1988

The Making of the Arizona Constitution

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Author: John D. Leshy
Source: Arizona State Law Journal
Citation: 20 Ariz. St. L.J. 1 (1988).
Title: *The Making of the Arizona Constitution*

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The Making of the Arizona Constitution

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“The science of government is the most abstruse of all sciences. . . . It is the science of experiment.”¹

“[The United States Supreme Court ought to be reluctant to construe the federal Constitution] to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States. . . .”²

I. INTRODUCTION

The attention showered on the federal Constitution on its bicentennial has not wholly obscured a truly exciting modern development in constitutional law—the revival of interest in the constitutions of the several states.³ These charters, like the federal, have two fundamental, closely-

1. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) (Johnson, J.).

2. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

3. See, e.g., *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959-1375 (1985).

related purposes: establishing a framework of government and the exercise of governmental power, and protecting individual liberties by, among other things, setting forth restraints on government.

The primary focus of renewed interest in state constitutions has been on the individual rights safeguards in the state constitutions that have counterparts in the federal Bill of Rights. Civil libertarians have promoted this idea as a reaction to the Burger Court's halt to the Warren Court's expansion of the protections afforded by the federal Constitution.⁴ It is attractive for this purpose because the "adequate and independent state ground" doctrine insulates state court decisions plainly bottomed on the state constitution from review by the United States Supreme Court.⁵

For most of this century, state courts have not been particularly assiduous in applying their state constitutions to protect individual rights.⁶ This lack of aggressiveness had helped stimulate the U.S. Supreme Court's steady incorporation of the federal Bill of Rights into the fourteenth amendment, making its guarantees applicable to actions by state government. But the application of the federal Bill of Rights to the states also means that the U.S. Supreme Court's decisions establish a federal floor for the protection of civil liberties below which less protective state constitutional safeguards are ineffective. For civil libertarians, this seemingly creates a "no-lose" situation—a renewed focus on state bills of rights could result only in expansions of individual liberties.

There is room to doubt whether this characterization is accurate, either now or in the future. The expansion of some individual rights may contract others; e.g., expanding the right of freedom of association may reduce the right to equal treatment and vice versa.⁷ Moreover, as more and more states interpret their state bills of rights differently from their federal counterpart, the U.S. Supreme Court may rethink its commitment to incorporation, at least to the extent that it has imposed uniform federal restraints on state governments.⁸

4. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

5. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983).

6. See, e.g., Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1147-48 (1985); but cf. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1030-41 (1985).

7. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 175-79 (1976) (discussing potential conflict between congressional ban on racial segregation in private education and freedom of association, parental rights, and right of privacy).

8. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 375 (1972) (Powell, J., concurring); see

Regardless of the Court's reaction over the long haul to state constitutional decisions in the civil liberties area, renewed interest in state constitutions ought not be so limited. State constitutional scrutiny also responds to the so-called new federalism, aimed at giving state and local governments more discretion and responsibility. The ebb and flow that has characterized state-federal relationships through history is now generally perceived as running in favor of the states on many matters, not simply those involving the constitutional rights of individuals.

But state constitutions have importance beyond the protection of individual rights. Many of their provisions of governmental structure and process either differ significantly from or entirely lack a federal counterpart. They deserve examination too, because they are often interesting in their own right, and provide a lens through which to view the challenges and problems of government at all levels of American life. The Arizona Constitution, for example, contains several departures from the federal model, such as special controls on the legislative process,⁹ a "line-item" executive veto,¹⁰ and opportunities for direct popular involvement in government by means of the initiative, referendum, and recall.¹¹

It is frequently forgotten, in celebrating the federal Constitution, that several state constitutions predated the national charter. In his classic work, *The American Commonwealth*, James Bryce¹² called state constitutions the "oldest things in the political history of America," for they stemmed from the royal charters that operated in the colonial phase of our history.¹³ The pathbreaking character of the original state constitutions is not merely a relic of history. Even though there was nothing in the federal Constitution that required it, Congress early on adopted the practice of requiring new states to adopt a constitution.¹⁴ Among other things, it gave Congress a convenient way to measure the worthiness of the territory to admission in the union. The territories themselves did not resist the idea, because it was a convenient way for

also *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 44 (1973).

9. ARIZ. CONST. art. IV, part 2, §§ 13, 14, 20.

10. *Id.* art. V, § 7.

11. *Id.* art. IV, part 1, § 1.

12. Bryce was the British ambassador to the United States while the Arizona Constitution was being drafted. He has been described as the "foremost expositor and critic of American institutions, manners, and traits." AMERICA THROUGH BRITISH EYES 383 (A. Nevins ed. 1948).

13. 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 427 (3d ed. 1906). See also Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS—THE JOURNAL OF FEDERALISM* 57, 60-61 (Winter 1982).

14. See Wickersham, *New States and Constitutions*, 21 *YALE L.J.* 1, 3-10 (1911).

them to establish the basic charter of their governance as states, and because it was a useful expression of the idea that all states were admitted into the union on an equal footing with other states. Thus, Congress and the territories together embraced a written constitution as the basic charter of state governments. As Willard Hurst has emphasized, "we built our constitution-making procedures out of a generation of practice, rather than out of the logical development of any clear-cut idea of constitutionalism."¹⁵

When these later-admitted states prepared their own constitutions, they borrowed much more from the state charters that preceded them than from the federal Constitution drafted in Philadelphia in 1787.¹⁶ Moreover, nearly all of these charters were drafted before the fourteenth amendment was adopted or interpreted to incorporate and apply the basic provisions of the federal Bill of Rights to the states. Thus, they were, and intended by their framers to be, the principal check on the exercise of power by state and local governments.¹⁷ Finally, state constitutions tend to be much more specific, and have proved much easier to amend or replace, than their federal counterpart.¹⁸ As a result they are, as Bryce put it, "more pictorial" than the federal Constitution, disclosing "more about the actual methods and conduct of the government"—indeed, providing "the most instructive sources for the history of popular government."¹⁹

In this context, the Arizona Constitution is particularly worthy of examination. As one of the last states admitted, its experience illustrates the politics of the statehood process, and the federal influence over the state constitution, in a comparatively recent context. Not fundamentally overhauled since statehood,²⁰ the Arizona Constitution is nevertheless

15. J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 202 (1950). *See also* L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 100-09 (1st ed. 1973).

16. *See, e.g.*, J.W. HURST, *supra* note 15, at 224-25; L. FRIEDMAN, *supra* note 15, at 124, 347-48.

17. *See, e.g.*, Abrahamson, *supra* note 6, at 1144-46.

18. *See, e.g.*, Sturm, *supra* note 13, at 74-86.

