PRINCIPLES OF STATE CONSTITUTIONAL INTERPRETATION*

CLINT BOLICK**

State constitutionalism—the practice of state courts deciding cases on independent state constitutional grounds—is a vital yet underdeveloped attribute of American federalism. Our system of dual sovereignty ensures the capacity of state courts to interpret their own constitutions to provide greater protections for individual rights than the federal constitution.[1] When they do so, their decisions are not subject to review by federal courts absent a federal issue.[2]

The subject has received significant judicial and academic attention ever since U.S. Supreme Court Justice William J. Brennan, Jr., in a pair of trailblazing law review articles in 1970 and 1984, urged state courts to independently interpret their constitutions to elevate the protection of individual rights.[3] Indeed, in the years leading up to his second article, Brennan counted over 250 state court decisions "holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy

---

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org. This article was originally published in the *Arizona State Law Journal*. Clint Bolick, *Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771 (2021).

** Justice, Arizona Supreme Court. The author thanks his law clerk John Milligan (ASU Sandra Day O'Connor College of Law, Class of 2020) for his invaluable assistance in all facets of the article. A future law clerk, Jennifer Aronsohn (Northwestern University Pritzker School of Law, Class of 2020) provided very helpful suggestions. The author also expresses gratitude to his two summer legal interns, Brooke Huppenthal (Belmont College of Law, Class of 2022) and Phillip Tomas (ASU Sandra Day O'Connor College of Law, Class of 2022) for outstanding technical assistance.

[1] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

[2] Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

[3] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Bill of Rights*].

the more stringent requirements of state constitutional law."[4] On issues encompassing free speech, religious liberty, private property rights, due process, privacy, capital punishment, education, victims' rights, and the rights of criminal defendants, state courts have frequently identified greater constitutional protections than their federal counterparts.

And yet the methodology of state constitutional interpretation remains largely unexamined. Rarely have state courts specified *when* they will interpret their state constitutions independently and *how* they will go about that task. As a result, the jurisprudence is inconsistent and confusing, and constitutional rights may not be protected to the extent the framers of our state constitutions intended. State court judges typically, and often correctly, blame practitioners for failing to raise and develop state constitutional arguments adequately. But if our jurisprudence lacks coherent methodology to determine whether and how to independently interpret our state constitutions, how can practitioners know when to raise such arguments and how to present them effectively?

Arizona jurisprudence is especially bereft of such coherent methodology. Sometimes we decide cases on independent state grounds, holding that certain state constitutional provisions provide greater protections than the federal constitution.[5] In other cases, we interpret state constitutional provisions in lockstep with federal jurisprudence construing federal constitutional provisions, even where the language is starkly different.[6] In one recent decision in which *only* state constitutional and statutory claims were raised, the majority nonetheless decided the case on the basis of federal precedents, reasoning that if the local ordinance at issue violated narrower federal constitutional constraints, it would necessarily also offend more protective state

---

[4] Brennan, *Bill of Rights*, *supra* note 3, at 548 (citing Ronald K.L. Collins, *Reliance on State Constitutions*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 1, 2 (B. McGraw ed., 1985)).

[5] *See, e.g.*, State v. Stummer, 194 P.3d 1043, 1049–50 (Ariz. 2008) (declining to follow the federal test for secondary effects of speech because it is inconsistent "with the broad protection of speech afforded by the Arizona Constitution"); Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n, 773 P.2d 455, 459–61 (Ariz. 1989) (applying "the broader freedom of speech clause of the Arizona Constitution" before consulting the U.S. Constitution); Phx. Newspapers, Inc. v. Superior Court, 418 P.2d 594, 596 (Ariz. 1966) (declining to resolve issues under the U.S. Constitution after holding that a judge's ban on publications of open court proceedings violated the Arizona Constitution).

[6] *See, e.g.*, State v. Mixton, 478 P.3d 1227, 1244–45 (Ariz. 2021) (interpreting the Private Affairs Clause in article 2, section 8 of the Arizona Constitution in lockstep with U.S. Supreme Court interpretations of the Fourth Amendment).

constitutional protection.[7] What we have never done is to explain when or why we will take one approach or another, resulting in an entirely subjective, ad hoc approach that must be mystifying to the advocates who appear before us.

In this Article, I explain why it is important for state judges to vigorously enforce their constitutions and propose several principles of state constitutional interpretation that may help alleviate the current jurisprudential cacophony. Although this article focuses primarily on the Arizona Constitution, the proposed principles are applicable to state constitutions generally. By creating a sensible and consistent methodology for interpreting state constitutions, we can better vindicate the precious guarantees that the framers intended to protect.

I. THE MAJESTY OF STATE CONSTITUTIONS

Both by content and their role in our federalist republic, state constitutions are freedom documents. In addition to containing protections for individual rights and constraints on government power that are similar to the national constitution, they contain additional protections that are completely unknown to the United States Constitution.[8] Moreover, the national constitution provides a "floor" for the protection of rights, above which state courts may find greater protections in their state constitutions.[9] State constitutionalism, in our system of federalism, thus properly serves as a one-way ratchet in the protection of individual rights.

The original state constitutions preceded the United States Constitution, and many of the protections of the Bill of Rights were based on similar pro-

---

[7] Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 901 (Ariz. 2019). *But see id.* at 927 (Bolick, J., concurring) (urging resolution under state law).

[8] Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 ARIZ. ST. L.J. 505, 506 (2012). Among many other examples, although the U.S. Supreme Court has held that no right to education exists under the national constitution, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), most if not all state constitutions clearly establish, or have been construed to provide, such a right. *See* ARIZ. CONST. art. XI, § 1 ("General and Uniform" Public School System Clause); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994). Several states, including Arizona, expressly protect the rights of crime victims. *See* ARIZ. CONST. art. II, § 2.1.

