in a statutorily prescribed state fee or assessment or an increase in a statutorily prescribed maximum limit for an administratively set fee.
5. The imposition of any new state fee or assessment or the authorization of any new administrative set fee.
6. The elimination of an exemption from a statutorily prescribed state fee or assessment.
7. A change in the allocation among the state, counties or cities of Arizona transaction privilege, severance, jet fuel and use, rental occupancy, or other taxes.
8. Any combination of the elements described in paragraphs 1 through 7.

(C) This section does not apply to:

1. The effects of inflation, increasing assessed valuation or any other similar effect that increases state revenue but is not caused by an affirmative act of the legislature.

2. Fees and assessments that are authorized by statute, but are not prescribed by formula, amount or limit, and are set by a state officer or agency.

3. Taxes, fees or assessments that are imposed by counties, cities, towns and other political subdivisions of this state.

(D) Each act to which this section applies shall include a separate provision describing the requirements for enactment prescribed by this section.

This section was approved in 1992 by nearly 72 percent of the voters, having been put on the ballot by initiative petition. In essence, it requires a two-thirds vote of the members of each house (three-fourths to override a gubernatorial veto) to enact any legislative proposal whose net effect is to increase state revenues. This is the same standard as required by Article IV, part 1, section 1(3) to exempt "emergency" measures from a referendum.

As subsection B indicates, it applies not only to new and increases in existing taxes, but also to various other fiscal adjustments that would result in more funds to the state treasury. Subsection C limits this section's applicability to "affirmative act[s] of the legislature." Thus revenue increases resulting from inflation or from actions by local governments or the executive branch of state government are exempt. The provision has not yet been addressed in any reported judicial decision.

Article X

State and School Lands

Following the practice it had established more than a century earlier, the U.S. Congress, in sections 24 and 25 of the Arizona Enabling Act, granted Arizona several million acres of federal land for specific purposes. By far the largest of these was the grant for the "support of common schools," consisting of four designated 640-acre (one square mile) sections of federal land in every township (each composed of thirty-six sections, or thirty-six square miles) in the state. If the land in these sections had previously been disposed of or set aside for some other use by the federal government, the state was, again consistent with long-standing federal practice, given the right to select other available ("unappropriated") federal lands as indemnity. This common school grant amounted to nearly ten million acres, or about 11 percent of the total land area in the state.[104] As the caption on this article indicates, the state received other lands from the federal government in the enabling act, including one million acres to pay off bonds

[104] Both the act creating the New Mexico territory, 9 Statutes at Large 446, 452 (1850), and the later one carving the Arizona territory out of it, 12 Statutes at Large 664, 665 (1863), "reserved" two sections in every township for the benefit of the common schools of the future state. This was the standard quantity at the time. The Arizona Enabling Act of 1910 doubled this quantity (see 36 Statutes at Large 557, 568 (1910)), following the precedent established by Congress in the Utah Enabling Act of 1894 (28 Statutes at Large 108 (1894)). The federal practice of granting lands to new states is treated in Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger Pub. Co., 1968), 285–318.

previously issued by several Arizona counties that had been validated by an act of Congress in 1896, and 1,350,000 acres for a variety of state penal, charitable, and educational institutions.[105]

Congress's expectation was not that the lands granted for various state institutional purposes would actually be used as sites for such institutions; rather, it was that the proceeds of the sale or lease of the lands would be placed in a permanent fund, the income of which would be used for the designated purposes. Thus the basic purpose for which these state lands are to be managed is to supply revenue to fund these various trusts. Congress took considerable pains to fashion the enabling act to ensure that these granted lands would be managed to serve their intended purposes (see the constitutional history, Part I in this volume). The enabling act restrictions are rescripted, with some modifications noted in the commentary on each section, in this article.[106]

This article's borrowing of much language from the federal enabling act does not mean that the intent or application of this article is exactly the same as that of the federal law (see the commentary on section 3 of this article). Furthermore, the revenue-producing objective of these lands does not require that they be managed to extract the maximum income that might be obtained from them. Revenue production is not the sole determinant of how these lands may be managed (*Williams v. Greene; Campbell v. Caldwell; Campbell v. Muleshoe Cattle Co.*). Other values, such as environmental protection and prudent resource conservation, may be taken into account; that is, the state may consider "the public benefits flowing from employing state land in uses of higher value than would the applicant for a lease" (*Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*). Moreover, comprehensive state regulatory programs may be applied to such lands without violating this article (*Seven Springs Ranch v. State ex rel. Ariz. Dept. of Water Resources*).[107]

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[105] See 29 Statutes at Large 262 (1896); 36 Statutes at Large 573 (1910). Arizona had earlier received a small grant of 4,680 acres for university purposes; 21 Statutes at Large 326 (1881). In 1929 Congress granted Arizona an additional 50,000 acres to be used for "miners' hospitals for disabled miners"; 45 Statutes at Large 1252. Except for Alaska, Arizona has the largest amount, and has retained the largest percentage, of its federally granted lands. See generally Sally K. Fairfax, Jon A. Souder, and Gretta Goldenman, "School Trust Lands: A Fresh Look at Conventional Wisdom," *Environmental Law* 22 (1992), 797, 832–33.

[106] Recent scholarship shows that the constitutional restrictions on management of federally granted lands in many states preceded, and were more stringent than, those imposed by the federal government. See Fairfax et al., "School Trust Lands," 821–22, 825.

[107] *Seven Springs* was anticipated by an earlier decision upholding the rejection of an application to drill wells for water on state land in order to bring additional land under cultivation pursuant to an agricultural lease (*Ernst v. Collins*) (not citing this article). The issue of water under state lands is explored in Steven Weatherspoon, "Water and the Arizona Trust Lands," *Arizona Bar Journal* 11 (Summer 1975), 15–58. See also Thomas W. Bade, "Safe Yield Versus Maximum Return: The Constitutionality of the Arizona Groundwater Code as Applied to State Trust Land," *Arizona State Law Journal* 22 (1990), 261–98.

SECTION 1

All lands expressly transferred and confirmed to the state by the provisions of the enabling act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, shall be by the state accepted and held in trust to be disposed of in whole or in part, only in manner as in the said enabling act and in this constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts and the lands producing the same.

This section, drawn nearly verbatim from the first paragraph of section 28 of the enabling act, expressly incorporates the enabling act limitations on the management of lands granted to Arizona by the federal government. In a bit of constitutional overkill, the same general pledge of allegiance to the enabling act is incorporated, by somewhat different language, in the second, eighth, and ninth sections of this article and in the twelfth section of Article XX.

The last sentence of this section applies the same trust limitations to the natural products and money proceeds of the lands as to the lands themselves. Thus lands acquired through foreclosure by the state for nonpayment of a loan, where the money loaned came from a state trust fund created from revenues from the lands acquired under the enabling act, are subject to the restrictions of this section, because these lands have "all the characteristics of the original trust lands" (*Murphy v. State*). "Natural products" of these lands include water (*Farmers Inv. Co. v. Pima Mining Co.*), sand and gravel (*State Land Dept. v. Tucson Rock & Sand Co.*), and minerals in general (*Kadish v. Arizona State Land Dept.*).

Section 1 goes beyond the enabling act's restrictions on federally granted lands, however, by applying the same general limitations to "all lands otherwise acquired by the state." The Supreme Court has held, however, that the limitations of this article do not apply to lands acquired by the state as a result of foreclosures for nonpayment of taxes (*Arizona Title Guarantee & Trust Co. v. State*). The Court later suggested that the phrase "all lands otherwise acquired" is inapplicable to the "countless pursuits that the state might engage in which would require the ownership of real estate," but is rather limited to those lands "otherwise acquired by the state for . . . the support and maintenance of the institutions referred to in the Enabling Act" (*Murphy v. State, dictum*). Acting on this judicial suggestion, the legislature has assumed that it may manage or dispose of land not within this description (such as lands acquired for rights-of-way for state highways) without regard for the requirements of Article X.[108]

[108] See, e.g., Ariz. Rev. Stat. 28–1865, authorizing the disposal of surplus land previously acquired by the Arizona Department of Transportation for highway purposes. See also Op. Atty. Gen. No. 179–319, construing this statute.

The Arizona courts have not directly addressed whether the trust limitations of this article apply to another category of state lands—so-called sovereign lands, such as the beds of waterbodies that were navigable at statehood. These submerged lands were not expressly "granted" to Arizona by the United States; instead, title to them passed to the new state at statehood as an inherent feature of the state's sovereignty under the so-called equal footing doctrine of federal law (see *Pollard's Lessee v. Hagan*). A court of appeals has said that such lands are subject to a public trust "for the use and enjoyment of present and future generations," without touching on the question of whether they are subject to the requirements of this article (*Arizona Ctr. for Law in the Pub. Interest v. Hassell*).

SECTION 2

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said enabling act, shall be deemed a breach of trust.

With slight modification in wording, this section repeats the proscription in the second paragraph of section 28 of the enabling act. The broad language, casting the prohibitory net over anything "of value directly or indirectly derived" from the lands, reflects Congress's distrust of state land managers. The Supreme Court has, accordingly, construed the section to prohibit the state legislature from forgiving interest on loans of funds derived from the sale of lands granted to the state by the federal government at statehood (*Rowlands v. State Loan Bd.*).

SECTION 3

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest

to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or,

3. The leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as long thereafter as oil, gas or other hydrocarbon substances may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions, as the legislature may prescribe, the terms and provisions to include a reservation of a royalty to the state of not less than twelve and one-half per cent of production.

This section is drawn from the third paragraph of section 28 of the enabling act, and in its original form prohibited leasing state lands for a term longer than five years "without advertisement." It was amended in 1940 to lengthen the maximum lease term without advertisement to ten years for grazing or agricultural purposes and to twenty years for mining purposes. Remarkably, this amendment was never approved by Congress, even though the twelfth and thirteenth sections of Article XX seem to require congressional consent. No reported decision has examined its validity. A second amendment, adopted in 1950, rewrote the last part of the provision again, addressing the terms of leasing without advertisement in the three numbered paragraphs. This amendment was expressly made contingent upon congressional approval, which followed in 1951 (65 Statutes at Large 51).

Nothing in either the enabling act or this article prevents the state from selling state lands outright, so long as the process of sale conforms to this section. The limitation on mortgaging state lands in the first sentence applies only to the state's interest in such lands (*Smith v. Rabb*); this section does not prevent the purchaser of such lands from mortgaging them (*Union Oil Co. v. Norton-Morgan Commercial Co.*).

The public auction requirement for the "sale or lease" of these lands, textually identical to section 28 of the enabling act, has produced a notable conflict

between state and federal court decisions. The U.S. Supreme Court interpreted the enabling act not to require an auction when the state highway department sought to acquire a right-of-way across a state school section, reasoning that so long as the full appraised value was paid, no purpose would be served by an auction (*Lassen v. State ex rel. Arizona Highway Dept.*).[109] The Arizona Supreme Court nevertheless construed the identical language in this section to require an auction in nearly identical circumstances, reasoning that strict enforcement was necessary to ensure that true value was obtained (*Deer Valley Unified School Dist. No. 97 v. Superior Court*).[110]

A later decision required a public auction for exchanges of state trust land, reasoning that an exchange is a "sale" within the meaning of this section, rather than a kind of "other disposal" subject only to the requirements of the next section (*Fain Land & Cattle Co. v. Hassell*). Although Congress had amended the Arizona enabling act in 1936 to authorize the state to "exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe" (49 Statutes at Large 1477), this section was never amended to take advantage of that opportunity. Arizona voters twice (in 1990 and 1992) rejected proposals to reverse the *Fain* decision.

The Court has also rejected a mining industry argument that the penultimate paragraph of this section, authorizing mineral leasing "in such manner as the Legislature may prescribe," implicitly repealed the requirement in section 4 of this article that leases shall be for not less than "true value," and struck down a state statute establishing a flat royalty rate (*Kadish v. Ariz. State Land Dept.*). On the other hand, the Court has upheld a state statute giving the holder of an expiring lease of state land a preferential right to match the highest bid at a public auction of the lease, rejecting the argument that the preferential right deterred other potential bidders from bidding, and thus undercut this section's

[109] Nearly twenty years before *Lassen,* the Supreme Court had ruled that a county could take a right of way across state trust lands without any payment at all to the school trust, largely on the policy ground of avoiding the "disturbing" result of impairing the construction of state highways (*Grossetta v. Choate*). This decision was reaffirmed a few years later (*State ex rel. Conway v. State Land Dept.*). The land department revived the issue in 1965 by promulgating new rules that eventually led to the *Lassen* litigation. The background is discussed in Note, "Public Lands—Trust Lands—Acquisition by State," *Arizona Law Review 9* (1967), 113–18.

[110] The U.S. Supreme Court had discounted the auction as an "empty formality," reasoning that even if someone else outbid the state at an auction, the state could condemn the land. It ignored the fact that the state may have to pay the winning bidder the value she bid, which would enrich the school trust more than relying on an appraisal alone. In the early 1960s, Arizona unsuccessfully pushed the Congress to amend the enabling act to permit the sale or lease of state trust lands to agencies of the state or its political subdivisions, without regard to the limitations in the enabling act. The amendment was approved by the Senate but failed in the House. See I. Douglas Dunipace, "Arizona's Enabling Act and the Transfer of State Lands for Public Purposes," *Arizona Law Review* 8 (1966), 133–40.

requirement that the public auction determine the "highest and best bidder" for the lands (*Ewing v. State*).[111]

SECTION 4

All lands, lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

This section is a rescript of the fourth paragraph of section 28 of the enabling act. Its mandate to receive "true appraised value" for interests in or products of state lands establishes a companion requirement to, and places an additional safeguard under, the public auction requirement in the preceding section. Thus an inflexible statutory royalty requirement for leasing the products of state lands violates this section (*State Land Dept. v. Tucson Rock & Sand Co.*;[112] *Kadish v. Ariz. State Land Dept.*). While this section requires that any disposition be made for true value, it does not directly address whether the state may enter into multiyear leases of state lands (which are expressly authorized by section 3 of this article) without including an escalator clause to keep the rental rate current with market value. Construing only the enabling act, the U.S. Supreme Court has upheld such a lease, at least where the lease payment was not substantially different from current market value (*Alamo Land & Cattle Co. v. Arizona*). Whether this section requires a different result is uncertain; as the commentary on the previous section shows, the Arizona courts are not bound by the U.S. Supreme Court's interpretation of parallel provisions in the enabling act. In any event, nothing in this article prevents the land department from including an escalator clause in its leases to ensure that it captures true value throughout the term of the lease.

SECTION 5

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or

[111] See Bill Eggleston, "The Preferred Right to Lease State Trust Land: *Ewing v. State*," *Arizona State Law Journal* 21 (1989), 793–808.

[112] This case is discussed, in the context of the general position of minerals under the enabling act, in James Shiner, "State Mineral Leases on Arizona's School Lands," *Arizona Law Review* 15 (1973), 211–22.

adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre; provided, that the state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project, and other lands in lieu thereof shall be selected from lands of the character named and in the manner prescribed in section twenty-four of the said enabling act.

This section derives from the fifth paragraph of section 28 of the enabling act. That act did not set any minimum sales price but merely required that the lands not be sold for "less than their appraised value." The first clause of this section does set minimum prices, but these have been rendered obsolete by inflation. Also obsolete is the proviso obligating the state to relinquish its lands to the federal government where necessary for water projects. It was included because of the uncertainty that prevailed in 1910 (but was later dispelled) about the federal government's constitutional power to build federal water projects inside states (see the commentary on Article XX, section 10. As a result of all this, the section has no real meaning today.

SECTION 6

No lands reserved and excepted of the lands granted to this state by the United States, actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission, which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the president declaring the admission of the state, shall be subject to any disposition whatsoever by the state or by any officer of the state, and any conveyance or transfer of such lands made within said five years shall be null and void.

This section owes its existence to the same constitutional uncertainty that gave rise to the proviso in the previous section. By its own terms it limited the disposition of certain state lands for only five years after statehood, and thus expired on February 14, 1917.

SECTION 7

A separate fund shall be established for each of the several objects for which the said grants are made and confirmed by the said enabling act to the state, and whenever any moneys shall be in any manner derived from any of said lands, the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was, by said enabling act, conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or

for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto.

This section, with slight wording changes, is the same as the seventh paragraph of section 28 of the enabling act. Its principal objects are, first, to ensure that the proceeds of the various different land grants (for common schools, public buildings, and specified institutions) are not intermingled; and second, to ensure that the funds are conservatively invested and not otherwise squandered. Section 8 of Article XI is a related provision, addressing specifically the "common school fund" derived from lands granted to the state for that purpose.

This provision underscores the concern of Congress and the framers of the state constitution that state lands be prudently managed. This concern (magnified by the volatility of the agricultural sector and real estate market in Arizona) was hardly fanciful, as judicial application of this section shows. In 1942 the Supreme Court determined that investing the state trust land money in promissory notes secured by farmland constituted "safe, interest-bearing securities" within the meaning of this section (*State ex rel. Conway v. Versluis*). Five years later the Court addressed the wreckage left by the souring of a number of these loans as a result of "questionable investments," to the detriment of the school fund (*Murphy v. State*). *Murphy* held that this section did not make the state treasurer the insurer of these state trust funds, so as to be responsible for the loss, but perceiving that legislative direction had been at fault, it emphasized (in order to head off further problems) that this section made the named officers in the executive branch solely responsible for the investment of state land funds, and thus the legislature "has no power to substitute its will and judgment for that of the [executive officers]" (*dictum*). Two other Supreme Court decisions dealt with bad agricultural loans of state land funds, although both addressed sections of the constitution other than this one (*Rowlands v. State Loan Bd.*; *Udall v. State Loan Bd.*).

SECTION 8

Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this state by the said enabling act, not made in substantial conformity with the provisions thereof, shall be null and void.

This section, drawn from the first sentence of the eighth paragraph of section 28 of the enabling act, is another provision attempting to cast a tight net of prudence over state land management. The Supreme Court has recognized that

taxpayers and educational beneficiaries have standing to challenge arrangements allegedly in violation of the provisions of this article (*Kadish v. Ariz. State Land Dept.*).[113] Curiously, however, this provision speaks of "substantial" rather than strict conformity and literally applies only to the enabling act, not to the provisions of this article. This allowed the Supreme Court to hold recently that land exchanges made in the past in compliance with the enabling act, as amended, would not be undone even though they were determined to violate section 3 of this article because no auction was held (*Fain Land & Cattle Co. v. Hassell*).

SECTION 9

All lands expressly transferred and confirmed to the state, by the provisions of the enabling act approved June 20, 1910, including all lands granted to the state, and all lands heretofore granted to the territory of Arizona, and all lands otherwise acquired by the state, may be sold or leased by the state in the manner, and on the conditions, and with the limitations, prescribed by the said enabling act and this constitution, and as may be further prescribed by law; provided, that the legislature shall provide for the separate appraisement of the lands and of the improvements on school and university lands which have been held under lease prior to the adoption of this constitution, and for reimbursement to the actual bona fide residents or lessees of such lands upon which such improvements are situated, as prescribed by title 65, Civil Code of Arizona, 1901, and in such cases only as permit reimbursements to lessees in said title 65.

This section repeats once more the need to comply with the specific limitations of the enabling act and the constitution. Like section 1 of this article, it applies the same restrictions to "all lands otherwise acquired by the state" as well as the statehood grant lands. It seems to have been included by the Arizona framers primarily for the proviso that allows "actual bona fide residents or lessees" of lands that became state school and university lands at statehood to receive compensation for their improvements in accordance with territorial law. It has no direct counterpart in the enabling act and might have been void if in conflict with federal law, but the passage of time has apparently rendered both that question and this part of the section obsolete. Curiously, this section protects improvements made by bona fide residents *or* lessees of such lands, while the

[113] Upon review, the U.S. Supreme Court noted that the taxpayer plaintiffs did not have standing under federal law to enforce the requirements of the federal enabling act, but nevertheless reached the merits on the ground that the mining company intervenor had standing under federal law to seek review in the high court, because it was injured by the state court's judgment that it should pay higher royalties (*Asarco, Inc. v. Kadish*).

next section protects improvements made by bona fide residents *and* lessees of such lands. No published court decision has addressed this difference or any other provision in this section.

SECTION 10

The legislature shall provide by proper laws for the sale of all state lands or the lease of such lands, and shall further provide by said laws for the protection of the actual bona fide residents and lessees of said lands, whereby such residents and lessees of said lands shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease to other parties the former lessee shall be paid by the succeeding lessee the value of such improvements and rights and actual bona fide residents and lessees shall have preference to a renewal of their leases at a reassessed rental to be fixed as provided by law.

This section also has no counterpart in the enabling act. As originally adopted, it generally limited leases of state lands to a five-year term, but the limit was repealed by an initiated amendment in 1918. By directing the legislature to adopt laws governing the sale or lease of the lands, this section effectively prevents state agencies from leasing state lands except where the legislature has allowed it, because the state land department "has no common law or inherent powers" in this area (*Havasu Heights Ranch & Dev. Corp. v. State Land Dept., dictum*).

The principal thrust of this section is to protect the interest of bona fide residents and lessees in the improvements they make in state lands, so that if the lands are leased to someone else, the new lessee must compensate any previous lessee for the value of improvements she has made. But no compensation is owed for the lessee's loss of opportunity to renew the lease or sublease the land to another (*Cracchiolo v. State*). On the other hand, the state land department cannot insert a term in a lease that would waive the right of the lessee to compensation for improvements under this section (*Havasu Heights Ranch & Dev. Corp. v. State Land Dept.*).

The last clause of the section does not require the renewal of a lease (*Campbell v. Muleshoe Cattle Co.*), and presumably the auction requirement of section 3 would apply to a renewal (see *Deer Valley Unified School Dist. No. 97 v. Superior Court; Ewing v. State*).

SECTION 11

No individual, corporation or association shall be allowed to purchase more than one hundred sixty (160) acres of agricultural land or more than six hundred forty (640) acres of grazing land.

This section did not derive from the enabling act, but reflects the Arizona framers' independent concern about large landholdings. As originally adopted, it prevented leasing or purchasing state lands in excess of the stated limits, but the limitation on leasing was repealed by initiated amendment in 1918; congressional approval was not necessary because it was not in the enabling act. The 640-acre limit of this section is the maximum that may be used to determine the value of school trust land condemned for highway purposes (*Arizona State Land Dep't v. State ex rel. Herman*).

Article XI

Education

SECTION 1

The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal schools, industrial schools, and a university (which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character.) The legislature shall also enact such laws as shall provide for the education and care of the deaf, dumb, and blind.

This section sets out the basic framework of the state public school system from kindergarten through university (including technical and skills education); the second sentence addresses the "education and care" of students with special needs. The legislature is required to provide for "maintenance" as well as "establishment" of the state education system, to the end that it be both "general" and "uniform," the latter suggesting statewide minimum standards. Although this section speaks of a single university and does not mention community colleges, the university system is now composed of three state universities (see the commentary on section 5, below), and the legislature created a comprehensive system of state colleges in 1927 (Laws 1927, ch. 84, now found at Ariz. Rev. Stat. 15–1401 through 1491). Two years earlier the legislature had established

kindergartens (Laws 1925, ch. 70, section 4; now Ariz. Rev. Stat. 15–703(B)). This section authorizes the incorporation of state educational institutions by special act (*Board of Regents v. Sullivan*).

The Supreme Court has described this section and section 6 of this article as establishing that education is a "fundamental right" of every person between the ages of six and twenty-one years, and placing an obligation on the state to "assure" every child a "basic education" (*Shofstall v. Hollins*). Without considering the "uniformity" requirement of this section, however, *Shofstall* rejected a claim that substantial disparities in funds available for education from locality to locality violated the equal privileges and immunities guarantee of Article II, section 13, or (following the U.S. Supreme Court's decision in *San Antonio Indep. School Dist. v. Rodriguez*) the equal protection clause of the U.S. Constitution.

Applying this section as well as sections 2 and 5 of this article, the Supreme Court has said that the legislature must determine the extent to which the board of regents is immune from municipal regulation in building university buildings inside a municipality (*Arizona Bd. of Regents v. City of Tempe*). Applying the same sections, a court of appeals has held that the board of regents cannot delegate its authority over personnel matters to a labor union (*Communication Workers of Am. v. Arizona Bd. of Regents*).

SECTION 2

The general conduct and supervision of the public school system shall be vested in a state board of education, a state superintendent of public instruction, county school superintendents, and such governing boards for the state institutions as may be provided by law.

This section sets out the administrative machinery for the "conduct and supervision" of the state public school system. The state superintendent of public instruction is an elective office under Article V, section 1; county school superintendents are elected pursuant to Article XII, section 3; and the state board of education is described in section 3 of this article. The powers and duties of these officials are set by the legislature under this section and Article V, section 9 (state superintendent of public instruction); Article XII, section 4 (county school superintendents); and section 3 of this article (state board of education). In addition, the legislature has established a myriad of other governing boards, including state and local community college boards and local boards of trustees for elementary, secondary, and other kinds of schools.

This section and others in this article create a measure of constitutional independence for the state school system, so that a state civil service board could not exercise supervisory authority even over nonteaching employees of the state school system (*Hernandez v. Frohmiller*) or the state board of regents

(*Arizona Bd. of Regents v. State Dept. of Admin.*). On the other hand, the educational institutions referred to in this article do not have the "power, authority, or privilege to spend the state's monies at will and with no review" by the state auditor (then a constitutional officer, see commentary on Article V, section 1) (*Bd. of Regents v. Frohmiller*), and the state legislature could require the state university to pay a specific minimum wage to its employees doing manual or mechanical labor (*State v. Miser*, not citing this article). Curiously, the Supreme Court did not discuss *Miser* in its later *Hernandez* decision described above.

SECTION 3

State board of education; composition; powers and duties; compensation. The state board of education shall be composed of the following members: the superintendent of public instruction, the president of a state university or a state college, three lay members, a member of the state junior college board, a superintendent of a high school district, a classroom teacher and a county school superintendent. Each member, other than the superintendent of public instruction, to be appointed by the governor with the consent of the senate in the manner prescribed by law. The powers, duties, compensation and expenses, and the terms of office of the board shall be such as may be prescribed by law.

In its original version, this section called for a somewhat different membership of the state board of education, to include the governor and no lay members. A 1964 amendment rewrote the membership requirements to their current form, and in the process implicitly recognized the expansion of the university system (by referring to "a" rather than "the" university). A 1976 amendment added the caption and provided that state senate consent for gubernatorial appointments was to be made "in the manner prescribed by law," as part of a package of amendments dealing with the senate confirmation process.

The preceding section of this article speaks of the state board, along with others, as being responsible for the "general conduct and supervision" of the public school system, while the last clause of this section gives the legislature authority to prescribe, among other things, the powers and duties of the state board. The Supreme Court has said that the state board "has only such powers as the legislature may prescribe," and therefore the board may not calculate average daily attendance for purposes of fixing the level of state aid in a way different from that provided by the legislature (*Harkins v. School Dist. No. 4*).

SECTION 4

The state superintendent of public instruction shall be a member, and secretary, of the state board of education, and, ex-officio, a member of any other board having

control of public instruction in any state institution. His powers and duties shall be prescribed by law.

This minor section specifies some features of the office of the state superintendent. The second sentence merely repeats Article V, section 9. The section has not been the subject of reported judicial interpretation.

SECTION 5

Regents of the university and other governing boards; appointments by governor; membership of governor on board of regents. The regents of the university, and the governing boards of other state educational institutions, shall be appointed by the governor with the consent of the senate in the manner prescribed by law, except that the governor shall be, ex-officio, a member of the board of regents of the university.

Although this section speaks of "the university" (meaning the University of Arizona), in fact the state has since established two other public universities (Arizona State University and Northern Arizona University); when this section was amended in 1976 to add the caption and provide for senate confirmation of gubernatorial appointments to the board of regents, it was not rewritten to capture the reality that the board of regents supervises all three universities. Two court decisions discuss the power of the board of regents; they are noted in the commentary on the first section of this article.

SECTION 6

The university and all other state educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible.

The legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years.

A companion to the first section in this article, this section helps establish the basic framework for public education in Arizona. Even though the framers of the constitution were not willing to embrace female suffrage, they did constitutionalize gender equality in public schools.

Most of the limited judicial attention paid to this section has focused on the extent to which the state may charge students for educational services. The first sentence speaks of furnishing instruction at state educational institutions "as nearly free as possible," while the second sentence calls for "free" common schools. Section 9 of this article directs the legislature to "enable" cities and towns to maintain "free high schools, industrial schools, and commercial schools." In a muddled

decision, the Supreme Court has held that the failure of public high schools to provide indigent students with free textbooks does not violate this section (*Carpio v. Tucson High School Dist. No.* 1). It distinguished an earlier decision broadly stating that "instruction in high as well as common schools shall be absolutely free" (*Estate of Ariz. Southwest Bank v. Bd. of Educ. of Tucson High School Dist.*) by construing "instruction" not to apply to text-books. *Carpio* did not address section 9 of this article. In another case, the Court said this section was not violated by substantial disparities among local areas in funds available for schools as a result of variations in the productivity of local property taxes (*Shofstall v. Hollins*). Requiring a nonresident high school student to pay tuition has also been held not to violate this section (*Chapp v. High School Dist. No. 1*).

This section's parallel command that university education be "as nearly free as possible" does not mean "entirely free," and reasonable fees do not violate this section (*Board of Regents v. Sullivan*), nor does a one-year residency requirement to qualify for lower residential tuition rate at state universities (*Arizona Bd. of Regents v. Harper*).

SECTION 7

No sectarian instruction shall be imparted in any school or state educational institution that may be established under this constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others.

This section, aimed at maintaining a separation between public education and religious instruction, is closely related to several other parts of the constitution, including Article II, section 12 (prohibiting using public money or property for religious instruction); Article IX, section 10 (prohibiting taxation in aid of any church or private or secretarian school); and Article XX, section 1 (mandating "[p]erfect toleration" of religious beliefs or their absence). It has not been construed in a published judicial decision.

SECTION 8

Permanent state school fund; source; apportionment of state funds. A permanent state school fund for the use of the common schools shall be derived from the sale of public school lands or other public lands specified in the enabling act approved June 20, 1910; from all estates or distributive shares of estates that may escheat to the state; from all unclaimed shares and dividends of any corporation incorporated under the

laws of Arizona; and from all gifts, devises, or bequests made to the state for general educational purposes.

The income derived from the investment of the permanent state school fund, and from the rental derived from school lands, with such other funds as may be provided by law shall be apportioned only for common and high school education in Arizona, and in such manner as may be prescribed by law.

A companion to Article X, section 7 (mandating the creation of separate funds for each category of federally granted land given by the federal government to the state), the first paragraph of this section establishes a permanent school fund for the "common schools" of the state derived from the sale of state lands,[114] as well as other sources, such as unclaimed corporate shares (see *In re Hull Copper Co.*).