19. J. BRYCE, *supra* note 13, at 450, 458. *See also* L. FRIEDMAN, *supra* note 15, at 120 ("An observer with nothing in front of him but the texts of . . . state constitutions could learn a great deal about state politics, state laws, and about social life in America.").

20. Although it is difficult to assess meaningfully in statistical terms how much of the original constitution of 1910 has survived, in general, more than 180 sections of the 256 in the original document survive in their original form (counting the separate numbered paragraphs of the Ordinance in article XX as separate sections). Somewhat fewer than 50 sections have been amended, often in minor ways. Although the original 24 sections of article VI, dealing with the judiciary, were replaced by a new thirty-five section article adopted in 1960, many of the core principles of the 1910 version survived. About thirty entirely new sections have been added, and some nine sections repealed (although five of the sections added prohibited liquor traffic and

a mature document, with a substantial history of interpretation and application.²¹

An additional reason for regarding the Arizona Constitution with particular interest is that it was drafted at the high-water mark of the progressive movement. This age of reform²² was marked by enormous popular interest in government in general, with widespread debate over not merely its role in American life, but also its structure and mechanics. This era saw four amendments to the federal Constitution within a span of seven years,²³ and some of the most concentrated efforts to transform government at all levels in our history.²⁴

Finally, the Arizona Constitution deserves examination if for no other reason than the radical demographic and economic change that has transformed the state since statehood. Its population has grown nearly sixteen-fold, its gross state product has multiplied 256 times, and its economic base has shifted dramatically from ranching, farming, and mining to finance, insurance, real estate, trade, and tourism.²⁵

This article takes a broad-brush, organic look at the document—its antecedents, the motivation of the Congress that invited it, and the

were subsequently repealed—see articles 23 and 24). The basic organization and structure of the 1910 version has survived along with, as this summary indicates, most of its substance.

21. In fact, Arizona is one of nineteen states operating under their original constitutions. Of these, only Alaska and Hawaii have constitutions of more recent vintage than Arizona's. Some others are much older; Massachusetts is still operating under its 1780 constitution and Maine its 1819 constitution. The most recent admissions to the union, the western states, comprise the bulk of states operating under their original constitutions. Indeed, only two western states (California, 1849, 1879; and Montana, 1889, 1972) have had as many as two constitutions. Although New Hampshire has had two and Vermont three constitutions since 1776, their current ones were adopted in 1784 and 1793, respectively. Other states have had as many as seven (South Carolina), nine (Georgia), and eleven (Louisiana) constitutions. See Sturm, *supra* note 13, at 59. Of course, these statistics on new constitutions are misleading in at least two respects: They do not reflect how state constitutions can be drastically revised without replacement, and they are skewed by the southern experience with Civil War and Reconstruction, which prompted numerous new constitutions in many states. Measuring its antiquity in perhaps a more meaningful way, the age of Arizona's Constitution is only slightly younger than the average (82 years) across all fifty states. Although Arizona is the third youngest state, fourteen states have younger constitutions. *Id.* at 74-76.

22. See R. HOFSTADTER, *THE AGE OF REFORM* (1955).

23. These were the 16th (income tax) and 17th (direct election of Senators), adopted in 1913; the 18th (prohibition), adopted in 1919; and the 19th (female suffrage), adopted in 1920.

24. See generally R. HOFSTADTER, *supra* note 22. And this was, as Hurst has pointed out, just after "the constitutional idea fully enter[ed] the catalog of basic American beliefs." J.W. HURST, *supra* note 15, at 203.

25. ARIZONA STATISTICAL ABSTRACT 15, 433 (N. de Gennaro ed. 1979); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 22 (107th ed. 1987); B. CARY, EMPLOYMENT AND LABOR FORCE TRENDS 75 (1986); McPheters, *Gross State Product and Arizona Economic Growth: 1960-1984*, in ARIZONA'S CHANGING ECONOMY 27-28 (B. Ronan ed. 1986).

people that framed it, its structure, and its dominant themes. I hope to convey a sense not only of its provisions but also its texture—the principles and spirit that pervade it and embellish the meaning of its words. Although I will briefly advert to some of its amendments, I will concentrate on its original form.²⁶

II. THE LONG MARCH TOWARD STATEHOOD

Arizona became a territory by act of Congress adopted in February 1863, when the nation was in the throes of a Civil War that the territory did not escape, either militarily or politically. In fact, the Confederate Congress had sought, at Jefferson Davis's urging, to organize the Arizona Territory in January, 1862; Davis had proclaimed it a Confederate Territory on February 14, 1862, exactly fifty years before it was to achieve statehood.²⁷ The Union responded by creating its own Arizona Territory the next year.²⁸ The long territorial experience was marked by repeated unsuccessful attempts to gain admission to the union as a sovereign state.

A. *An Early Attempt at a Constitution*

Half-hearted efforts at statehood were launched as early as 1872,²⁹ but these were not taken seriously in Washington because of the region's sparse population and remoteness. After four states were admitted in 1889, local interest in statehood quickened, and in 1891, without prompting from Washington, local citizens organized a convention to draft a constitution and petition for admission. Twenty-two men, meeting in Phoenix for fewer than four weeks, came up with a basic charter for the proposed new state. This "volunteer sort of affair" was conducted without much partisan wrangling.³⁰

Some of the 1891 provisions and debates foreshadowed the more successful effort of nineteen years later. For example, female suffrage

26. This initial foray is part of a projected longer work on the Arizona Constitution that will cover its post-adoption history in more detail.

27. R.W. LARSON, *NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912* 84 (1968).

28. See 12 Stat. 664-65 (1863); see generally H.R. LAMAR, *THE FAR SOUTHWEST 1846-1912* 427-442 (1966) (reprint Norton Library, 1970).

29. J. MCCLINTOCK, *ARIZONA—THE YOUNGEST STATE* 361 (1916); J.J. WAGONER, *ARIZONA TERRITORY 1863-1912* 75 (1970); T.A. McGinnis, *The Influence of Organized Labor on The Making of The Arizona Constitution* 10 (1930) (unpublished M.A. thesis, U. of Arizona). Bills were introduced to admit Arizona (along with Idaho and Wyoming) in 1889. 20 CONG. REC. part 1, 481; part 2, 1253, 2335 (1889).