[9] Clint Bolick, *State Constitutions as a Bulwark for Freedom*, 37 OKLA. CITY U. L. REV. 1, 6 (2012); Brennan, *Bill of Rights*, *supra* note 3, at 548.

tections in state constitutions.[10] Apart from a handful of constraints on the power of state governments in the national constitution, state constitutions provided the primary protections for individual rights; thus, for the first 150 years of our republic, most constitutional litigation took place in the states.[11] That equation changed, of course, with the adoption of the Fourteenth Amendment and its protections of privileges or immunities, equal protection, and due process against the states. But even then, the Bill of Rights was not applied to the states until the twentieth century, when specific guarantees were incorporated through the Fourteenth Amendment.[12] That evolution occurred slowly over the past century: only recently were the Second Amendment's right to keep and bear arms and the Eighth Amendment's prohibition against excessive fines extended to individuals against their state governments.[13] So long as the rights contained in the Bill of Rights were not applied against state governments, they were either protected by state courts under state constitutions, or not at all.

With the emergence of a robust federal Bill of Rights and Fourteenth Amendment jurisprudence, most Americans have come to view the national constitution as the primary, if not sole, protection for their rights. That view is doctrinally embedded in American legal education, where "Constitutional Law" is usually taken to mean federal constitutional law, and state constitutional law is consigned to elective law school courses that few stu-

---

[10] *Brush & Nib*, 448 P.3d at 927–28 (Bolick, J., concurring); *see* Turken v. Gordon, 224 P.3d 158, 161–62 (Ariz. 2010); Moore v. Chilson, 224 P. 818, 829 (Ariz. 1924) (applying prior-construction canon); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322–23 (2012) (discussing prior-construction canon).

[11] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 13 (2018). *See* Brennan, *State Constitutions*, *supra* note 3, at 493; Gitlow v. New York, 268 U.S. 652, 669–70 (1925) (holding that the Due Process clause imposes restrictions on the states concerning freedom of speech); Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (holding that the Due Process Clause requires just compensation for state-seized property).

[12] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (incorporating the right to counsel in all felony cases); Malloy v. Hogan, 378 U.S. 1, 5–6 (1964) (incorporating the right to be free from self-incrimination); Pointer v. Texas, 380 U.S. 400, 403 (1965) (incorporating the right to confront adverse witnesses); Washington v. Texas, 388 U.S. 14, 17–18 (1967) (incorporating the right to obtain defense witnesses); Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968) (incorporating the right to a jury trial in non-petty cases); Benton v. Maryland, 395 U.S. 784, 794 (1969) (incorporating the Double Jeopardy Clause); McDonald v. City of Chicago, 561 U.S. 742, 791 (2012) (incorporating the 2nd Amendment); Timbs v. Indiana, 139 S. Ct. 682, 686 (2019) (incorporating the Excessive Fines Clause); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (incorporating the Sixth Amendment right to a jury trial).

[13] *McDonald*, 561 U.S. at 749–50; *Timbs*, 139 S. Ct. at 686.

dents take and is sparsely tested on state bar examinations. I have often quipped that were my Court to insert questions on state constitutional law on our bar exam, almost everyone would fail them. Yet for lawyers who defend their clients' constitutional rights or who advise government officials on the scope of their powers, ignorance of state constitutional law ought to be intolerable.

As the reach of the federal constitution grew, interest in state constitutionalism diminished. Especially during the Warren era, the United States Supreme Court expanded the rights of criminal defendants and found in the Fourteenth Amendment's Due Process Clause rights to privacy and abortion.[14] A more robust application of the Equal Protection Clause yielded greater constraints against race and sex discrimination.[15] Most litigators seeking to expand constitutional rights have focused largely if not exclusively on federal lawsuits. After all, a single powerful precedent like *Brown v. Board of Education*[16] could effect nationwide change. State constitutions were relegated to afterthought.[17]

Ironically, one of the main architects of the Warren Court's expansion of constitutional rights also provided the intellectual foundation for the revival of state constitutionalism. Alarmed that the emergence of a more conservative Court would curtail recently recognized federal constitutional rights, Justice Brennan urged state courts and practitioners to advance state constitutional protections.[18] "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law," Brennan urged, "for without it, the full realization of our

---

[14] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a married couple has a constitutional right of access to contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (holding that the Fourteenth Amendment protects a woman's right to have an abortion).

[15] Loving v. Virginia, 388 U.S. 1 (1967) (holding that prohibiting interracial marriages violates the Equal Protection Clause); United States v. Virginia, 518 U.S. 515 (1996) (holding that a public institution's single-sex admission policy, without "exceedingly persuasive justification," violates the Equal Protection Clause).

[16] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954), *aff'd in part, rev'd in part sub nom.* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[17] *See* SUTTON, *supra* note 11, at 13–14.

[18] *See* Brennan, *State Constitutions*, *supra* note 3, at 491.

liberties cannot be guaranteed."[19] Brennan observed that state constitutional protections preceded the Bill of Rights, the drafters of which drew upon such provisions, and that for many years "these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable."[20] He urged that constitutional decisions by federal courts "are not mechanically applicable to state law issues," and that "only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."[21] Of the growing propensity of state courts to independently interpret provisions in their constitutions, Brennan remarked that "[e]very believer in our concept of federalism . . . must salute this development in our state courts."[22] More pointedly, nine years later he remarked that "[a]s state courts assume a leadership role in the protection of individual rights and liberties, the true colors of purported federalists will be revealed."[23]

More recently, Judge Jeffrey Sutton, chief judge of the U.S. Court of Appeals for the Sixth Circuit, weighed in with the book *51 Imperfect Solutions,* reminding us that we have not one constitution but fifty-one.[24] "The most inspired constitution writing in this country, perhaps at any time, perhaps anywhere, occurred before 1787," Sutton remarked, "and it occurred in the States."[25] State constitutions adopted since then reflect the times and circumstances in which those documents were created. As Sutton suggests, "State constitutional law respects and honors these differences between and among the States by allowing interpretation of the fifty state constitutions to account for these differences in culture, geography, and history."[26]

Acknowledging the highly divisive issues that occupy much of the U.S. Supreme Court's docket, Sutton posits, "what better time to permit the

---

[19] *Id.*

[20] *Id.* at 501–02.