The second paragraph originally provided that the income from the fund's investments (as well as rental income from school lands) should be distributed among Arizona's counties "in proportion to the number of [resident] pupils of school age." It was amended upon initiative petition in 1964 (with caption) to authorize apportionment for "common and high school education," and to abandon the rigid per-pupil allocation formula in order to allow the legislature to redress the disparity between rich and poor districts.[115] A court of appeals has held that the allocation decision "rests solely with the Legislature" (*Mirkin v. School Dist. No. 38*).

SECTION 9

The amount of this apportionment shall become a part of the county school fund, and the legislature shall enact such laws as will provide for increasing the county fund sufficiently to maintain all the public schools of the county for a minimum term of six months in every school year. The laws of the state shall enable cities and towns to maintain free high schools, industrial schools, and commercial schools.

This section implicitly acknowledges that the permanent state school fund created by section 8 of this article may prove insufficient to produce enough income to support the public schools. Therefore this section requires the legislature to

[114] Section 27 of the enabling act directed that 5 percent of the net proceeds of sales of federal lands in Arizona after statehood be paid to the state "to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools"; 36 Statutes at Large 557, 574 (1910).

[115] Proponents of this amendment specifically sought to give the legislature "authority (which it does not now have) to give additional assistance to needy districts, according to whatever formula it chooses to adopt." See *Publicity Pamphlet,* 1964 General Election, p. 10 (ballot argument of Arizona Congress of Parents and Teachers and Arizona Education Association).

appropriate sufficient money to maintain a base level of public education in each county for a minimum of six months a year. The last sentence in this section goes further by providing that the laws shall allow cities and towns (as opposed to counties) to maintain "free high schools, industrial schools, and commercial schools." This section has not been addressed in any published court decision, but related issues have been addressed under section 6 of this article, which also deals with free schools.

SECTION 10

The revenue for the maintenance of the respective state educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the enabling act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective state educational institutions. In addition to such income the legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all state educational institutions, and shall make such special appropriations as shall provide for their development and improvement.

A companion to the preceding section, this one recognizes that state educational institutions (presumably the university, normal schools, technical schools, and special institutions for disabled persons) may not derive sufficient funds from the income from state lands granted by the federal government at statehood. Therefore this section requires the legislature to levy taxes to raise sufficient revenue to appropriate enough money to "insure the proper maintenance," development and improvement of state educational institutions. It may also use sources of revenue other than state taxation, such as tuition, fees, rentals, and donations (*Board of Regents v. Sullivan*), although some of these methods may be limited by other parts of this article (such as the requirement of section 6 that instruction be "as nearly free as possible").

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Article XII

Counties

SECTION 1

Each county of the state, now or hereafter organized, shall be a body politic and corporate.

This section derives from a territorial-era statute (see *Haupt v. Maricopa County*) and establishes counties as "political subdivisions of the state created to aid in the administration of the state's laws and for the purpose of local self-government" (*Hunt v. Mohave County*). Counties are distinguished from municipal corporations subject to Article XIII. Municipalities are "voluntary corporations" organized by local residents for "special and local purpose . . . independent of the general governmental activities of the state," while counties are "created by the legislature regardless of the wishes of the inhabitants for the purpose of exercising a certain portion of the general powers of the government in a specified locality" (*Hartford Accident & Indent. Co. v. Wainscott*).

The other sections of this article make clear that the creation, maintenance, powers, and duties of counties are the responsibility of the state legislature; thus counties "have only such powers as have been expressly or by necessary implication, delegated to them by the state Legislature" (*Associated Dairy Prods. Co. v. Page*). The legislature's power over counties is, however, subject to the "local or special law" limitations of Article IV, part 2, section 19; see also section 4 of this article (state legislation fixing the salaries of county officers must be "general law").

Furthermore, a 1992 amendment adding section 5 through 9 have allowed the state's two largest counties more governmental autonomy by forming charters.

SECTION 2

The several counties of the territory of Arizona as fixed by statute at the time of the adoption of this constitution are hereby declared to be the counties of the state until changed by law.

This section maintained the fourteen counties during the transition from territory to statehood; its final four words recognize the power of the legislature to abolish, create, or change the boundaries of counties after statehood.[116]

SECTION 3

County officers; election; term of office. There are hereby created in and for each organized county of the state the following officers who shall be elected by the qualified electors thereof: a sheriff, a county attorney, a recorder, a treasurer, an assessor, a superintendent of schools and at least three supervisors, each of whom shall be elected and hold his office for a term of four (4) years beginning on the first of January next after his election, which number of supervisors is subject to increase by law. The supervisors shall be nominated and elected from districts as provided by law.

The candidates for these offices elected in the general election of November 3, 1964 shall take office on the first day of January, 1965 and shall serve until the first day of January, 1969.

As included in the original constitution, this section established certain county offices, and provided that each officer should serve a two-year term. The section began with the words "[s]ubject to change by law," effectively giving

[116] Proposals to create new counties have occasionally been offered; a prominent example followed a Supreme Court decision in 1973 (*Shirley v. Superior Court*) clearing away legal barriers that discouraged Indians (who comprise a majority of Apache County's population) from voting and serving as members of the board of supervisors, and a 1975 federal district court decision (*Goodluck v. Apache County*) that required reapportionment of the county's supervisor districts according to population. Together these decisions gave Indians control of the county board of supervisors, which sparked attempts to create a new county in the predominantly non-Indian part of the county. These efforts were stymied by a gubernatorial veto and potential conflict with federal civil rights laws. In another part of the state in 1982, the voters in Yuma County (following the procedures for the formation of new counties established by the legislature in 1913 (Civ. Code 1913, sees. 2660, 2661)) approved the creation of a new county, La Paz, out of its northern portion (see *La Paz County v. Yuma County*). The legislature has since made it more difficult to form new counties by county initiative (Ariz. Rev. Stat. 11–131 through 145).

the legislature power to alter the offices, terms, and other features of county government. In 1964, the voters approved an initiated amendment that rewrote this section to its current form. The amendment eliminated the county superintendent of roads and surveyor from the list of constitutional county officers and extended the terms of county officers to four years. It also deleted the introductory five words, and thus apparently abolished the power of the legislature to make alterations in county offices recognized in this section. At the same time, it gave the legislature express power to increase the number of supervisors (the original version had fixed the number at three, but had been "[s]ubject to change by law"), and it provided that supervisors are to be elected from "districts as provided by law" (the original version was silent on this specific point). County officers named in this section are somewhat independent of each other; for example, the county recorder serves "the county as a whole" rather than the board of supervisors (*Blauvelt v. Maricopa County*).

SECTION 4

The duties, powers, and qualifications of such officers shall be as prescribed by law. The board of supervisors of each county is hereby empowered to fix salaries for all county and precinct officers within such county for whom no compensation is provided by law, and the salaries so fixed shall remain in full force and effect until changed by general law.

The first sentence of this section makes clear that the legislature retains general authority over county government; that is, unlike some other states, Arizona counties have no constitutional "home rule" powers (but see sections 5–9 of this article, added in 1992). Because the duties of county officers are prescribed by the legislature (e.g., *Cecil v. Gila County; Merrill v. Phelps*), questions about their authority to act in particular circumstances require interpretation of applicable statutes (e.g., *Marsoner v. Pima County*). The legislature may make demands upon county budgets over the objection of the county board of supervisors, such as by ensuring that the judicial system fully functions, because supervisor authority over county budgets is "subject to legislative control" (*Broomfield v. Maricopa County*).

The second sentence vests the supervisors with residual power over salaries of county officers (*Gregory v. Thompson*) where the legislature has not acted (Article XXII, section 17 requires county officers, as well as others, to be paid "fixed and definite salaries"). Any legislative revision in salaries must be made by "general" rather than specific law, a limitation that echoes the limitations on "local and special laws" in Article IV, part 2, section 19. This means that the legislature may not fix the salaries of county officers on an inflexible formula based upon current population (*Hunt v. Mohave County*).

SECTION 5

Charter committee; charter preparation; approval. A. The board of supervisors of any county with a population of more than five hundred thousand persons as determined by the most recent United States decennial or special census may call for an election to cause a charter committee to be elected by the qualified electors of that county at any time. Alternatively, the board of supervisors of any county with a population of more than five hundred thousand persons as determined by the most recent United States decennial or special census shall call for the election of the charter committee within ten days after receipt by the clerk of the board of supervisors of a petition that demands the election and that is signed by a number of qualified electors of the county at least equal to ten per cent of the total number of ballots cast for all candidates for governor or presidential electors in the county at the last preceding general election. The election shall be held at least one hundred days but not more than one hundred twenty days after the call for the election. Except as otherwise provided in this section, for elections held under this section or section 6 of this article, the manner of conducting and voting at an election, contesting an election, canvassing votes and certifying returns shall be the same, as nearly as practicable, as in elections for county officers.

B. At the election a vote shall be taken to elect members of the charter committee who will function if further proceedings are authorized and the ballot shall contain the question of whether further proceedings toward adopting a charter shall be authorized pursuant to the call for the election. Unless a majority of the qualified electors voting on the question votes to authorize further proceedings, the election of members of the charter committee shall be invalidated and no further proceedings may be had except pursuant to a subsequent call pursuant to subsection A.

C. The charter committee shall be composed of fifteen qualified electors of the county elected by supervisorial district with the same number serving from each district. A nomination petition for election to the charter committee shall be made available by the clerk of the board of supervisors and shall be signed by a number of qualified electors of the supervisorial district who are eligible to vote for the nominee at least equal to one per cent of the total number of ballots cast for all candidates for governor or presidential electors in the supervisorial district at the last preceding general election, and filed with the clerk not later than sixty days before the election. All qualified electors of the county, including all elected public officials, are eligible to seek election to the charter committee.

D. Within one hundred eighty days after the election the charter committee shall prepare and submit a proposed charter for the county. The proposed charter shall be signed by a majority of the members of the committee and filed with the clerk of the board of supervisors, after which the charter committee shall be dissolved. The county shall then publish the proposed charter in the official newspaper of the county at least once a week for three consecutive weeks. The first publication shall be made within twenty days after the proposed charter is filed with the clerk of the board of supervisors.

E. At least forty-five days but not more than sixty days after final publication, the proposed charter shall be submitted to the vote of the qualified electors of the county at a general or special election. If a general election will be held within ninety days after final publication, the charter shall be submitted at that general election. The full text of the proposed charter shall be printed in a publicity pamphlet and mailed to each household containing a registered voter at least eleven days before the charter election and the ballot may contain only a summary of the proposed charter provisions. The ballot shall contain a question regarding approval of the proposed charter and the questions pertaining to taxation authority and appointment of officers, if any, provided for in sections 7 and 8 of this article.

F. If a majority of the qualified electors voting ratifies the proposed charter, a copy of the charter, together with a statement setting forth the submission of the charter to the qualified electors and its ratification by them, shall be certified by the clerk of the board of supervisors and shall be submitted to the governor for approval. The governor shall approve the charter within thirty days after its submission if it is not in conflict with, or states that in the event of a conflict is subject to, this constitution and the laws of this state. On approval, the charter becomes the organic law of the county, and certified copies of the charter shall be filed in the office of the secretary of state and with the clerk of the board of supervisors after being recorded in the office of the county recorder. Thereafter all courts shall take judicial notice of the charter.

SECTION 6

Amendment of charter. A charter shall set forth procedures for amendment of the charter. Proposed amendments shall be submitted to the qualified electors of the county at a general or special election and become effective if ratified by a majority of the qualified electors voting on the amendments and approved by the governor in the manner provided for in section 5 of this article.

SECTION 7

County charter provisions. A. Charter counties continue to be political subdivisions of this state that exist to aid in the administration of this state's laws and for purposes of self-government. Except as otherwise provided in this article the powers of the legislature over counties are not affected by this section and sections 5, 6, 8 and 9 of this article. Charter counties shall provide the same state mandated services and perform the same state mandated functions as non-charter counties. Charter counties may exercise, if provided by the charter, all powers over local concerns of the county consistent with, and subject to, the constitution and the laws of this state. In matters of strictly local municipal concern, charters adopted pursuant to Article XIII shall control in any case of conflict with a county charter adopted pursuant to this article.

B. If a county has framed and adopted a charter and the charter is approved by the governor as provided in this article, the county shall be governed by the terms of its charter and ordinances passed pursuant to its charter. If the charter has been framed, adopted and approved and any of its provisions are in conflict with any county ordinance, rule or regulation relating to local concerns of the counties in force at the time of the adoption and approval of the charter, the provisions of the charter prevail notwithstanding the conflict and operate as a repeal or suspension of the law to the extent of conflict, and the law is not thereafter operative as to such conflict.

C. Notwithstanding Article IX, section 1, if proposed and approved in the charter, a charter county may levy and collect:

1. Taxes on a county wide basis to provide services on a county wide basis.
2. Taxes on a specially designated area basis to provide services or special levels of service to that area. All taxes levied pursuant to this subsection shall be uniform upon the same class of property within the territorial limits of the county or the specially designated area and shall be levied and collected for public purposes only.

D. The decision to include a charter provision authorizing taxation pursuant to subsection C, paragraph 1 or 2 of this section shall be placed on the ballot as separate questions at the election to ratify the charter and must be approved by a majority of the qualified electors voting at the election. The result of the voting on either provision authorizing taxation does not affect the result of the voting to ratify the charter. Charter provisions authorizing taxation pursuant to subsection C, paragraph 1 or 2 of this section may also be proposed by an amendment to the charter pursuant to Section 6 of this article.

E. If the authority to tax pursuant to subsection C, paragraph 2 of this section is approved for inclusion in the charter, any new tax proposed by the county under subsection C, paragraph 2 of this section shall be voted on by the qualified electors of the specially designated area. The tax must by ratified by a majority vote of the qualified electors voting at the election.

F. A transaction privilege tax, use tax or similar tax levied by a county pursuant to subsection C, paragraph 1 of this section:

1. May be imposed on only those business activities, or on the use, storage or consumption, which are subject to the comparable state transaction privilege tax, use tax or similar tax.
2. Shall provide all exclusion and exemptions provided by, and administrative provisions consistent with, the comparable state transaction privilege tax, use tax or similar tax.

G. All taxes levied under subsection F of this section shall not exceed an aggregate rate of two per cent when combined with existing taxes levied pursuant to Title 42, chapter 8.3.

H. If approved in the charter, a charter county may adopt fees and fee schedules for any county products and county service delivery it provides in the conduct of any official business. Notwithstanding any fee schedules or individual charges provided

by state law, the governing body of a charter county may adopt an alternate fee schedule or individual charge. Any fee or charge established pursuant to this section shall be attributable to and defray or cover the current or future costs of the product or service delivery for which the fee or charge is assessed.

I. Taxes raised under the authority of this section shall be subject to the provisions of the county property tax and expenditure limitations pursuant to Article IX, sections 19 and 20.

SECTION 8

Government and other powers. A. The county charter shall provide:

1. For an elective governing body and its method of compensation, its powers, duties and responsibilities, its authority to delegate powers, the method of election and removal of members, the terms of office and the manner of filling vacancies in the governing body.

2. For all officers established under section 3 of this article and Article VI, section 23, and such additional officers as the charter may provide for, their election or appointment, consolidation or segregation, method of compensation, powers, duties and responsibilities, authority to delegate powers and, if elected, the method of election and removal, terms of office and the manner of filling vacancies in such offices. If the charter provides for the attorney to remain an elective officer of the county, the charter may provide for an appointive office to carry out the civil representation needs of the county, its departments, agencies, boards, commissions, officials and employees. If the elective governing body provided for in the charter does not consist of the supervisors, the charter may provide for elimination of the office of supervisor. If the charter provides for the office of supervisor, the number of supervisors shall be not fewer than five or greater than nine. If the charter provides for the appointment or elimination of an officer established under section 3 of this article or Article VI, section 23, or for an appointive office to carry out the civil representation needs of the county, those provisions shall include an effective date not earlier than the expiration of the term of office for the officer commencing in January immediately following the first general election at which the officer is elected following approval of the charter by the voters and shall be placed on the ballot as separate questions at the election to ratify the charter and must be approved by a majority of the qualified electors voting at the election. The result of the voting on any provisions authorizing appointment or elimination of officers does not affect the result of the voting to ratify the charter.

3. For the performance of functions required by statute.

4. For a periodic review of the charter provisions to be conducted at least once every ten years from the time of its ratification by the voters and the procedures for the periodic review.

B. The county charter may provide for other elective and appointive offices.

SECTION 9

Self-executing provision. The provisions of Sections 5 through 8 of this article are self-executing, and no further legislation is required to make them effective.

Sections 5–9 of this article were added in 1992. Together they give Arizona counties with a population of more than 500,000—now and for the foreseeable future likely to be only Maricopa (greater Phoenix) and Pima (greater Tucson) counties, which together comprise about three-quarters of the state's population—the opportunity to exercise "home rule" under a charter form of government. Long sought by the state's largest counties, who had chafed under their obligation to seek enabling authority from the state legislature to pursue various programs, this charter government idea is similar but not identical to the "charter city" provisions of Article XIII, section 2.

Section 5 establishes a two-step process to implement charter government. Either the county board of supervisors by referral, or ten percent of the voters by initiative petition, can place the question of pursuing charter government before the voters. At the same election the voters elect a charter committee of fifteen members, distributed equally across supervisorial districts. If the voters approve initiation of the process, the elected committee prepares and submits a proposed charter (signed by at least a majority of the committee members) within 180 days. Following publication and circulation of the charter to the voters, it is placed on the ballot at either a general election (if one is to be held within ninety days after final publication) or a special election. If a majority of those voting approve the charter, it is submitted to the governor, who "shall approve" it within thirty days if it conforms to (or if the governor "states" that in the event of conflict it is "subject to") the Constitution and state laws. The charter becomes the "organic law of the county" upon approval. Section 6 provides that, once adopted, a county charter may be amended upon voter and gubernatorial approval, although this section leaves the details of the amendment process to the charter itself.

Section 7 elaborates on the relationships among the county charter and state laws, existing county ordinances, and municipal charters. In general, a charter county remains subject to the provisions of this Constitution and state laws. A county's charter has control over any conflicting provision in the county's existing ordinances, rules, or regulations "relating to local concerns" (subsection B). A city charter adopted under Article XIII controls if it conflicts with a county charter on matters of "strictly local municipal concern" (subsection A). Undoubtedly these provisions will demand judicial interpretation, as have analogous provisions dealing with charter cities (see the commentary on Article XIII, section 2).

Section 7(C) authorizes county charters to include authority to levy taxes, but circumscribes this power by several procedural and substantive limitations. A charter may contain authority to tax either on a county wide basis or in

particular areas to provide particular levels or kinds of services to those areas. The subsection waives the need for state legislative approval otherwise required by Article IX, section 1, but, like that section, it requires any taxes levied to be "uniform" and levied only for public purposes. If either a general or special taxing authority is proposed in the charter, it must be submitted to the voters as a separate question at the charter ratification election. In effect, this gives the electorate an item veto on either kind of taxing authority; voter rejection of taxing authority does not negate voter approval of the rest of the charter. Subsection E requires that any new special (rather than county wide) tax proposed under authority of a charter provision be approved by a majority vote in the area being taxed.

Subsections F and G place additional limits on a charter county's power to impose transaction privilege, use, or similar taxes. Such taxes (and accompanying exemptions) must generally track comparable state taxes and cannot exceed an aggregate rate of two percent when combined with existing comparable state taxes. Subsection H gives a charter county the right to charge for county-supplied products and services at rates that differ from those in state law, as long as the county charges are based on "current or future costs" of such products or services. All county taxes levied under authority of this section are expressly made subject to the property tax and expenditure limitations of Article IX, sections 19–20.

Section 8 directs the charter to include provisions for an "elective governing body" of the county, but leaves such important details as powers, duties, compensation, method of election, removal and filling vacancies, and terms of office to the charter to prescribe. Similarly, the charter is authorized to provide for additional county officers, including those identified in section 3 of this article and the clerk of the county superior court (see Article VI, section 23). Once again, however, the details (including, in addition to those mentioned in the first sentence of this paragraph, the question of whether or not such officers are to be elected or appointed), are left to the charter with certain limitations specified in the last half of subsection (A) (2). Subsection (A) (4) mandates a periodic review of the charter at least every ten years. Section 9 makes the county home rule provisions self-executing. These sections have not yet been addressed in any reported judicial decision.

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Article XIII

Municipal Corporations

SECTION 1

Municipal corporations shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation and organization of cities and towns and for the classification of such cities and towns in proportion to population, subject to the provisions of this article.

This section authorizes and directs the legislature to provide for local governments (municipal corporations) as distinct from county governments.[117] Legislation providing the framework for local governments must be done by general rather than special laws, a limitation echoing Article IV, part 2, section 19(17), the commentary on which is relevant here.[118] But this section also expressly allows the legislature to classify cities and towns "in proportion to

[117] A good, albeit somewhat outdated, review of the issues raised by this article is David A. Bingham, *Constitutional Municipal Home Rule in Arizona* (Tucson: Bureau of Business and Public Research, University of Arizona, 1960).

[118] These provisions, common in state constitutions, reflect a reaction to early American experience where charters for cities and towns were granted by *ad hoc* state legislation. According to a leading commentator, this practice allowed legislatures to "interfere unduly in municipal affairs" leading to, among other things, "legislative connivance for political purposes and the subjection of city residents to rural domination." Eugene McQuillin, *The Law of Municipal Corporations,* 3d ed. (Chicago: Callaghan & Co., 1987), vol. 1, sec. 1.40, p. 53.

population"; the legislature may, for example, establish a police pension fund only in cities over a certain population (*Luhrs v. City of Phoenix*). Such classifications can be upheld even if only one county currently meets the population standard (*Picture Rocks Fire Dist. v. Pima County*, not citing this section).

Like county governments, municipal governments are subject to general control by the legislature, although the next section, dealing with charter cities, contains an important limitation on legislative power. With that qualification, the legislature's power over the methods and procedures for incorporating municipalities has been described as "practically unlimited" (*Udall v. Severn*); the legislature may "erect, change, divide, and abolish" such corporations at will (*Blount v. MacDonald*); and need not provide for the consent of, or even notice to, the municipality, its inhabitants, or other affected subdivisions (*Skinner v. City of Phoenix*).

Because a municipal corporation is a creature of the state, it may exercise only such power as the legislature confers upon it, whether expressly or by reasonable implication (*McClintock v. City of Phoenix*); thus municipal powers should be rather strictly construed (e.g., *City of Flagstaff v. Associated Dairy Prods. Co.*). Unless the legislature provides otherwise, for example, a municipal corporation cannot apply its building codes and regulations to a state university located within its borders (*Board of Regents v. City of Tempe*).

Other parts of the constitution bear on the authority of municipalities; for example, Article IX, section 6 permits the legislature to vest all municipal corporations with authority to "assess and collect taxes," and to make local improvements by special assessments. Section 7 of the same article prohibits municipalities as well as other units of state government from giving any grant or donation or loan of credit to anyone. Section 8 of the same article limits local government indebtedness.

SECTION 2

Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the constitution and the laws of the state, in the following manner: a board of freeholders composed of fourteen qualified electors of said city may be elected at large by the qualified electors thereof, at a general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city. Such proposed charter shall be signed in duplicate by the members of such board, or a majority of them, and filed, one copy of said proposed charter with the chief executive officer of such city and the other with the county recorder of the county in which said city shall be situated. Such proposed charter shall then be published in one or more newspapers published, and of general circulation, within said city for at least twenty-one days if in a daily paper, or in three consecutive issues if in a weekly paper,

and the first publication shall be made within twenty days after the completion of the proposed charter. Within thirty days, and not earlier than twenty days, after such publication, said proposed charter shall be submitted to the vote of the qualified electors of said city at a general or special election. If a majority of such qualified electors voting thereon shall ratify such proposed charter, it shall thereupon be submitted to the governor for his approval, and the governor shall approve it if it shall not be in conflict with this constitution or with the laws of the state. Upon such approval said charter shall become the organic law of such city and supersede any charter then existing (and all amendments thereto), and all ordinances inconsistent with said new charter. A copy of such charter, certified by the chief executive officer, and authenticated by the seal, of such city, together with a statement similarly certified and authenticated setting forth the submission of such charter to the electors and its ratification by them, shall, after the approval of such charter by the governor, be made in duplicate and filed, one copy in the office of the secretary of state and the other in the archives of the city after being recorded in the office of said county recorder. Thereafter all courts shall take judicial notice of said charter.

The charter so ratified may be amended by amendments proposed and submitted by the legislative authority of the city to the qualified electors thereof (or by petition as hereinafter provided), at a general or special election, and ratified by a majority of the qualified electors voting thereon and approved by the governor as herein provided for the approval of the charter.

This section establishes the procedure for creating and operating so-called charter or home rule cities; comparable provisions are found in most other state constitutions.[119] Only cities with more than 3,500 residents can take advantage of this provision; currently somewhat fewer than half of the forty-two municipalities that meet the population standard (but all of the major cities) have adopted the charter form of government authorized by this section.[120] Municipalities that are not charter cities operate under the general laws of the state, as modified by constitutional provisions such as section 5 of this article.

The creation of a city charter is not dependent upon any action by the state legislature (*City of Tucson v. Tucson Sunshine Climate Club*); indeed, the very purpose of the home-rule provision is to render cities independent of the legislature with respect to matters strictly of local concern (*City of Tucson v. Walker*). As explained in more detail in the next section, creation of a charter is initiated and carried out almost entirely at the local level; the only state action necessary

[119] Some forty states have "local home rule" constitutional provisions, but their terms vary widely. See Kenneth Vanlandingham, "Constitutional Home Rule Since the AMA (NLC) Model," *William and Mary Law Review* 17 (1975), 1–34.

[120] *Charter Government Provisions in Arizona Cities* (Phoenix: League of Arizona Cities and Towns, 1989); U.S. Dept. of Commerce, Bureau of the Census, *Summary Characteristics for Governmental Units and Standard Metropolitan Statistical Areas—Arizona 1980* (Washington, D.C.: Government Printing Office, 1982).

(found in the fifth sentence of this section) is approval by the governor. One commentator, writing in 1960, noted that the governor's approval "has never been withheld and is looked upon as a formality,"[121] but no cases address the point. The constitutional text arguably contemplates something more than perfunctory review, requiring the governor to determine that the charter does not "conflict with this constitution or with the laws of the state." The last-quoted clause makes constitutional provisions applicable to local offices (such as the prohibition in Article XXII, section 18 against an "incumbent of a salaried elective office" running for another office except in the last year of her term) equally applicable to elected council members of charter cities (*Laos v. Arnold*).

Upon adoption and approval, the "charter" becomes, under the terms of this section, the city's "organic law." For the most part, Arizona courts have followed the idea that a city charter is "a grant of power" rather than a "limitation of power," which means that the charter city "can exercise only such powers as are delegated to it by the Constitution and the laws of the state and its charter" (*Paddock v. Brisbois*), or conferred by reasonable implication (*City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*). Overall the numerous court decisions addressing issues of charter city power show considerable variation in the flexibility with which they construe charters (e.g., cf. *Shaffer v. Allt* with *Home Builders Assn. v. Riddel,* and the majority and dissenting opinions in *Kendall v. Malcolm*).[122]

State laws may preempt the exercise of power by charter cities, even though the city action may be fairly within the terms of its charter (*Clayton v. State*). Numerous cases have tested whether particular ordinances of charter cities are preempted by state law. The method of analysis is, broadly speaking, analogous to that used to determine whether state action has been preempted by federal law. Charter cities are generally accorded broad powers to act in accordance with their charters in purely municipal affairs, even if they appear to conflict with state laws (*Strode v. Sullivan*). But a law that deals with a subject of statewide concern takes precedence over any municipal action under a charter (*City of Tucson v. Walker*), and the state may occupy the field and impliedly as well as expressly limit the power a city may exercise under its charter (*Prendergast v. City of Tempe*). In some circumstances, both the state and the charter city may legislate on the same subject (*Clayton v. State*); the state may have established only the

[121] See Bingham, *Home Rule,* 13.

[122] Nationally, there are two schools of thought on the nature of municipal charters: the first views the charter as a grant of power, so that the municipality has only such powers as are expressly granted or necessarily implied in the charter; while the second regards the charter as a limitation, allowing the municipality plenary authority over local affairs subject only to limits contained in the charter or elsewhere in the constitution. See generally C. D. Sands and M. E. Libonati, *Local Government Law* (Wilmette, Ill.: Callaghan Pub. Co., 1981), vol. 1, sec. 4.14. The first is analogous to national power under the U.S. Constitution; the latter is analogous to state legislative power. See the commentary on Art. IV, pt. 1, sec. 1.

minimum standard, allowing charter cities room to enact more stringent or restrictive provisions on the same subject (*City of Phoenix v. Breuninger*).

The published decisions addressing this issue span a wide variety of contexts. For example, the state laws on police pensions (*Luhrs v. City of Phoenix*), overtime pay (*Prendergast v. City of Tempe*), traffic and highway safety, state fiscal laws, the state minimum wage law, and state laws regulating dairy products have all been regarded as preempting, at least to some extent, the regulatory power of charter cities (*City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*, collecting cases). On the other hand, municipal plumbing codes (*Shropshire v. Peery*); a city's disposal of real estate (*City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon*); and city ballot restrictions on municipal elections (*Strode v. Sullivan*) have been held to be matters of local concern within the regulatory powers of charter cities.

This section contains a notable glitch in its last paragraph. It allows charter amendments to be proposed parenthetically "by petition as hereinafter provided," but nothing is "hereinafter" provided.[123] Perhaps charter amendments may be made by initiative petition, by rather awkwardly reading the "hereinafter" in this paragraph to refer to the initiative provisions of Article IV, part 1, section 1(8).[124]

SECTION 3

> An election of such board of freeholders may be called at any time by the legislative authority of any such city. Such election shall be called by the chief executive officer of any such city within ten days after there shall have been filed with him a petition demanding such election, signed by a number of qualified electors residing within such city equal to twenty-five per centum of the total number of votes cast at the next preceding general municipal election. Such election shall be held not later than thirty days after the call therefor[e]. At such election a vote shall be taken upon the question whether further proceedings toward adopting a charter shall be had in pursuance to the call, and unless a majority of the qualified electors voting thereon shall vote to proceed further, no further proceedings shall be had, and all proceedings up to the time of said election shall be of no effect.

This section provides that either the "legislative authority" of a city or 25 percent of the qualified electors may initiate the process for creating a charter city.