30. J. MCCLINTOCK, *supra* note 29, at 362; J.J. WAGONER, *supra* note 29, at 288-91, 317-19.

was vigorously debated,³¹ as was property qualifications for voting or holding office (rejected), and an eight-hour day for state jobs (adopted).³² The 1891 Bill of Rights and the sections on the legislative process, borrowing liberally from the constitutions of other states, contained a number of provisions very close in language to the version eventually adopted in 1910.³³ On the whole, the 1891 document was, reflecting the *Zeitgeist*, substantially populist in approach, calling for, among other things, controls on corporate abuses.³⁴ The voters of the territory overwhelmingly approved it.³⁵

Nevertheless, it cannot be said that the 1891 proposal had much influence on the 1910 constitutional convention. None of the 1891 delegates served in the 1910 convention, and there is no reference to the 1891 document in the latter's journals. One can find in the 1891 version, however, a spirit of independence that would be reflected in the lasting constitution drafted nineteen years later. Specifically, the free coinage of silver was a controversial national issue in 1891, with many in Congress opposed to pressure from the Western mining states to purchase the product of their mines.³⁶ Indeed, easterners charged with considerable justification that the silver mining regions in the West

31. The 1891 proposal authorized but did not require the Legislature to submit the question to the people, but did allow women to vote in school elections. ARIZ. CONST. OF 1891, art. X, § 1. See JOURNALS OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF ARIZONA 24, 31 (1891) [hereinafter JOURNALS] (available on microfiche at Ariz. Dep't. of Library and Archives). The 1891 Constitution is found, among other places, in H.R. REP. NO. 168, *Admission of Arizona Into The Union*, 53d Cong., 1st Sess., at 11-30.

32. ARIZ. CONST. OF 1891 art. XX; JOURNALS, *supra* note 31, at 55.

33. Actually, the Arizona Territory had adopted a Bill of Rights in its original code of laws, adopted in 1864. The entire code was known as the Howell Code, after its preparer, William T. Howell of Michigan, one of the first Associate Justices of the Territorial Supreme Court. See J.J. WAGONER, *supra* note 29, at 31, 45-47. This Bill of Rights was not, strictly speaking, of constitutional stature, but it was meant to be on a plane higher than ordinary legislation, because by its own terms it could not be altered except with the concurrence of a majority of "all the members elected to both branches of the Legislative Assembly," Howell Code, Bill of Rights, § 32, rather than simply a majority of those present, as with ordinary legislation. (Four provisions were altered in relatively minor ways between 1864 and 1910.).

Substantively, the Howell Code Bill of Rights contained a number of provisions quite close to those included in the Declaration of Rights in the Arizona Constitution, although the language used is rarely identical. It appears that Howell frequently borrowed language from state constitutions existing at that time, or occasionally from the federal Constitution. Like the counterpart provisions of the 1891 proposed constitution, the Howell Code Bill of Rights was not explicitly referred to in the debate on the 1910 constitution.

34. ARIZ. CONST. OF 1891 art. XVII.

35. See H.R. LAMAR, *supra* note 28, at 478-79; Hubbard, *The Arizona Enabling Act and President Taft's Veto*, 3 PAC. HIST. REV. 307, 307-09 (1934).

36. See R. WEIBE, *THE SEARCH FOR ORDER 1877-1920* 93 (1967).

were interested in little but the free coinage of silver.³⁷ Yet the delegates to this first Arizona Constitutional Convention adopted a provision allowing the use of silver to pay state obligations, “any contract to the contrary notwithstanding,”³⁸ a stance that, it turned out, doomed the effort to achieve statehood with this constitution.³⁹ Indeed, protection of the silver-mining industry seemed to overshadow the dream of statehood, for “[e]ven the Republican press viewed statehood not as an end but as a means by which free silver might ultimately be obtained.”⁴⁰

The House of Representatives passed statehood bills in both 1892 and 1893,⁴¹ but the Senate stood firm against the notion, President Benjamin Harrison explaining that the Republicans were “opposed to the free coinage of western senators.”⁴² No less a publication than the *New York Times*, in an editorial on statehood for Arizona in 1894, reported that the convention of 1891 allegedly “represented the railroad corporations and the gamblers and liquor sellers of the territory.”⁴³ Arizona was, of course, not unique in seeing its early attempt at constitution-making rebuffed. A number of Rocky Mountain states, including New Mexico, Utah, Colorado, and Nevada, had each held as many as seven constitutional conventions during their territorial days, failing for various reasons to persuade Congress of their worthiness of admission.⁴⁴

Adverse economic conditions stemming from the national economic panic of 1893 effectively postponed serious renewal of statehood efforts until after the turn of the century, although the national Republican and Democratic parties had both included planks in their 1892 and 1896 platforms supporting admission; the Democrats without qualification, and the Republicans more cautiously “with due regard for the interests of the Territory and the people of the remainder of the Nation.”⁴⁵

37. See J.D. HICKS, *THE HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY* 268 (1961).

38. ARIZ. CONST. OF 1891 art. II, § 16.

39. See Hubbard, *supra* note 35, at 308.

40. ARIZONA: ITS PEOPLE AND RESOURCES 60 (J.L. Cross ed. 1960). [hereinafter ARIZONA].

41. See 26 CONG. REC. part 1, at 267 (1893); 23 CONG. REC. part 6, at 5089 (1892). See generally L. Langston, *Arizona's Fight for Statehood in the Fifty-Seventh Congress* 5-6 (June 1939) (unpublished M.A. Thesis, U. of N. Mexico).

42. H.R. LAMAR, *supra* note 28, at 480 (citation omitted).

43. Dec. 20, 1894, at 4, col. 5, reprinted in J.J. WAGONER, *supra* note 29, at 318. See generally J.J. WAGONER, *supra* note 29, at 288-91, 317-19.

44. G.M. BAKKEN, *ROCKY MOUNTAIN CONSTITUTION MAKING 1850-1912* 6-12 (1987).

45. K.H. PORTER, *NATIONAL PARTY PLATFORMS* 176, 186, 197, 216, 232 (1924); see also C.G.

In 1900, the Republicans, now in control of the White House and the Congress, endorsed statehood without reservation.⁴⁶ President McKinley visited the territory in May 1901, and diplomatically expressed the hope that the people might soon convince Congress they were ready for statehood.⁴⁷ Thus began the final chapter in Arizona's struggle for statehood, one that has been called "the longest sustained admission fight in American territorial history."⁴⁸

B. Senator Beveridge: Statehood's Principal Opponent

At the center of the fight was a Midwesterner, Albert J. Beveridge of Indiana. First elected to the Senate in 1899, he took the commanding seat as chair of the Senate Committee on Territories in December 1901. An "elegant and eloquent public figure,"⁴⁹ and a respected statesman, Beveridge was not enamored by the idea of statehood for either Arizona or New Mexico. His reasons highlighted contemporary conditions in the territory, as well as the politics of admission. For one thing, Beveridge had a sense of morality unusual for the era, refusing to compromise his duties as a public servant. He was practically alone, for example, in rejecting offers of railroad passes and refusing contributions to defray campaign expenses.⁵⁰ Thus, he was greatly offended by letters he received from residents of the Arizona territory in 1902 arguing that admission for Arizona would mean two more Republican Senators, chosen at the behest of the railroad and mining interests in the territory.⁵¹ Although

BOWERS, BEVERIDGE AND THE PROGRESSIVE ERA 197 (1932); L. Langston, *supra* note 41, at 7-12, 75-76.