[21] *Id.* at 502.

[22] *Id.*

[23] Brennan, *Bill of Rights*, *supra* note 3, at 550.

[24] SUTTON, *supra* note 11, at 2.

[25] *Id.* at 11.

[26] *Id.* at 17. Judge Gerald A. Williams and I recently explored similarities and differences between the state constitutions of Oklahoma (where he attended law school) and Arizona. *See* Clint Bolick & Gerald A. Williams, *The Role of State Constitutions in the Protection of Individual Rights,* OKLA. BAR J., Mar. 2020, at 18.

state courts to adopt their own interpretations of similarly worded constitutional guarantees found in their constitutions?"[27] Indeed, he asserts that "[r]espect for state constitutional law as an independent source of rights, and its revitalization as a litigation tool, may be the best thing that could happen for federal constitutional law."[28] He argues that "[f]or too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions. Why not do the reverse?" Sutton asks.[29]

Good question. As Sutton notes, decisions in other major areas of law, such as tort and contract law, tend to originate in state courts.[30] A major attribute of our system of federalism is that different states can try different ideas on for size—and other states (as well as the national government) can see what happens.[31] As Justice John Paul Stevens observed, "some conflict among state courts on novel questions . . . is desirable as a means of exploring and refining alternative approaches to the problem."[32]

In a nation whose constitution invests limited and defined powers in the national government, with the residuum of legitimate government powers remaining in the states,[33] it is curious that many state courts have largely ceded to the U.S. Supreme Court the power of state constitutional interpretation through its decisions interpreting the national constitution. Justice Brennan, Judge Sutton, and others have voiced many reasons why we should not persist in that practice. In a recent dissenting opinion, I articulated what I consider the most compelling reason for state judges to take responsibility for independently interpreting their state constitutions: "After all, Supreme Court justices do not take an oath to uphold the Arizona Constitution. But we do."[34]

---

[27] SUTTON, *supra* note 11, at 18.

[28] *Id.* at 19–20.

[29] *Id.* at 20.

[30] *Id.*

[31] FERC v. Mississippi, 456 U.S. 742, 787–88 (1982) (O'Connor, J., concurring).

[32] California v. Carney, 471 US 386, 397 n.7 (1985) (Stevens, J., dissenting).

[33] *See* U.S. CONST. amend. X; *see also* Bond v. United States, 572 U.S. 844, 854 (2014) ("[T]he National Government possesses only limited powers; the States and the people retain the remainder.").

[34] *Mixton*, 478 P.3d at 1249 (Bolick, J., dissenting).

II. JURISPRUDENTIAL CACOPHONY

Before we can vindicate the unfulfilled promise of state constitutions, we must first make some sense over when and how we should do so. Despite renewed interest in state constitutionalism, state court jurisprudence and legal scholarship are almost entirely devoid of established or even suggested principles guiding how and when we should independently interpret our state constitutions.

As in many other states, our approach to state constitutional interpretation in Arizona is inconsistent and entirely ad hoc. As former Arizona Supreme Court Chief Justice Stanley Feldman and constitutional scholar David Abney have argued, "In some cases, the court ignored the [state] constitution, even where there were significant textual differences between it and the federal counterpart. In other cases, the court relied on textual disparity to formulate its decision."[35] The Court has never explained the divergence in its approach.

Our ad hoc approach to state constitutional interpretation leaves our jurisprudence susceptible to the perception that it is subjective and results-oriented, and it tends to produce inconsistency and unpredictability. As Professor James A. Gardner has asserted, the failure of state courts to create a coherent discourse on state constitutional law has led to "confusing, conflicting, and essentially unintelligible pronouncements."[36]

A prime example is our cases interpreting article 2, section 8 of the Arizona Constitution, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[37] The first clause, referred to as the "private affairs" clause, has no analogue in the U.S. Constitution.[38] By contrast, the second provision, the "home invasion" clause, covers terrain similar to the Fourth Amendment, which among other things protects the "right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures."[39] The Arizona Supreme Court has held that the home invasion clause, article 2, section 8 of the Arizona Constitution, provides broader protection than the Fourth Amendment,

---

[35] Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 144 (1988) (footnote omitted).

[36] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

[37] ARIZ. CONST. art. 2, § 8.

[38] Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 ARIZ. ST. L.J. 723, 723 (2019).

[39] U.S. CONST. amend. IV.

and that it is not bound by the U.S. Supreme Court's construction of the Fourth Amendment.[40] The Court did so "based upon our own constitutional provision, its specific wording, and our own cases, independent of federal authority."[41] By contrast, in *State v. Mixton*, a 4-3 majority of our Court applied the U.S. Supreme Court's Fourth Amendment jurisprudence to the private affairs clause, even though that protection does not appear in the Fourth Amendment.[42] Anyone looking for clues about how to anticipate or reconcile these divergent approaches to state constitutional interpretation will not find them.

Judges often assign blame for our failure to independently interpret state constitutions to lawyers who fail to raise or develop such arguments. True enough. But as Feldman and Abney argue, "In the final analysis, . . . the fault is judicial."[43] Why should advocates devote finite time and resources to do so if they have no assurance courts will take such arguments seriously? Because we have failed to articulate guidance for when and how we will interpret the Arizona Constitution, it is impossible for litigators to know when they should make state constitutional arguments, and when doing so would be a waste of time. Yet we cannot address state constitutional issues if litigators do not raise, preserve, and meaningfully develop them. If they do so, I believe it is our duty as state court judges to address them meaningfully.