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[123] A commentator suggested that this error was "borrowed" from the Oklahoma Constitution; see Bingham, *Home Rule,* 16. But that charter did, and still does, contain a specific provision for amendment by petition. See Oklahoma Constitution, Art. XVIII, sec. 4(b), (e); Maurice H. Merrill, "Constitutional Home Rule for Cities—Oklahoma Version," *Oklahoma Law Review* 5 (1952), 139, 146–49.

[124] In fact, however, a motion was made on the floor of the constitutional convention to so provide, but it was defeated. See Goff, *Records,* 515.

The next step is to elect of a board of "freeholders," who then "prepare and propose" a charter within ninety days of the election. The reference to "freeholders" is unclear; the term usually refers to an owner of property, but other parts of the constitution refer to "property tax payers" rather than freeholders (e.g., Article VII, section 13). Legislation implementing this section has not expressly required property ownership; in any event, if "freeholder" were understood to limit membership to property owners, it would probably be unenforceable under the U.S. Constitution (see *City of Phoenix v. Kolodziejski*).[125]

SECTION 4

No municipal corporation shall ever grant, extend, or renew a franchise without the approval of a majority of the qualified electors residing within its corporate limits who shall vote thereon at a general or special election, and the legislative body of any such corporation shall submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice. No franchise shall be granted, extended, or renewed for a longer time than twenty-five years.

This section and the two that follow it reflect the framers' progressivism, specifically their fear of municipal corruption and their perception that constitutional limits were necessary to deter it. This section sets out two such limits. The first, popular election, was a favorite progressive tool. The second, the absolute time limit on such franchises, is similar to Article II, section 9 (preventing the legislature from "granting irrevocably any privilege, franchise, or immunity"). A "franchise" has been defined as a "special privilege conferred by the government [that] does not belong to the citizens generally by common right" (*Northeast Rapid Transit Co. v. City of Phoenix*). A court of appeals has said that this section can only be enforced by the state attorney general, a county attorney, or a private party claiming a "personal interest" in the franchise (*Crouch v. City of Tucson*).

SECTION 5

Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation.

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[125] For the common definition of "freeholder," see *Daniels v. Fossas,* 152 Wash. 516,278 P. 412 (1929); *Oxford English Dictionary,* vol. 4, p. 525 (Oxford, U.K.: Oxford University Press, 1933). Delegate Cunniff specifically (but unsuccessfully) objected to inclusion of the term on the floor of the convention. See Goff, *Records,* 515. For implementing legislation that does not require property ownership, see Ariz. Rev. Stat. 9–281. A territorial law allowed town citizens to initiate a charter form of government without referring to "freeholders." See Rev. Stat, of Ariz., Civil Code 1901, sec. 718.

This section sets out another check on abuse of franchise granting by municipal governments; namely, preserving a municipality's authority to compete directly with its franchisees. This section was made mostly superfluous by the adoption, in the first poststatehood election, of a constitutional amendment adding section 34 to Article II, giving the state and "each municipal corporation" the right to engage in "industrial pursuits." The Supreme Court has generally construed these sections together (e.g., *City of Tombstone v. Macia*), so the commentary under that section is relevant here.

This section is not self-executing, so that either the legislature or a city's charter must supply the necessary authority to engage in such a "business or enterprise" (*Buntman v. City of Phoenix*), and it must be for a public purpose (*Shaffer v. Allt*). Within these limits, municipal corporations have broad authority to engage in such activities as selling alcoholic beverages at a city recreation complex (*Shaffer v. Allt*) and furnishing water to both residents (*City of Tucson v. Polar Water Co.*) and nonresidents (*City of Tucson v. Sims*). A municipality's exercise of power under this section may be limited when it threatens to invade the powers of another municipality (*Long v. Town of Thatcher*), but there is no flat rule prohibiting a municipality from operating a public utility within the boundaries of another municipality (*Crandall v. Town of Safford*). Cities exercising power under this section are "liable to the same extent and on the same principles as a private corporation" (*Sumid v. City of Prescott*).

SECTION 6

No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds, or ways, of any municipality shall divest the state or any of its subdivisions of its or their control and regulation of such use and enjoyment; nor shall the power to regulate charges for public services be surrendered; and no exclusive franchise shall ever be granted.

This section is a further limitation on the power of municipalities to grant franchises; specifically, those that involve the use of streets and other public property. Although it is not literally limited to municipally granted franchises, the courts have construed it to apply only to municipal corporations because of its placement in this article (*Maricopa County Mun. Water Conservation Dist. No. 1 v. La Prade*). A franchise granted by a municipality does not insulate the franchisee from "control or regulation" (including regulating "charges for public services") by the "state or any of its subdivisions." The complicated interplay between municipal and state corporation commission regulation of public utilities is considered in the commentary on Article XV, section 3. The last clause's prohibition of "exclusive" franchises presumably means that a municipality may not grant one franchisee the right to occupy public property to the exclusion of other potential franchisees, but the question has not been addressed by the courts.

SECTION 7

Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the state, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this constitution or any law of the state or of the United States; but all such districts shall be exempt from the provisions of sections 7 and 8 of article IX of this constitution.

This section was added by constitutional amendment, initiated by petition, in 1940. It was prompted by a Supreme Court decision a few months earlier holding that irrigation districts were not "municipal corporations" and thus their property was not exempt from taxation under Article IX, section 2 (*State v. Yuma Irrigation Dist.*). The amendment not only overrules that decision, but goes on generally to treat these special districts as equivalent to municipalities and political subdivisions in many respects (*Local 266, Intl. Bd. of Elec. Workers v. Salt River Project Agric. Improvement & Power Dist.*), while exempting them from the so-called gift clause of Article IX, section 7 (a result that confirmed the Supreme Court's earlier decision in *Day v. Buckeye Water Conservation & Drainage Dist.*) and from the debt limits in Article IX, section 8. In general, districts may receive the same exemptions (such as from filing fees) as other political subdivisions (*Pinetop-Lakeside Sanitary Dist. v. Ferguson*; see also *Maricopa County v. Maricopa Water Dist.*). But a district's "privileges and immunities" under this section extend only to the objectives it is legally organized to meet (*City of Mesa v. Salt River Project Agric. Improvement & Power Dist.*). Furthermore, because these districts must be "organized pursuant to law," they remain subject to legislative control, and the legislature has used its continuing power over the organization of these districts effectively to restrict the scope of the tax immunity provided by this section (see *Department of Property Valuation v. Salt River Project Agric. Improvement & Power Dist.*).

The legislature has broad power to create special districts (*Roberts v. Spray*) and has in fact created a wide variety. Numerous Arizona court decisions have attempted, without noteworthy success, to describe their legal status.[126] Many of these districts, particularly those associated with such public utility functions as water and electricity, are a peculiar amalgam of private business and public entity. Their cloak of governmental status, for example, exempts such districts from rate and service regulation by the corporation commission (*Rubenstein Constr. Co. v. Salt River Project Agric. Improvement & Power Dist.*). They may be given the power to tax (*Shumway v. Fleishman*) but may not be a state agency for purposes

[126] For a brief survey of judicial attempts at categorization, see John D. Leshy, "Irrigation Districts in a Changing West—An Overview," *Arizona State Law Journal* (1982), 345, 349–53.

of the due process clauses of the federal and state constitutions (*Niedner v. Salt River Project Agric. Improvement & Power Dist.*) and may be liable for torts of their employees in the same way as private corporations (*Taylor v. Roosevelt Irrigation Dist.*).

Not all special districts the legislature may choose to create meet the definition of this section, and thus may not possess privileges, benefits, and immunities comparable to municipalities and political subdivisions. For example, a county free library system is not a special purpose district within this section (*Mountain States Legal Found, v. Apache County*), and neither is a school district (*Pima County v. School Dist. No. 1*), even though it is a political subdivision of the state (*Hernandez v. Frohmiller*). But an industrial development district does qualify for treatment as a political subdivision under this section (*Industrial Dev. Auth. v. Nelson*).

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Article XIV

Corporations other than Municipal

SECTION 1

The term "corporation," as used in this article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships, and all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons.

The framers of the Arizona Constitution took considerable pains to ensure that the state would have sufficient authority to check the power of private corporations. Their concern stemmed largely from the experience of the territorial government, which most of the framers perceived to be overly dominated by railroad and mining companies, and from the belief that the federal judiciary had gone too far in protecting corporations from governmental regulation. That historical context informs understanding of most of the sections in this and the following article.[127]

This section establishes a broad definition of corporation, contrasted with the definition of "public service corporation" in Article XV, section 2. Not all corporations fit within the definition of the latter, but all "public service corporations" are corporations for purposes of this article (*Corporation Commn. v. Pacific*

[127] See generally Leshy, "The Making of the Arizona Constitution," 10–17, 88–91.

Greyhound Lines). This section also ensures that such entities are subject to the judicial system.[128] It allows the state, for example, to apply its corporate "Blue Sky" laws (intended to protect the public from dishonest promoters of unsound stock) to investment associations (*Reilly v. Clyne*) and its corporation law to a foreign business trust (*Rubens v. Costello*).

SECTION 2

Corporations may be formed under general laws, but shall not be created by special acts. Laws relating to corporations may be altered, amended, or repealed at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, and restrained by law.

This section aims to check corporate influence in two respects. The first sentence echoes the prohibition of several kinds of "local or special laws" found in Article IV, part 2, section 19(13) and 19(20). It applies to public corporations such as the state bar, if organized in corporate form (*Bridegroom v. State Bar*), or a state insurance guaranty association (*Fireman's Fund Ins. Co. v. Arizona Ins. Guar. Assn.*), but not to state educational institutions authorized by Article XI (*Board of Regents v. Sullivan*).

The second sentence (along with a closely related provision in section 14 of this article) seeks to prevent any corporation from claiming immunity from legislative control because it had been chartered under previous law. Comparable provisions are found in some forty state constitutions; they respond to an early decision of the U.S. Supreme Court (*Dartmouth College v. Woodward*) that prevented a state from regulating a college in ways inconsistent with its previously granted charter.[129] Although the Supreme Court has said that this section and section 14 give the legislature "plenary authority" over corporations (*Corporation Commn. v. Pacific Greyhound Lines, dictum*), it has several times protected a corporation from regulation inconsistent with its prestatehood charter, so long as the charter has not changed since statehood (*Hammons v. Watkins; Herndon v. Hammons*). Another decision refused to apply the double liability on bank stockholders imposed by section 11 of this article to stock reissued after a poststatehood amendment to a corporate charter granted prior to statehood, reasoning that the "old corporation continues" despite the poststatehood charter

[128] Some ten other states have corporate "sue and be sued" provisions in their constitutions. See Harry G. Henn and John R. Alexander, *Laws of Corporations,* 3d ed. (St. Paul, Minn.: West Publishing Co., 1983), 42.

[129] Concurring in that case, Justice Story suggested that states remained free to reserve in their constitutions the power to apply new restrictions to existing corporations, and the U.S. Supreme Court later confirmed that view (*Ogden v. Saunders*). See generally Laurence H. Tribe, *American Constitutional Law,* 2d ed. (Mineola, N.Y.: Foundation Press, 1988), 618–19.

amendment, and thus the old law governs (*Dagg v. Hammons*). This result seems dubious in light of this section, and has been characterized as awkward in a more recent court of appeals decision holding that the poststatehood renewal of a corporate charter first granted in the territorial era subjects the corporation to the cumulative voting principle in section 10 of this article (*Hanks v. Borelli*).

SECTION 3

All existing charters under which a bona fide organization shall not have taken place and business commenced in good faith within six months from the time of the approval of this constitution shall thereafter have no validity.

This provision, a companion to the previous section, sought to ensure that moribund or "shell" corporations had a limited life after statehood. It was never the subject of significant judicial interpretation, and it is obsolete today.

SECTION 4

No corporation shall engage in any business other than that expressly authorized in its charter or by the law under which it may have been or may hereafter be organized.

This section constitutionalizes a basic principle of corporation law that the business of a corporation is limited by its charter and prevailing law; corporate acts are generally without effect if they go beyond those limits (*Trico Elec. Coop., Inc. v. Ralston*). This section is, however, robbed of effectiveness when a corporate charter follows the modern practice of authorizing the corporation to enter into businesses for all purposes.[130]

SECTION 5

No corporation organized outside of the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this state; and no foreign corporation shall be permitted to transact business within this state unless said foreign corporation is by the laws of the country, state, or territory under which it is formed permitted to transact a like business in such country, state, or territory.

The first clause of this section seeks to establish a level playing field for Arizona-chartered corporations competing with outside corporations (those organized under the laws of another jurisdiction). It prevents outside corporations

[130] See Henn and Alexander, *Laws of Corporations,* 26–27, 477–78.

doing business in Arizona from escaping the limits Arizona law places on Arizona-chartered corporations; thus, if Arizona law allows Arizona corporations to be sued for activities conducted before they ceased doing business, the same result would apply to an outside corporation where the cause of action arose out of its business in Arizona (*Arizona Barite Co. v. Western-Knapp Eng. Co.*), regardless of whether a different result would be reached in the jurisdiction in which the outside corporation was chartered (*Lurie v. Arizona Fertilizer & Chem. Co.*). But this clause only levels the playing field; it does not disable outside corporations from carrying out the same activities as Arizona-chartered corporations (*Bezat v. Home Owners' Loan Corp.*). Other constitutional provisions operate generally to prevent unjustifiable discrimination against outsider corporations; for example, Article II, section 13 (which prevents the legislature from granting any privilege or immunity to any corporation that does not "equally belong" to all corporations, without distinguishing between corporations chartered in Arizona and those chartered elsewhere); and the U.S. Constitution's interstate commerce and equal protection clauses.

The second clause aims, in effect, at enforcing the limits other jurisdictions place on the activities of their domestic corporations while those corporations are operating in Arizona. It is substantive rather than procedural; that is, it does not define the steps an outside corporation must take to transact business in Arizona (see section 8, below), but rather refers to the kind of business it can transact (*Bezat v. Home Owners' Loan Corp.*).

SECTION 6

No corporation shall issue stock, except to bona fide subscribers therefor or their assignees; nor shall any corporation issue any bond, or other obligation, for the payment of money, except for money or property received or for labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock of any corporation without the consent of the person or persons holding the larger amount in value of the stock of such corporation, nor without due notice of the proposed increase having been given as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

The Supreme Court has described the purpose of this section as to "protect creditors, to prevent the distribution of worthless securities, and to protect the stockholders against spoliation" (*Prina v. Union Canal & Irrigation Co.*). Among other things, it seeks to discourage "watering" corporate stock, a term derived from the practice of salting and then watering livestock before selling it by weight.[131] The second sentence seeks to protect corporate shareholders against

[131] See ibid., 428–31.

devaluation through the issuance of new shares, at least without the consent of a majority of stockholders or without giving whatever notice the law requires. It also reaffirms Article IV, part 2, section 19(13) and 19(20) by prohibiting the legislature from enacting a special law authorizing increases in corporate stock.

Most of the prohibitions of this section reflect the common law principles governing corporations.[132] When a corporation sells stock in violation of this section, the purchaser can recover the amount paid (*Ettlinger v. Collins*); if new stock is issued as payment for property the owner of which knows is practically worthless, the owner is not a "bona fide subscriber" within the meaning of this section, and the stock certificates may be annulled (*Frame v. Mahoney*; cf. *Ong Hing v. Arizona Harness Raceway, Inc.*).

SECTION 7

No corporation shall lease or alienate any franchise so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor, or grantor, lessee, or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or of any of its privileges.

This section prevents a corporation from evading any debt or other liability through sale or lease of any "franchise," such as in a merger, sale of assets, or corporate reorganization. While the reach of this section is seemingly broad, it has not been interpreted by the courts in any reported decision.

SECTION 8

No domestic or foreign corporation shall do any business in this state without having filed its articles of incorporation or a certified copy thereof with the Corporation Commission, and without having one or more known places of business and an authorized agent, or agents, in the State upon whom process may be served. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county where the cause of action may arise.

This section seeks to ensure that corporations doing business in Arizona, whether "domestic or foreign," are subject to suit in Arizona courts (*Wray v. Superior Court*). Compliance with this section does not, however, automatically vest Arizona courts with jurisdiction to entertain suits involving corporations

[132] For a good if somewhat outdated review of Arizona constitutional history and appellate decisions construing this section, concluding that it has had "very little effect upon the shareholder's liability as it existed at common law," see Hamilton E. McRae III, "'Watered Stock'—Shareholder's Liability to Creditors in Arizona," *Arizona Law Review* (1967), 327.

from other jurisdictions, even if property in Arizona is involved in the suit; other factors may prevent the exercise of such jurisdiction (*Van Denburgh v. Tungsten Reef Mines Co.*). Repeal of this section was proposed in 1972 as part of a package of revisions that would have overhauled the corporation commission (see the introductory commentary on Article XV), but the voters rejected the idea.

SECTION 9

The right of exercising eminent domain shall never be so abridged or construed as to prevent the state from taking the property and the franchises of incorporated companies and subjecting them to public use the same as the property of individuals.

This section must be read in conjunction with Article II, section 17, which establishes procedures for, and limits on, the exercise of the state's power to take private property for public use upon payment of just compensation. It underscores the framers' concern that corporations might be so dominant as to prevent the state from taking corporate property under that power. In essence it provides that the state shall never relinquish the right to take corporate property for public use, and it reveals some distrust of the courts by cautioning against "construing" the right of eminent domain so narrowly as to be inapplicable to corporate property. It has not been interpreted by the courts in any reported decision.

SECTION 10

In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as he shall be entitled to vote in said company under its charter multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more such candidates; and such directors or managers shall not be elected otherwise.

This section constitutionalizes the principle of cumulative voting, defined in a leading treatise on corporate law this way: "each share carries as many votes as there are vacancies to be filled, and the shareholder [is] permitted to distribute the votes for all such shares among candidates in any way desired."[133] More colloquially, the Supreme Court has described it as protecting minority shareholders by making "it possible [for them] to have a member on the board so that

[133] Henn and Alexander, *Laws of Corporations,* 495. Some nine other states have a similar constitutional provision; see ibid., 42.

[they know] what is going on" (*Bohannan v. Corporation Commn.*). This section does not, however, dictate that minority shareholders be represented in proportion to the percentage of shares they own. In practice, the power of minority shareholders under cumulative voting is determined in part by the number of directors or officers elected at any one election. In *Bohannan* the Court suggested that a corporation cannot evade the requirement of this section by electing only one director or officer at each corporate election, but went on to hold that this section is not violated by a nine-person board, with three elected at any one time.

SECTION 11

The shareholders or stockholders of every banking or insurance corporation or association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares or stock; provided, however, that the shareholders or stockholders of any banking corporation or association which is a member of the federal deposit insurance corporation or any successor thereto or other insuring instrumentality of the United States in accordance with the provisions of any applicable law of the United States of America, shall not be liable for any amount in addition to the amount already invested in such shares or stock.

This section qualifies the principle of limited liability, a fundamental notion of the corporate form of activity that shareholders are ordinarily liable for corporate debts only in the amount they have invested in their stock.[134] The framers debated whether to overthrow the principle of limited liability entirely (by making the shareholders' liability for corporate debts unlimited), but the proposal was defeated after opponents argued it would destroy any incentive for outsiders to invest in Arizona enterprise.[135] The expansion of shareholder liability in this section applies only to those owning shares in a limited class of corporations and associations—those in the banking and insurance business. This provision was apparently drawn from a very similar federal law then in effect that applied to shareholders in national banks.[136] Shareholders in such businesses are individually responsible only on a proportionate basis, and only to the extent of the amount of their stock, multiplied by the par value thereof. This limitation to

[134] See Henn and Alexander, *Laws of Corporations,* 130–31.

[135] Goff, *Records,* 610–12; Leshy, "The Making of the Arizona Constitution," 90.

[136] See 13 Statutes at Large 103 (1864); see also Goff, *Records,* 604, where delegate Winsor referred to a similar clause in the "national banking law."

par value robs this section of meaning in many circumstances, because par value is often set at a minimal amount.[137]

The last part of this section, beginning with the proviso, was added in 1956 after a nearly identical proposal had been defeated by the voters in 1950. It further limits the applicability of this section, by exempting any banking entity that is a member of a federal insurance scheme (even though federal insurance protects only depositors, not creditors), which includes most if not all banking corporations or associations in Arizona.

Characterizing this section as imposing "double liability" upon bank stockholders, the Supreme Court upheld it against federal constitutional challenge, as applied to a bank chartered after statehood, regardless of what the charter provides (*Fredericks v. Hammons*). The Court has also construed it not to apply to a bank whose prestatehood charter exempted shareholders from liability for corporate debts, even if the bank continued in business after adoption of this section, out of concern that such application would impair obligations of contracts in violation of Article I, section 10 of the U.S. Constitution (*Hammons v. Watkins*; see also the commentary on section 2 of this article). This section is self-executing (*Fredericks v. Hammons*) and may be enforced by the state superintendent of banks (*Button v. O.S. S tap ley Co.*).

SECTION 12

Any president, director, manager, cashier, or other officer of any banking institution who shall receive, or assent to, the reception of any deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances shall be individually responsible for such deposits.

Related to the preceding section, this provision aims at protecting patrons of "banking institutions" by holding their officers and directors liable for deposits made, but only if and after they have knowledge of the institution's "failing circumstances" (*Long v. Schutz*). The advent of broad federal deposit insurance in the 1930s[138] supersedes the protections of this section in many situations, although recent failures of many financial institutions may revive interest in this section.

SECTION 13

No persons acting as a corporation under the laws of Arizona shall be permitted to set up, or rely upon, the want of a legal organization as a defense to any action which may

[137] See Henn and Alexander, *Laws of Corporations,* 282–83.

[138] See, e.g., the Banking Act of 1933, 48 Statutes at Large 168, creating the Federal Deposit Insurance Corporation.

be brought against them as a corporation, nor shall any person or persons who may be sued on a contract now or hereafter made with such corporation, or sued for any injury now or hereafter done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his or their defense.

The first part of this section is designed to protect those who deal with an entity that holds itself out, but is not in fact legally organized, as a corporation. It seeks, in other words, to protect the innocent against loss because of technical defects. The corporation in such a circumstance is bound by actions done on its behalf by a person owning all or nearly all of its stock, despite the legal defect (*Russell v. Golden Rule Mining Co.*).

The second part of the section deals with the flip side of this problem, by protecting "de facto" corporations against those who seek to escape debts or other obligations owed to the corporation on account of defects in its legal organization. The common law doctrine of "de facto corporations" was long recognized in Arizona (e.g., *Leon v. Citizens Bldg. & Loan Assn.*); it was not until sixty-three years after statehood, however, that this section was regarded as establishing the doctrine of "separate and apart from decisional law" (*Terrell v. Industrial Commn.*). Two years later the legislature abolished the doctrine in a new corporation code (see *T-K Distribs., Inc. v. Soldevere*).[139] A court of appeals has tersely said it could find nothing in this section preventing the legislature from abolishing the doctrine (*Booker Custom Packing Co. v. Sallomi*).

SECTION 14

This article shall not be construed to deny the right of the legislative power to impose other conditions upon corporations than those herein contained.

This section is an example of constitutional overkill; it simply underscores the second sentence in section 2 of this article, and probably the state legislature has power to impose other conditions anyway (see the commentary on Article IV, part 1, section 1). It has been cited as support for the proposition that the legislature has "full power to impose conditions" on corporations (*Arizona Pub. Serv. Co. v. Arizona Corp. Commn.*).

SECTION 15

Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly

[139] See John L. Cocanower and John L. Hay, "The New Arizona Business Corporation Act," *Arizona Law Review* 17 (1975), 559.

> combine or make any contract, with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders or with any co-partnership or association of persons, or, in any manner whatever, to fix the prices, limit the production, or regulate the transportation of any product or commodity. The legislature shall enact laws for the enforcement of this section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty declare a forfeiture of their franchises.

This section, drafted in the era when President Theodore Roosevelt had gained a national reputation as a "trust-buster" through enforcement of federal antitrust laws, expresses strong support for a free, competitive marketplace. To implement it, the Arizona legislature adopted a set of antitrust laws in 1912 (Laws 1912, ch. 73), which remained intact until 1974, when Arizona adopted a version of the Uniform State Antitrust Act (Ariz. Rev. Stat. 44–1401 through 1415).

Given its potential applicability to a broad range of economic enterprise, decisions under this section have been surprisingly sparse; most of the relatively few antitrust decisions in the Arizona courts have been resolved on statutory rather than constitutional grounds (*e.g., Datillo v. Tucson Gen. Hosp.*).[140] Partly this is because the Supreme Court has characterized this section as a direction to the legislature rather than a self-executing "prohibition of a grant of a monopoly by the state" (*Visco v. State ex rel. Pickrell*). Even so, despite the fact that this section requires the legislature to "enact laws for the enforcement of this section by adequate penalties," the Court has held that the legislature has the power to authorize conduct that would otherwise violate statutes implementing this section, because the specific authorization controls over the general antitrust law (*Arizona Downs v. Arizona Horsemen's Found.*). Similarly, the legislature may authorize insurers to cooperate to set prices (*Tucson Unified School Dist. v. Chicago Title Ins. Co.*), and manufacturers to fix retail prices of their goods (*State ex rel. LaSota v. Arizona Licensed Beverage Assn.*). None of these cases mentions this section. Their effect, ironically, is to give the legislature the power to abrogate rather than enforce this section, thus rendering it toothless.

A few cases have considered this section. In one, the Supreme Court upheld a law allowing manufacturers to set retail prices for their products against a challenge that they are price fixing in violation of this section (e.g., *General Electric Co. v. Telco Supply, Inc.*). It has also held that this section does not apply to public service corporations, many of which are so-called natural monopolies, whose rates and terms of service are regulated by the corporation commission pursuant to the provisions of Article XV (*Visco v. State ex rel Pickrell*).

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[140] About one-fourth of the states have similar provisions (Henn and Alexander, *Laws of Corporations,* p. 42), but proceedings under either of these provisions or state antitrust statutes have been "relatively rare" (ibid., 860).

SECTION 16

The records, books, and files of all public service corporations, state banks, building and loan associations, trust, insurance, and guaranty companies shall be at all times liable and subject to the full visitorial and inquisitorial powers of the state, notwithstanding the immunities and privileges secured in the declaration of rights of this constitution to persons, inhabitants, and citizens of this state.

This section must be read in connection with various provisions of the declaration of rights in Article II, such as that protecting the privacy of persons (section 8), protecting persons against self-incrimination (section 10), and guaranteeing persons rights of due process of law (section 4). At least some of the framers thought that corporations were "persons" protected by these provisions, and therefore wanted to ensure that the state was not disabled from investigating corporate activities in order to enforce state regulatory laws. As originally introduced, the section would have applied to all corporations, but it was rewritten to limit the kinds of corporations to which it would apply.[141] The Supreme Court has said this section is not self-executing because the "visitorial and inquisitorial powers of the state" it refers to "are not conferred on any particular person or body" (*State v. Jones, dictum*), but it would come into play when state law vests an agency with regulatory powers that could be facilitated by gathering information from corporations. Furthermore, the Court has subsequently held that a related constitutional provision applying to the corporation commission (Article XV, section 4) is self-executing, distinguishing *Jones (Arizona Pub. Serv. Co. v. Arizona Corp. Commn.)*.

This section might be viewed as casting doubt on the power of the state to investigate privately held, nonpublic-service corporations (not subject to this section), through application of the *exclusio* principle of statutory construction (mentioning one implicitly excludes others). Although no court has addressed this issue in a published decision, reading this section to enlarge corporate privacy by implication seems inconsistent with the framers' fundamental objective of deterring corporate abuse.

SECTION 17

Provision shall be made by law for the payment of a fee to the state by every domestic corporation, upon the grant, amendment, or extension of its charter, and by every foreign corporation upon its obtaining a license to do business in this state; and also for the payment, by every domestic corporation and foreign corporation doing business in this state, of an annual registration fee of not less than ten dollars, which fee shall be paid irrespective of any specific license or other tax imposed by law upon

[141] Goff, *Records* 718–24; see Leshy, "The Making of the Arizona Constitution," 87.

> such company for the privilege of carrying on its business in this state, or upon its franchise or property; and for the making, by every such corporation, at the time of paying such fee, of such report to the corporation commission of the status, business, or condition of such corporation, as may be prescribed by law. No foreign corporation, except insurers, shall have authority to do business in this state, until it shall have obtained from the corporation commission a license to do business in the state, upon such terms as may be prescribed by law. The legislature may relieve any purely charitable, social, fraternal, benevolent, or religious institution from the payment of such annual registration fee.

This section should be read in conjunction with Article XV, section 5, which vests the corporation commission with the exclusive power to issue certificates of incorporation to domestic corporations, and licenses to corporations incorporated in other jurisdictions that seek to do business in Arizona. Taken together, both sections effectively forbid any other branch of government, including the courts through their rulemaking powers, from imposing any other conditions on the right to do business in Arizona (*Kreiss v. Clerk of Superior Court*). The fee, reporting, and licensing provisions of this section are relatively straightforward; the latter two are not self-executing because they are "as may be prescribed by law" (*Selective Life Ins. Co. v. Equitable Life Assurance Soc*).

This section's penultimate sentence was amended in 1968, as part of a package of amendments removing insurance companies from the purview of the commission, to exempt foreign insurance corporations from the obligation to obtain a license from the corporation commission (see the commentary on section 5 of Article XV). Outright repeal of this section was proposed by the legislature in 1972 as part of a proposal to restructure the corporation commission, but the voters rejected it.

SECTION 18

> It shall be unlawful for any corporation, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action.

This section reflects the framers' concern with undue corporate influence on governmental action. The same concern is expressed in other parts of the constitution, for example, Article IV, part 2, section 23 (prohibiting free transportation passes to public officers) and Article XXII, section 19 (lobbying). Also relevant here are Article II, section 5 (protecting the "right of petition") and the First Amendment to the U.S. Constitution, as construed by the U.S. Supreme Court in a number of cases to equate campaign contributions with speech protected by that amendment (e.g., *Buckley v. Valeo*).

This section applies broadly to corporate contributions influencing any "official action," not just elections, but it has been held to apply only to corporate contributions made to others and not to expenditures made by the corporation on its own behalf in connection with the proper exercise of its authorized activities; therefore the state bar of Arizona, a public organization, did not violate this section by expending money to promote the passage of a constitutional amendment providing for merit selection of judges (see Article VI, sections 36–40)) (*Bridegroom v. State Bar*). The attorney general has opined that this section does not prohibit corporations from establishing political action committees, financed by employee contributions, to influence elections (Op. Atty. Gen. R76–26).

SECTION 19

Suitable penalties shall be prescribed by law for the violation of any of the provisions of this article.

This self-explanatory section has not been interpreted in any reported decision.