46. K.H. PORTER, *supra* note 45, at 232. The platform called for "home rule" and "early admission" for Arizona, New Mexico, and Oklahoma. The Democratic platform that year lambasted the Republicans for foot-dragging on statehood. *Id.* at 216.

47. Hubbard, *supra* note 35, at 310.

48. H.R. LAMAR, *supra* note 28, at 486.

49. *Id.* at 490. Beveridge would later write the definitive study of Chief Justice John Marshall. A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, 4 vol. (1919).

50. J. BRAEMAN, ALBERT J. BEVERIDGE, *AMERICAN NATIONALIST* 35 (1971). See also C.E. Maddox, *The Statehood Policy of Albert J. Beveridge: 1901-1911*, at 15 (1938) (unpublished M.A. Thesis, U. of N. Mexico) (few public officials have had Beveridge's "scruples and personal integrity").

51. One of the correspondents, S.M. McGowan, a former owner and editor of the *Arizona Republican*, explained the Territory's traditional Democratic dominance by "the apathy . . . of the officials of . . . the Santa Fe and Southern Pacific, and the managers of the great mining corporations," because "the very ordinary timber sent to the territorial] Legislature . . . was easily controlled" so that it has "always been easy for these corporations to get through any legislation they desired in their interest." R.W. LARSON, *supra* note 27, at 207. Because the new state's Senators would be chosen by the new state legislature, McGowan argued with seemingly impeccable logic, these same corporations would "put up [enough] money" to control the election for the Republicans. C.G. BOWERS, *supra* note 45, at 182-83; Langston, *supra* note 41, at 24-25. The Territorial Governor, Nathan O. Murphy, echoed these sentiments. R.W. LARSON, *supra* note 27, at 208.

at the time a Republican himself, he believed that the matter ought to be resolved on its merits.⁵²

Beveridge was also skeptical because of the territory's sparse population, but it was what he perceived as the "sinister motives" behind the statehood movement that most put him off.⁵³ He was particularly troubled that the statehood effort was being led by Republican Senator Mathew Quay of Pennsylvania, apparently to benefit the fortunes of his former political lieutenant, "Bull" Andrews, who had taken up residence in New Mexico and hankered for a Senate seat.⁵⁴ Beveridge's concern about the self-interested motives of statehood advocates in Congress was well-taken, for a number of other congressmen also had stakes in the outcome.⁵⁵

Beveridge's attitude hardened even further when, as he reported later to Gifford Pinchot, he was offered a gift of mining stock, presumably as a bribe for supporting statehood.⁵⁶ He complained bitterly that the businessmen and rich among the statehood proponents wanted nothing except continued escape from taxation, charging that the "mining corporations of Arizona have taken out . . . over \$400,000,000 of mineral wealth; and they have paid the Territory nothing in the way of taxes."⁵⁷ Concern about giant corporations evading taxation had been repeatedly rehearsed in the territorial legislature to little avail, demonstrating the railroad and mining companies' strong grip on the

52. See C.G. BOWERS, *supra* note 45, at 182-84.

53. *Id.* at 197.

54. Langston, *supra* note 41, at 35-36; R.K. WYLLYS, *ARIZONA: THE HISTORY OF A FRONTIER STATE* 298 (1950); Hubbard, *supra* note 35, at 312. See also R.W. LARSON, *supra* note 27, at 233. Andrews later became territorial delegate from New Mexico, *id.* at 230-31, but was implicated in several scandals, *id.* at 233-34, 255-56, and eventually was upset in his quest for the Senate at the new state's first election. *Id.* at 299-300.

55. The brother of the other Senator from Pennsylvania (and another Quay protege), Boise Penrose, was part owner of the Commonwealth Mines in Arizona, and Senator William A. Clark, a Montana Democrat, owned the highly profitable United Verde Mine. R.W. LARSON, *supra* note 27, at 212, 213. The brother of Republican Senator Joseph Foraker of Ohio was U.S. Marshal for New Mexico and had been a prominent stockman in the Territory, Republican Senator Stephen B. Elkins of West Virginia had been a New Mexico lawyer and land speculator who still owned vast tracts in the territory, Michigan Republican Senator Russell A. Alger was a heavy investor in Arizona mines and railroads, and Democratic Senator Henry Teller of Colorado was co-owner of a farm near Yuma. *Id.* at 219; J. BRAEMAN, *supra* note 50, at 87, 91; R.W. LARSON, *supra* note 27, at 230. Beveridge also suspected Quay of seeking to benefit some cronies in Pennsylvania who had invested in a new railroad being built in New Mexico. R.W. LARSON, *supra* note 27, at 213.

56. C.G. BOWERS, *supra* note 45, at 216. Beveridge wrote Pinchot that someone had "quite accidentally sent me a block of stock in the mine. Well, I just as accidentally returned it to him—damn him." C.E. Maddox, *supra* note 50, at 15.

57. C.G. BOWERS, *supra* note 45, at 233.

political process.⁵⁸ Small wonder that both contemporary reformers and historians agreed that the large corporations “reigned . . . virtually untrammelled” in territorial days.⁵⁹ Moreover, this domination, as Beveridge feared, was achieved by means foul as well as fair. One instance of railroad bribery involving the Southern Pacific Company became famous.⁶⁰ The mines were apparently not above bribery either.⁶¹ The