III. PRINCIPLES OF INTERPRETATION

Our citizens deserve more than most state courts have given them: a cogent, coherent articulation of when we will interpret our state constitution independently and the methods we will use in doing so.

In *State v. Gunwall*,[44] the Washington Supreme Court articulated principles by which it will resolve state constitutional issues. Former Washington Supreme Court Justice Robert F. Utter explained that *Gunwall* was in-

---

[40] *See* State v. Ault, 724 P.2d 545, 550–51 (Ariz. 1986); State v. Bolt, 689 P.2d 519, 523–24 (Ariz. 1984).

[41] *Bolt*, 689 P.2d at 524.

[42] 478 P.3d 1227, 1227 (Ariz. 2021) (Bolick, J., dissenting).

[43] Feldman & Abney, *supra* note 35, at 146.

[44] 720 P.2d 808, 811 (Wash. 1986).

tended to create neutral principles to guide state constitutional interpretation, partly in response to the criticism that the prior approach "was solely result-oriented."[45] The "*Gunwall* factors," as Justice Utter summarized them, are "(1) textual language; (2) differences in the texts of the state and federal constitutions; (3) constitutional history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern."[46] These factors help inform the inquiry into when to interpret a state constitution independently, but they fail to provide clear guidance to courts and advocates on how to do so.

Arizona should heed the Washington Supreme Court's wisdom in developing interpretative methodology but improve upon its model. As Feldman and Abney have argued, "If a jurisprudence of neutral principles is truly governed by text and original intent, then its adherents can hardly ignore either the unique text of the Arizona Constitution or the intent of those who drafted the document."[47] By articulating clear principles, we can bring consistency and predictability to the law while vindicating the promise of our constitution. The following are five principles, derived from the constitution's structure and intent, that I propose to help guide jurists and advocates in this vital endeavor.

A. The Primacy Principle

State judges have an obligation to enforce two constitutions, not one. Where state and federal claims are raised, as the Arizona Supreme Court has held, we should "first consult our constitution."[48] Of course, by virtue of the Supremacy Clause,[49] where national law governs a matter, it prevails over contrary state law. But where a lawsuit brought in state court seeks to protect individual rights or constrain government action under both the state and national constitutions, we should accord primacy to our own constitution.[50] "By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties," the Washington Supreme Court has instructed, a duty "that stems from the

---

[45] Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153, 1161 (1992).

[46] *Id.* (citing *Gunwall*, 720 P.2d at 811).

[47] Feldman & Abney, *supra* note 35, at 117.

[48] *Mountain States Tel. & Tel. Co.*, 773 P.2d at 461.

[49] U.S. CONST. art. VI, cl. 2.

[50] *See* State v. Coe, 679 P.2d 353, 359 (Wash. 1984).

very nature of our federal system and the vast differences between the federal and state constitutions and courts."[51]

That rule makes sense. Only state court judges proclaim fidelity to state constitutions. If we do not enforce those protections, who will? Put another way, if we subordinate state constitutional protections to federal constitutional jurisprudence, we risk sacrificing liberties that were important to our state constitution's framers.[52] As Feldman and Abney point out, given that the Bill of Rights was not yet incorporated to the states when our constitution was enacted, neither the Arizona Constitution's framers nor the citizens who adopted it "could have intended that *federal* constitutional law would protect the rights and liberties of Arizona's populace."[53]

Prudential reasons also counsel consulting the state constitution first: finality, stability, and predictability. Finality, because cases decided on independent state law grounds are unreviewable by the U.S. Supreme Court, so long as no separate federal law argument is made and the state court decision itself does not violate valid federal law or the U.S. Constitution.[54] Stability and predictability, for our decisions need not follow the vagaries and shifting tides of federal jurisprudence.

Former Oregon Supreme Court Justice Hans A. Linde, who devoted much of his distinguished career to state constitutional scholarship and taught at Arizona State University School of Law following his retirement from the bench, observed that independent state constitutional holdings "can bring stability to the state's law in the face of frequent inconsistencies and changes in Supreme Court [decisions]."[55] Indeed, as he points out, "[Is it not] an illusion to seek stability by following the Supreme Court in deciding a state claim; for once it has been decided, does the decision not contin-

---

[51] *Id.*

[52] *See Mixton*, 478 P.3d at 1249 (Bolick, J., dissenting).

[53] Feldman & Abney, *supra* note 35, at 116; *see also* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 ARIZ. ST. L.J. 265, 275 (2003).

[54] *See, e.g.*, *Long*, 463 U.S. at 1043; *see also* Paul Bender, *Some Thoughts on the Interpretation of Arizona Constitutional Rights*, 35 ARIZ. ST. L.J. 295, 300 (2003) ("[I]t would advance both judicial economy and the prompt finality of Arizona Supreme Court decisions if, in cases in which both state and federal individual rights protections are invoked . . . court[s] were to adopt the general practice of considering the state constitutional question first.").