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Article XV

The Corporation Commission

SECTION 1

Term limits on corporation commission; composition; election; office and residence; vacancies; qualifications. A. No member of the corporation commission shall hold that office for more than one consecutive term. No corporation commissioner, after serving that term, may serve in that office until out of office for one full term. Any person who serves one half or more of a term shall be considered to have served one term for purposes of this section. This limitation shall apply to terms of office beginning on or after January 1, 1993.

B. A corporation commission is hereby created to be composed of three persons, who shall be elected at the general election to be held under the provisions of the enabling act approved June 20, 1910, and whose term of office shall be co-terminous with that of the governor of the state elected at the same time, and who shall maintain their chief office, and reside, at the state capital. At the first general state election held under this constitution at which a governor is voted for, three commissioners shall be elected who shall, from and after the first Monday in January next succeeding said election, hold office as follows:

The one receiving the highest number of votes shall serve six years, and the one receiving the second highest number of votes shall serve four years, and the one receiving the third highest number of votes shall serve two years. And one commissioner shall be elected every two years thereafter. In case of vacancy in said office, the

> governor shall appoint a commissioner to fill such vacancy. Such appointed commissioner shall fill such vacancy until a commissioner shall be elected at a general election as provided by law, and shall qualify. The qualifications of commissioners may be prescribed by law.

This section creates a three-member corporation commission, whose members are elected on a statewide ballot and who serve six-year, staggered terms (one elected every two years). Arizona is one of only twelve states to regulate utilities through a constitutionally established commission.[142] Like many other parts of the constitution, this article reflects the framers' pronounced, progressive-era concern with regulating corporations, a concern enhanced by the perceived dominance of large railroad and mining companies during the territorial era.[143] Two years after statehood, the Supreme Court noted that "no other state has given its [corporation] commission, by whatever name called, so extensive power and jurisdiction" (*State v. Tucson Gas, Elec. Light & Power Co.*; see also *Arizona Corp. Commn. v. State*).

Until 1992, this section had never been amended, but not for lack of trying. Four times in the last quarter century the legislature has unsuccessfully sponsored amendments to overhaul it: a 1968 proposal would have made the commission appointive rather than elective;[144] a 1972 proposal would have reformed the entire article, substituting an elected public utilities commission and altering its jurisdiction in order, in the language of the amendment's proponents, to "streamline and modernize" its functions;[145] and two separate proposals in 1984 would have enlarged the commission to five members, each serving a four-year term. Under one, commissioners would have been elected; under the other, the governor would have appointed them with the advice and consent of the state senate, but with no more than three from a single political party. Repeated efforts

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[142] *Annual Report on Utility and Carrier Regulation* (Washington, D.C.: National Association of Regulatory Utility Commissioners, 1988); Pt. I, sec. 2, pp. 184–245. This article bears considerable resemblance to provisions in the Virginia (Art. IX, secs. 1–7) and Oklahoma (Art. 9, sees. 15–35) constitutions, both adopted a few years before the Arizona Constitutional Convention. One delegate mentioned studying the corporation commission laws of Oklahoma, Louisiana, and Virginia; Goff, *Records,* 845. For useful general discussions of the commission, see D. Barney, "Arizona and Public Utility Control: A Problem in Constitutional Law and Politics" (M.A. thesis, Arizona State University, 1962); and Deborah Scott Engelby, "The Corporation Commission: Preserving Its Independence," *Arizona State Law Journal* 20 (1988), 241–61.

[143] See Leshy, "The Making of the Arizona Constitution," 11–13, 88–91.

[144] This was the only one of ten proposed amendments to fail in the election; its proponents made the interesting argument that an elected commission is not accountable to the people. *Publicity Pamphlet,* 1968 General Election, p. 25 (argument of Government Re-Organization Wanted Committee).

[145] One of its principal proponents was Sandra Day O'Connor, then a state senator, later to become Associate Justice of the U.S. Supreme Court. See *Publicity Pamphlet,* 1972 General Election, p. 18.

to amend other parts of this article have usually, though not always, met a similar fate, as described in the commentary on the following sections.

In 1992 the caption and a new first paragraph (subsection A) were added. (Although the 1992 amendment did not so specify, the remainder has been redesignated as subsection B.) As part of the term limits package of amendments (see also Article IV, part 2, section 21; Article V, sections 1 and 10; Article VII, section 19; and Article XIX), corporation commissioners were prohibited from succeeding themselves after they had served one half or more of a single six-year term.

This section specifies that commission vacancies are to be filled by gubernatorial appointment until the next general election; thus, commissioners cannot be elected at a special election (*Hudson v. Cummard*), and a gubernatorial appointee cannot serve out an unexpired term if a general election, as defined in Article VII, section 11, intervenes (*Bolin v. Superior Court*). The legislature has implemented its authority in the last sentence of this section only by prohibiting commissioners from having a financial interest in any corporation subject to the commission's regulatory jurisdiction (Ariz. Rev. Stat. 40–101, enacted in 1912).

SECTION 2

"**Public service corporation" defined.** All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

The commission has some power to regulate all corporations (see section 5 of this article and section 17 of Article XIV), and additional power to regulate corporations whose stock is offered for sale to the public (see sections 4 and 13 of this article), but its most important and extensive power is over public service corporations defined by this section. The original proposal at the constitutional convention was for the commission to have broad powers to regulate all corporations, but the framers eventually decided to limit its most sweeping regulatory jurisdiction to public service corporations, while rejecting other proposals to limit its powers.[146]

[146] Goff, *Records,* 613–16; Leshy, "The Making of the Arizona Constitution," 90–91.

Public service corporations are basically private enterprises ("other than municipal") providing utility service to the public. They are usually regarded as "natural" or "legalized" monopolies not subject to the competition of the marketplace (*General Alarm, Inc. v. Underdown*). They are regulated by the commission as a substitute for marketplace competition, and to eliminate duplication of facilities and services (*Corporation Commn. v. Peoples Freight Line, Inc.*). But this section does not expressly define public service corporations as those exercising monopoly power, and the commission can regulate public service corporations operating in a competitive marketplace, although it cannot regulate those corporate activities that are not "an integral or essential part of the public service performed by the company" (*Mountain States Tel. & Tel. Co. v. Arizona Corp. Commn.*, 1982).

This section was amended in 1974 to cover profit-making sewage system operators (and to add the caption); a similar proposal had been part of a comprehensive overhaul of this article rejected by the voters two years earlier. It was amended again in 1980 to eliminate private corporations "carrying persons or property for hire," except for "common carriers." This removed buses and airlines operating intrastate routes, taxicabs, ambulances,[147] and trucking, moving, and touring companies from the regulatory jurisdiction of the commission. In 1986 voters defeated a proposal to amend this section to give the legislature authority to remove commission jurisdiction over private corporations "providing telecommunications service," as defined by the legislature.

Regarding this section's exemption for "municipal" corporations, the Supreme Court has said that "no plainer language could have been used" to exempt public utilities "owned and operated by municipal corporations of any character" (*Menderson v. City of Phoenix*). Going further, the Court in *Menderson* said that "by necessary implication" this exclusion "forbids such regulation" even at the invitation of the legislature. This latter conclusion is questionable (see the commentary on sections 3 and 6 of this article). The exclusion of municipal corporations is a blanket one, "not predicated upon the place where they do business, but upon the fact that they *are* municipal corporations" (*City of Phoenix v. Wright*, emphasis in original). Special governmental districts are harder to categorize; some (like irrigation or power districts) have been deemed not within this definition (*Rubenstein Constr. Co. v. Salt River Project Agric. Improvement & Power Dist.*), while others (such as a municipal transit authority financially independent

[147] While the 1980 amendment had eliminated commission jurisdiction over ambulance service, it would seem to have left the state legislature with plenary power to regulate. Its proponents had argued that the legislature would still retain some regulatory authority after commission jurisdiction was removed; see *Publicity Pamphlet,* 1980 General Election, pp. 8–9. Nevertheless, in a puzzling step, Art. XXVII was added two years later to confirm the legislature's power to regulate ambulance service. The 1982 proposal simply assumed that the 1980 amendment had prohibited the legislature from regulating; see *Publicity Pamphlet,* 1982 General Election, pp. 4–5.

from a city and possessing full power to set rates and other terms of service) are subject to commission regulation (*Tucson Transit Auth., Inc. v. Nelson*).

Numerous decisions address whether particular private entities fall within the definition in this section. Despite the textual limit to "corporations," the Supreme Court has said it is applicable to individuals (*Williams v. Pipe Trades Industrial Program, dictum*), and to individuals acting as joint venturers (*Arizona Corp. Commn. v. Nicholson*). Both of these decisions follow a rare opinion of the U.S. Supreme Court construing the Arizona Constitution (*Van Dyke v. Geary*). In *Van Dyke* an individual operating an unincorporated business supplying water to municipal residents claimed in federal court that commission regulation of her activities violated the Fourteenth Amendment of the U.S. Constitution. In the course of rejecting that challenge, the U.S. Supreme Court held that, first, the basic purpose of Article XV is to regulate certain kinds of activities on the basis of their character rather than their ownership, and this purpose "could easily be frustrated if concerns owned by individuals were excluded from its operation." The Court also said that, regardless of how this section might be construed, the legislature had the power under section 6 of this article to expand the commission's jurisdiction to include individuals. This second holding of *Van Dyke*—that the legislature could enlarge the commission's jurisdiction—has not always been followed (see the commentary on sections 3 and 6 of this article).

A cooperative formed by farmers to acquire and distribute natural gas to its members has been held to be a public service corporation because, among other things, it had broad power under its charter to deal in a service in which the public had an interest, and it sought to compete with an already operating public service corporation and ultimately to secure a monopoly of a lucrative business (*Natural Gas Serv. Co. v. Serv-Yu Coop., Inc.*). The same result was reached with respect to a nonprofit electric cooperative (*Trico Elec. Coop., Inc. v. Corporation Commn.*), but if a nonprofit canal company is authorized to serve only its members, rather than the public generally, it is "not 'furnishing water for irrigation' in the sense that this term is used" in this section (*Prina v. Union Canal & Irrigation Co.*; cf. *Olsen v. Union Canal & Irrigation Co.*). A few decisions have read this section parsimoniously, for example, to exclude enterprises supplying water for heating or cooling purposes (*Williams v. Pipe Trades Industrial Program*), furnishing fire protection services (*Rural/Metro Corp. v. Arizona Corp. Commn.*), or serving only a few (albeit large) direct consumers of natural gas, with no plans to serve any others (*Southwest Gas Corp. v. Arizona Corp. Commn.*).

The last clause of this section, referring to "common carriers," needs to be read with sections 7–10 of this article, which provide more detail on the definition of and commission jurisdiction over such enterprises. A company selling security alarm systems has been held not to be "in the business of sending messages for the public" within the meaning of this section (*General Alarm, Inc. v. Under-down*); the same result has been reached regarding cable television companies because, while they literally transmit electronic messages, providing

programming to subscribers "simply is not common carriage" (*American Cable Television, Inc. v. Arizona Pub. Serv. Co.*).

SECTION 3

The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said corporation commission may from time to time be amended or repealed by such commission.

This section sets out the parameters of the commission's responsibilities to regulate public service corporations defined in section 2. Textually, it gives the commission "full power" to regulate virtually every aspect of the corporation's operations (including the rates it charges its customers) that bears on the public convenience, comfort, safety, and health. The Supreme Court has, however, displayed a marked ambivalence toward the commission's authority over the eight decades since statehood.

In the first case addressing this section, the Supreme Court described it as vesting full and effectively exclusive power to do all the things listed in this section (*State v. Tucson Gas, Elec. Light & Power Co.*). Four years later, the Court described the commission's power in the first part of this section—to classify and prescribe rates and make reasonable rules, regulations, and orders regarding public service corporations' "transaction of business"—as "mandatory and compelling"; and its power in the rest of this section—to promote the convenience, comfort, safety and health of these corporations' employees and patrons—as "permissive and discretionary" (*Arizona Eastern R.R. v. State*). As a result, on matters falling in the latter category, the legislature could exercise its inherent police power (bolstered by its power to regulate railroads under section 10 of this article), and thus a statute limiting the length of trains operating in the state did not conflict with this section's grant of jurisdiction to the commission. This result seems sensible, because part of the commission's responsibility under this section is mandatory (the commission "shall" do the things listed in the first

third of this section), and part is discretionary (the commission "may" do the things listed in the middle third of the section, before the proviso).

The Court took a much different view in 1939, sharply limiting *Tucson Gas* and modifying *Arizona Eastern R.R.* by interpreting the introductory phrase of this section (giving the commission "full power") to apply only to setting rates and rate classifications, and by interpreting the second clause ("and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state") as referring only to the commission's rate regulation power (*Corporation Commn. v. Pacific Greyhound Lines*). The Court said that the legislature had "paramount power to make all rules and regulations governing public service corporations not specifically and expressly given to the commission by some provision of this constitution"; therefore the legislature could prohibit the commission from issuing an operating license to a common carrier that would compete with a carrier the commission had already licensed to operate on the same route, unless the commission deemed the original carrier's service not "satisfactory."

Other decisions of the courts have displayed similar variety; some say that the commission has no "implied" powers, and that its powers should be measured by "a strict construction of the Constitution and implementing statutes" (*Commercial Life Ins. Co. v. Wright*; see also *Walker v. De Concini*). Others speak of the commission's "very broad powers" over public service corporations, in contrast to its more limited powers over other corporations (*Wylie v. Phoenix Assurance Co.*); and apply the principle that the powers expressly granted it by the constitution are "merely the minimum," so that it may exercise "all powers which may be necessary or essential in connection with the performance of its duties" (*Garvey v. Trew*). These inconsistent pronouncements cannot be explained by chronology; *Wright* and *Garvey*, for example, were decided within three months of each other.

Recently, however, the Supreme Court has characterized *Pacific Greyhound* and its progeny as "undercut[ting] the framer's vision of the Commission's role" as well as earlier case law (*Arizona Corp. Commn. v. State*). Though it stopped short of overruling that line of cases, it did uphold commission rules requiring public service corporations to report and obtain permission for transactions with its parent, subsidiary, and other affiliated corporations, finding they are "reasonably necessary for ratemaking" under this section, and thus "fulfill the framers' intent with respect to ratemaking in light of modern corporate practices and regulatory realism" (*id.*).

This section gives the commission power to prescribe "just and reasonable rates and charges"; section 12 contains a separate antidiscrimination principle that overlays this responsibility. The commission's power over rates "of necessity [gives it] a range of legislative discretion" (*Simms v. Round Valley Light & Power Co.*), but the operating principle of public utility regulation followed practically everywhere is that rates should allow the utility to recover its operating costs

plus a reasonable rate of return on its investment. One key determinant in this equation is the value of the corporation's investment, a question addressed in section 14 of this article.

This section does not allow the commission to approve a substantial rate increase "without any consideration" of its "overall impact" upon the return to the utility, and without any determination of the utility's rate base (*Scates v. Arizona Corp. Commn.*). Similarly, it does not allow the commission to use, as the sole criterion for a rate increase, a percentage of return on the utility's common stock equity because this would allow the interests of the stockholders "to overshadow those of the public served" (*Arizona Community Action Assn. v. Arizona Corp. Commn.*). The commission can, however, allow a utility to charge a particular rate on an interim basis, subject to possible adjustment later (*Pueblo Del Sol Water Co. v. Arizona Corp. Commn.*), and it has the exclusive right to determine the disposition of an admitted overcollection (*Arizona Pub. Serv. Co. v. City of Phoenix*). Judicial review of commission decisions is generally explored in the commentary on section 17 of this article.

The power vested in the commission by this section includes the power to issue appropriate "orders" as well as "rules" and "regulations," and it may deal with "specialized situations on a case by case approach," such as by ordering a utility to furnish water of a specified quality to its customers (*Arizona Corp. Commn. v. Palm Springs Utility Co.*), or requiring it to make capital investments and improvements "required to render adequate service to the communities it serves" (*Arizona Corp. Commn. v. Tucson Gas, Elec. Light & Power Co.*). Such orders must, however, conform to constitutional requirements of due process (*Southern Pac. Co. v. Arizona Corp. Commn.; Western Gillette Inc. v. Arizona Corp. Commn.*). This section does not give the commission power to "control the internal affairs" of public service corporations; for example, it cannot order the transfer of corporate stock from one party to another (*Corporation Commn. v. Consolidated Stage Co.*).

The first proviso in this section allows the legislature to authorize cities and towns to regulate public service corporations operating within their borders. If no legislation permits such regulation, the commission retains full power to regulate, even to the extent of superseding the terms of the franchise the city has granted to the corporation (*Phoenix Ry. v. Lount*). The same result obtains if the city's charter purports to give it regulatory authority (*Yuma Gas, Light & Water Co. v. City of Yuma*). Conversely, the city may not (even if authorized by the city charter) impose a license fee on a bus operator regulated by the commission under this section (*City of Phoenix v. Sun Valley Bus Lines, Inc., dictum*), although presumably a city may apply its local police regulations to a corporation regulated by the corporation commission, to the extent they do not conflict with commission regulations or other state laws (see the commentary on Article XIII, section 2).

SECTION 4

The corporation commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be offered for sale to the public and of any public service corporation doing business within the state, and for the purpose of the commission, and of the several members thereof, shall have the power of a court of general jurisdiction to enforce the attendance of witnesses and the production of evidence by subpoena, attachment, and punishment, which said power shall extend throughout the state. Said commission shall have power to take testimony under commission or deposition either within or without the state.

This section is aimed at giving the commission sufficient investigatory powers to carry out its responsibilities. In part it supplements the commission's power over public service corporations addressed in the preceding section, but it also applies to "any corporation whose stock shall be offered for sale to the public" and is in that aspect related to section 13 of this article and section 16 of Article XIV. The Supreme Court has recently rejected *dicta* in an earlier decision (*Wylie v. Phoenix Assurance Co.*) and held that this section and section 13 of this article give the commission a self-executing power to inspect and investigate any matter involving such corporations, and not just issues arising out of a stock offering (*Arizona Pub. Serv. Co. v. Arizona Corp. Commn.*).

SECTION 5

Power to issue certificates of incorporation and licenses. The corporation commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this state, and to issue licenses to foreign corporations to do business in this state, except as insurers, as may be prescribed by law.

Domestic and foreign insurers shall be subject to licensing, control and supervision by a department of insurance as prescribed by law. A director of the department of insurance shall be appointed by the governor with the consent of the senate in the manner prescribed by law for a term which may be prescribed by law.

Originally this section consisted only of the first paragraph, without the exception for insurers. Until 1954 insurers were fully subject to commission jurisdiction (see *State v. Jones*), but in that year the legislature stripped it of its insurance regulatory function, leaving it only the power to appoint the insurance director (subject to senate confirmation) and to remove her for cause (see *Williams v. Bankers Natl. Ins. Co.*). In 1967 the Supreme Court Struck down this sharp contraction of the commission's regulatory authority over insurance as inconsistent with this section (*Selective Life Ins. Co. v. Equitable Life Assurance Soc*). The next year this section was amended to except insurers and add the

second paragraph, effectively transferring jurisdiction over insurance companies from the commission to a separate department under the governor. A 1976 amendment added the caption and rewrote the last sentence by substituting "with the consent of the senate in the manner prescribed by law" for "subject to approval by the senate."

Although this section gives the commission "sole power" to *issue* certificates of incorporation to domestic corporations and licenses to foreign corporations, the last phrase of the first paragraph ("as may be prescribed by law") and similar language in Article XIV, section 17 (reinforced by sections 2 and 14 of that article) have been interpreted to mean that the legislature has "exclusive power" to determine the conditions under which certificates and licenses shall be issued (*Kreiss v. Clerk of Superior Court*). Indeed, the legislature has "unlimited" power to establish "the kinds of qualifications of corporations and the rules and regulations for the conduct of their business," as long as it does not "lodge the duty of issuing the certificate or license" anywhere but in the commission (*Arizona Corp. Commn. v. Heralds of Liberty*). This effectively reduces the commission's role to one of determining whether a foreign corporation or a proposed new corporation meets legislatively established requirements, and if it fails to do so or does so arbitrarily, the courts will step in (*id.*; see also *Senner v. Bank of Douglas*).

SECTION 6

> The law-making power may enlarge the powers and extend the duties of the corporation commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the commission may make rules and regulations to govern such proceedings.

This section addresses a delicate and controversial subject—the relationship between the legislature and the commission. The key phrase is that the legislature "may enlarge . . . and extend" the powers and duties of the commission; in its first examination of this article, the Supreme Court held that this language "impliedly forbids the legislature from . . . lessening or decreasing the commission's powers," for otherwise the commission would be "a constitutional body in name only . . . a useless body, if the legislature chose to make it so" (*State v. Tucson Gas, Elec. Light & Power Co.*).[148] Numerous subsequent decisions (including one

[148] *Tucson Gas* involved a statute passed by the first state legislature prohibiting public service corporations from charging customers except by the quantity of water, electricity, and gas actually served. A utility that set a minimum rate for service in violation of the statute argued that it conflicted with the commission's jurisdiction. The Court struck down the statute, even though the record did not indicate whether the commission had approved the utility's minimum rate; dissenting Justice Cunningham took the sensible position that, while the statute could not survive a commission judgment to the contrary, it was enforceable until the commission had actually passed on the matter.

by the U.S. Supreme Court, *Van Dyke v. Geary*) have reaffirmed that view (*Garvey v. Trew; Selective Life Ins. Co. v. Equitable Life Assurance Soc; Arizona Corp. Commn. v. Superior Court*). Indeed, the Court has said, this section is superfluous unless it is interpreted to limit the power of the legislature to restrict the commission, because "[e]ven without constitutional authorization, it would have been competent for the legislature to delegate power over the subject matter to a special agency like the Corporation Commission" (*Haddad v. State*; see also *State v. Smith*, 1927, and the commentary on section 16 of this article).

Despite this impressive authority, the Supreme Court began in the late 1930s to take a different view. It first suggested that the legislature could not vest the commission with jurisdiction to regulate municipal corporations excluded from the definition of public service corporations in section 2 of this article (*Menderson v. City of Phoenix, dictum*).[149] It followed this by suggesting that the legislature could expand commission authority only over "subject matter" over which "it has already been given jurisdiction, and other matters of the same class not expressly or impliedly exempt by other provisions of the Constitution" (*Commercial Life Ins. Co. v. Wright, dictum*). This construction is difficult to square with the idea that the legislature has broad power (confirmed by sections 2 and 14 of Article XIV) to "regulate, alter and restrain" corporations (*Corporation Commn. v. Pacific Greyhound Lines*). In particular, this section does not seem offended by a legislative delegation of some of its power to the commission, especially because the commissioners are independently elected and therefore as accountable to the electorate as the legislature.[150]

Mender son's broad *dictum* has led to mischievous results, however. In 1981, for example, the Court relied on it to void legislation giving the commission jurisdiction over nonmunicipal corporations that it found do not fit the definition of public service corporations in section 2 (*Rural/Metro Corp. v. Arizona Corp. Commn.*). The earlier decisions taking a contrary approach to this section have not been overruled, however, so that the legislature's power to enlarge the commission's jurisdiction remains uncertain.

The legislature also has power under this section to make "rules and regulations to govern proceedings" before the commission. This authority must be read against section 3's directive that the commission make "reasonable rules [and] regulations" governing various activities of public service corporations.

[149] The Court's explication of the legislature's power in *Mender son* is *dictum* because the Court actually construed the statute in question as not vesting the commission with authority over municipal corporations. Had the statute been read otherwise, it still could have been struck down on the narrower ground that the legislature could not vest the commission with jurisdiction over municipal corporations, because they are not only expressly excluded from commission jurisdiction by sec. 2 of this article, but also have a constitutional status under Art. XIII, with elected officers and an independent accountability to the people.

[150] See generally Engelby, "The Corporation Commission."

A court of appeals has upheld a statute subjecting commission proceedings to the state administrative procedure act (*State ex rel. Corbin v. Arizona Corp. Commn.*). Another court of appeals, while acknowledging that the legislature has the power under this section to enact "rules of practice and procedure" for commission proceedings, applied the Supreme Court's most recent guidance on the commission (see *Arizona Corp. Commn. v. State*, discussed in the commentary on power to veto commission rules relating to its ratemaking function (*State v. Arizona Corp. Commn.*). It found that the commission had "sole and exclusive jurisdiction," subject to judicial review, to decide on the form and content of such rules and its authority to adopt them (*id.*).

Finally, although not directly addressed in this section, the legislature's control of the purse strings gives it an important source of authority over the commission; that is, this article does not make constitutional appropriations of money to enable the commission to perform its responsibilities (*Millett v. Frohmiller*; see also *Garvey v. Trew* and the commentary on article IX, section 5).[151]

SECTION 7

Every public service corporation organized or authorized under the laws of the state to do any transportation or transmission business within the state shall have the right to construct and operate lines connecting any points within the state, and to connect at the state boundaries with like lines; and every such corporation shall have the right with any of its lines to cross, intersect, or connect with, any lines of any other public service corporation.

This section and the two that follow are aimed at promoting competition and efficient service in "transportation" and "transmission" enterprises; this one prevents them from asserting exclusive rights-of-way and otherwise refusing to cooperate with actual or potential competitors to choke off competition. Its last clause effectively gives competitors a right of access to or across the "lines" of their competitors. This section has not been subject to any reported judicial interpretation.

SECTION 8

Every public service corporation doing a transportation business within the state shall receive and transport, without delay or discrimination, cars loaded or empty, property, or passengers delivered to it by any other public service corporation doing

[151] The legislature has authorized the commission to assess public service corporations to help underwrite the cost of regulation (see Ariz. Rev. Stat. 40–401 through 408), but the assessments must be appropriated for the commission's use by the legislature.

a similar business, and deliver cars, loaded or empty, without delay or discrimination, to other transportation corporations, under such regulations as shall be prescribed by the corporation commission, or by law.

This section is a companion to the ones that precede and follow it, although this one is limited to public service corporations "doing a transportation business." The Supreme Court has said that it prevents the commission from exercising its power under section 3 to do less than this section requires (*State v. Tucson Gas, Elec. Light & Power Co., dictum*). The last phrase gives the legislature concurrent power to prescribe regulations in this area, but the courts have not addressed the interface between this and the legislature's power under section 6 of this article.

SECTION 9

Every public service corporation engaged in the business of transmitting messages for profit shall receive and transmit, without delay or discrimination, any messages delivered to it by any other public service corporation engaged in the business of transmitting messages for profit, and shall, with its lines, make physical connection with the lines of any public service corporation engaged in the business of transmitting messages for profit, under such rules and regulations as shall be prescribed by the corporation commission, or by law; provided, that such public service corporations shall deliver messages to other such corporations, without delay or discrimination, under such rules and regulations as shall be prescribed by the corporation commission, or by law.

This section essentially does for communications public service corporations what the preceding section does for their counterparts in the transportation sector. Like the preceding section, this one does not limit the commission's power under section 3 of this article (*State v. Tucson Gas, Elec. Light & Power Co., dictum*). An amendment proposed in 1986 would have rewritten this section as part of a major proposal to allow the legislature to define and deregulate telecommunications enterprises, but it was rejected by the voters.

SECTION 10

Railways as public highways; other corporations as common carriers. Railways heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways and all railroads are declared to be common carriers and subject to control by law. All electric, transmission, telegraph, telephone, or pipeline corporations, for the transportation of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law.

This section declares the named categories of businesses to be "common carriers." It is an adjunct to section 2 of this article, which includes common carriers in the definition of public service corporations made subject to commission regulation under section 3. In 1939 the Supreme Court ruled that it was "intended to cover all known methods" of transport of the items enumerated in this section, and therefore construed it to include "motor vehicles operating as common carriers for profit on public highways" even though they are not specifically listed (*Corporation Commn. v. Pacific Greyhound Lines*).

It was rewritten (and the caption added) by a 1980 amendment to delete companies that transport "persons"; a companion amendment to section 2 deleted "transportation of persons or property for hire" from the definition of public service corporation. Curiously, the 1980 amendment retained this section's reference to companies transporting "property for profit," and the penultimate clause in section 2 continues to include as public service corporations "all" private corporations "operating as common carriers." Textually, then, companies transporting property for hire remain common carriers potentially subject to commission regulation, while companies transporting persons for hire are not. In practice, the commission no longer regulates either (see Laws 1980, ch. 169, section 6; historical note to Ariz. Rev. Stat. 28–101). In 1986 voters rejected a package of amendments designed to give the legislature authority to define and deregulate "telecommunications" service, one of which would have rewritten this section.

Numerous cases address the definition of "common carrier"; most involve common law or statutory questions rather than this section (e.g., *Claypool v. Lightning Delivery Co.*, taxation). Of those that do address this section, most have for various reasons excluded particular businesses from this section; for example, an armored car security company (*Arizona Corp. Commn. v. Continental Sec. Guards*), a cable television company (*American Cable Television, Inc. v. Arizona Pub. Serv. Co.*), crop dusting (*Quick Aviation Co. v. Kleinman*), and collecting and hauling trash (*Visco v. State ex rel. Pickrell*). The phrase "subject to control by law" merely authorizes but does not mandate regulation; thus it does not prevent repeal of existing regulatory laws, such as those requiring minimum train crews (*Iman v. Southern Pac. Co.*).

SECTION 11

The rolling stock and all other movable property belonging to any public service corporation in this state, shall be considered personal property, and its real and personal property, and every part thereof, shall be liable to attachment, execution, and sale in the same manner as the property of individuals; and the law-making power shall enact no laws exempting any such property from attachment, execution, or sale.

This section is designed to check the influence of public service corporations by ensuring that all their real and personal property is subject to the same judicial processes (such as those used to collect taxes and enforce court judgments) as apply to the property of individuals. It has not received published judicial interpretation.

SECTION 12

All charges made for service rendered, or to be rendered, by public service corporations within this state shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of tree or reduced rate transportation may be authorized by law, or by the corporation commission, to the classes of persons described in the act of congress approved February 11, 1887, entitled an act to regulate commerce, and the amendments thereto, as those to whom tree or reduced rate transportation may be granted.

This section adds a prohibition on discrimination in rates and terms of service to section 3's grant of power to the commission to prescribe "just and reasonable" rates and terms of service by public service corporations. Such discrimination had long been prohibited by statute or common law in many jurisdictions, and the Supreme Court had applied it as a matter of common law in Arizona to municipal corporations providing utility service (*Town of Wickenburg v. Sabin*, not citing this section, municipalities being excepted from section 2's definition of "public service corporations"). Generally, this section means that rates may not be set on the basis of ability to pay, but rather on the basis of the service provided (*Southern Pac. Co. v. Corporation Commn., dictum*). But a utility or carrier may make different charges for different services provided, such as in offering on-call as opposed to regularly scheduled service, without transgressing this section (*Haddad v. State*).