58. Armed with numerous studies showing that these companies had greatly profited from unrealistically low property assessments and various other kinds of tax breaks, territorial governors from 1899 on had repeatedly called for more equitable distribution of taxes, but reform measures were almost always stymied in the Territorial Legislature. Territorial Governor Murphy had suggested in 1899 that mining property worth \$100 million had been assessed at only \$2 million. J.J. WAGONER, *supra* note 29, at 350. His call for increasing the tax on mines in 1899 was defeated at a cost to the mines, it was said, of only \$9000. J. MCCLINTOCK, *supra* note 29, at 347. In January 1905, Territorial Governor Brodie called again for mine tax reform, pointing out that while they had produced nearly \$39 million in ore the preceding year, their property had been assessed for taxation at less than \$4.5 million, and their total county and territorial tax was only \$178,000, an effective tax rate of less than one-half of 1%. *Id.* at 354. A study that year by the Territorial Board of Equalization concluded that mine property was generally assessed at 3-5% of its actual value, while other property, except for railroads, was assessed at 40-75% of its value. J.J. WAGONER, *supra* note 29, at 442-43. There was a very modest reform that year, but proposals for more equitable distribution of taxes caused the “greatest struggle” of the territorial legislature the next year, and still the mining interests were strong enough to block most of the reforms advocated by the new territorial governor, Joseph Kibbey. J. MCCLINTOCK, *supra* note 29, at 355-56. Railroad taxation followed a comparable pattern. The Territorial Legislature granted tax exemptions to new railroads in 1897, 1899, 1901, and 1903. J.J. WAGONER, *supra* note 29, at 330, 350, 351, 365, 403, 444. Even had the legislature been more willing to tax the railroads, it was limited by Congress’s action fixing the tax rate for one major railroad, the Santa Fe, by federal statute. *Id.* at 444. Attempts to pass territorial legislation to set up a railroad rate regulatory commission were defeated. *Id.*; see also G.H. KELLY, LEGISLATIVE HISTORY: ARIZONA 1864-1912 249-52, 255 (comp. 1926).

59. George W.P. Hunt, in his campaign to become the new state’s first governor, as quoted in J.M. RICHARDS, THE BIRTH OF ARIZONA: THE BABY STATE 39 (1940). See also R.K. WYLLYS, *supra* note 54, at 183 (mining companies “tended to dominate territorial affairs in the first decade of the twentieth century”).

60. Its head, Collis Huntington, sent Territorial Governor Safford a large sum of money in the 1870’s to secure favorable legislative action on the railroad’s right of way. H.R. LAMAR, *supra* note 28, at 463. Safford was “efficient,” historian Howard Roberts Lamar noted, because he needed to spend only a portion of it, returning the rest to Huntington with the “laconic explanation that Arizonians were not as expensive as (Huntington) had anticipated.” See the *Huntington-Colton Letters*, in REPORT OF THE UNITED STATES PACIFIC RAILWAY COMMISSION, EXEC. DOC. NO. 51, 50th Cong., 1st Sess., pt. 8, at 3724. See also M. JOSEPHSON, THE ROBBER BARONS 223-225 (1934); J.J. WAGONER, *supra* note 29, at 256-57. The railroad companies also received several special favors from the territorial government and its subdivisions. Several counties granted subsidies to railroads, underwritten by county bonds, to construct lines or spurs to benefit them. Most of these went into default and became an issue in the statehood fight, with Congress granting the new state one million acres of federal land, the proceeds to be used to pay off the bondholders. J.J. WAGONER, *supra* note 29, at 213-14, 368-71. Some of the bonds had been voided by a U.S. Supreme Court decision finding them in conflict with a federal statute prohibiting territories from granting special privileges or private charters. *Lewis v. Pima County*, 155 U.S. 54 (1894). Congress overturned the court decision and validated the bonds by statute in 1896,

close fit between government and the interests of the mining and railroad enterprises could scarcely have been surprising to contemporary observers. There had been a long history of direct involvement by officials of the territorial government of Arizona in mining, railroad, canal, and other private ventures.⁶²

Beveridge was also enamored by what he thought was Anglo-Saxon cultural supremacy, and the Hispanic influence in the Southwest troubled him.⁶³ For all these reasons, and fearing the rising tide of statehood sentiment, he decided to stand firmly against admission. In the summer of 1902 he succeeded in burying a bill the House had overwhelmingly passed in May, authorizing statehood for the territories of Oklahoma, New Mexico, and Arizona.⁶⁴ But the price extracted by Senator Quay was Beveridge's agreement to take up the matter at the beginning of the second session of the 57th Congress scheduled to begin in December.⁶⁵

Following a whirlwind trip through all three territories, Beveridge filed a majority report for his committee in December, recommending against statehood for the two southwestern territories while favoring admission of Oklahoma.⁶⁶ It argued that Arizona was unprepared for statehood, with little irrigation and a sparse population with a high illiteracy rate and an estimated twenty-four percent unable to speak English.⁶⁷ Its saloons and gambling houses operated day and night, even on Sunday.⁶⁸ The Democrats and Republican Senator Quay filed

and three more decisions from the Supreme Court established their validity. *Vail v. Territory of Arizona*, 207 U.S. 201 (1907); *Murphy v. Utter*, 186 U.S. 95 (1902); *Utter v. Franklin*, 172 U.S. 416 (1899).

61. Territorial Governor B.J. Franklin charged in 1897 that a mining company lobbyist planned to spend \$6,000 to defeat a mine tax bill, but needed to spend only \$2,000, distributed among nine members to secure the needed votes against it. J.J. WAGONER, *supra* note 29, at 330.

62. These included territorial Governor John Charles Fremont (1878-81), his sometime partner, Judge Charles Silent of the Territorial Supreme Court, Territorial Governor Frederick Tritle (1882-85), and Territorial Governor Lewis Wolfley. As Lamar summed it up: "Safford, Fremont, and Tritle were railroad and mining promoters. Tritle and Murphy were railroad builders; Wolfley and Murphy were irrigation promoters; Hughes was a land speculator." See H.R. LAMAR, *supra* note 28, at 468-76; J.J. WAGONER, *supra* note 29, at 173-74, 193-94, 202-03, 216-17.

63. H.R. LAMAR, *supra* note 28, at 491.

64. R.W. LARSON, *supra* note 27, at 206-09. See generally Langston, *supra* note 41. See also 35 CONG. REC. 7198-99 (1902).