[55] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 (1984).

ue to bind the state's courts even when the Supreme Court doctrine changes?"[56] The Iowa Supreme Court recently took that approach in the search and seizure context, proclaiming that "we encourage stability and finality in law by decoupling Iowa law from the winding and often surprising decisions of the United States Supreme Court" under the Fourth Amendment, and "take the opportunity to stake out higher constitutional ground."[57]

Justice Linde aptly summarized the proper approach:

> The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.[58]

Justice Brennan offered an additional expedient: correction of constitutional errors.[59] If the U.S. Supreme Court errs in constitutional interpretation, it is difficult for the people to correct it because the amendment process is nearly impossible.[60] But state constitutions are usually easier to amend and therefore constitutional errors are easier to correct.[61] All of those advantages accrue from according primacy to state constitutional provisions. State constitutionalism is an important component of federalism.[62] Justice Brennan commented that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."[63] As a unanimous Supreme Court declared in *Bond v. United States*, "Federalism secures the freedom of the individual. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[64] We vindicate that

---

[56] *Id.*

[57] State v. Ingram, 914 N.W.2d 794, 797–98 (Iowa 2018) (declining to follow the U.S. Supreme Court's Fourth Amendment analysis in favor of Iowa's constitutional provisions relating to search and seizure upon a driver's challenge to the constitutionality of an inventory search); *see also* State v. Wright, 961 N.W.2d 396, 396 (Iowa 2021).

[58] Linde, *supra* note 55, at 179.

[59] *See* Brennan, *Bill of Rights*, *supra* note 3, at 551.

[60] *Id.*

[61] *Id.*

[62] *See, e.g.*, Brennan, *State Constitutions*, *supra* note 3, at 503.

[63] *Id.*

[64] 564 U.S. 211, 221–22 (2011).

principle when we apply the greater protective force of state constitutional law in the first instance.

B. The Serious Examination Principle

The Arizona Supreme Court has expressly rejected a lockstep approach in construing provisions of the Arizona Constitution.[65] Yet many older Arizona cases concluded, with little or no analysis, that state provisions are coextensive with federal provisions.[66] Those cases are then cited for the proposition that Arizona has adopted federal jurisprudence in interpreting provisions of the state constitution.[67] In this manner, as to many state constitutional provisions, our courts have adopted a de facto lockstep approach in which federal precedents are presumed to govern interpretation of similar state constitutional provisions. Lower courts, which are required to follow Arizona Supreme Court precedents, further embed these precedents within our jurisprudence.[68] Although this practice is typically not the product of anything approaching rigorous analysis, it undermines case law calling for independent interpretation of our state constitution while contributing to our confusing jurisprudence. As former Arizona Supreme Court Chief Justice Ruth McGregor has observed, "None of the opinions from our court provide any in-depth analysis of the reasons we have so often opted for a goal of uniformity."[69]

A case in point is our private affairs clause jurisprudence. The Court's initial analysis of the interplay between article 2, section 8 of the Arizona Constitution and the Fourth Amendment in *Malmin v. State* comprised fewer than fifty words, concluding that federal cases governed because the

---

[65] *See* Pool v. Superior Court, 677 P.2d 261, 271 (Ariz. 1984).

[66] *See, e.g.*, Malmin v. State, 246 P. 548, 548–49 (Ariz. 1926) (stating that, although the Arizona Constitution's private affairs clause is "different in its language," it is "of the same general effect and purpose as the Fourth Amendment" and is thus appropriately analyzed under federal precedent).

[67] *See, e.g.*, State v. Reyna, 71 P.3d 366, 369 (Ariz. Ct. App. 2003) (citing *Malmin*, 246 P. at 549, in noting that "[o]ur supreme court long ago held that . . . the decisions concerning the scope of allowable vehicle searches under the federal constitution are 'well on point' in deciding cases under the Arizona Constitution").

[68] *See id.*

[69] McGregor, *supra* note 53, at 276.

provisions "[are] of the same general effect and purpose."[70] Still, shortly thereafter, the Court affirmed that despite *Malmin*, "[w]e have the right . . . to 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 based on that Constitution."[71] Indeed we do. Yet in *Mixton*, the Court continued to reflexively follow *Malmin* without pausing to examine that decision's lack of analytical foundation.[72]

The lockstep precedents do not merit stare decisis because they are bereft of reasoned analysis and may drain state constitutional provisions of their intended meaning.[73] Precedential effect is deserving only where the court gave fulsome analysis of why the provisions are coextensive, and more importantly, why they should track evolving federal decisions.

Justice Clarence Thomas admonishes that when prior precedents have drained a right of meaning, a case that raises the question of "whether, and to what extent, a particular Clause in the Constitution protects the particular right at issue" creates "an opportunity to reexamine, and begin the process of restoring, the meaning" of the provision "agreed upon by those who ratified it."[74] It is surely easier to simply accept the earlier decisions, but doing so abdicates the judiciary's central duty of enforcing constitutional rights and boundaries. And, of course, giving meaning to a constitutional provision for the first time inevitably raises new issues of how to apply it. "To be sure, interpreting the [constitutional provision] may produce hard questions," Justice Thomas acknowledges, "[b]ut they will have the advantage of being questions the Constitution asks us to answer."[75]

If we choose to follow federal precedent to interpret state constitutional provisions, we should do so deliberately and explain why, only after a rigor-

---

[70] 246 P. at 549.

[71] Turley v. State, 59 P.2d 312, 316–17 (Ariz. 1936).

[72] *See Mixton*, 478 P.3d at 1235.

[73] *See, e.g.*, *McDonald*, 561 U.S. at 854–55 (Thomas, J., concurring) (arguing that precedent is entitled to no respect when it contains flawed interpretations that contravene original meaning); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (stating that it is necessary to reject stare decisis if "a prior judicial ruling should come to be seen so clearly as error that its enforcement [is] for that very reason doomed"); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009) (noting that "stare decisis is 'not an inexorable command'")).

[74] *McDonald*, 561 U.S. at 813 (Thomas, J., concurring). In his *McDonald* concurrence, Justice Thomas engaged in extensive examination of the original meaning of the Privileges and Immunities Clause, which was eviscerated by the *Slaughter-House Cases*, 83 U.S. 36 (1872). *See McDonald*, 561 U.S. at 813–58 (Thomas, J., concurring).