The last part of this section authorizes the legislature or the commission to allow free or reduced-rate transportation to the "classes of persons" described in the federal Interstate Commerce Commission Act of 1887 (24 Statutes at Large 379—87).[152] That act contained a similar antidiscrimination principle but excepted numerous classes of property and persons.[153] The repeal of this part of the federal statute in 1978 (92 Statutes at Large 1466, 1470) arguably does not

[152] The Interstate Commerce Act was actually approved on February 4, 1887, not February 11 as stated in this section. 24 Statutes at Large 387.

[153] The exemptions in the original act were subsequently revised several times; see 49 U.S. Code former sec. 22 (since repealed); they covered such things as property of federal, state, and local governments, charities, ministers, and travels "to and from fairs and expositions for exhibition."

prevent the last clause in this section from operating, because the clause refers to classes of persons named in the federal law, without incorporating the law itself.

SECTION 13

All public service corporations and corporations whose stock shall be offered for sale to the public shall make such reports to the corporation commission, under oath, and provide such information concerning their acts and operations as may be required by law, or by the corporation commission.

This self-explanatory section is a companion to section 4 of this article (and thus the commentary on that section is relevant here), and both are related to section 16 of Article XIV. Together they seek to ensure that the commission and the state have broad information-gathering powers (including demanding reports "under oath") over public service corporations and those whose stock is offered for sale to the public. This section, for example, permits the commission to require a public service corporation's parent holding company to provide detailed monthly reports on its business activities (*Arizona Pub. Serv. Co. v. Arizona Corp. Commn.*).

SECTION 14

The corporation commission shall, to aid it in the proper discharge of its duties, ascertain the fair value of the property within the state of every public service corporation doing business therein; and every public service corporation doing business within the state shall furnish to the commission all evidence in its possession, and all assistance in its power, requested by the commission in aid of the determination of the value of the property within the state of such public service corporation.

This section relates to the commission's responsibility under section 3 of this article to prescribe "just and reasonable rates." The most common way to determine such rates is first to determine the value of the public service corporation's property (commonly called the "rate base"), and then to apply a specific percentage rate of return to that value. This section deals with the first step. By speaking of the "ascertainment of] fair value" of utility property merely as an "aid" to the commission in the proper discharge of its duties, it does not dictate that it be the sole determinant of the rate base; therefore, although this section specifically refers to property "within the state," the commission may, in determining a company's rate base, consider as well the value of utility property located outside the state (*Morris v. Arizona Corp. Commn.*). But this section has been read to constrain the commission's rate-setting responsibility; for example, the Supreme Court has said that a public service corporation "is entitled to a fair return on the

fair value of its properties devoted to the public use, no more and no less" (*Arizona Corp. Commn. v. Arizona Water Co.*; see also *Arizona Corp. Commn. v. Arizona Pub. Serv. Co.*).

"Fair value" essentially measures the property's replacement value as of the time of the rate proceeding, rather than its original cost to the utility. Original cost is of course relevant to determining fair value (*Arizona Corp. Commn. v. Arizona Water Co.*), but it cannot be the exclusive measure because of variability in construction costs; that is, fair value "allows the increase or decrease in the cost of construction to influence the rates, whereas [original cost] makes no such allowance" (*Simms v. Round Valley Light & Power Co.*). Given the near inevitability of inflation, the same rate of return applied to the fair (current) value of property will usually produce higher utility rates to customers than if the same rate were applied to the corporation's original investment. Of course, the converse may be true if the fair value of a utility's property is less than its original cost, because under fair value a utility is "not entitled to a fair return on its investment" but rather to a fair return on the fair value of its properties (*Arizona Corp. Commn. v. Arizona Water Co.*).[154]

When the Arizona Constitution was framed, fair value was used in utility rate regulation across the country and had been approved by the U.S. Supreme Court in 1898 against a challenge based on the due process clause of the Fourteenth Amendment (*Smyth v. Ames*; see also *McCardle v. Indianapolis Water Co.*). Bound to observe the Fourteenth Amendment, the framers of the Arizona Constitution may well have thought they had no choice but to admit the relevance of "fair value." Thirty-four years after this section was adopted, the U.S. Supreme Court, as part of its retreat from vigorous application of substantive due process, became far more deferential in applying the federal Constitution to rate-setting decisions of regulatory agencies, asking merely whether the "total effect of the rate order [is] unjust and unreasonable" (*Federal Power Commn. v. Hope Natural Gas Co.*). In the aftermath of this decision, most federal and state regulatory agencies eventually abandoned fair value as the controlling standard for utility rate setting.

The commission tried to follow suit in Arizona, but in 1956 the Supreme Court held that abandonment of fair value was inconsistent with the command of this section that the "reasonableness and justness of the rates . . . be related to [a] finding of fair value," even though this section "does not establish a formula for arriving at fair value" (*Simms v. Round Valley Light & Power Co.*). This decision did not completely quell efforts to move away from the fair value standard. In 1984 and 1988 the legislature put constitutional amendments on the ballot to

[154] A statute in the Arizona water code (Ariz. Rev. Stat. 45–159) makes the original cost of a water right (which is usually zero) the basis for setting water utility rates by a "public authority," presumably including the corporation commission. Enacted in 1919 (Laws 1919, ch. 164, sec. 9), this statute has never been tested for compliance with this section.

repeal this section, and effectively allow the commission discretion in valuing the rate base. Both were defeated; the first time narrowly, the second by a margin of nearly two to one.[155] The 1986 telecommunications deregulation amendment would have exempted telecommunications corporations from this section; it too was defeated.

The Supreme Court has upheld the commission's use of a recent "test year" for determining fair value, even in times of rapid inflation in construction costs (*Arizona Corp. Commn. v. Arizona Pub. Serv. Co.*), and has allowed construction work in progress to be included in the fair value rate base, at least if the plant under construction will come on line within two years of the rate increase (*Arizona Community Action Assn. v. Arizona Corp. Commn.*). But customer contributions in aid of construction may be excluded because of the "inherent unfairness" in requiring the customer to pay the utility a return on an investment "made by the customer himself" (*Cogent Pub. Serv., Inc. v. Arizona Corp. Commn.*).

The legislature may not dictate when or how the commission determines fan-value (*Ethington v. Wright*; compare the commentary on section 6), and the commission need not formulate and publish rules for these value determinations "because the relevant factors may be given different weight in the discretion of the Commission at the time of the inquiry" (*Morris v. Arizona Corp. Commn.*).Judicial review of fair value decisions is discussed in the commentary on section 17, below.

SECTION 15

No public service corporation in existence at the time of the admission of this state into the union shall have the benefit of any future legislation except on condition of complete acceptance of all provisions of this constitution applicable to public service corporations.

This section echoes the concern found in parts of Article XIV (e.g., sections 2, 3, and 14) that corporations in existence at statehood not be allowed to escape regulation in the public interest. Now archaic, it has not been subject to judicial interpretation in any published decision.

[155] The few ballot arguments on these proposals were in favor of the proposed amendment. One called "fair value" a "dinosaur." Curiously, representatives of the public interest organization Common Cause supported the proposal in 1984 and opposed it in 1988, arguing the second time around that the failure to substitute an alternative standard left the commission with too much discretion. See *Publicity Pamphlet,* 1984 General Election, pp. 32–33; *Publicity Pamphlet,* 1988 General Election, pp. 7–10.

SECTION 16

If any public service corporation shall violate any of the rules, regulations, orders, or decisions of the corporation commission, such corporation shall forfeit and pay to the state not less than one hundred dollars nor more than five thousand dollars for each such violation, to be recovered before any court of competent jurisdiction.

This section brackets the permissible financial penalties the commission may impose when public service corporations violate its directives (see also secion 19 of this article). Although the upper limit of $5,000 per violation has been rendered relatively trivial by inflation, the legislature may (under its inherent power and under section 6 of this article) provide additional, even criminal, penalties for such violations without transgressing either this section or the double jeopardy clause found in section 10 of Article II (*Haddad v. State*, compare the commentary on section 6).

SECTION 17

Nothing herein shall be construed as denying to public service corporations the right of appeal to the courts of the state from the rules, regulations, orders, or decrees fixed by the corporation commission, but the rules, regulations, orders, or decrees so fixed shall remain in force pending the decision of the courts.

Although the corporation commission exercises a blend of legislative, executive, and judicial powers in carrying out its regulatory responsibilities, this section authorizes the judicial branch to review commission actions (see *State ex rel. Corbin v. Arizona Corp. Commn.*). Statutes in effect since early statehood have authorized "[a]ny party in interest, or the attorney general on behalf of the state," to seek judicial review of commission orders and decisions (Laws 1912, ch. 90, section 67, now found as amended at Ariz. Rev. Stat. 40–254, 254.01). The Arizona courts have not been wholly consistent concerning the standard of review the courts should apply in reviewing commission actions; indeed, one commentator has described the judicial decisions as "muddled."[156] A number of decisions (starting with the first one to construe this article) have emphasized the technical nature of rate regulation questions, the "unwisdom and impracticality" of searching judicial review (*State v. Tucson Gas, Elec. Light & Power Co.*), and the commission's "range of legislative discretion" (*Simms v. Round Valley Light & Power Co.*). Other cases have taken a more aggressive stance, speaking of the reviewing courts' power to exercise *de novo* review of commission decisions (*Arizona Corp. Commn. v. Reliable Transp. Co.*), and their duty to make an

[156] Note, "Rate Decisions: Judicial Review of the Arizona Corporation Commission," *Arizona Law Review* 19 (1977), 488–503, esp. 489.

"independent judgment" and their power to reach an "independent conclusion" on the evidence (*Arizona Corp. Commn. v. Fred Harvey Transp. Co.*). A commentator has demonstrated that the *de novo* review label the Arizona courts have sometimes used is misleading in that it is "much narrower in scope than a completely new trial."[157] On commission determinations of fair value in particular, the courts have generally agreed that the courts may set aside a commission determination only if the commission has acted "unreasonably in that its finding has no substantial support in the evidence, is arbitrary or otherwise unlawful" (*Simms v. Round Valley Light & Power Co.*), such as by refusing to "consider all relevant factors" (*Arizona Corp. Commn. v. Arizona Water Co.*). The applicable statute currently provides that challengers to commission orders and rate decisions must "make a clear and satisfactory showing that the order is unlawful or unreasonable" (Ariz. Rev. Stat. 40–254.01 (E); see also 40–254 (E)).

The last clause of this section reflects a measure of commission independence by allowing its actions to take effect until the courts have reviewed them. A lower federal court held that a 1912 statute levying what it characterized as "enormous" penalties, when coupled with the last clause of this section, effectively denied meaningful judicial review and was invalid under the Fourteenth Amendment to the U.S. Constitution (*Van Dyke v. Geary*, 1914). Furthermore, this clause does not prevent a reviewing court, once it has set aside a commission denial of a rate increase as illegally confiscatory, from allowing the corporation involved to collect higher rates "pending the final determination of just and reasonable rates by the commission" (*Arizona Corp. Commn. v. Mountain States Tel. & Tel. Co.*).

SECTION 18

There is no section 18.

In the original constitution, this section provided simply that the corporation commissioners shall receive a salary of $3,000 per year, plus expenses, "until otherwise provided by law." It was repealed in 1970 at the same time section 13 was added to Article V, creating a new mechanism for setting salaries of elective state officers, including corporation commissioners.

SECTION 19

The corporation commission shall have the power and authority to enforce its rules, regulations, and orders by the imposition of such fines as it may deem just, within the limitations prescribed in section 16 of this article.

[157] Ibid., 494.

This section relates to the penalty provisions of section 16, but is potentially broader because, unlike the earlier section, it is not limited to public service corporations. As with section 16, the legislature may provide additional penalties, including criminal ones, without violating this section (*Haddad v. State*).

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Article XVI

Militia

SECTION 1

The militia of the state of Arizona shall consist of all able-bodied male citizens of the state between the ages of eighteen and forty-five years, and of those between said ages who shall have declared their intention to become citizens of the United States, residing therein, subject to such exemptions as now exist, or as may hereafter be created, by the laws of the United States or of this state.

SECTION 2

The organized militia shall be designated "The National Guard of Arizona," and shall consist of such organized military bodies as now exist under the laws of the territory of Arizona or as may hereafter be authorized by law.

SECTION 3

The organization, equipment, and discipline of the national guard shall conform as nearly as shall be practicable to the regulations for the government of the armies of the United States.

The idea of a militia of ordinary citizens to defend the organized polity dates back at least to colonial times, and the Arizona framers preserved it in this article. The limitation to "male" citizens in the first section seems anachronistic in this age of gender equality. This article should be read with Article V, section 3, which makes the governor "commander-in-chief" of the state military forces except when they are placed under federal control by federal law. Federal legislation adopted in 1903 organized the various state militias into a national guard, subjecting them to federal control in an emergency (32 Statutes at Large 775), which would, of course, supersede this article.

Article XVII

Water Rights

SECTION 1

The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the state.

Because of the importance of water in this arid state, it is not surprising that the framers of the constitution spent considerable time wrestling with various detailed proposals on the subject. Ultimately, however, they could agree to include only the two brief sections in this article.[158] This first section consitutionalizes the rejection, during the territorial period, of the English common law principle of water law that had been transported to the eastern United States. The fundamental idea of the riparian rights doctrine is that the right to use water is intimately associated with ownership of land bordering a body of water, among other things preferring the use of water on that riparian land. It is most commonly followed in more humid climes, where water is plentiful. By contrast, most of the western states, including Arizona, have generally followed a different water law doctrine, prior appropriation, which allocates rights to use water on a

[158] Goff, *Records*, 693–703, 765–772, 830; Leshy, "The Making of the Arizona Constitution," 53.

principle of priority of its use, without regard for land ownership or place of use.[159]

Although the Supreme Court has emphatically described this as an absolute prohibition on riparian water rights (*Brasher v. Gibson*), this section has received surprisingly little attention in reported judicial decisions. This is curious because the Arizona courts have sometimes applied a form of riparian water rights to groundwater, by according landowners some right to water found underneath their land. A comprehensive discussion of the muddled treatment this section has received in the Arizona courts is found in a recent law review article.[160]

SECTION 2

All existing rights to the use of any of the waters in the state for all useful or beneficial purposes are hereby recognized and confirmed.

This general confirmation of water rights presumably applies only to those "existing" at statehood and not to rights created after that time. Given the protection for "private property" in Article II, section 17, this section seems superfluous unless water rights are not considered the kind of "private property" addressed by that section, but no published judicial decision addresses this issue. Overall, this section has received little judicial attention; the Supreme Court has held that it does not prevent the legislature from restricting uses of land with the effect of making enjoyment of a water right more "inconvenient or expensive," at least if the restriction is "not necessary to the enjoyment of [the] water right" (*Hancock v. State*).

[159] See David Getches, *Water Law in a Nutshell,* 2d ed. (St. Paul, Minn.: West Publishing Co., 1990), 14, 19–22, 74–78.

[160] John D. Leshy and James Belanger, "Arizona Law Where Ground and Surface Water Meet," *Arizona State Law Journal* 20 (1988), 657, 700–707.

Article XVIII

Labor

This article reflects the substantial presence at the constitutional convention of advocates for the rights of labor. The Supreme Court has described the "prohibitions, mandates and abjurations" of this article as designed "to protect the rights of the laboring class from the evils which over the preceding century had eroded rights believed necessary to do justice between workmen and their employers" (*Kilpatrick v. Superior Court*). Two sections of this article—5 and 6—go beyond this scope to apply to tort actions generally.

SECTION 1

Eight hours and no more, shall constitute a lawful day's work in all employment by, or on behalf of, the state or any political subdivision of the state. The legislature shall enact such laws as may be necessary to put this provision into effect, and shall prescribe proper penalties for any violations of said laws.

This guarantee of a maximum eight-hour workday, a quite radical idea when included in the constitution, is limited to governmental employment. The direction that the legislature "put this provision into effect" means the guarantee is not self-executing, and the legislature can limit it to certain categories of employment (*City of Phoenix v. Yates*). While the Court has said that there is "no *right* to an eight hour day," it has generously interpreted a statute to provide for

compensatory time off for overtime to "accord with the spirit" of this section and avoid unjust enrichment to the state (*State v. Boykin,* emphasis in original).

SECTION 2

Child labor. No child under the age of fourteen years shall be employed in any gainful occupation at any time during the hours in which the public schools of the district in which the child resides are in session; nor shall any child under sixteen years of age be employed underground in mines, or in any occupation injurious to health or morals or hazardous to life or limb; nor for more than eight hours in any day.

Child labor was a contentious issue across the nation when the Arizona Constitution was framed, and inclusion of this section helped to put a prominent progressive stamp on the constitution. This section does not outlaw all child labor, but limits it to protect children's health, safety, and educational opportunities. As originally drafted, this section prohibited employing children under the age of sixteen "in any occupation at night," but in a reflection of changing mores the quoted phrase was deleted (and the caption added) in 1972. The section was first implemented by statute enacted in 1912 (now found, as amended, at Ariz. Rev. Stat. 23–230 through 242). It has not been interpreted in any reported judicial decision.

SECTION 3

It shall be unlawful for any person, company, association, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, association, or corporation shall be released or discharged from liability or responsibility on account of personal injuries which may be received by such servants or employees while in the service or employment of such person, company, association, or corporation, by reason of the negligence of such person, company, association, corporation, or the agents or employees thereof; and any such contract or agreement if made, shall be null and void.

This section should be read in conjunction with several other provisions in the constitution (e.g., Article II, section 31 and sections 4–8 of this article) that generally protect the right of workers injured on the job (as well as others) to recover compensation. Their collective thrust was, according to the Supreme Court, "so far as possible, to get away from the old common-law action of negligence and the rules governing it as between master and servant, and substitute therefor the doctrine that the industry must bear the burden of human, as well as material, wastage" (*Oatman United Gold Mining Co. v. Pebley*).

This particular section generally prohibits any employer from using its superior bargaining strength to extract from its employees a release of its liability for personal injuries caused by its negligence or that of its agents or employees. By simply declaring such agreements or contracts "null and void," this section prevents employers from frustrating the employer's liability and workers' compensation provisions in sections 7–8 of this article, as well as the right to sue for injuries protected by section 6 of this article and section 31 of Article II. Statutes and court decisions in other states had outlawed agreements condemned by this section, which was also similar "in purpose or effect" to a provision in the Federal Employers' Liability Act first enacted in 1908 (45 U.S. Code 55; see *Daniel v. Magma Copper Co.*), but the validity of such provisions under the federal Constitution was in doubt until shortly after the Arizona Constitution was drafted (see *Chicago B. & Q. R.R. v. McGuire*).

This section's protection applies "only to work-related injuries," and thus does not protect an employee-at-will from being discharged for threatening to sue an employer for a non-job-related injury incurred at the employer's company hospital (*Daniel v. Magma Copper Co.*). It also does not prevent the legislature from giving an employee a "free and voluntary option" to choose an alternative means of compensation for his work-related injury (*Industrial Commn. v. Frohmiller*), nor does it prevent enforcing a collective bargaining agreement requiring arbitration of certain claims (*Payne v. Pennzoil Corp.*).

SECTION 4

The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

This and the following section stem from the evolution of tort law in the courts in the decades preceding the Arizona constitutional convention. Consciously or not, courts in nearly all states erected two major obstacles to an employee seeking to recover compensation for injuries received on the job.[161] One was the "fellow servant" doctrine addressed in this section, which generally barred the employee from recovering compensation from the employer for injuries caused by fellow employees. That doctrine, particularly obnoxious to workers, was "forever abrogated" by this section; the second obstacle was dealt with in the next section. This section has never been interpreted in any published court decision.

[161] See generally Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67 (1967), 50.

SECTION 5

The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

This section addressed the second major roadblock to employee recovery of compensation: the common law doctrine that prohibited any recovery for the employer's negligence whenever the employee was found to have assumed the risk of injury or to have herself been negligent in the slightest degree. This doctrine, according to the Supreme Court, "slipped casually into the common law as a defense to the master's wrong irrespective of the degree of negligence of the servant and of the magnitude of the risk to which the master exposed him" (*Kilpatrick v. Superior Court*). This section does not abolish those defenses, but rather makes them a question of fact for the jury to decide "in all cases whatsoever." Apparently drawn from the 1907 Oklahoma Constitution (Article 23, section 6), the only comparable state constitutional provision, it expresses, in the words of the Supreme Court, the "belief of Arizona's founders . . . that juries composed of ordinary people brought together under the common law system—and not judges or legislators—were to be trusted to render individualized justice under the facts of each case" (*City of Tucson v. Fahringer*). It overlays and reinforces, in cases where contributory negligence of assumption of risk are at issue, the right to trial by jury protected by Article II, section 23.

The complex tale of the adoption and implementation of this provision has been well told by Judge Fidel;[162] this commentary sketches only the high points. The framers' intent was to license juries to weigh comparative negligence by depriving judges of their common law power to direct verdicts where there was sufficient evidence of assumption of risk or contributory negligence (e.g., *Inspiration Consol. Copper Co. v. Conwell; Brannigan v. Ray buck*). Despite its location in the labor article, "the language is too broad and comprehensive" to limit its application to labor cases; it therefore applies in all cases where the named defenses may be mounted (*Morenci S. Ry. v. Monsour*). It is immaterial for purposes of applying this section whether the plaintiff's alleged contributory negligence is ordinary or gross negligence (*Zancanaro v. Hopper*).

The defenses in question are submitted to the jury only if "it is first shown that there was negligence on the part of the defendant" (*Moore v. Southwestern Sash & Door Co.*); otherwise, the court may "direct a verdict for the defendant" (*Texas-Arizona Motor Freight, Inc. v. Mayo*). Similarly, the jury is not asked to determine whether plaintiff's contributory negligence is a bar unless there is "some substantial evidence from which a reasonable man might have inferred"

[162] Noel Fidel, "Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence," *Arizona State Law Journal* 23 (1991), 1, 12–19. For an earlier article addressing these questions, see Note, "Contributory Negligence—Confusion Out of Compromise," *Arizona Law Review* 13 (1971), 556–65.

that plaintiff was guilty of such negligence (*Humphrey v. Atchison T. & S.F. Ry.*). Likewise, a jury may not be instructed on assumption of risk unless the evidence shows that the plaintiff had "actual knowledge" of the "specific risk" that resulted in his injury or death (*Gonzales v. Arizona Pub. Serv. Co.*, emphasis deleted). Once such questions are submitted to the jury, it is "given the most deference in weighing evidence, drawing inferences, and reaching conclusions" on them (*Orme School v. Reeves*).

A key to implementing this section is the instructions the trial judge gives to the jury at the conclusion of the evidence. This section does not govern jury instructions where the defenses covered by this section are not available (*Gosewich v. American Honda Motor Co.*). For many years the Arizona courts have vacillated over whether the trial judge should instruct the jury that it "should" or "may" find for defendant if it determines the plaintiff to be contributorily negligent (or to have assumed the risk of injury), but the Supreme Court has said that an instruction that the jury "must" find for defendant in such circumstances is improper (e.g., *Lay ton v. Rocha*).[163] The courts have also not settled whether the trial court can grant a new trial when the jury's verdict seems against the evidence on contributory negligence (cf. *Lay ton v. Rocha,* no, with *General Petroleum Corp. v. Barker,* yes). A trial court cannot require a jury that finds contributory negligence to "specify the amount of such negligence," which would allow the court to reduce plaintiffs recovery (*Gunnerson v. Gunnerson*).[164]

This section does not prohibit the legislature from abolishing the defenses of assumption of the risk or contributory negligence by adopting (as the legislature did in 1984) comparative negligence as the general standard for determining tort liability (*Hall v. A.N.R. Freight Sys., Inc.*).[165] This comparative negligence statute should diminish the number of cases applying this section. It also does not prevent the legislature from requiring plaintiffs to submit claims involving alleged contributory negligence to an advisory panel for nonbinding findings before submitting the case to the jury (*Eastin v. Broomfield*).[166] And it does not

[163] See Fidel, "Political Institution," 38–44. On a related matter, the U.S. Supreme Court once held this section inapplicable to federal court lawsuits heard under diversity of citizenship jurisdiction (*Herron v. Southern Pacific Co.*), but that result should no longer obtain because of more recent U.S. Supreme Court decisions (principally *Erie R.R. v. Tompkins*). See Fidel, "Political Institution," 56–60; David A. Paige, "Arizona Constitutional Law Derailed in Federal Diversity Court: A Reevaluation of *Herron v. Southern Pacific Co.*," *Arizona Law Review* 16 (1974), 208–34.

[164] See Fidel, "Political Institution," 46–47.

[165] The Court had reached the same conclusion in *dictum* nearly seven decades earlier (*Superior & Pittsburg Copper Co. v. Tomich*). See Fidel, "Political Institution," 17, 45–46; Reed C. Tolman, "Comparative Negligence in Arizona," *Arizona State Law Journal* (1979), 581–93.

[166] See Barbara F. Klein, "A Practical Assessment of Arizona's Medical Malpractice Screening System," *Arizona State Law Journal* (1984), 335–67; Jona Goldschmidt, "Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel," *Arizona State Law Journal* 23 (1991), 1013–1109.

prevent a trial court from bifurcating the trial to determine liability before addressing damages (*Rosen v. Knaub*). On the other hand, a statute immunizing a tavern owner from liability for negligently serving alcoholic beverages to an intoxicated person who "knew of [his] impaired condition" violates this section, because it effectively takes the case from the jury "if the facts establish the defense of contributory negligence—that the plaintiff was drinking" (*Schwab v. Matley;* see also *City of Tucson v. Fahringer*).[167]

SECTION 6

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.

This much-litigated section overlaps Article II, section 31, which prohibits any "law . . . limiting the amount of damages to be recovered for causing death or injury of any person." Except for its reference to "death," that section generally tracks the second part of this one; but the first part of this one prohibits abrogation of the right of action itself. Both sections stem from a proposal introduced by a labor representative to protect employees. On the convention floor, however, the protection was expanded to cover all injuries, not simply those arising out of employment.[168] As the Supreme Court has put it, the idea "evolved from a provision to serve the parochial interests of labor" to one that guaranteed the "right of action for damages . . . to all persons" (*Kenyon v. Hammer*). The "vital language" of the second clause of this section "was considered of such importance that it was reiterated in a separate section and placed in Article II" (*Kilpatrick v. Superior Court*); the two provisions "were intended to guarantee the same basic right" (*Kenyon v. Hammer*).[169]

These sections bear some resemblance to provisions in many other state constitutions that guarantee "open courts," which have often been interpreted to

[167] For commentary on the evolution of so-called dramshop (tavern) liability in Arizona, discussing this section and sec. 6 of this article but written before the *Fahringer* decision, see Diane M. Evans, "Dram Shop Civil Liability in Arizona," *Arizona State Law Journal* (1984), 369–96; Douglas E. Erickson, "Undermining the Arizona Constitution: Recent Developments in Dramshop Law," *Arizona State Law Journal* 20 (1988), 263–83.

[168] Goff, *Records,* 885, 897, 1147 (proposition 50). A similar provision is found in the Wyoming Constitution (Art. X, sec. 4), and the Oklahoma Constitution has also been referred to as its source (see *Bryant v. Continental Conveyor & Equip. Co.*, dissenting opinion).

[169] For commentary on this section, see Kathleen Coughenour, "The Right to Recover Damages: Tort Reform and the Arizona Constitution," *Arizona State Law Journal* 20 (1988), 227–40; Evans, "Dram Shop Civil Liability"; and Erickson, "Undermining the Arizona Constitution."

protect the right to sue,[170] but the Arizona provisions are "stronger and more explicit" (*Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*). Because they severely limit the legislature's ability to reform the common law of tort liability, they have provoked continuing controversy. In 1986 and 1990, attempts were made to limit their effect by authorizing the legislature to limit damage awards and causes of action in ordinary negligence cases (the 1986 amendment) and to adopt a no-fault auto insurance scheme (the 1990 amendment). Both failed; the former by a close margin, the latter by better than four to one.

The Supreme Court recently described this section as "intended to take the right to justice out of executive and legislative control, preserving the ability to invoke judicial remedies for these wrongs traditionally recognized at common law" (*Boswell v. Phoenix Newspapers, Inc.;* see also *Alabam's Freight Co. v. Hunt*). Although *dicta* in a few early cases suggested that this section protects only negligence actions (e.g., *Landgraff v. Wagner*), more recent cases make clear that its "simple, explicit and all-inclusive" language protects all causes of action for injuries (*Kilpatrick v. Superior Court*) that were "cognizable by law" when the constitution was adopted (*Morrell v. City of Phoenix*). Thus it applies to intentional torts and those based upon liability without fault (such as defamation) as well (*Boswell v. Phoenix Newspapers, Inc.*).

Moreover, this section permits the "evolution of common-law actions to reflect today's needs and knowledge"; that is, the common law rights preserved by this section were "not frozen as of 1912" or "limited to the elements and concepts of particular actions which were defined in our pre-statehood case law" (*id.*). Thus it protects the right of a plaintiff in a defamation action to recover damages for emotional distress, even though the Arizona courts did not reach that result until a decade after statehood (see *Conard v. Dillingham*). Following this lead, a court of appeals has ruled that this section protects causes of action based upon a hospital's "negligent supervision" of its staff physicians (*Humana Hosp. Desert Valley v. Superior Court*), even though the courts first recognized the cause of action in 1972 (*Purcell v. Zimbelman*).

But the breadth of protection furnished by this section has not been finally settled. After *Boswell* the Supreme Court upheld, by a 3–2 margin, a statute generally prohibiting causes of action for products liability more than twelve years after the product is first sold for use or consumption (*Bryant v. Continental Conveyor & Equip. Co.*), reasoning that the cause of action for strict products liability was not recognized until 1967 (see *Shannon v. Butler Homes, Inc.*). The *Bryant* majority acknowledged its inconsistency with *Boswell* but did not overrule it; lower courts have tended to follow *Bryant* (e.g., *Estate of Hernandez v. Board of Regents*), sometimes disapproving their own prior decisions in the

[170] See generally Note, "Constitutional Guarantees of a Certain Remedy," *Iowa Law Review* 49 (1964), 1202. Art. n, sec. 11 is a modified version of an "open courts" provision.

process (see *Hays v. Continental Ins. Co.*, disapproving *Franks v. United States Fidelity & Guar. Co.*).

A number of earlier cases had held that this section does not protect causes of action that did not exist in 1912 (e.g., *Rail N Ranch Corp. v. State; Lewis v. Swenson*). Similarly, if a common law right of action had been extinguished prior to 1912, such as where a territorial statute adopting a city charter had immunized the city from liability, this section did not revive it (*Morrell v. City of Phoenix;* see also *Sandbak v. Sandbak*). A cause of action based on a pre-1912 statute is not protected by this section and "can be granted or withheld at the pleasure of the legislature" (*Halenar v. Superior Court*).