65. R.W. LARSON, *supra* note 27, at 209.

66. S. REP. NO. 2206, 2d Sess., 57th Cong., pt. 1 (1902). See Langston, *supra* note 41, at 37-49.

67. R.W. LARSON, *supra* note 27, at 215.

68. J. BRAEMAN, *supra* note 50, at 84. Statehood proponent Foraker countered with the observation that Arizonans' morality was improving because the number of breweries in the state had dropped from 10 in 1890 to three in 1900. 36 CONG. REC. 954-56 (1903).

dissenting reports urging statehood. President Roosevelt sided with Beveridge, although not without reluctance because he had recruited many of his Rough Riders from the region.⁶⁹

Quay and the Democrats continued to press for statehood, and took the House bill to the Senate floor. Beveridge and other statehood opponents filibustered for several weeks, using a variety of tactics to avoid a vote.⁷⁰ As adjournment neared, a compromise was suggested, offering to admit New Mexico and Arizona as one state. This so-called "jointure" had been suggested as early as 1893⁷¹ and had been brought to a vote in May 1903 by Indiana Republican Congressman Jesse Overstreet, but the House had rejected it by a substantial margin.⁷² Beveridge reluctantly supported the compromise, but it never got full backing from the Democrats, and the 57th Congress adjourned in March 1903 without taking final action on the House bill.⁷³

Beveridge was temporarily victorious, but the close call persuaded him to shift tactics. Despite the lack of mutual interests in the two territories, he dropped outright opposition to statehood and instead came out foursquare for jointure in the next Congress. A bill to that effect was introduced in the House on April 1, 1904, and was swiftly adopted by that Republican body, the vote proceeding along party lines.⁷⁴ When it reached the Senate in early February 1905, Beveridge took the floor to give a ringing speech, called "Arizona the Great," which extolled the virtues of joint admission.⁷⁵

Arizona residents recoiled at the idea of jointure, but Teddy Roosevelt was persuaded by his good friend Beveridge to support it.⁷⁶ Despite

69. J. BRAEMAN, *supra* note 50, at 87.

70. R.W. LARSON, *supra* note 27, at 217-24.

71. *Id.* at 226.

72. *Id.* at 206. See 35 CONG. REC. 5198-228 (1903); Langston, *supra* note 41, at 19-20. The *Arizona Daily Star* supported jointure at this time, but with Southern California, not New Mexico. *Id.* at 19.

73. C.E. Maddox, *supra* note 50, at 85-86; R.W. LARSON, *supra* note 27, at 225.

74. R.W. LARSON, *supra* note 27, at 228.

75. *Id.* at 239; J. BRAEMAN, *supra* note 50, at 92. Beveridge argued that Arizona's population was too sparse and New Mexico not Anglo-Saxon enough—the "great majority" of its people not being "of the blood and speech that is common to the rest of us." J. BRAEMAN, *supra* note 50, at 92. Combined statehood, he argued, would foster "Americanizing within a few brief years every drop of the blood of Spain." C.G. BOWERS, *supra* note 45, at 217. The idea had wider appeal because the Oklahoma territory was expected to be Democratic, while the union of Arizona and New Mexico would "make certain a Republican state," thus preserving the political balance in the Senate. 39 CONG. REC. 1931, 3520-21, 3534-36 (1905); Hubbard, *supra* note 35, at 315.

76. Lamar reports that the city fathers of Phoenix changed the name of Roosevelt Street in protest. H.R. LAMAR, *supra* note 28, at 494 n.24. See also C.E. Maddox, *supra* note 50, at 64-65.

Beveridge's speech, jointure faced an uphill battle. Arizona Territorial Delegate Marcus A. Smith drafted an amendment that would allow the two territories to hold separate referenda on the proposal. The amendment, formally introduced by Senator Foraker of Ohio, was adopted. But the House refused to concur and a conference committee could not reach agreement on the issue before Congress adjourned.⁷⁷

President Roosevelt greeted the 59th Congress, convening in December 1905, by urging passage of a jointure bill. Beveridge was by now more suspicious than ever, because a House Committee led by James Tawney of Minnesota had recently toured Arizona. Traveling at the expense of territorial mining and railroad interests, they received red-carpet treatment and many blandishments against jointure.⁷⁸ Under pressure from President Roosevelt, the House nevertheless passed a jointure statehood bill in January 1906.⁷⁹ Beveridge reported it out of his Senate Committee four days later.

On the Senate floor, Foraker's amendment to require approval by the voters of each territory was adopted by a 42-29 vote.⁸⁰ A few days later, however, the Senate voted statehood for Oklahoma only, striking all reference to Arizona and New Mexico. After two months of deliberation, the conference committee called to reconcile the House and Senate versions reached a compromise close to Foraker's approach. It reinstated a referendum on jointure providing that, if the vote were favorable in each territory, the new state could be admitted. Otherwise, the enabling act would "be null and void and of no effect."⁸¹ The compromise passed the Congress and was signed by Roosevelt on June 16, 1906.

Opposition in Arizona to jointure quickly reached a fever pitch. One source was budding Arizona politicians, mostly Democrats, who feared they would be outvoted by the Republican voters in New Mexico. More powerful were the railroad and mining companies who dominated the Arizona Territory. They were horrified at the prospect of jointure because their hopes of controlling the new state were threatened by the

77. R.W. LARSON, *supra* note 27, at 229.

78. Beveridge also noted that three of the four congressmen on the tour held stock in Arizona mines. *See id.* at 234-35.

79. *Id.* at 237.

80. *Id.* at 240.

81. 34 Stat. 278, § 24 (1906). Beveridge had sought in the conference to have the referendum on jointure occur after the constitution for the new state was drafted, and at the same time the voters were electing officers for the new state government. He reasoned that this would provide some momentum and encourage candidates for office to support jointure. But the opposition was too strong in the committee and he had to back down, so the final agreement was to have the referendum at the regular fall elections. J. BRAEMAN, *supra* note 50, at 95.

agricultural interests that dominated more populous New Mexico.⁸² The Territorial Bar Association resolved against it, citing "differences in our history, laws, customs, and races."⁸³ Even the Arizona Cattle Growers' Association opposed it, as did nearly all the territory's newspapers, many of them corporate-dominated. Their propaganda argued that jointure meant "the end of Anglo-Saxon culture within the boundaries of the Arizona Territory."⁸⁴ The Republican Territorial Governor, Joseph H. Kibbey, also helped mobilize support against the idea, which enraged Beveridge, who demanded his removal, but Roosevelt refused to go along.⁸⁵ Copper Queen Mining Company attorney E.E. Ellinwood successfully maneuvered with Kibbey to hold the conventions of both the Republican and Democratic parties simultaneously to oppose jointure in a combined show of strength.⁸⁶

Senator Foraker's amendment requiring approval by both territories gave these opponents substantial solace.⁸⁷ Even though Beveridge sought to entice the voters in the more sparsely populated territory by naming the new state Arizona,⁸⁸ they were not convinced. At the fall 1906 election, as expected, the citizens of Arizona rejected joint statehood by such an overwhelming margin that, even though New Mexico voters approved the idea, the combined total in both states was negative.⁸⁹

Jointure having been scotched, the Republican party in 1907 and President Roosevelt himself in 1908 both endorsed separate statehood for both territories. The Arizonans helped the cause along by electing a Republican, Ralph Cameron, as congressional delegate, who campaigned on the theme that a Democrat could not achieve statehood.⁹⁰

82. See R.K. WYLLYS, *supra* note 54, at 300; see also Hubbard, *supra* note 35, at 315-16.

83. Farlow, *Arizona's Admission to Statehood*, 9 HIST. SOC. OF S. CALIF. Q. 132, 141 (1912-13). Other reasons offered by various opponents included size (the new state would be larger than any except Texas) and geographic separation. It would, by the then existing transportation network, take longer to travel from the proposed capitol in Santa Fe to Phoenix than it would from New York to Chicago. *Id.* at 139 n.2, 140.