[75] *Id.* at 855.

ous analysis of the text, history, and meaning of the provision at issue. Failure to do that in the past does not excuse us from doing so now.

C. The Independent Meaning Principle

As Arizona was the forty-eighth state, its framers "had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona's needs."[76] Arizona adopted many provisions completely unknown to the national constitution (although many have antecedents in other state constitutions).[77] Other provisions were essentially the same as provisions in the Bill of Rights, and others modified language from the national constitution.[78]

It is a maxim of constitutional interpretation that where different language is consciously used, a different meaning was intended.[79] Our job is then to interpret the difference, through plain language, original public meaning, legislative history, and decisions of other state courts at the time our state adopted similar constitutional language.

Where the text's meaning is clear—which it often is not, given the general wording typically used in constitutional text—we should enforce it as written.[80] If not, we should examine the original public meaning of the words as understood by the drafters and people at the time of adoption.[81] Among the tools available for doing so is corpus linguistics, pioneered by Utah Supreme Court Justice Thomas Lee, among others.[82] Beyond that, we can employ legislative history.[83] Where such history is lacking as to our own

---

[76] Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 ARIZ. ST. L.J. 461, 468 (2012).

[77] *See, e.g.*, John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 81–88 (1988) (discussing provisions of the Arizona Constitution that differ from the U.S. Constitution and the influence that the constitutions of Rocky Mountain states and the State of Washington had on these Arizona provisions).

[78] *See* Feldman & Abney, *supra* note 35, at 121–22.

[79] *See* SCALIA & GARNER, *supra* note 10, at 256.

[80] Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 46 (Ariz. 2013).

[81] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

[82] *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 830 (2018).

[83] See Phelps v. Firebird Raceway, Inc., 111 P.3d 1003, 1007 (Ariz. 2005); Boswell v. Phx. Newspapers, Inc., 730 P.2d 186, 189 (Ariz. 1986). *See also Turken*, 224 P.3d at 167 (citing Fain

constitution, we may inform ourselves of the purposes and meaning of our provisions by examining history and decisions from states whose provisions we adopted, as they can guide us about why our framers did so.[84] All of these tools help us give the intended meaning to our state constitutional provisions.

The contrary approach is that when state constitutional provisions have similar purposes, even if the language is starkly different, we should extol "the value in uniformity with federal law when interpreting and applying the Arizona Constitution."[85] After all, the argument goes, a person's rights should not differ from one state to another. That uniformity can be achieved only by interpreting our state constitutional provisions in lockstep with federal court decisions interpreting provisions with similar purpose or effect in the national constitution.

That argument has some facial appeal: we are, after all, a national union. But it deprives residents of our state of rights our constitution's framers intended to protect. It also places us on the often unpredictable path of U.S. Supreme Court jurisprudence.

The U.S. Supreme Court has consistently repudiated any requirement of uniformity in state constitutional decisions. It has ruled that the interest in uniformity "does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees . . . Nonuniformity is, in fact, an unavoidable reality in a federalist system of government."[86] Indeed, divergent approaches to important issues were a central part of the federalist design, which was intended to fragment popular opinion and consign the most divisive disputes to the states, in order to reduce the danger of a tyrannical majority coalescing at the national level.[87] It furthers the purposes of federalism for Arizonans to possess greater private property rights, religious liberty, freedom of speech, rights to redress for

---

Land & Cattle Co. v. Hassell, 790 P.2d 242, 251 (Ariz. 1990) (noting that the prospective application of an opinion is a discretionary policy question for the appellate court)).

[84] *See, e.g.*, *Mixton*, 478 P.3d at 1235, 1241-42 (analyzing several Washington state court decisions to inform interpretation of Arizona's private affairs clause, which "was adopted verbatim from the Washington State Constitution").

[85] *Id.* at 1235.

[86] Danforth v. Minnesota, 552 U.S. 264, 280 (2008).

[87] *Cf.* Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON 382, 383–84 (Robert A. Rutland et al. eds., 1975).

personal injuries, freedom of enterprise, victims' rights, or privacy rights than citizens of other states.

Not only do constitutions vary from state to state, but so, of course, do statutes. Legislative enactments vary widely in myriad ways. Yet in construing unique state statutes, state courts rarely recourse to federal court decisions interpreting similar federal statutes unless some connection exists between them.[88] That is because our obligation is to effectuate our legislature's intent in enacting the statute.[89] In such instances, we do not worry about uniformity, even though our state's laws may differ dramatically from federal law or that of neighboring states.[90] If we do not seek uniformity in interpreting our state's positive law, why should we do so with regard to its organic law? To the contrary, that law is basic and fundamental, and deserves our faithful fidelity.

Courts in other states have strongly rejected uniformity with federal precedent in interpreting their state constitutions. "Although Delaware is bound together with forty-nine other States in an indivisible federal union, it remains a sovereign State, governed by its own laws and shaped by its own unique heritage," declared the Delaware Supreme Court.[91] "If we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty."[92] The New Hampshire Supreme Court stated its "responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution."[93] The Texas Supreme Court added, "When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state

---

[88] *See, e.g.*, *Brush & Nib*, 448 P.3d at 918 (citing federal cases interpreting the Federal Religious Freedom Restoration Act to interpret a state law that was derived from its federal counterpart).

[89] Rasor v. Nw. Hosp., LLC, 403 P.3d 572, 576 (Ariz. 2017).

[90] *Cf. id.* (stating that "[i]f the statute is subject to only one reasonable interpretation, we apply it without further analysis").

[91] Sanders v. State, 585 A.2d 117, 145 (Del. 1990).

[92] *Id.*

[93] State v. Ball, 471 A.2d 347, 350 (N.H. 1983).

charter and denies citizens the fullest protection of their rights."[94] The list of state court decisions that have rejected uniformity is long.