Where this section does not apply, the legislature has authority to allow recovery of damages on such terms as it sees fit (*Industrial Commn. v. Frohmiller*). Even where it does apply, the legislature retains some power to "regulate" causes of action "so long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action"; but it may not regulate so heavily "as to effectively deprive the claimant of the ability to [sue]" (*Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*). Numerous cases apply this distinction between regulation and abrogation; for example, a statute is regulatory if it "merely furnishes an alternative" means of recovery for the injured person to "voluntarily accept or reject" (*Ruth v. Industrial Commn.*). This case and a number of others dealing with the legislature's power to prescribe alternative remedies stem from the interface between this section and section 8 of this article (workers' compensation) and are discussed in the commentary on that section. Statutes requiring lawsuits to be brought within a specific time after injury are a proper regulation of the right to sue under this section (*Martinez v. Bucyrus-Erie Co.*), unless they are applied in such a way as to bar a suit before the potential plaintiff knows of her injury (e.g., *Anson v. American Motors Corp.; Kenyon v. Hammer,* but see *Bryant v. Continental Conveyor & Equip. Co.*). Other restrictions that "effectively bar the courthouse door" to injured persons have been struck down (e.g., *McKinney v. Aldrich*).

The prohibition on limiting damages contained in this section and Article II, section 31 has sometimes been applied to all causes of action, whether based on statute or the common law, whenever recognized (*Inspirational Consol. Copper Co. v. Mender, Halenar v. Superior Court;* but see *Hays v. Continental Ins. Co.*). Other parts of the constitution come into play here, however; the legislature may limit damages in workers' compensation and employer liability statutes adopted under sections 7 and 8 of this article, so long as the injured employee is provided a reasonable election of remedies (*Alabam's Freight Co. v. Hunt*). The damage limitation prohibitions do not prevent the legislature from requiring the jury to consider a nonparty employer's fault in assessing the liability of nonemployee defendants who contributed to the plaintiff's work-related injuries, even though the employer has a statutory lien on the employee's recovery from the defendants, and thus the amount the plaintiff receives may thereby be

diminished (*Dietz v. General Elec. Co.*). This result was justified as "part of the trade-off contemplated" in section 8 of this article, namely, "common law tort rights for no-fault workers' compensation benefits" (*id.* see also *Aitken v. Industrial Commn.*).

The prohibition on limiting damages does not apply to punitive damages because by definition they do not "compensate for actual injury" (*Downs v. Sulphur Springs Valley Elec. Coop., Inc.*). It also does not prevent the legislature from abolishing limitations on the introduction of evidence about the plaintiffs actual loss, where the jury remains free to ignore such evidence in determining damages (*Eastin v. Broomfield*). And it does not prevent the legislature from providing for periodic rather than a lump sum payment of damages for future economic loss in certain cases, because this still allows compensation for actual loss (*Smith v. Superior Court*).

SECTION 7

To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the legislature shall enact an employer's liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

This section is another expression of the framers' concern with workers killed or injured on the job, to be read in tandem with sections 3–6 and 8 of this article. It directs the legislature to enact a law making employers liable for accidental death or injury of employees in all "hazardous" occupations if the accident was due to "a condition or conditions" of the occupation, rather than "caused by the negligence" of the employee. Early on, the Supreme Court described it as expressing an "advanced as well as humane public policy, one in consonance with the present day enlightened thought and conscience" (*Consolidated Ariz. Smelting Co. v. Ujack*).

There is considerable overlap between this section's mandate of an employer's liability act and the next section's mandate of a workers' compensation law. This section is limited to "hazardous occupations"; section 8 was originally similarly limited, but was expanded in 1925 to cover workers "engaged in manual or mechanical labor" (see the commentary on section 8). Furthermore, this section's coverage of injuries "caused by any accident due to a condition or conditions of such occupation" is less extensive than section 8's application to accidental injuries "arising out of and in the course of . . . employment" (*Arizona*

Eastern R.R. Co. v. Matthews).[171] Other differences between the two sections are discussed further below in this commentary and that on section 8.

The first state legislature enacted an employer's liability law that has remained in force ever since without major amendments (see Ariz. Rev. Stat. 23–801 through 808). This section deems a number of specific occupations (i.e., "mining, smelting, manufacturing, railroad or street railway transportation") to be hazardous. The implementing statute goes on to identify several kinds of labor practices as hazardous regardless of the nature of the business; for example, working with explosives, operating elevators, and using electrical current (see Ariz. Rev. Stat. 23–803). One commentator described the statute as "sufficiently broad to encompass a large variety of employments."[172] Judicial treatment of the coverage of this section and the statute has, however, followed a tortuous path.

Coverage questions may be subdivided into two parts. The first is whether the legislature can designate certain conditions as hazardous by statute regardless of whether the occupation itself is deemed hazardous by this section. The Supreme Court has answered this question in the affirmative, although it has cautioned that occupations hazardous in fact, but not deemed so either by this section or the statute, are not covered (*United E. Mining Co. v. Hoffman*). The same decision said that this section and the statute cannot extend to "all kinds of labor, both hazardous and nonhazardous," and the Court has also narrowly construed a statutory extension of this section's coverage (*Feffer v. Bowman*). The second coverage issue is whether employees engaged in occupations deemed hazardous by this section or its implementing statute are covered even when their injuries do not arise from the conditions that make the occupation hazardous, such as when a file clerk at a mine site is injured in the office. The Supreme Court has waffled badly on this question, rendering four inconsistent decisions within a span of seven years shortly after statehood (*Arizona Eastern R.R. Co. v. Matthews', Consolidated Ariz. Smelting Co. v. Egich; United E. Mining Co. v. Hoffman', Phoenix–Tempe Stone Co. v. Jenkins*). Recently a court of appeals has helpfully tried to reconcile the results of these cases this way: If an industry has been declared hazardous by this section or the statute, any injury that results from a condition of that employment is covered; but if the industry has not been specifically declared hazardous, the injury is not covered unless it stems from "the specific hazardous aspects of the employment which the legislature has considered to create a hazardous 'zone of danger'" (*Henderson v. Gardner Mechanical Contractors*). *Henderson* rejected liability under this section when an estimator for a commercial air conditioning contractor (who occasionally

[171] The statute enacted to implement this section, however, seems to blur this difference (see Ariz. Rev. Stat. 23–805).

[172] Morris K. Udall, *Alternative Remedies for Industrial Injuries* (Phoenix: *Arizona Weekly Gazette,* 61 pp., undated, but published in approximately 1956 because it surveys Arizona court decisions through 1955), p. 53.

climbed twenty-foot ladders on the job, a practice described as hazardous in the statute) slipped and fell while walking down an office aisle way.

Unlike the next section, this section immunizes the employer from liability if the accident is "caused by the negligence of the employee"; the Court has interpreted this to bar recovery only if the employee's negligence is the sole cause of the injury (*Southwest Cotton Co. v. Ryan;* see also *Consolidated Ariz. Smelting Co. v. Egich*). The implementing statute provides that the employee's contributory negligence "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee" (Ariz. Rev. Stat. 23–806). The statute does not, strictly speaking, call for comparative negligence, even though the Supreme Court once described it that way (*Feffer v. Bowman*). The negligence of the parties is not compared because the employer is strictly liable without fault under this section (*Grasty v. Sabin;* see also *Inspiration Consol. Copper Co. v. Mendez*); whether the employer is negligent is "immaterial to the inquiry" (*Arizona Copper Co. v. Burciaga*). Assumption of risk by the employee is not a defense under this section (*Inspiration Consol. Copper Co. v. Mendez*).

The remedy authorized by this section does not displace the ordinary common law remedy of injured employees, a remedy facilitated by sections 4 and 5 of this article, but that, unlike this section, requires a showing of negligence on the part of the employer. The employee may also have a remedy in workers' compensation under section 8 of this article. In some situations, then, an employee may elect to proceed (1) under this section, (2) under common law remedies as modified by sections 4 and 5 of this article, or (3) under workers' compensation as provided in section 8 of this article (*Consolidated Ariz. Smelting Co. v. Ujack*). An injured worker who elects to sue under the statute implementing this section is not limited to the prescribed amount of compensation set out in the workers' compensation act for the particular injury involved (*Myers v. Rollette*). But pursuing one remedy can bind the worker in a subsequent pursuit of another remedy (*Nunez v. Arizona Milling Co.*). The employee's right to choose among these remedies is, moreover, subject to very significant qualifications (see the commentary on section 8).

It has been suggested that the remedy provided by the employer's liability law "is widely available [but] rarely used."[173] Judging from the number of reported cases, at least the second conclusion is correct. Presumably this is because workers' compensation is routinely available in most industries and occupations covered by this section and its implementing legislation, and is rarely rejected by workers in advance of injury (see commentary on next section). Another reason for the relatively limited use of this section is that, as another commentator has

[173] Ibid., 53.

noted, many of the hazardous occupations it covers "are capable of being considered interstate in character" and thus subject to preemptive federal law.[174]

SECTION 8

Workmen's compensation law. The legislature shall enact a workmen's compensation law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the state, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer or any person employed by said employer, acting in the scope of his employment, as provided by this constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the state of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the state of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such workmen's compensation law prior to the injury, except that if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such employee may, after the injury, exercise the option to accept compensation or to retain the right to sue the person who injured him.

The percentages and amounts of compensation provided in house bill no. 227 enacted by the seventh legislature of the state of Arizona, shall never be reduced nor any industry included within the provision of said house bill no. 227 eliminated except by initiated or referred measure as provided by this constitution.

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[174] Ray Jay Davis, *Arizona Workmen's Compensation* (Tucson: Arizona Law Institute, University of Arizona College of Law, 1980), 12. The Supreme Court has said that the act is not available to employees in interstate commerce covered by the Federal Employer's Liability Act (45 U.S.C. 51) (*Saxton v. El Paso & Southwestern R.R.,* following the U.S. Supreme Court decision in *New York Cent. R.R. v. Winfield*).

This is a companion to the previous section. At the time the Arizona Constitution was framed, the notion of creating a comprehensive scheme to compensate workers for work-related injuries was just gaining a foothold in American law. New York had been the first state to adopt such a scheme by statute in 1910, shortly before the Arizona Constitution was drafted, a fact noted on the floor of the Arizona convention.[175] Arizona became the third state to adopt the idea (Wisconsin having followed New York in 1911), and the first and one of the few states to constitutionalize it; workers' compensation was rapidly accepted across the country within a few years.[176]

The original version of this section was nearly identical to the current version down to the clause beginning "and, provided further" in the middle of the first paragraph, except that it applied only to workers engaged in "manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous," and did not clearly indicate whether public as well as private employment was covered. A statute enacted in 1912 to implement it (Laws 1912, 1st Sp. Sess., ch. 14) contained the same list of "especially dangerous" employments as were adopted in the act implementing section 7 of this article; made the employer liable for employee injury without fault; established a schedule of compensation for injury or death, generally based on an employee's prior earnings; and left disputes under it to be resolved by arbitration, submission to the attorney general, or in the courts. The Supreme Court early on interpreted it to allow the injured employee to elect whether to pursue workers' compensation or common law remedies *after* the injury, in order to protect the worker's right to sue in section 6 of this article *(Consolidated Ariz. Smelting Co. v. Ujack)*. Guaranteeing the right to choose compensation under this section or a lawsuit after injury had one ironic result; the surviving dependent of a worker who was killed without making the choice had no remedy because the right to choose "died with him" *(Behringer v. Inspiration Consol. Copper Co.)*.

Private employers disliked this system because, among other things, it made compensation "compulsory on the part of the employer, and optional on the part of the employee" *(Consolidated Ariz. Smelting Co. v. Ujack)*. Specifically, it gave the employee the option to decide, based upon the circumstances of the injury and the extent to which the employee might be found negligent, whether to pursue (1) the relatively certain but limited compensation under the workers' compensation system, (2) the less certain but potentially larger recovery under common law remedies as modified by sections 3–5 of this article, or (3) depending upon the occupation involved, a remedy under the employer's liability act.

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[175] Goff, *Records,* 543–49. The pioneering New York law would be held unconstitutional within a year (*Ives v. South Buffalo Ry.*).

[176] See Lawrence M. Friedman, *A History of American Law,* 2d ed. (New York: Simon & Schuster, 1985), 682; Arthur Larson, "The Nature and Origins of Workmen's Compensation," *Cornell Law Quarterly* 37 (1952), 206–34.

Lavishly detailed proposals to replace this section with a new article creating a comprehensive and mandatory workers' compensation system as a substitute for common law and other remedies were promoted by employers and placed on the ballot by initiative petition in 1916 and 1918. Both were defeated. In 1921 the legislature tried a similar approach by statute, but the Supreme Court struck it down almost immediately; reaffirming its earlier decision in *Ujack,* the Court said that this section and section 6 made workers' compensation an "additional remedy" rather than simply "substitutionary" for the common law *(Industrial Commn. v. Crisman*).

Following this turmoil, a compromise was finally crafted between the warring interests of labor and management in 1925, and the voters approved an amendment to this section. In an unusual twist, the compromise included a statute as well as the amendment; the statute was expressly made contingent upon the amendment being approved, and the last paragraph of the amendment effectively incorporated part of the statute.[177] The compromise is described in what follows.

Level of Benefits

While employers were comforted by the limitation of workers' compensation benefits to a statutory schedule, the last paragraph of this section prevents the legislature from reducing the level of benefits without the approval of the people at large, acting through an initiative or referendum. The legislature may increase benefits above the level set in 1925 *(State Compensation Fund v. De La Fuente*), but it may also hold the scheduled level steady "while inflation saps its buying power" *(McPeak v. Industrial Commn.*). The court of appeals in *McPeak* withheld its endorsement of that miserly practice, noting that Arizona is one of only a handful of states that have not adopted a sliding scale for compensation tied to the state's average weekly wage.[178]

Scope of Coverage

For the benefit of employees, the 1925 compromise extended coverage of workers' compensation to include public employment, a significant expansion at a time when the prevailing common law doctrine was that the government was immune from tort suits (see, e.g., *Stone v. Arizona Highway Commn.*). Even more important, the previous limitation to "especially dangerous" private employments was repealed. This limitation (and its counterpart in section 7, applying only to

[177] This unusual procedure was upheld by the Supreme Court shortly after the amendment was adopted (*Alabam's Freight Co. v. Hunt*). For a comprehensive review of these developments, see Victor DeWitt Brannon, "Employers' Liability and Workmen's Compensation in Arizona," *University of Arizona Bulletin,* 5, no. 8 (Nov. 1934).

[178] See Arthur Larson, *Workmen's Compensation* (New York: Matthew Bender, 1987), sec. 60.43.

"hazardous" occupations) grew out of a concern that the U.S. Supreme Court would hold broader schemes inconsistent with the due process clause of the Fourteenth Amendment, as interfering with employers' property rights and employees' freedom of contract. This concern was not fanciful; while the statute implementing section 7 of this article was sustained by the U.S. Supreme Court in 1919, it was by a bare 5–4 margin, with the majority justifying its "burden of cost to industry" on the basis of its "hazardous nature" (*Arizona Copper Co. v. Hammer*), which implied that extending liability without fault to nonhazardous employments might not survive. Within two years, however, the Court took a more relaxed view and upheld New York's compulsory workers' compensation system even though it covered broad categories of occupations beyond those deemed hazardous (*Ward v. Krinsky*). That decision cleared the decks for the 1925 compromise to expand coverage of this section; shortly after it was adopted, the Arizona Supreme Court, quoting extensively from the *Krinsky* decision, upheld it against federal constitutional attack (*Alabam's Freight Co. v. Hunt*).

Although the 1925 amendment to this section did not specify the categories of private employment to which workers' compensation was extended (merely authorizing extension to "such private employments as the legislature may prescribe"), the companion statute contained such a specification; the last paragraph of this section was included to prevent narrowing the scope of that statutory coverage "except by initiated or referred measure as provided by this constitution." The 1925 compromise also made surviving dependents of a worker who was killed eligible to collect benefits.

Election of Remedies

The 1925 amendment also added the last half of the first paragraph, which established the presumption that employees have elected to be covered by workers' compensation unless they reject such coverage "prior to the injury." One commentator has called this a "silent election"; without an affirmative notice of rejection in advance of injury, the employee is generally "conclusively presumed to have accepted compensation as his exclusive remedy and to have waived his rights to all other remedies."[179] The amendment's text offers an explanation, namely, "to assure and make certain a just and humane compensation law" to relieve workers from the need to pursue "burdensome, expensive and litigious remedies" that produce "uncertain and unequal compensation."

The choice among remedies can be critical. From the worker's perspective, the primary advantages of using the system created in this section are that fault is irrelevant and recovery relatively more swift and certain than pursuing other remedies. (The companion statute to the 1925 amendment created an

[179] Udall, *Alternative Remedies,* sec. 2.1.

administrative tribunal—the industrial commission—to decide claims and make awards as a substitute for "ordinary judicial proceedings with their well known formality, delay, and cost"; *Red Rover Copper Co. v. Industrial Commn.*) The disadvantage is that the amount of recovery is controlled by the statutory schedule and is generally substantially less than might be available under common law; for example, damages for pain and suffering and other injuries that "do not lessen the employee's ability to earn wages" are generally not recoverable under workers' compensation (*Shaw v. Salt River Valley Water Users' Assn.*). In short, as the Supreme Court has put it, "[b]oth employer and employees gain and lose something by this shift to workmen's compensation" (*Ohlmaier v. Industrial Commn.*).[180]

Most workers, whether out of ignorance or conscious choice, choose not to reject coverage; "instances of advance rejection are rare."[181] The employee must be given the opportunity to make a "free and voluntary" election of remedies in advance of injury "uninfluenced by intimidation, fraud or coercion of any nature whatsoever"; otherwise, the employee may pursue common law remedies (*Red Rover Copper Co. v. Industrial Commn.*). Similarly, if an employer has failed to provide her employees with workers' compensation insurance, the employee can sue under the statute implementing this section or can bring an action under common law (*Robles v. Preciado*). Where the right to pursue other remedies has been preserved, an employee's acceptance of workers' compensation benefits usually constitutes a waiver of it (*Anderson v. Industrial Commn.*).

Even though it must be exercised in advance of injury, the employee's choice among remedies satisfies section 6 of this article, which prohibits abrogation of the right to sue for recovery of damages. But the private employee must be given a choice; a statute that denies private employees the right to reject workers' compensation violates the right to sue that section 6 "imbedded" in the constitution (*Alabam's Freight Co. v. Hunt*). For workers in the public sector, however, workers' compensation is mandatory under the 1925 amendment. This lack of choice is justified, the Supreme Court has explained, because governmental employees had no right to sue at common law as a result of prior court decisions immunizing state and local government from suit for employee injuries sustained "in the performance of a governmental function" (*Industrial Commn. v. Navajo County,* emphasis deleted). This justification for mandatory coverage for public employees was removed when the Supreme Court generally abolished the government's common law immunity from tort suits (*Stone v. Arizona Highway Commn.*); nevertheless, the attorney general has opined that giving public employees the right to elect to pursue a common law remedy would require amendment of this section (Op. Atty. Gen. 64–12).

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[180] Ibid., sees. 1, 10; see also Note, "Workmen's Compensation: Arizona's Exclusive Remedy," *Arizona State Law Journal* (1974), 485.

[181] Udall, *Alternative Remedies,* sec. 10.

Recovery from Third Parties or Fellow Employees—1980 Amendment

Besides the employer and the employer's workers' compensation insurance carrier, two other classes of defendants may be available to provide compensation to an injured worker—third parties and fellow employees. The legislature may give a worker the right, after injury, to elect between workers' compensation and suing a third party allegedly causing the injury, but no double recovery will be allowed (*Moseley v. Lily Ice Cream Co.;* see also *State ex rel. Industrial Commn. v. Pressley*). For a time, double recovery was possible when the injury was caused by a fellow employee, as a result of a 1970 decision of the Supreme Court holding that section 6 of this article preserved the injured employee's right to sue a fellow employee for the latter's negligence, notwithstanding the employee's right to seek compensation under this section for the same injury (*Kilpatrick v. Superior Court*). An attempt to overturn this decision by statute was promptly rejected by the Supreme Court (*Halenar v. Superior Court*).

The results in *Kilpatrick* and *Halenar* were effectively reversed by a 1980 amendment to this section, which added the caption and made two changes. The first specified that a worker who elected to litigate rather than pursue the workers' compensation remedy could sue not only the employer but also "any person employed by said employer, acting in the scope of his employment." Although cleverly cast in positive terms, it backhandedly prevented employees who did not affirmatively reject workers' compensation prior to injury from suing their fellow employees as well as their employer. That change was made to the part of this section dealing with "private" as opposed to "public" employment, but a court of appeals has held (after examining ballot arguments submitted on the 1980 amendment) that the intention "was to bar double recoveries by all injured workers covered by the act, whether they be public or private employees" (*Bussanich v. Douglas*).

The second change made in 1980 cut back somewhat on the 1925 amendment requiring an election before injury, by adding the language in the last clause of the first paragraph beginning "except that if." It restores the employee's right to elect to sue *after* injury where the injury results from circumstances indicating an employer's "wilful disregard of the life, limb, or bodily safety of employees." The Supreme Court has recently ruled that the jury rather than the trial judge should decide whether an injury was the result of "wilful" misconduct under this amendment (*Bonner v. Minico, Inc.*, reconciling and modifying prior decisions).

Other Issues

This section "in no way abridge[s]" the legislature's inherent power to act (*Atkinson, Kier Bros., Spicer Co. v. Industrial Commn.*), and therefore it does not by implication prevent the legislature from requiring employers to take additional steps to compensate injured workers (*Home Accident Ins. Co. v. Industrial Commn.*).

Nor does it prevent legislative extension of workers' compensation coverage beyond this section, such as by widening the scope of "accident" beyond that comprehended in this section (*Goodyear Aircraft Corp. v. Industrial Commn.,* modifying and reconciling prior cases), or by extending coverage to workers not "engaged in manual or mechanical labor" (*Atkinson, Kier Bros., Spicer Co. v. Industrial Commn.*). Originally the Court regarded the legislature's decision to provide compensation for workers disabled by occupational disease rather than by accident as an extension of this section (*Industrial Coram, v. Frohmiller*), but more recently it has held that this section mandates such compensation because its framers intended that "industry be made to compensate for the human cost of producing goods and materials" (*Ford v. Industrial Commn.,* explaining and reconciling prior decisions).

Workers protected by expansions in coverage beyond the strict limits of this section must still elect in advance of injury to reject workers' compensation in order to retain the right to seek common law judicial remedies, at least where no common law remedy existed for such injuries when the constitution was adopted (*Industrial Commn. v. Frohmiller*). But even where no election is made, a court of appeals has held that section 6 of this article protects the right of an injured worker to sue his employer's workers' compensation insurance carrier for the tort of bad faith, because that is a "separate and distinct injury from the original industrial injury" covered by this section (*Franks v. United States Fidelity & Guar. Co.*). Section 6 has also been used to strike down a statute of limitations on claims by surviving spouses for workers' compensation death benefits that could effectively bar the claim for compensation before it arose (*Alvarado v. Industrial Commn.*). Furthermore, the Supreme Court has recently allowed an employee to pursue common law remedies for a supervisor's alleged sexual harassment, rejecting the argument that workers' compensation was the employee's exclusive remedy, because the acts in question were not "accidents" within the meaning of the applicable workers' compensation statutes (*Ford v. Revlon, Inc.*).

Available treatises discuss the scores of decisions reviewing the industrial commission's administration of the compensation system contained in this section and its implementing legislation.[182]

SECTION 9

The exchange, solicitation, or giving out of any labor "black list," is hereby prohibited, and suitable laws shall be enacted to put this provision into effect.

This section prohibits a practice apparently rather common when the constitution was drafted, in which employers attempted to stifle workers' efforts to

[182] See, e.g., Davis, *Arizona Workmen's Compensation.*

organize into unions by circulating among each other so-called black lists of union organizers and sympathizers.[183] This section has never been interpreted by the courts in any published decision. A law was first adopted by initiative petition in 1915 to implement this section; it was recently rewritten and is now found at Ariz. Rev. Stat. 23–1361, 1362.

SECTION 10

No person not a citizen or ward of the United States shall be employed upon or in connection with any state, county or municipal works or employment; provided, that nothing herein shall be construed to prevent the working of prisoners by the state or by any county or municipality thereof on street or road work or other public work and that the provisions of this section shall not apply to the employment of any teacher, instructor, or professor authorized to teach in the United States under the teacher exchange program as provided by federal statutes enacted by the congress of the United States or the employment of university or college faculty members. The legislature shall enact laws for the enforcement and shall provide for the punishment of any violation of this section.

This section's limitation on alien labor in public employment provoked considerable controversy at the constitutional convention. Favored by labor interests as a way to limit competition for jobs, it provoked charges of racism.[184] In its original form, it limited public employment (except for "the working of prisoners") to citizens or wards of the United States or those who had declared their intention to become citizens, and also contained the last sentence. A 1930 amendment expanded the prohibition slightly, by eliminating the reference to those declaring their intention to become citizens. A 1956 amendment created the exception for "teacher exchange" programs, and a 1960 amendment created the exception for "university or college faculty members." In the only reported judicial decision interpreting this section, the Supreme Court held that employment on a school construction project was "municipal works or employment" within the meaning of this section, because it would be "absurd to suppose" otherwise (*State v. Davey*).

The extent to which this section has retained vitality when measured against the preemptive effect of federal law remains uncertain. The history of federal law on this question has been tortuous. Aliens were recognized as persons protected by the equal protection clause of the Fourteenth Amendment of the U.S. Constitution before the Arizona Constitution was drafted (*Yick Wo v. Hopkins*). In 1915 the U.S. Supreme Court upheld a New York statute similar to this

[183] See Byrkit, Forging the Copper Collar, 101–2.

[184] Goff, *Records,* 450–54, 462–63; Leshy, "The Making of the Arizona Constitution," 51–52.

section (*Heim v. McCall*), shortly after striking down, on equal protection and federal preemption grounds, an Arizona statute that limited private employment of aliens (*Truax v. Raich*). In 1973, however, the Court summarily affirmed a lower court decision striking down this section as a violation of equal protection (*Nelson v. Miranda*). More recently, however, the Court has upheld numerous state laws barring aliens from various kinds of public employment (e.g., *Cabell v. Chavez-Salido*), which may have resuscitated this section.[185]

[185] For a somewhat outdated but useful review of Arizona's history on this issue, see Ann M. Haralambie, "Employment Rights of Resident Aliens in Arizona," *Arizona Law Review* 19 (1977), 409–34.

Article XIX

Mines

The office of mine inspector is hereby established. The legislature shall enact laws so regulating the operation and equipment of all mines in the state as to provide for the health and safety of workers therein and in connection therewith, and fixing the duties of said office. Upon approval of such laws by the governor, the governor, with the advice and consent of the senate, shall forthwith appoint a mine inspector, who shall serve until his successor shall have been elected at the first general election thereafter and shall qualify. Said successor and all subsequent incumbents of said office shall be elected at general elections, and shall serve for a term of two [four] years. [The initial four year term shall be served by the mine inspector elected in the general election held in November, 1994.] No mine inspector shall serve more than four consecutive terms in that office. No mine inspector, after serving the maximum number of terms, which shall include any part of a term served, may serve in the same office until out of office for no less than one full term. This limitation on the number of terms of consecutive service shall apply to terms of office beginning on or after January 1, 1993.

This provision, and its placement in a separate article, illustrate the prominence of the mining industry in Arizona at statehood. Although today mining remains an important local industry in some parts of the state, it is scarcely a dominant force in Arizona's economy; as a result, the constitutional stature of the mine inspector, especially as an elected position, is increasingly anachronistic.

For nearly a quarter century, the mine inspector was the only elected state executive branch officer who served a two-year term, because the framers of the 1968 amendment to Article V, section 1 (extending the term of all other such officers to four years) neglected to include this position. In 1992 the oversight was corrected by amendment, the text of which is set out in the brackets. That same year, however, this article was also amended to add the last three sentences to limit any person from serving more than four consecutive two-year terms in this office. These two amendments thus appear to conflict. The term-limits provision passed by a considerably larger margin than the four-year-term amendment; thus, if the principle of Article XXI, section 1, is followed, the former should take precedence over the latter. This situation of conflicting amendments has occurred before, in connection with the state auditor (see the commentary on Article V, section 1).

This article has not been interpreted in any reported judicial decision.

Article XX

Ordinance

This article derives almost entirely from section 20 of the statehood enabling act (36 Statutes at Large 557, 569–71), which contained a set of unusually specific directives to the Arizona constitutional convention.[186] Section 20's last paragraph explicitly required the framers to include in this constitution the provisions in this article, "in such terms as shall positively preclude [changing them] in whole or in part without the consent of Congress." The Arizona framers dutifully complied, even to the extent of retaining the enabling act's heading ("ordinance") and its style of referring to the individual provisions ordinally rather than using cardinal numbers for the individual sections, as in the other articles. For convenience and consistency, the commentary refers to these parts by cardinal section numbers; for example, section "First" is referred to as section 1. The framers reorganized the congressional dictates in minor ways, and in a few places changed some words or added phrases. Where meaningful, these alterations are noted in the commentary under each section.

As the introductory clause and section 13 both make clear, the provisions of this article have a meta-constitutional status, because federal consent as well amendment of the state constitution is necessary to alter them. But congressional

[186] See Leshy, "The Making of the Arizona Constitution," 10–27.

consent was never obtained for the 1927 amendment to section 5 and the repeal of section 10 that same year (see the commentary under those sections).

> The following ordinance shall be irrevocable without the consent of the United States and the people of this state:
>
> First. Perfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same.

The enabling act did not contain the last five words. They were added by the Arizona framers—over an objection that the addition was inconsistent with the enabling act—specifically to protect the right of those who did not choose to worship.[187] This ringing statement of religious freedom is related to several other provisions (Article II, section 12; Article IX, section 10; and Article XI, section 7). A court of appeals has held that its scope is also limited by section 2 of this article, because the "juxtaposition and contemporaneous approval of the two provisions indicate that the framers of our constitution did not intend the perfect toleration clause to protect the practice of polygamy" (*Barlow v. Blackburn*). In the only other reported decision to address this part, a court of appeals held it inapplicable to the discharge of an employee at will because of her objection to alleged immoral conduct of fellow employees (*Wagenseller v. Scottsdale Memorial Hosp.*).

> Second. Polygamous or plural marriages, or polygamous co-habitation, are forever prohibited within this state.

This provision stemmed from the sizeable Mormon settlement in Arizona, and it grew out of a similar provision included in the enabling act for Utah's statehood adopted by Congress in 1894 (28 Statutes at Large 107, 108). The only reported judicial decision addressing it held that it justified an inquiry into the suitability of a law officer who practiced polygamy (*Barlow v. Blackburn*).[188]

> Third. The introduction of intoxicating liquors for resale purposes into Indian country is prohibited within this state until July 1, 1957.