84. ARIZONA, *supra* note 40, at 61.

85. J. BRAEMAN, *supra* note 50, at 96.

86. R.W. LARSON, *supra* note 27, at 248-49.

87. His sponsorship was no surprise, because his Senate career had been marked by his ardent support for big business. *Id.* at 229, 238, 240.

88. A compromise joint statehood proposal floated in 1903 proposed to call the combined state Montezuma, a proposal that embittered the Arizonans. See *id.* at 224-25.

89. Thus, Foraker's amendment was not critical to the outcome. Compare the contention of Territorial delegate Marcus A. Smith to the contrary, in his considerably gilded recollection, "The Fight for Statehood," in G.H. KELLY, *supra* note 58, at 287-302. On the jointure proposal generally, see Hubbard, *Arizona's Struggle Against Joint Statehood*, 11 PAC. HIST. REV. 415 (1942).

90. Hubbard, *supra* note 35, at 317.

Beveridge continued to resist, more and more on the frankly partisan ground that the new states would be Democratic.⁹¹ Without the support of his own party, however, his position became increasingly attenuated. Roosevelt, with sure political instincts, counseled him in a November 1908 letter that “[y]ou will have to take them both in. . . . [B]y keeping them out for a short time, which is all you can do, you merely irritate the people there against the Republican Party.”⁹² Nevertheless, Beveridge made one more attempt, writing the new president, William Howard Taft, in September 1909 that statehood ought to be delayed, but Taft rejected the plea.⁹³

In view of the progressive tenor of the constitution that ultimately emerged from Arizona, Beveridge’s role as chief adversary of Arizona statehood is ironic. He was already becoming an ardent progressive, later to bolt the Republican Party and run for Vice-President with Teddy Roosevelt’s Bull Moose progressive party in 1916.⁹⁴ Indeed, his frustration in battling the corporate interests in the territory on the jointure issue marked, according to one biographer, “the first step in Beveridge’s shift . . . to progressivism.”⁹⁵

Beveridge must have been pleased with many of the features of the Arizona Constitution, which gave him ample reason not to regret his role in Arizona’s statehood.⁹⁶ His resistance delayed the process by several years which, quite unintentionally, allowed the progressive and labor forces in Arizona to gain enough strength to dominate the constitutional convention that ensued. These interests, led by George W.P. Hunt, had rather suddenly come to power in the territorial legislature in 1909.⁹⁷ As Beveridge’s early biographer noted, “in the end his was the triumph, after all. . . .”⁹⁸

91. H.R. LAMAR, *supra* note 28, at 497; cf. C.G. BOWERS, *supra* note 45, at 267-68.

92. C.G. BOWERS, *supra* note 45, at 301.

93. C.E. Maddox, *supra* note 50, at 107-08.

94. During the filibuster on the statehood bill in the early part of 1903, he hid for a week on the third floor of the house of one of the progressives’ patron saints, Gifford Pinchot, to postpone and thus avoid losing the vote to admit Arizona. *Id.* at 197; see also R.W. LARSON, *supra* note 27, at 223.

95. J. BRAEMAN, *supra* note 50, at 97. This seems an exaggeration, for he was already heavily involved in pushing his bill to provide for federal inspections in the meat-packing industry in the wake of Upton Sinclair’s muckraking novel, *The Jungle*—legislation that was certainly a progressive landmark. See Act of June 30, 1906, ch. 3913, 34 Stat. 669, 674-75; see also, Act of March 4, 1907, ch. 2907, 34 Stat. 1256, 1260-65; C.G. BOWERS, *supra* note 45, at 226-33.

96. Ironically, Beveridge lost his office while the Arizonans were drafting their constitution; the Democrats gained a majority of both Houses of the Indiana legislature (which then selected Senators) in November of 1910, thus assuring his defeat. See J. BRAEMAN, *supra* note 50, at 196.

97. See R.K. WYLLYS, *supra* note 54, at 304; ARIZONA, *supra* note 40, at 62; Hubbard, *supra* note 35, at 318.

98. C.G. BOWERS, *supra* note 45, at 379.

C. Beveridge and the Enabling Act

Bowing to the inevitable, Beveridge turned to the task of making the statehood enabling act as protective of his perception of the national interest as possible. Mindful of Arizona's maverick tendencies and its Democratic domination, he took pains to ensure that its constitution (as well as New Mexico's) would not escape careful review in Washington. His Committee on Territories inserted in the bill providing for New Mexico and Arizona's admission as separate states, a provision requiring them to submit their constitutions to the federal government for approval prior to each state's first general election.⁹⁹ Such a condition was unusual.¹⁰⁰

Moreover, Senator Beveridge was not eager to leave approval solely up to the divided Congress, where the House was dominated by the Democrats and substantial statehood sympathy existed in his own chamber. His committee therefore required the new constitution to be submitted for the approval of both the President and Congress, in effect giving the President a veto over admission.¹⁰¹ The novelty of this provision did not pass unnoticed. Democrats¹⁰² and even a few

99. It was a matter of simple justice, the Committee Report explained, because the nation was "interested as vitally in the form of government of the states which it creates as are the new states themselves." Besides, the Report continued, assuming a more ominous tone, it is a "measure of safety," because it "will certainly prevent any unsound or harmful provisions" in the new constitutions, for the benefit of the new states as well as the nation. S. REP. NO. 454, 61st CONG., 2d Sess. 2 (1910).

100. The 1906 Enabling Act that would have combined Arizona and New Mexico provided merely that it was "the duty of the President" to proclaim statehood if the enabling act had been complied with and the constitution and government were "republican in form." Act of June 16, 1906, ch. 3335, § 26, 34 Stat. 267, 280. Oklahoma, admitted by the same act, was governed by identical language. *Id.* at 271, § 4. The Committee could cite only three precedents for its action. S. REP. NO. 454, 61st CONG., 2d Sess. 2-3. These were the admission of Louisiana in 1811, Alabama in 1819, and Texas in 1845. But the terms of the Arizona/New Mexico bill differed from each of these in the process for review that it created. Louisiana's Enabling Act had placed the burden on Congress to disapprove its new constitution; otherwise admission was secured. Alabama's simply required its constitution to be "transmitted to Congress for its approbation." Texas's had followed the Alabama precedent, requiring its new constitution to be transmitted to the President, "to be laid before Congress for its final action." *Id.*

101. Eliminating any doubt about his ultimate purpose, his committee amendment explicitly required Presidential approval in any event, but provided that if the President approved but the Congress "fail[ed] to act in its next regular session," the state could proceed with its first election. Thereafter, it continued, once the President proclaimed the result of that election, the state "shall be deemed admitted by Congress into the Union by virtue of this Act. . . ." See Act of June 20, 1910, ch. 310, § 23, 36 Stat. 557, 571-72.