The rule in Arizona is that we do not have a consistent rule.[95] The rule should be that where our constitutional language differs from the national constitution, we will examine the differences and follow that examination where it leads us. Anything less diminishes our state's constitutional legacy.

D. The Originalist Principle

The converse of the maxim for the preceding principle is also true: where our constitution's framers adopted language from the federal constitution, we may presume that they did so deliberately, and intended to adopt its meaning as they understood it.

However, this emphatically does not mean that they intended to hitch interpretation of the state constitution to evolving Supreme Court jurisprudence. Rather, the meaning was established at the time the provision was adopted. "The meaning of a writing or saying is in part a function of the context in which the communication occurs; the relevant context is the context at the time of writing or saying."[96]

We may safely assume this for three reasons. First, the dominant judicial philosophy at the time of Arizona's statehood was originalism,[97] thus our framers would have assumed that the provisions they drafted would be interpreted in accordance with original meaning. Second, as discussed previously, at the time of our constitutional ratification, the Bill of Rights was not yet applied to the states.[98] So our framers would not have viewed evolving

U.S. Supreme Court explication of federal constitutional rights as especially meaningful, as those decisions had no effect in the states. Finally, and relatedly, the framers would have found it incredible that judges in our nation's capital could evolve the meaning of the Arizona Constitution. Thus, as con-

---

[94] Davenport v. Garcia, 834 S.W.2d 4, 12 (Tex. 1992).

[95] *See Pool*, 677 P.2d at 271 (stating that uniformity is desirable, but courts should not follow federal precedent blindly when interpreting articles of the Arizona Constitution that correspond with federal provisions).

[96] Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 25 (2015).

[97] *See* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341, 351–52, 368–69 (2017) (recounting Arizona cases to that effect).

[98] *E.g.*, Barron v. City of Baltimore, 32 U.S. 243, 243 (1833) (holding that the Fifth Amendment did not apply to the states).

stitutional scholar Timothy Sandefur explains, "Even if the wording of both constitutions is identical, there is no constitutional justification for following federal precedent that only originates *after* the people of a state ratify their state constitution."[99]

Certainly, many current federal constitutional protections were narrower, or nonexistent, when Arizona's constitution was adopted.[100] In such instances, where an Arizona constitutional provision does not separately establish the right, we must look to more protective federal jurisprudence that has developed over time to safeguard rights. However, the opposite is also true: many federal constitutional provisions enjoyed greater or different protection than they do today;[101] and we must assume that such meaning was embraced by our constitution's drafters when they adopted similar provisions.

Among other rights, private papers and effects were accorded greater protection under the Fourth Amendment at the turn of the last century than they are today.[102] Likewise, the U.S. Supreme Court protected freedom of enterprise within the Equal Protection and Due Process clauses.[103] Paul Avelar and Keith Diggs observe that early Arizona cases provided extensive protection for economic liberty, but "[t]his tradition was seemingly abandoned as the Arizona Supreme Court embraced—without explanation— a 'lockstep' approach to economic liberty by adopting federal jurisprudence to interpret the relevant provisions of the Arizona Constitution."[104] They argue that "this lockstep approach cannot be squared with the original cases, ig-

---

[99] *See* Timothy Sandefur, *supra* note 38, at 750.

[100] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 119–25 (1942) (expanding protections for Congress to regulate commerce under the federal constitution after the adoption of the Arizona Constitution).

[101] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[102] Boyd v. United States, 116 U.S. 616, 621–22 (1886) (holding that a compulsory production of private books and papers, without entry, constituted an unreasonable search and seizure). *See generally* Sandefur, *supra* note 38, at 726 (explaining that the Fourth Amendment barred forced production of private papers).

[103] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that discriminatory application of a neutral state ordinance banning wooden laundromats violated the Equal Protection Clause).

[104] Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L.J. 355, 355–56 (2017).

nores unique aspects of the Arizona Constitution, and leads to incorrect results."[105]

A recent Texas Supreme Court case drew upon its state constitution's Due Course of Law Clause to invalidate state regulatory provisions governing eyebrow threading.[106] In a concurring opinion for three justices, then-Justice Don Willett (now a judge on the U.S. Court of Appeals for the Fifth Circuit) explained the import of the ruling:

> Today's case arises under the *Texas* Constitution, over which we have final interpretive authority, and nothing in its 60,000-plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living. Indeed, even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.[107]

Our state constitution clearly was intended to preserve at least as much freedom—and certainly, by its unique and expansive terms, much greater freedom—than the federal constitution.[108] To the extent that federal jurisprudence has eroded federal constitutional protections, our state jurisprudence should not automatically follow suit.

E. The Broader Purpose Principle

Constitutions should be interpreted in their overall context. As the U.S. Supreme Court declared in *M'Culloch v. Maryland*, constitutional interpretation must "depend on a fair construction of the whole instrument."[109] Antonin Scalia and Bryan Garner explain in *Reading Law*: "Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that comprise the whole. The entirety of the document thus provides the context for each of its parts."[110]

---

[105] *Id.* at 356.

[106] Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 80–90 (Tex. 2015). Despite numerous efforts by well-meaning people to overcome his ignorance, the author has been unable to fathom eyebrow threading, blockchains, or cryptocurrencies.

[107] *Id.* at 98 (Willett, J., concurring).

[108] *See* Berch et al., *supra* note 76, at 468–503 (suggesting several ways in which the Arizona Constitution provides protections and guarantees for individual rights that are more substantial than those found in the U.S. Constitution).

[109] 17 U.S. 316, 406 (1819).

[110] SCALIA & GARNER, *supra* note 10, at 167.