As originally included in the enabling act and the constitution, this section was a broad and permanent prohibition on dispensing liquor to Indians or introducing it into Indian country. It was amended to its current form in 1954, congressional consent to the change having been granted the previous year (67 Statutes at Large 586). A related provision in section 11 of this article was

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[187] Goff, *Records,* 423–24; Leshy, "The Making of the Arizona Constitution," 107.

[188] A 1953 state police raid on an isolated polygamous Mormon community on the Arizona Strip—the same one from which the officer in *Barlow v. Blackburn* hailed—became a significant political controversy that led to the defeat of the state's governor in 1954. See Odie B. Faulk, *Arizona: A Short History* (Norman: U. of Oklahoma Press, 1970), 210.

repealed at the same time. This section has never been subject to reported judicial scrutiny, and, given its express time limit, is now obsolete.

> Fourth. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.

The text of this section is almost identical to the first part of the second paragraph of section 20 of the federal enabling act. It was intended to confirm, first, that the federal government would retain title to federal lands (including Indian lands acquired "through or from the United States or any prior sovereignty") within the borders of the new state; and second, that these Indian lands would remain subject to the "absolute jurisdiction and control" of the Congress. (Similar provisions are found in the enabling acts of a number of the later-admitted states in the western United States; see *Arizona v. San Carlos Apache Tribe.*) Both propositions are now firmly established in federal law, and thus this section is arguably legally superfluous. But the disclaimer over Indian lands may have had meaning in 1910 because of the wavering course of U.S. Supreme Court decisions on the subject of state jurisdiction over Indian lands (see *id.*).[189]

The Supreme Court has described this section's disclaimer as "an acknowledgment of federal superiority in matters involving Indians and Indian land but not a complete abdication of state power in those situations where Congress has permitted the states to exercise jurisdiction"; as a result it does not prevent the state courts from adjudicating Indian water rights claims under federal law consistent with the intention of Congress (*United States v. Superior Court*). Federal law generally allows the state courts only limited jurisdiction over activities on Indian lands, and most of the cases that address this section are primarily concerned with whether federal law preempts state jurisdiction. For example, federal law preempts the state from exercising jurisdiction over non-Indians who commit crimes against Indians on a reservation (*State v. Flint*), and preempts counties from levying property taxes on Indian lands leased by non-Indian corporations for mining purposes (*Pima County v. American Smelting & Ref. Corp.*). Even where the federal enabling act (and by implication this section) does not preclude the state from "exercising its governmental interest by way of service of

[189] See generally William C. Canby, Jr., *American Indian Law in a Nutshell,* 2d ed. (St. Paul, Minn.: West Publishing Co., 1988), 108–19.

process on an Indian on a reservation," other federal law does bar it (*Francisco v. State*).

While this section "clearly forbids" state court assertion of jurisdiction over an Indian tribe, it does not prevent the court from exercising jurisdiction over an insurance company that was the surety of the tribe, in an action by a supplier of materials for a tribal housing project (*Smith Plumbing Co. v. Aetna Casualty & Sur. Co.*). Similarly, this section does not prevent state courts from exercising jurisdiction over a landlord-tenant dispute between a non-Indian lessee of Indian land and his non-Indian sub-lessee, because title to the land is not implicated (*Kuykendall v. Tim's Buick, Pontiac, GMC, & Toyota, Inc.*); or over a non-Indian's suit to enforce an arbitration clause in a contract with a tribe (*Val/Del, Inc. v. Superior Court*).

This section's disclaimer over non-Indian federal lands extends only to the state's "proprietary" (ownership) interest, and not its "governmental" (regulatory) interest; thus the state may prosecute a person for a crime committed on a federal military base unless preempted by federal law (*State v. Vaughn*). The Supreme Court has long said that the state may generally regulate activities on non-Indian federal lands where federal title is not affected and the state regulation is not preempted by federal law (*Hancock v. State,* following the U.S. Supreme Court decision in *Omaechevarria v. Idaho*). A recent U.S. Supreme Court decision sets out the general principles currently applied to determine whether federal law preempts state regulation on federal land (*California Coastal Commn. v. Granite Rock Co.*).

> Fifth. The lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property situated in this state belonging to residents thereof, and no taxes shall be imposed by this state on any lands or other property within an Indian reservation owned or held by any Indian; but nothing herein shall preclude the state from taxing as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of congress.

As originally adopted, this section also contained a general disclaimer against any state taxation of federal lands (presumably including federal lands held for the benefit of Indians). It was amended to its current form in 1927. This effectively narrowed the general prohibition against taxing federal lands by substituting for it the second clause against taxation of Indian-owned property within an Indian reservation. The publicity pamphlet for this amendment is silent on the reasons behind it.

No congressional consent was ever obtained for this change, despite the unambiguous requirement of such consent in the introductory language to this article and in section 13, below. The annotation to this section in the Arizona

Revised Statutes contains a memorandum from one Wilfred C. Gilbert of the Legislative Reference Service, Library of Congress, expressing the view that congressional consent was not necessary under the U.S. Supreme Court's 1911 decision in *Coyle v. Smith*.[190] That case held that Congress's demand, in the Oklahoma enabling act, that Oklahoma agree not to move the state capital from Guthrie until 1913 (and thereafter only upon a vote of the general electorate), was unenforceable, because Congress lacked the constitutional power to interfere with the "essentially and peculiarly state powers" of choosing where to "locate its own seat of government and to determine when and how it shall be changed." The Court went on to distinguish enabling act restrictions dealing with federal lands or Indian tribes, suggesting that these "might be upheld as legislation within the sphere of the plain power of Congress." The soundness of Gilbert's application of *Coyle v. Smith* to this section has never been tested in court; his memorandum quotes the Court's pertinent *dictum* without attempting to justify his contrary conclusion.

The *dictum* of *Coyle v. Smith* seems correct. In contrast to Congress's lack of authority over the location of a state capital, several parts of the U.S. Constitution give Congress power to deal with the subjects of this section—state taxation of property owned by nonresidents or owned by Indians and located on Indian reservations. Thus the original version of this section was probably enforceable despite *Coyle v. Smith,* and congressional consent for the 1927 amendment was necessary for it to be effective (see, e.g., *Boice v. Campbell,* discussed in the commentary on section 12 of this article).

The general prohibition of discriminatory taxation against U.S. citizens who are not residents of Arizona contained in the first part of this section has not been interpreted in any published court decision. The disclaimer against taxing property held by Indians within reservations in the remainder of the section was construed by the Supreme Court in 1964 not to prevent the state from enforcing a transaction privilege tax against a non-Indian company mining coal on reservation land (*Industrial Uranium Co. v. State Tax Commn.*). Because the Court in that case also concluded that the tax did not conflict with the 1910 enabling act, the same result would presumably have obtained before the 1927 amendment to this section and thus would not be affected if the 1927 amendment were deemed void for lack of congressional consent. A court of appeals has held that this section prevents a county from levying property taxes on a producing mine on a reservation, even if it is being operated by a non-Indian mining company

[190] The memorandum, dated April 9, 1956, is found in volume 1A of *Arizona Revised Statutes Annotated* (1984), pp. 377–81. It was prepared in response to a March 23, 1956 inquiry from state librarian Mulford Winsor (who had been a delegate at the Constitutional Convention) to Senator Carl Hayden of Arizona. Winsor's letter, also excerpted in the annotation, asked whether the state lawfully referred the 1927 amendments to this section and sec. 10 of this article "to the people without the authority of Congress."

(*Pima County v. American Smelting & Ref. Corp.;* cf. *Navajo County v. Peabody Coal Co.*). In general, the ability of the state or its political subdivisions to tax property on Indian reservations is controlled more by federal law than by the terms of this section (see the commentary on section 4 of this article).

> Sixth. The debts and liabilities of the territory of Arizona, and the debts of the counties thereof, valid and subsisting at the time of the passage of the enabling act approved June 20, 1910, are hereby assumed and shall be paid by the state of Arizona, and the state of Arizona shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said territory or of any of the several counties thereof, at the time of the passage of the said enabling act; provided, that nothing in this ordinance shall be construed as validating or in any manner legalizing any territorial, county, municipal, or other bonds, obligations, or evidences of indebtedness of said territory or the counties or municipalities thereof which now are or may be invalid or illegal at the time the said state of Arizona is admitted as a state, and the legislature or the people of the state of Arizona shall never pass any law in any manner validating or legalizing the same.

With minor changes in wording, this section repeats the third part of section 20 of the enabling act. It is a transitional provision, under which the new state assumed the obligations incurred by the territorial government and its county subdivisions. A reciprocal provision, under which the new state became the beneficiary of debts owed to the territory, is found in Article XXII, section 3. This section never received any reported judicial attention and is now obsolete.

> Seventh. Provisions shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and be free from sectarian control, and said schools shall always be conducted in English.
>
> The state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude.

This section is taken from the fourth and the first half of the fifth paragraph of section 20 of the enabling act. The first sentence reflects the concern of Congress that the new state establish a system of universal nonsectarian education with instruction in English. Related and somewhat overlapping provisions are found in Article XI, sections 1, 2, 6, and 7; Article II, section 12; and Article IX, section 10.

A strict reading of this section's requirement that schools shall "always" be conducted in English would prevent the teaching of foreign languages. The recent adoption of Article XXVIII, making English the official language of Arizona, ironically seems to cure this problem, because its section 3(2)(a) and (c) expressly allows foreign language instruction in some circumstances. Of course, if this section had ever been read to forbid foreign language instruction, it would have been preempted by the U.S. Constitution (*Meyer v. Nebraska*).

The second sentence carries out the idea behind the Fifteenth Amendment to the U.S. Constitution. It may not be superfluous, however, because it prohibits the state from "restricting" the right to vote, whereas the Fifteenth Amendment prohibits a state from "den[ying]" it. This section has never been interpreted in any reported judicial decision.

> Eighth. The ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter, shall be a necessary qualification for all state officers and members of the state legislature.

This part is taken from the second half of the fifth paragraph of section 20 of the enabling act. Congress's concern that state officers and legislators be conversant in English probably stemmed from substantial Hispanic and Indian presence in the Arizona and New Mexico territories.[191] This section has never been interpreted by the courts in any published decision; the English language issue is now addressed in more detail in Article XXVIII.

> Ninth. The capital of the state of Arizona, until changed by the electors voting at an election provided for by the legislature for that purpose shall be at the city of Phoenix, but no such election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

This section is drawn from the sixth paragraph of section 20 of the enabling act. The seat of government of the Arizona Territory had been located in several different places before it was finally fixed in Phoenix in 1889;[192] the capital has remained in Phoenix since statehood. The legislative history of the enabling act does not reveal Congress's reason for including this section; given the incessant wrangling in the territorial legislature over the location of the seat of state government, its purpose was presumably to avoid such a distraction as the new state was gaining its footing.

A similar provision had been included in the Oklahoma enabling act of 1906, but was struck down by the U.S. Supreme Court in 1911 (*Coyle v. Smith;* see the commentary on section 5 of this article). As a result, this section's restriction on moving the capital is probably unenforceable as a matter of federal law. But it may not be superfluous because, should the question arise, the state courts could enforce its requirement for a statewide referendum on moving the capital; as the U.S. Supreme Court said in *Coyle v. Smith,* the provision may still have "force," but the force of "a state constitution and not that of an act of Congress." This section has never been interpreted by the courts in any reported decision.

> Tenth. There is no section Tenth.

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[191] See Leshy, "The Making of the Arizona Constitution," 13, 23–24.

[192] See Jay J. Wagoner, *Arizona Territory:* 1863–1912 (Tucson: University of Arizona Press, 1970), 31, 33, 36, 40, 55, 70–72, 113, 245–47.

This section originally reserved to the United States, "with full acquiescence of this state," all rights and powers to carry out the federal reclamation act of 1902, the primary charter under which the federal government has built and operated water resource development projects in the western states. This section was included in the seventh paragraph of section 20 of the enabling act as an attempt to sidestep a 1907 decision of the U.S. Supreme Court (*Kansas v. Colorado*) that cast doubt on whether Congress had the constitutional authority to build and operate such projects inside states. Even though this section attempted to expand federal power vis-à-vis the new state, the Arizonans were fully supportive of the idea because the federal government underwrote much of the cost of these projects.

This section was repealed in 1927. The publicity pamphlet on the change provides no background on the repeal, but it occurred at a time when there was substantial pressure on the state to withdraw its stubborn opposition to the Colorado River interstate water compact negotiated five years earlier. The repeal may have been designed to indicate Arizona's continuing opposition to federal water projects on the Colorado River primarily to benefit California.[193] As with the modification of section 5 that same year, no congressional consent for the repeal was ever obtained. Although the federal government spent hundreds of millions of dollars in the first half of this century to build water resource projects in the western states under the reclamation program, the U.S. Supreme Court did not finally confirm the constitutional power of Congress to carry out this program until 1950 (*United States v. Gerlach Live Stock Co.*). That decision rendered obsolete any lingering questions about the propriety of repealing this section without the consent of Congress.

Eleventh. There is no section eleventh.

Drawn from the eighth paragraph of section 20 of the enabling act, this section subjected Indian lands that were disposed of after statehood to all federal laws prohibiting the introduction of liquor into Indian country, for a period of twenty-five years after their disposal. It was repealed in 1954, at the same time that section 3 of this article, which also addressed the issue of liquor in Indian

[193] See Norris Hundley, Jr., *Water and the West* (Berkeley: University of California Press, 1975), 232–76. In early 1927, for example, the state of Utah had taken legislative steps to nullify its earlier approval of the compact; ibid., 263. In fact, in subsequent litigation between Arizona and the United States over whether the latter could build Parker Dam on the Colorado River to benefit California (*United States v. Arizona*), both the U.S. and Arizona cited Art. XX of the Arizona Constitution, the U.S. arguing that it constituted Arizona's irrevocable consent to build the project, and Arizona arguing that it was unenforceable under the doctrine of *Coyle v. Smith*. The Court did not address this section in its decision, merely holding that Parker Dam had not been authorized by Congress. Prior to this litigation, Arizona had actually sent its "Navy" to battle the U.S. engineers building the project. See Remi Nadeau, *The Water Seekers,* rev. ed. (Santa Barbara, Calif.: Peregrine Smith, 1974), 222–26.

country, was being amended. Congress consented to this repeal in 1953 (67 Statutes at Large 586).

> Twelfth. The state of Arizona and its people hereby consent to all and singular the provisions of the enabling act approved June 20, 1910, concerning the lands thereby granted or confirmed to the state, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in the aforesaid enabling act provided.

This section, drawn from the ninth paragraph of section 20 of the enabling act, reflected U.S. Senator Albert Beveridge's zeal to nail down Arizona's commitment to adhere to the congressional restrictions on the management and disposition of the lands the federal government granted to Arizona at statehood. The same idea is expressed in somewhat different form in the next section and in Article X, sections 1, 2, 8, and 9.[194] The Supreme Court early on confirmed that this section, and by implication those provisions in Article X incorporated into this section, have a super-constitutional status; that is, the enabling act limitations are "absolutely binding on the State of Arizona" unless Congress consents to their change, and "any statute or amendment to the state Constitution in conflict therewith is null and void" (*Boice v. Campbell*). *Boice* held that a state statute giving an existing lessee of state land a "preferred right of renewal" did not conflict with this section, but only because the statute was construed not to limit the discretion of the state land department to lease the land to another, after "taking into consideration all the facts . . . including, of course, the prior occupancy." If the preference for the existing lessee had been absolute, the Court said, it would violate the enabling act and this section.

As the commentary under Article X, section 3 shows, the Supreme Court has sometimes interpreted the provisions of that article differently from U.S. Supreme Court interpretations of similar or identical provisions in the enabling act. In some circumstances, the enabling act "merely sets out the minimum protection . . . [and the] state constitution does much more"; the net effect is that the enabling act and the state constitution provide "two complementary levels of protection against improvident state legislative or executive disposal of Arizona's school trust land" (*Deer Valley Unified School Dist. No. 97 v. Superior Court*). Thus if Congress amends the enabling act to relax its restrictions, and the state does not amend its constitution to take advantage of the federal leniency, the state constitution remains a bar because both the state and federal "levels of protection must be satisfied for any disposal of state trust land to be valid," and changes in the enabling act cannot operate to amend the state constitution

[194] See Leshy, "The Making of the Arizona Constitution," 24–27.

because the state has not delegated that power to Congress (*Fain Land & Cattle Co. v. Hassell*).

> Thirteenth. This ordinance is hereby made a part of the constitution of the state of Arizona, and no future constitutional amendment shall be made which in any manner changes or abrogates this ordinance in whole or in part without the consent of congress.

This section, drawn from the last paragraph of section 20 of the enabling act, also reflects Congress's concern that its carefully designed restrictions not be circumvented by the new state without its consent. Broadly drawn, the Supreme Court has described it as making the provisions of this article the "fundamental and paramount law" of the state, which "cannot be altered, changed, amended, or disregarded without an act of Congress" (*Murphy v. State*). Nevertheless, as the discussion under sections 5 and 10 of this article show, the state has not always followed this teaching.

Article XXI

Mode of Amending

SECTION 1

Any amendment or amendments to this constitution may be proposed in either house of the legislature, or by initiative petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for governor at the last preceding general election.

Any proposed amendment or amendments which shall be introduced in either house of the legislature, and which shall be approved by a majority of the members elected to each of the two houses, shall be entered on the journal of each house, together with the ayes and nays thereon. When any proposed amendment or amendments shall be thus passed by a majority of each house of the legislature and entered on the respective journals thereof, or when any elector or electors shall file with the secretary of state any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen per centum of the total number of votes for all candidates for governor in the last preceding general election, the secretary of state shall submit such proposed amendment or amendments to the vote of the people at the next general election (except when the legislature shall call a special election for the purpose of having said proposed amendment or amendments voted upon, in which case the secretary of state shall submit such proposed amendment or amendments to the qualified electors at said special election,) and if a majority of the qualified electors voting thereon shall approve and ratify such proposed

amendment or amendments in said regular or special election, such amendment or amendments shall become a part of this constitution. Until a method of publicity is otherwise provided by law, the secretary of state shall have such proposed amendment or amendments published for a period of at least ninety days previous to the date of said election in at least one newspaper in every county of the state in which a newspaper shall be published, in such manner as may be prescribed by law. If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately.

The Arizona framers deliberately made their handiwork relatively easy to amend.[195] This section sets out two distinct processes for amending the constitution. The first, and most common in practice, is referral by the legislature.[196] Constitutional amendments may be proposed in either house, but must be approved by a majority of the members "elected to each house" on a recorded roll call vote. Such proposals are not subject to gubernatorial veto, because the veto power under Article V, section 7, is limited to bills intended to become laws. Nevertheless, some legislatively proposed amendments have been submitted to and approved by the governor before going on the ballot; others have not, and the governor has apparently never attempted to veto such a proposal.[197]

The second way to propose amendments under this section is by initiative petition signed by a number of qualified electors equivalent to 15 percent of the total votes cast for all candidates for governor at the most recent general election. "Qualified elector" means the same thing here as elsewhere in the constitution—a currently registered voter (*Ahrens v. Kerby*). If an insufficient number of registered voters have signed initiative petitions for a proposed amendment, the courts may enjoin putting it on the ballot (*id.*).

This second method bypasses the legislature, because the "people" have reserved the power to propose and adopt or reject amendments to the constitution "independently of the legislature" (Article IV, part 1, section 1(1)). By implication from that section, and from section 7 of Article V, this method also bypasses the governor. While Article IV, part 1, section 1(6) may give the governor power to veto statutes approved through the initiative or referendum process (see the commentary on that subsection), it has no application to constitutional amendments.

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[195] See ibid., 108–10.

[196] For statistics on the methods used to propose amendments, see the constitutional history in Part I of this volume.

[197] An example of a legislatively proposed constitutional amendment that was submitted to and approved by the governor before being sent to the voters is the 1962 amendment to Art. VII, sec. 17; see *Publicity Pamphlet,* 1962 General Election, p. 7. An example of a proposed amendment not presented to the governor is the 1958 amendment adding sec. 26 to Art. VI; see *Publicity Pamphlet,* 1958 Special Election, pp. 5–6.

Once amendments are proposed through either the legislative or initiative process, they are submitted to the people at the next general election, unless the legislature decides to call a special election for that purpose. Amendments require only a "majority of the qualified electors voting thereon" to be ratified. The framers' decision to require approval by only a simple majority was deliberate; they rejected a number of proposals to raise the required margin of victory.[198] Amendments become effective, under the terms of Article IV, part 1, section 1(5), "upon proclamation of the governor," and the governor "shall forthwith issue" such a proclamation upon the completion of the canvass of votes (Article IV, part 1, section 1(13); see *State ex rel. Nelson v. Jordan*).

The Supreme Court has interpreted the last sentence of this section as expressing a "single-subject rule," analogous to the "one-subject" restriction for state legislative action contained in Article IV, part 2, section 13 (*Tilson v. Mofford*). It attempts to ensure that the voters have separate opportunities to vote on discrete and distinct subjects, and is aimed at the "pernicious practice of 'log-rolling,'" or including multiple proposals in a single proposition to induce voters to vote for all even though some may be rejected if submitted separately *(Kerby v. Luhrs*). This practice, "evil in the legislature,. . . [is] much more . . . vicious when constitutional changes, far-reaching in their effect, are to be submitted to the voters" (*id.*). A second reason to enforce a single-subject requirement is to prevent amendment sponsors from "confusing or deceiving the voters by inserting unrelated provisions . . . and 'hiding them' from the voters" *(Slayton v. Shumway*).

Applying this last sentence requires the courts to decide whether the separate parts of a proposed amendment "constitute a consistent and workable whole on the general topic . . . and if, logically speaking, [the parts] should stand or fall as a whole," so that voters supporting one part "would reasonably be expected to support the . . . others" *(Kerby v. Luhrs*). Single amendments passing this test include one authorizing the legislature to reform the system of tort law in a variety of ways *(Tilson v. Mofford*); one revising the size and composition of both houses of the legislature, the subject being the legislature and not its separate houses *(State ex rel. Jones v. Lockhart*); and one containing "reasonably related" tax exemptions that together presented a "coherent scheme" *(Hood v. State*). But a single amendment that dealt with taxation of copper mines and public utilities, and also established a constitutional tax commission, was held to violate the single-subject principle *(Kerby v. Luhrs*). The courts may narrowly construe parts of a proposed single amendment in order to remain faithful to that principle *(Slayton v. Shumway*).

Sometimes the courts have reviewed single-subject challenges prior to an election (e.g., *Tilson v. Mofford; Slay ton v. Shumway; Kerby v. Luhrs*) and sometimes

[198] Goff, *Records,* 686–90, 733–34, 1062–63 (proposition 14); Leshy, "The Making of the Arizona Constitution," 109.

afterward (e.g., *State ex rel. Jones v. Lockhart; Hood v. State*). In general, any "interested citizen" may sue to enjoin the submission of proposed amendments to the voters, and an injunction will be granted upon a showing that there has been "no substantial compliance" with the constitutional and statutory rules regarding the manner of submission. If, however, there is "any possibility" that the legal requirements *"couldbe* complied with," the injunction should be denied, for it is "only in cases where it is conclusively evident that this cannot nor will not be done that the injunction should issue" *(Kerby v. Griffin,* emphasis in original).

While the Supreme Court has been reasonably diligent in enforcing the single-subject requirement, it has also held that this section contains no requirement that the proposed amendment disclose its impact on other constitutional provisions *(Tilson v. Mofford*). In *Tilson* the Court allowed a proposed amendment dealing with tort reform to be submitted to the voters as an addition to a part of the constitution allowing the legislature to regulate ambulance services, without expressly indicating that it would, in the Court's words, "drastically alter" other parts of the constitution. The Court explained that "fundamental fairness and due process requirements of the elective process" are not transgressed by this nondisclosure, because the political campaign process allowed full airing of the proposal's effect on existing constitutional provisions. There is some merit in the Court's approach; too much camouflage by amendment proponents might backfire if the voters were persuaded that trickery was afoot. But the approach can also be questioned; Article IV, part 2, section 14 generally forbids the legislature from amending existing laws except by bills that show the changes being made, and no less would seem to be required for constitutional changes which are, as the Court has noted, more "far-reaching" in their effect (*Kerby v. Luhrs*).

SECTION 2

No convention shall be called by the legislature to propose alterations, revisions, or amendments to this constitution, or to propose a new constitution, unless laws providing for such convention shall first be approved by the people on a referendum vote at a regular or special election, and any amendments, alterations, revisions, or new constitution proposed by such convention shall be submitted to the electors of the state at a general or special election and be approved by the majority of the electors voting thereon before the same shall become effective.

This section establishes the constitutional convention as a third avenue of constitutional change. Such a device is contained in forty other state constitutions as well as the U.S. Constitution.[199] The convention process contains a

[199] See Albert Sturm, "The Development of American State Constitutions," *Publius—The Journal of Federalism* 12 (Winter 1982), 61, 76–81.

number of steps not required for simple amendments. The legislature must initiate it by passing "laws providing for such convention"; presumably these would deal with such things as selection of convention delegates and the rules under which the convention would proceed. These laws must then be approved by the people in a referendum election before the convention can be held. This section does not indicate whether the governor could veto such "laws"; there is no gubernatorial veto of laws subject to an ordinary referendum (see the commentary on Article IV, part 1, section 1(2)), although there is the possibility of a veto of some referenda (see commentary on *id.*, section 1 (6)). If the convention decides to propose constitutional changes, they too must be submitted to the voters for approval; thus the electorate must be directly involved near the beginning and again at the end of the convention process.

The first section of this article speaks only of "amendments," while this section provides that the convention may propose, in addition to amendments, "alterations" and "revisions" of the constitution, or a new constitution. Constitutional changes other than simple amendments are, then, deemed so fundamental that they may only take place through the more elaborate and studied convention process, as opposed to the amendment process provided for in the first section of this article (*see Raven v. Deukmejian,* involving a similar provision in the California Constitution). Like the national government and eight other states, Arizona has never called such a convention since adopting its original constitution,[200] and therefore this section has never received any judicial scrutiny.

[200] Ibid.

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Article XXII

Schedule and Miscellaneous

The first twelve sections of this article were designed to provide an orderly transition from territorial to statehood status, so that "no abruptness might occur in the change from a territory to a state [and] the administration of the law should proceed unaffected by any change in the form of government" (*Steinfeld v. Nielsen,* on rehearing). While a number of these first twelve sections have been the subject of judicial attention (especially in the first few years of statehood), they are practically obsolete and no commentary is provided on them. Probably the only one that might have application today is the second, which preserves laws adopted by the territorial government to the extent they are "not repugnant to this constitution." An example of how it has been applied is set out in the commentary on section 17 of this article. Sections 13–22 have some continuing vitality and are addressed in commentary.

SECTION 1

No rights, actions, suits, proceedings, contracts, claims, or demands, existing at the time of the admission of this state into the union, shall be affected by a change in the form of government, from territorial to state, but all shall continue as if no change had taken place; and all process which may have been issued under the authority of the territory of Arizona, previous to its admission into the Union, shall be as valid as if issued in the name of the state.

SECTION 2

All laws of the territory of Arizona now in force, not repugnant to this constitution, shall remain in force as laws of the state of Arizona until they expire by their own limitations or are altered or repealed by law; provided, that wherever the word territory, meaning the territory of Arizona, appears in said laws, the word state shall be substituted.

SECTION 3

All debts, fines, penalties, and forfeitures which have accrued, or may hereafter accrue, to the territory of Arizona shall inure to the state of Arizona.

SECTION 4

All recognizances heretofore taken, or which may be taken, before the change from a territorial to a state government, shall remain valid, and shall pass to and may be prosecuted in the name of the state, and all bonds executed to the territory of Arizona, or to any county or municipal corporation, or to any officer, or court, in his or its official capacity, shall pass to the state authorities and their successors in office for the uses therein expressed, and may be sued for and recovered accordingly; and all the estate, real, personal, and mixed, and all judgments, decrees, bonds, specialties, choses in action, and claims, demands or debts of whatever description, belonging to the territory of Arizona, shall inure to and vest in the state of Arizona, and may be sued for and recovered by the state of Arizona in the same manner, and to the same extent, as the same might or could have been by the territory of Arizona.

SECTION 5

All criminal prosecutions and penal actions which may have arisen, or which may arise, before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the state. All offenses committed against the laws of the territory of Arizona before the change from a territorial to a state government, and which shall not be prosecuted before such change, may be prosecuted in the name, and by the authority, of the state of Arizona, with like effect as though such change had not taken place, and all penalties incurred and punishments inflicted shall remain the same as if this constitution had not been adopted. All actions at law and suits in equity, which may be pending in any of the courts, of the territory of Arizona at the time of the change from a territorial to a state government, shall be continued and transferred to the court of the state, or of the United States, having jurisdiction thereof.

SECTION 6

All territorial, district, county, and precinct officers who may be in office at the time of the admission of the state into the union shall hold their respective offices until their successors shall have qualified, and the official bonds of all such officers shall continue in full force and effect while such officers remain in office.

SECTION 7

Whenever the judge of the superior court of any county, elected or appointed under the provisions of this constitution, shall have qualified, the several causes then pending in the district court of the territory, and in and for such county, except such causes as would have been within the exclusive jurisdiction of the United States courts, had such courts existed at the time of the commencement of such causes within such county, and the records, papers, and proceedings of said district court, and other property pertaining thereto, shall pass into the jurisdiction and possession of the superior court of such county. It shall be the duty of the clerk of the district court having custody of such papers, records, and property, to transmit to the clerk of said superior court the original papers in all cases pending in such district and belonging to the jurisdiction of said superior court, together with a transcript, or transcripts, of so much of the record of said district court as shall relate to the same; and until the district courts of the territory shall be superseded in manner aforesaid, and as in this constitution provided, the said district courts, and the judges thereof, shall continue with the same jurisdiction and powers, to be exercised in the same judicial district, respectively, as heretofore, and now, constituted.

SECTION 8

When the state is admitted into the union, and the superior courts, in their respective counties, are organized, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration pending therein, shall pass into the jurisdiction and possession of the superior court of the same county created by this constitution, and the said court shall proceed to final judgment or decree, order, or other determination, in the several matters and causes with like effect as the probate court might have done if this constitution had not been adopted.

SECTION 9

Whenever a quorum of the judges of the supreme court of the state shall have been elected, and qualified, and shall have taken office, under this constitution, the causes

then pending in the supreme court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States courts, had such courts existed at the time of the commencement of such causes, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state, and until so superseded, the supreme court of the territory, and the judges thereof, shall continue, with like powers and jurisdiction as if this constitution had not been adopted, or the state admitted into the union; and all causes pending in the supreme court of the territory at said time, and which said causes would have been within the exclusive jurisdiction of the United States courts, had such courts existed, at the time of the commencement of such causes, and the papers, records, and proceedings of said court, relating thereto, shall pass into the jurisdiction of the United States courts, all as in the enabling act approved June 20, 1910, provided.

SECTION 10

Until otherwise provided by law, the seal now in use in the supreme court of the territory, shall be the seal of the supreme court of the state, except that the word "state", shall be substituted for the word "territory" on said seal. The seal of the superior courts of the several counties of the state, until otherwise provided by law, shall be the vignette of Abraham Lincoln, with the words "Seal of the Superior Court of _____ County, State of Arizona", surrounding the vignette. The seal of municipalities, and of all county officers, in the territory, shall be the seals of such municipalities and county officers, respectively, under the state, until otherwise provided by law, except that the word "territory", or "territory of Arizona", be changed to read "state" or "state of Arizona", where the same may appear on any such seals.

SECTION 11

The provisions of this constitution shall be in force from the day on which the president of the United States shall issue his proclamation declaring the state of Arizona admitted into the union.

SECTION 12

One representative in the congress of the United States shall be elected from the state at large, and at the same election at which officers shall be elected under the enabling act, approved June 20, 1910, and, thereafter, at such times and in such manner as may be prescribed by law.

SECTION 13

The term of office of every officer to be elected or appointed under this constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify.

The purpose of this section is to reduce vacancies in public office by extending the term of lawful incumbents until successors are available (*Sweeney v. State*). It means that an office is not vacant when an officer is able and willing to occupy it beyond the fixed term for which she was appointed or elected, if for some reason no successor is ready to assume the office (*Lockwood v. Jordan*). This "additional term, though in its nature contingent and defeasible, is, while it exists, as much a part of the term of the incumbent as is his original, fixed, or regular term" (*Sweeney v. State*). Although at first blush this section seems to apply to both elective and appointive offices, *Sweeney* suggested that it applies only to the former, reasoning that because its last clause refers to the election of successors, the earlier reference to appointment meant only those cases where persons are appointed to fill vacancies in elective offices.

This section is related to Article V, section 8, which gives the governor the power to fill a "vacancy" in any "office" when no law or constitutional provision governs how the vacancy shall be filled. The Supreme Court has harmonized the two by in effect giving this one priority; there is no "vacancy" under Article V, section 8 if the incumbent remains in office pursuant to the terms of this section (*McCall v. Cull*). Thus an office becomes truly vacant (and potentially subject to Article V, section 8) only upon the same events that would create a vacancy during a term, "such as the death, resignation, removal, disqualification, or the like, of the incumbent" (*Sweeney v. State*). Where an incumbent is defeated in his bid for reelection, but the successful challenger is not qualified to serve, the defeated incumbent may remain in office under this section until a new election can be held, and the legislature may not declare the office vacant to allow the governor to appoint another (*id.*). But this section does not allow a person elected to an office to continue in it when she was not legally qualified to hold the position in the first place (*State v. Macias*).

SECTION 14

Any law which may be enacted by the legislature under this constitution may be enacted by the people under the initiative. Any law which may not be enacted by the legislature under this constitution shall not be enacted by the people.

This section must be considered with the provisions of Article IV, part 1, dealing with the initiative. It "expressly prohibits a] differentiation of powers" between the legislature and the people in enacting a law (*State v. Oshorn*). It means,

in essence, that an initiated statute "is limited by constitutional provisions to the same extent as an act of the legislature" (*State ex rel. Conway v. Superior Court,* not citing this section). Because constitutionality in both cases is determined "by the same rules," if the constitution would prohibit the legislature from making a particular delegation of power to the executive, it would also prohibit the people from doing the same through an initiative (*Tillotson v. Frohmillef*).

There is one and perhaps a second exception to this principle. First, Article IV, part 1, section 1(6) can put some initiated statutes (those approved by a majority of the registered voters) beyond repeal by the legislature (see the commentary on that section). In such cases, the legislature may not enact a law repealing or amending the initiated statute, but the people themselves may do so notwithstanding this section. Second, the Supreme Court has suggested that the "one-subject" rule that applies to legislative enactments under Article IV, part 2, section 13, does not apply to initiated statutes (*Tilson v. Mofford, dictum;* but see *Iman v. Bolin* and the commentary on Article IV, part 1, section 1(15)).

While this section makes initiated statutes subject to judicial review for consistency with the constitution, such challenges are generally not properly made until after the measure has been approved by the voters, just as courts will generally not address the constitutionality of bills introduced into but not yet enacted by the legislature itself (*State v. Oshorn*). The courts will, however, strike a proposed statutory initiative from the ballot if it is "defective in form or does not bear the [required] number of signatures . . . or where the prescribed procedure has not been followed" (*Iman v. Bolin;* see also *Kerby v. Griffin*). A claim that an initiative proposing a statute violates the "single-subject" requirement is a challenge to form, not substance, and thus may be reviewed prior to the election (*Iman v. Bolin*); the same result has been reached with respect to an initiated constitutional amendment (*Tilson v. Mofford;* see the commentary on Article IV, part 1, section 1(15); Article XXI, section 1).

SECTION 15

Reformatory and penal institutions, and institutions for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law.

This seemingly straightforward section might be seen as merely exhortatory, but the Supreme Court has cryptically suggested that it contains a "mandate" to establish and support these institutions, and therefore if the state attempted to abolish public almshouses it would violate this section (*Board of Control v. Buckstegge*).[201] But the legislature does have the power to require residents of

[201] The president of the Constitutional Convention and seven-term governor, George W. P. Hunt, held strong and progressive views on the prison system and may have influenced this section.

such state institutions, so far as they are able, to "bear their share" of the expense of their maintenance (*State ex rel. Conway v. Glenn*). Because the concluding phrase of this section refers to legislative action, and because site selection "inheres in the idea of 'establishing' an institution of this nature," at least where the site is "remote from any other" similar institution, the governor has no constitutional or inherent power to select the site of a new prison unilaterally (*Litchfield Elementary School Dist. No. 79 v. Babbitt*).

SECTION 16

It shall be unlawful to confine any minor under the age of eighteen years, accused or convicted of crime, in the same section of any jail or prison in which adult prisoners are confined. Suitable quarters shall be prepared for the confinement of such minors.

This section reflects a concern that juvenile offenders warrant separate confinement and is related to Article VI, section 15, which gives superior courts exclusive and flexible jurisdiction in proceedings involving minors. This section should, as a matter of form, be in either Article VI or Article II. It does not prohibit placing juveniles in adult prisons so long as they are segregated in a separate "section." A court of appeals, citing this section but primarily construing an implementing statute (Ariz. Rev. Stat. 8–226), said that "exposure to, association with, or any type of contact with adults charged with or convicted of crimes is prohibited," and invalidated the confinement of a juvenile held in a separate cell in an adult jail, while reserving the question whether it would be permissible to maintain a separate juvenile detention center within an adult facility (*Anonymous Juvenile v. Collins;* see also *Vigileos v. State*). The attorney general has issued a number of opinions on such issues (e.g., Nos. 72–2,179–40,179–182,180–215,185–037). In 1980 the legislature proposed to amend this section to allow a person under the age of eighteen who "has been convicted of a criminal offense as an adult" (see the commentary on section 15 of Article VI) to be "confined in a state prison for this offense." The voters rejected this amendment by a narrow margin.

SECTION 17

All state and county officers (except notaries public) and all justices of the peace and constables, whose precinct includes a city or town or part thereof, shall be paid fixed and definite salaries, and they shall receive no fees for their own use.

See Leshy, "The Making of the Arizona Constitution," 37. For a history of the Arizona corrections system, see Thomas K. Irvine, "Arizona Prisons: 109 Years of Neglect," *Arizona Bar Journal* 13 (Dec. 1977), 7–13.

This section is related to Article IV, part 2, section 17's limitation on the legislature's power to set compensation levels for public officers. Both reflect a concern with legislative coercion or favoritism in setting officers' salaries. This problem has been partially ameliorated because salaries for elective state officers are now set pursuant to the process in Article V, section 13, added by amendment in 1970. Within the limits set by this section and other parts of the constitution, the courts have regarded the fixing of salaries of public officers as a legislative function that cannot be intruded upon by the courts (e.g., *Gregory v. Thompson*).

"Public officers," as used both in this section and in Article IV, part 2, section 17, are to be distinguished from "ordinary servants or agents" (*State ex rel. Colorado River Commn. v. Frohmiller*). They are determined according to the same test the Supreme Court formulated to define a "person holding any public office of profit or trust under the authority . . . of this state" in Article IV, part 2, section 4 *(Winsor v. Hunt*). The *Winsor* test requires "definite duties imposed by law" that involve "the exercise of some portion of the sovereign power" of the state (see *Moore v. Frohmiller, 1936*). A court reporter is not a "state or county officer" within the meaning of this section, and therefore may receive fees in addition to his salary *(Powers v. Isley*).

This section's requirement of "fixed and definite salaries" and its prohibition of fees recognizes the potential for abuse under a fee system of compensation, by which public officers are paid on a piecework basis for performing the public's business. A "salary" is a fixed compensation based on service for definite and regular periods of time and paid at regular and fixed intervals, and a "fee" is compensation for particular services rendered at irregular and uncertain periods *(State ex rel. Colorado River Commn. v. Frohmiller,* applying a territorial law decision to this section). Fee systems were not uncommon in the Arizona Territory; county sheriffs and justices of the peace received fees fixed by statute for a variety of public tasks. In 1915 these territorial laws were deemed "repugnant" to this section and thus unconstitutional by virtue of section 2 of this article *(Adams v. Maricopa County*).

SECTION 18

Nomination of incumbent public officers to other offices. Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or federal office.

This section originally addressed an entirely different subject; it created the office of the State Examiner, appointed by the governor with the advice and consent of the Senate, to "examine the books and accounts of . . . public officers," but it was repealed in 1968. The current version of this section was added in 1980.

It is commonly called the "resign to run" provision, because it requires a holder of elected office to resign her position if she chooses to run for another office, unless she is in the final year of her term. This section closely tracks a state statute first enacted in 1949 (Laws 1949, ch. 68, section 1; now found at Ariz. Rev. Stat. 38–296). It applies to all salaried elected officials in the state, including officials of chartered cities, because Article XIII, section 2 specifically requires that a city charter be "consistent with, and subject to, the Constitution" *(Laos v. Arnold*). The same case held that, even though this section and its implementing legislation are silent on remedies, an officer who violates this section should be removed from office. A federal court of appeals has held that this section does not, by barring a sitting county supervisor from running for federal office, conflict with the U.S. Constitution, because it does not add an additional qualification for federal office but rather merely regulates the conduct of state office holders (*Joyner v. Moffbrd;* see also *Clements v. Fashing*).

SECTION 19

The legislature shall enact laws and adopt rules prohibiting the practice of lobbying on the floor of either house of the legislature, and further regulating the practice of lobbying.

This section reflects the framers' concern with ensuring an open legislative process. Despite its command, the legislature did not enact a registration and reporting code for lobbyists until 1974 (now found, as amended, in Ariz. Rev. Stat. 41–1231 through 1239). This section has not been interpreted in any published judicial decision.

SECTION 20

The seal of the state shall be of the following design: in the background shall be a range of mountains, with the sun rising behind the peaks thereof, and at the right side of the range of mountains there shall be a storage reservoir and a dam, below which in the middle distance are irrigated fields and orchards reaching into the foreground, at the right of which are cattle grazing. To the left in the middle distance on a mountain side is a quartz mill in front of which and in the foreground is a miner standing with pick and shovel. Above this device shall be the motto: "Ditat Deus." In a circular band surrounding the whole device shall be inscribed: "Great Seal of The State of Arizona", with the year of admission of the state into the union.

Curiously, this detailed description of the state seal (which also constitutionalizes the state motto) provoked vigorous debate on the floor of the convention on the day before adjournment. A group of delegates led by Morris Goldwater argued for retention of the seal used by the Arizona Territory. An opponent

derided that seal, apparently accurately, as having been "taken from a baking powder can," and his position carried the day.[202] This section has not been interpreted in any published judicial decision.

SECTION 21

The legislature shall enact all necessary laws to carry into effect the provisions of this constitution.

This section's direction to the legislature is closely related to Article II, section 32, which makes constitutional provisions "mandatory, unless by express words they are declared to be otherwise." On its only occasion to address this section, the Supreme Court classified constitutional provisions by type: some are "expressly . . . self-operating"; others are "plainly self-operating by implication"; others "contain mandates to the legislature to enact supplemental legislation" (e.g., section 19 of this article); and still others merely "indicate a policy or principle, and no more" (*Gherna v. State*). It went on to suggest that this section was in fact superfluous, because the legislature has the same duty to carry out constitutional principles without this section as it does with it: "A [constitutional] mandate to the legislature to do its duty cannot make the obligation any more binding. The duty exists just the same without the mandate." This discussion was pure *dictum;* the Court upheld Gherna's conviction for violating the constitutional amendment on alcohol prohibition (Article XXIII, adopted in 1914 and repealed in 1932), even though the legislature had not adopted any legislation to implement it, because it was held to be a self-executing provision that was not to be "suspended or postponed until the legislature should speak."

Although the legislature may have a duty to act under the constitution, it is a separate question whether such a constitutional mandate is judicially enforceable. Ultimately that is a question of separation of powers (see the commentary on Article III).

SECTION 22

Judgments of death. The judgment of death shall be inflicted by administering an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death except that defendants sentenced to death for offenses committed prior to the effective date of the amendment to this section shall have the choice of either lethal injection or lethal gas. The lethal injection or lethal gas shall be administered

[202] Goff, *Records,* 994–98, 1001–2. A brief essay on the historical background on the state seal, by convention delegate Mulford Winsor, writing in his capacity of director of the state library and archives, is found in the *Arizona Revised Statutes Annotated,* vol. 1A, pp. 405–7.

under such procedures and supervision as prescribed by law. The execution shall take place within the limits of the state prison.

This section was added in 1933 to provide for administering the death penalty by lethal gas; previously the death penalty existed by statute, but the method was by hanging (Rev. Code of 1928, 5129). In 1992, it was amended to its current form, substituting lethal injection for lethal gas and adding the second sentence and the caption. (The third sentence was the second sentence in the 1933 version.) The consistency of this section with the Eighth Amendment's prohibition of "cruel and unusual punishment" (and with the counterpart provision in this constitution; Article II, section 15) has also been confirmed in a modern case (*State v. Williams*). For further discussion of the death penalty, see the commentary on Article II, section 15.

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Article XXIII

Prohibition

The original version of the constitution ended with the twenty-second article. Article XXIII was added upon initiative petition in 1914. It prohibited, effective January 1, 1915, the manufacture or introduction into the state of all intoxicating liquor, and provided penalties for persons violating the section. The Eighteenth Amendment to the U.S. Constitution, ratified in 1919, contained essentially the same provisions. This article was repealed upon initiative petition in 1932.

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Article XXIV

Prohibition

This article was a companion to the preceding one. It had been added upon initiative petition in 1916 and broadened the terms of the prohibition to include receipt or possession, as well as manufacture or introduction, of demon rum. The amendment was promoted by the Temperance Federation of Arizona in response to a Supreme Court decision that Article XXIII did not cover the introduction of alcohol into the state for personal consumption (*Sturgeon v. State*). Complaining that Article XXIII had been "changed by the Court," it explained that this amendment was to "get the law back precisely to where it had been before."[203] This was inaccurate, for the amendment also broadened the sole exemption in Article XXIII (for denatured alcohol) to include possession of wine "for sacramental purposes" by clergy of established churches, and possession of grain alcohol "for scientific uses" under regulation by the university board of regents. It also set penalties for its violation and added the requirement that any offending liquor seized should be "publicly destroyed." Like its companion, the preceding article, this one was repealed upon initiative petition in 1932, one year before the Twenty-First Amendment to the U.S. Constitution was ratified to end the "noble experiment" of national alcohol prohibition.

[203] *Publicity Pamphlet,* 1916 General Election, p. 9.

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Article XXV

Right to Work

> No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.

This provision outlawing the so-called union shop was added upon initiative petition in 1946. The framers of the original constitution had rejected a provision, modeled on one in the South Dakota Constitution, that would have guaranteed each citizen the right "to obtain employment wherever possible," which was perceived by labor advocates as having a similar impact.[204] Prior to the adoption of this section, the Supreme Court had upheld an employer's agreement to employ only union members against a challenge that it violated "public policy" (*Corpuz v. Hotel & Restaurant Employees*). This article was sustained against federal constitutional attack shortly after its adoption (*American Federation of Labor v. American Sash & Door Co.*).

[204] Goff, *Records,* 897–98. For background on the 1946 amendment, see Michael S. Wade, *The Bitter Issue: The Right to Work Law in Arizona* (Tucson: Arizona Historical Society, 1976); John C. Halverson, "An Historical Summary and Analysis of Events Concerning the Arizona Right-to-Work Law from 1945 to 1948" (M.B.A. thesis, Arizona State University, 1966).

The Supreme Court has held that the courts could enjoin peaceful picketing of an employer by a union where the object was to coerce "an employer to agree to replace his non-union help with union members," because such picketing "would be for an unlawful purpose" in view of this article (*Baldwin v. Arizona Flame Restaurant*), but another case found no prima facie case of a conspiracy to violate this article where an experienced sheet metal worker who had been expelled from a union was thereafter discharged by employers from three successive jobs (*Sheet Metal Workers Intl. Assn. v. Nichols*). The attorney general has issued a number of opinions bearing on this article (e.g., Nos. 62–2; I87–128).

Article XXVI

Right of Licensed Real Estate Brokers and Salesmen to Prepare Instruments Incident to Property Transactions

SECTION 1

Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona state real estate department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.

This article was the product of a struggle between the organized bar and real estate brokers. In 1961 the Supreme Court held that title company employees filling in the blanks on standard form contracts for the purchase of real estate were engaged in the unauthorized practice of law (*State Bar of Arizona v. Arizona Land Title & Trust Co.;* see also the commentary on Article III). A year after this decision, the Arizona voters approved an initiative, spearheaded by the real estate industry, to overturn it by adding this article.[205] Although neither attorneys nor

[205] See M. F. Adler, "Are Real Estate Agents Enabled to Practice a Little Law?" *Arizona Law Review* 4 (1963), 188; Note, "Inherent Judicial Power and Regulation of the Practice of Law," *Arizona Law Review* 23 (1981), 1313.

real estate brokers seem to be held in particularly high public esteem, the latter clearly won this test in the court of public opinion because the vote on the amendment was better than three to one in favor. This article gives the real estate industry broad power to draft and complete instruments incident to a sale, lease, or exchange of property, although it does prohibit charging for this service. The Arizona courts have held that with this power comes "the responsibility and duty" to protect the consumer by "explaining . . . the implications" of the documents (*Morley v. J. Pagel Realty & Ins.*). This decision was later held not to create a duty on the part of a real estate broker representing the seller to advise the purchaser (*Haldiman v. Gosnell Dev. Corp.*). A commentator has noted the emergence, out of this amendment and subsequent court decisions, of a doctrine of real estate broker malpractice.[206]

[206] Note, "Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine," *Arizona Law Review* 20 (1978), 767.

Article XXVII

Regulation of Public Health, Safety and Welfare

SECTION 1

The legislature may provide for the regulation of ambulances and ambulance services in this state in all matters relating to services provided, routes served, response times and charges.

This article, added in 1982, stemmed from the adoption, two years previously, of an amendment to Article XV, section 2, that removed private corporations "carrying persons . . . for hire" from the definition of "public service corporations" subject to regulation by the corporation commission. In early 1982 the legislature enacted a statute to regulate ambulance service "with respect to essential public health and safety matters" (Laws 1982, ch. 130, sections 1, 18) and simultaneously proposed submitting this article to the voters in the fall. The perceived necessity for this amendment is puzzling (see the commentary on Article XV, section 2).

This article leaves the regulation of ambulance service entirely up to the legislature, rather than simply reinstating corporation commission jurisdiction. Legislation implementing this section subjects both private and publicly owned ambulances to rather comprehensive regulation by the state department of health services (Ariz. Rev. Stat. 36–2231 through 2242), but exempts paramedic

vehicles operated by cities and towns (*Kord's Ambulance Serv. v. City of Tucson*). Neither this section nor the legislation prevents a city from entering into a contract with a single private ambulance service to provide service within its borders, so long as the state regulatory agency approves the contract (*Emergency Medical Transp., Inc. v. City of Tempe*).

Article XXVIII

English as the Official Language

SECTION 1

(1) The English language is the official language of the state of Arizona.
(2) As the official language of this state, the English language is the language of the ballot, the public schools and all government functions and actions.
(3) (a) This article applies to:

(i) The legislative, executive and judicial branches of government
(ii) All political subdivisions, departments, agencies, organizations, and instrumentalities of this state, including local governments and municipalities,
(iii) All statutes, ordinances, rules, orders, programs and policies.
(iv) All government officials and employees during the performance of government business.

(b) As used in this article, the phrase "this state and all political subdivisions of this state" shall include every entity, person, action or item described in this section, as appropriate to the circumstances.

SECTION 2

This state and all political subdivisions of this state shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.

SECTION 3

(1) Except as provided in subsection (2):

(a) This state and all political subdivisions of this state shall act in English and in no other language.

(b) No entity to which this article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This state and all political subdivisions of this state may act in a language other than English under any of the following circumstances:

(a) To assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) To comply with other federal laws.

(c) To teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) To protect public health or safety.

(e) To protect the rights of criminal defendants or victims of crime.

SECTION 4

A person who resides in or does business in this state shall have standing to bring suit to enforce this article in a court of record of the state. The legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

This article was added upon initiative proposal by a narrow margin in 1988. In most respects it greatly broadens the scope of the constitution's previous references to English literacy and instruction, which stemmed from the statehood enabling act (see Article XX, sections 7 and 8). Similar so-called Official English proposals have been adopted by legislation in several other states and localities. At least four other states have constitutional provisions on the subject, although none of these have specific provisions similar to section 3 of this article.[207] This article has not yet been construed by the Arizona courts, but there has been federal court litigation on whether it violates the First Amendment to the U.S. Constitution (*Yniguez v. Mqfford*).

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[207] California Constitution, Art. 3, sec. 6 (added 1986); Colorado Constitution, Art. 2, sec. 30a (added 1988); Hawaii Constitution, Art. 15, sec. 4 (added 1978); Nebraska Constitution Art. I, sec. 27. See generally Note, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," *Harvard Law Review* 100 (1987), 1345; Rachel F. Moran, "Irritation and Intrigue: The Intricacies of Language Rights and Language Policy," *Northwestern University Law Review* 85 (1991), 790 (book review).

BIBLIOGRAPHICAL ESSAY

A comprehensive discussion of available sources is found in J. Leshy, "The Arizona Constitution," chapter 1 (pp. 1–11) of K. Shimpock-Vieweg and M. S. Alcorn, eds. *Arizona Legal Research Guide* (Buffalo, N.Y.: Wm. S. Hein & Co., 1992).

TERRITORIAL ANTECEDENTS

The best territorial history, Howard Roberts Lamar's *The Far Southwest 1846–1912* (New Haven, Conn.: Yale University Press, 1966; Norton Library reprint, 1970), contains an excellent bibliographic essay. Robert W. Larson's *New Mexico's Quest for Statehood 1846–1912* (Albuquerque: University of New Mexico Press, 1968) also addresses Arizona's fight for statehood. Other informative works are Jay J. Wagoner's *Arizona Territory: 1863–1912* (Tucson: University of Arizona Press, 1970) and *Legislative History: Arizona 1864–1912,* G. H. Kelly, ed. (Phoenix, Ariz.: Manufacturing Stationers, 1926).

William F. Swindler's compilation, *Sources and Documents of United States Constitutions* (Dobbs Ferry, N.Y.: Oceana Publications, 1973), 1:234–316, contains relevant territorial documents, the draft constitution of 1891, the 1910 enabling act and constitution, the statehood resolutions, President Taft's veto message, and the proclamation of statehood.

THE CONSTITUTIONAL CONVENTION OF 1910

The most comprehensive narrative work is John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20 (1988), 1–113. It references many other available sources. A shorter treatment is Gordon M. Bakken, "The Arizona Constitutional Convention of 1910," *Arizona State Law Journal* (1978): 1–30. Gordon M. Bakken's *Rocky Mountain Constitution Making 1850–1912* (Westport, Conn.: Greenwood Press, 1987) examines, in comparative fashion, some fundamental issues involved in the drafting of the original constitutions of several states, including Arizona.

The most comprehensive record of the convention deliberations is *The Records of the Arizona Constitutional Convention of 1910,* edited by John S. Goff and published by the Supreme Court of Arizona in 1991. It collects most of the available materials on the 1910 convention, as well as some additional information, specifically: (1) the most complete transcript of the floor deliberations available; (2) an index to the subjects considered on the floor; (3) the text of the 153 propositions introduced that formed the starting point for the convention's deliberations; (4) a separate index on the disposition of each proposition; (5) an index of the sources in the propositions of each of the twenty-two articles that comprised the 1910 constitution; (6) brief biographies of the

fifty-two convention delegates; (7) the text of the original version of the constitution adopted in December 1910; and (8) the text of the one hundred amendments adopted through the fall of 1990. This publication is described in detail, with some shortcomings noted, in a review essay by John D. Leshy, *Arizona State Law Journal* 23 (1992), 1163–68.

CONSTITUTIONAL AMENDMENTS

The Arizona Secretary of State's office has publicity pamphlets for most amendment propositions that have appeared on the ballot. The *Arizona Blue Book 1986* (with periodic supplements), published by that office, contains voting statistics on all proposed constitutional amendments submitted to the voters since statehood. Brief discussions of some amendments are found in some of the histories cited in the next section.

ARIZONA CONSTITUTIONAL EVOLUTION AND INTERPRETATION

A general overview is provided in the college-level text, *Constitutional Government in Arizona,* 7th ed. (Tempe, Ariz.: Cleber Publishing Co., 1982), by Professors Bruce B. Mason and Heinz R. Hink. Bruce B. Mason, John P. White, and Russell B. Roush have published *A Guide to the Arizona Constitution* (Scottsdale, Ariz.: Cross Plains Publishers, 1982), a section-by-section commentary. Professor John S. Goff s *Arizona Civilization,* 2d ed. (Cave Creek, Ariz.: Black Mountain Press, 1970) contains some information on the constitution and its evolution, arranged by topics. Goff also published a biography of the convention president and seven-time governor, *George W. P. Hunt and His Arizona* (Pasadena, Calif.: Socio Technical Publications, 1973). James M. Murphy's *Law, Courts, and Lawyers* (Tucson: University of Arizona Press, 1970) contains some materials on the evolution of the judicial system under the constitution. Roy D. Morey's *Politics and Legislation: The Office of the Governor in Arizona* (Tucson: University of Arizona Press, 1965) focuses on the governor and the legislative process and its evolution since statehood. James Byrkit's *Forging the Copper Collar: Arizona's Labor-Management War of 1901–1921* (Tucson: University of Arizona Press, 1982) examines labor politics in early Arizona and devotes considerable discussion to labor's influence on the constitutional convention.

Two other general studies of Arizona government and the constitution bear mentioning. In 1949 the state legislature contracted with a private consulting firm, Griffenhagen & Associates, to prepare a comprehensive report on state government. The "Griffenhagen Report" (published as part of a supplement to the Journal of the Senate, First Sp. Sess., Nineteenth Legislature, 1950) contains useful information on the evolution of state government to that time, and a number of its recommendations were eventually adopted as constitutional amendments. The Arizona Academy, a private nonprofit institution formed in 1962, semiannually holds Town Halls at which invited community leaders address various issues facing the state. Several Town Halls have dealt with constitutional issues, including one in 1964 on the subject of revising or

replacing the constitution. See Arizona Academy, *Fifth Arizona Town Hall on Revision of Arizona's Constitution* (Temper Arizona State University, 1964); the background study for this convocation was prepared by Professors Bruce B. Mason and Heinz R. Hink, entitled *Revision of Arizona's Constitution* (Phoenix: Arizona Academy, 1964).

Other helpful studies of Arizona constitutional issues are Victor DeWitt Brannon, "Employers' Liability and Workmen's Compensation in Arizona," *University of Arizona Bulletin* 5, no. 8 (Nov. 1934) (Social Science Bulletin No. 7); Neal D. Houghton, "Arizona Experience with the Initiative and Referendum," *New Mexico Historical Review* 29, no. 3 (July 1954), 183–209; David A. Bingham, *Constitutional Municipal Home Rule in Arizona* (Tucson: Bureau of Business and Public Research, University of Ariz., Nov. 1960); and David A. Bingham, "Legislative Apportionment: The Arizona Experience," *Arizona Review of Business and Public Administration* (Tucson: Bureau of Business and Public Research, University of Arizona), 11, no. 10 (Oct. 1962).

Some articles on Arizona constitutional issues have appeared in the *Arizona Law Review* (published since 1959 by the University of Arizona College of Law) and the *Arizona State University Law Journal* (published since 1969; from 1969 to 1973 it was known as *Law and the Social Order*). A good place to start is a special symposium issue in volume 20 of the *Arizona State Law Journal,* published in 1988. Since the publication of this symposium, the pace of law journal commentary has quickened. The *Index of Legal Periodicals* and the *Arizona Legal Research Guide,* noted above, list relevant titles.

Most court decisions and attorney general's opinions that interpret specific constitutional provisions can be located in the "annotations" (brief summaries with legal citations) found in the first two volumes of the *Arizona Revised Statutes Annotated.* These annotations sometimes fail to capture all of the decisions that discuss the Arizona constitution, and conversely sometimes list cases focusing exclusively on the federal rather than the state constitution. *Shepard's Arizona Citations (Statute Edition)*, 3rd ed. (Colorado Springs, Colo.: Shepard's McGraw-Hill, 1985), pp. 49–65 (with periodic supplements), lists citations to the Arizona Constitution in reported decisions of Arizona and federal courts, in articles in numerous legal periodicals, in several legal texts, in annotations, and in laws of Arizona. Modern computer databases (WESTLAW and LEXIS) may also be used to locate constitutional decisions. The annotated Arizona Constitution is available only on WESTLAW.

The Arizona Room and the collection of the Arizona Historical Foundation in Hayden Library at Arizona State University include unpublished material that bear on the Arizona Constitution, such as the papers of George W. P. Hunt. The University of Arizona Library in Tucson and the State Capitol Library in Phoenix also have some relevant materials. Finally, some unpublished theses have addressed Arizona constitutional issues. They are cited in the various bibliographies noted above and in J. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20 (1988), 1–113.

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