Here, preambles and overall constitutional structure are important.[111] Like other constitutions, the Arizona Constitution provides a roadmap for its interpretation. For instance, our Declaration of Rights begins with this admonition: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."[112] Likewise, it provides that "governments . . . are established to protect and maintain individual rights."[113]

Reference to these guideposts while interpreting more specific provisions can help vindicate our state constitution's promise. Retired Justice John Pelander and I have argued, for example, that these principles are inconsistent with the presumption of constitutionality of laws, which is taken for granted in federal jurisprudence.[114]

A contextual reading of the Arizona Constitution also yields themes of interpretation. Constitutional historian John D. Leshy observes that in the drafting of the Arizona Constitution, "perhaps the single dominant idea was one shared by constitutions across the United States; that is, they manifested 'more distrust than confidence in the uses of authority.'"[115] For instance, several provisions of our Progressive-era Constitution appear aimed at thwarting the combination of government and private power for private ends.[116] A recent Arizona Supreme Court decision effectuated that purpose in the context of taxpayer subsidies.[117]

---

[111] Frederick Douglass made this argument when he asserted that the U.S. Constitution was an anti-slavery document: "I am prepared for those rules of interpretation which when applied to the Constitution make its details harmonize with its declared objects in its preamble." Letter from Frederick Douglass to Gerrit Smith (May 1, 1851), *quoted in* DAMON ROOT, A GLORIOUS LIBERTY: FREDRICK DOUGLASS AND THE FIGHT FOR AN ANTISLAVERY CONSTITUTION 47 (2020).

[112] ARIZ. CONST. art. II, § 1.

[113] *Id.* § 2.

[114] *See* State v. Arevalo, 470 P.3d 644, 652–56 (Ariz. 2020) (Bolick & Pelander, JJ., concurring).

[115] John D. Leshy, *supra* note 77, at 58 (citation omitted).

[116] *See, e.g.*, ARIZ. CONST. art. II, § 17 (Eminent Domain Clause); *id.* art. IX, § 7 (Gift Clause); *id.* art. IV, § 19 (Special Law Clause).

[117] *See* Schires v. Carlat, 480 P.3d 639, 646–47 (Ariz. 2021) (holding that subsidies paid by municipality to private university violated the Arizona Constitution's Gift Clause because payments were grossly disproportionate to fair market value).

A constitution should be interpreted in light of its objectives, particularly those that are stated expressly. Doing so ensures that the boundaries of government power are enforced and the rights of the people are secured.

IV. HUMAN IMPACT

Discussions about state constitutionalism are conducted largely in esoteric terms. But how we interpret state constitutional protections has profound real-world ramifications.

Among the many examples I could cite, my personal favorite involves eminent domain. Under the Fifth Amendment of the United States Constitution, the government may take private property for a "public use."[118] Over time, and culminating in the infamous *Kelo v. City of New London* decision, the Supreme Court rewrote the "public use" provision, substituting it with the far less demanding requirement of "public benefit."[119] By a 5-4 decision, over an emphatic dissenting opinion by Justice Sandra Day O'Connor,[120] the Court sanctioned the taking of a working-class neighborhood to make way for amenities for a Pfizer pharmaceutical facility.[121]

At the same time that Susette Kelo and her neighbors were losing their homes and businesses in federal court,[122] Randy Bailey, owner of Bailey's Brake Service in Mesa, Arizona, was waging a similar battle in state court.[123] The city sought to take his business and provide the property to a hardware store that wanted to expand in a prime retail location.[124] But Bailey had a weapon that Kelo lacked: Article 2, Section 17 of the Arizona Constitution,[125] which on its face provides greater protection against eminent domain than does its federal counterpart.

The Arizona Court of Appeals could have construed Article 2, Section 17 in lockstep with the Fifth Amendment, as interpreted by the Supreme Court. Had it done so, Bailey surely would have lost. But the court reasoned that in choosing different language than the Fifth Amendment, the Arizona Constitution's framers intended to provide greater protection.[126]

---

[118] U.S. CONST. amend. V (Takings Clause).
[119] *See* 545 U.S. 469, 487–90 (2005).
[120] *See id.* at 494–505 (O'Connor, J., dissenting).
[121] *Id.* at 473–75 (majority opinion).
[122] *Id.*
[123] *See* Bailey v. Myers, 76 P.3d 898, 899–900 (Ariz. Ct. App. 2003).
[124] *Id.*
[125] ARIZ. CONST. art. II, § 17.
[126] *See Myers*, 76 P.3d at 903.

Concluding that the provision prohibits the use of eminent domain to effectuate transfers of property to private owners, the court ruled in favor of Bailey,[127] who continued to operate his business at the corner of Country Club and Main for many years.[128]

The vindication of state constitutions protects individual rights and constrains government excesses. Certainly not all state constitutional claims are meritorious; far from it. Nor do all of our constitutional protections necessarily exceed those protected by the federal constitution. But our system of federalism, and the central role of state courts within that system, require us to take state constitutional provisions seriously. Our frontier constitution is not mere verbiage. It provides a rich constitutional legacy to which every Arizonan is heir. It is our duty to protect that inheritance.

Other Views:

- Steven Twist & Len Munsil, *The Double Threat of Judicial Activism: Inventing New 'Rights' in State Constitutions*, 21 ARIZ. ST. L.J. 1005 (1989), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/arzjl21&div=48&id=&page=.
- Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1174 (2019), *available at* https://www.yalelawjournal.org/review/state-courts-and-constitutional-structure.
- Jason Mazzone, *Radical State Constitutionalism*, 2020 UNIV. ILL. L. REV. 1401 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723699.
- Nick Ehli, *State constitutions vex conservatives' strategies for a post-Roe world*, MONTANA FREE PRESS, Feb. 17, 2022, https://montanafreepress.org/2022/02/17/state-constitutions-vex-conservatives-strategies-for-a-post-roe-world/.

[127] *Id.* at 904–05.

[128] Bolick, *supra* note 8, at 509.