102. On the Senate floor, James B. Frazier, a Tennessee Democrat, observed that the President "has no constitutional function to perform with respect to the admission of a Territory to statehood." He went on to suggest, pointedly, that the "kind of constitution which might please [the President] might not please the people who are to live under it." 45 CONG. REC. 8233 (1910).

Republicans¹⁰³ thought Beveridge had gone too far. But Beveridge gained the support of most Republicans, and the opponents reluctantly voted for the bill to avoid being accused of delaying statehood even further.

Beveridge's committee meddled still further in the mechanics of achieving statehood. It required the territorial electorate to ratify the new constitution separate 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 was, the Report explained, to avoid confusing the electorate with “conflicting considerations,” allowing them to focus single-mindedly on the constitution.¹⁰⁴ The key figure in this maneuver may have been President Taft, who in his message to Congress in December 1909 “earnestly advise[d]” that a separate vote be taken on the constitutions of the new states.¹⁰⁵ Taft was known to be unhappy with the Oklahoma Constitution's provision for an initiative and referendum, and he feared what one historian has called the “rising tide of radicalism in the West.”¹⁰⁶

The most drastic and controversial restriction added by the Senate Committee was in defining the new state's electorate. The House bill had adopted what apparently had been the standard practice with previous admissions, by having the election of convention delegates governed by the same rules then applicable to election of members of the territorial legislature.¹⁰⁷ But the Senate Committee was not content to defer to existing territorial laws; instead, it adopted the qualifications established by the territorial legislature nine years earlier, in 1901. And it applied these qualifications not only to the election of delegates to the constitutional convention, but also to the first general elections to be held in the new state.¹⁰⁸

103. Knute Nelson of Minnesota opined that he was “unwilling to leave this question to the President.” *Id.* at 8234.

104. S. REP. NO. 454, 61st Cong., 2d Sess. 2-3. Although the Senate Committee regarded this as a change, the bill reported out by the House Committee in January 1910 had taken the same approach, noting that this was a change from the bill that Committee had approved a year earlier. H. REP. NO. 152, 61st Cong., 2d Sess. 2 (1910). And it was also a change from the 1906 Enabling Act for Arizona which, like that for Oklahoma, allowed the election of officers and representatives to be held on the same day as the vote on the constitution. *See* Act of June 16, 1906, ch. 3335, §§ 27, 40, 34 Stat. 267, 281, 285 (Arizona); *Id.* at 272, § 6 (Oklahoma).

105. R.K. WYLLYS, *supra* note 54, at 304; Hubbard, *supra* note 35, at 319.

106. J. BRAEMAN, *supra* note 50, at 172 (citing letter from Taft to Joseph G. Cannon, June 17, 1909).

107. *See, e.g.,* the 1906 Enabling Act for Oklahoma and the State of Arizona (jointure of the territories of Arizona and New Mexico), Act of June 16, 1906, ch. 3335, §§ 2, 24, 34 Stat. 267, 268, 278-79.

108. *See* Act of June 20, 1910, ch. 310, § 19, 36 Stat. 557, 568-69. James Frazier, Tennessee Democrat, protested that this was an “unjust invasion” of the sovereign rights of the people of

The Committee's intent was scarcely hidden. The Committee Report explained: "[This amendment] expressly refuses to recognize the law passed by the present territorial legislature of Arizona at its last session" that required a literacy test for all voters.¹⁰⁹ The Committee also objected to the broad, unreviewable discretion vested in the Board of Elections to apply this test, which the Committee viewed as an invitation to partisan, wholesale disenfranchisement.¹¹⁰

The territorial literacy test had been enacted without debate, over the veto of the Republican territorial governor, by a solid Democratic majority led by George W.P. Hunt.¹¹¹ Its highly partisan flavor clearly suggested a motivation to allow the Democrats to control the franchise by manipulation of the literacy requirement. As Governor Kibbey said in vetoing it, the test allowed the "dominant party [to] perpetuate itself in power beyond remedy."¹¹² Literacy did not necessarily have racial overtones, because white Anglo-Saxons on the frontier might have been as illiterate in English as anyone, but the Republican opposition emphasized that the effect (and by implication the primary intent) was to exclude Mexican-Americans who had resided in the territory for generations in enclaves that had made the learning of English unnecessary.¹¹³ Still, the effect of the literacy test was unclear at best. Mexican-Americans were a small fraction of Arizona's population, and it was disputed whether they tended to vote Democratic or Republican. The

the state. 45 CONG. REC. 8232 (1910). The Committee also set forth three additional qualifications (male citizen of United States, 21 or older, and a resident of the Territory for at least 12 months) which, while they were found in the current territorial laws, were apparently not the basis for legally challenging those who might wish to vote.

109. See S. REP. NO. 454, 61st Cong., 2d Sess. 4 (1910). Specifically, every voter, unless prevented by physical disability, had to be able to read the United States Constitution in English "in such manner as to show he is neither prompted nor reciting it from memory," and to write his name.

110. In a letter to the then-territorial Governor Richard E. Sloan, Beveridge called this an "outrage done to the people of Arizona." J. BRAEMAN, *supra* note 50, at 170. See S. REP. NO. 454, 61st Cong., 2d Sess. 4 (1910).

111. Hunt would later become president of the constitutional convention and Arizona's first and longest serving Governor. See *infra* text accompanying notes 195-203.

112. See S. REP. NO. 454, 61st Cong., 2d Sess. 7 (1910).

113. See *id.* at 7, 14. Territorial Governor Sloan, appointed to succeed Kibbey in May 1909, described it as "not so much an educational as a racial qualification." *Id.* at 13. Sloan distinguished the literacy tests that a few other states had adopted, because those exclusively Southern states had generally excepted people whose fathers or grandfathers had been entitled to vote. These were the notorious "grandfather clauses" shortly to be invalidated by the Supreme Court. See *Guinn v. United States*, 238 U.S. 347 (1915). In any event, Sloan said, the "negro population is excessive" in these states, while in Arizona, with a Mexican-American vote of not more than 10% (and declining), it was, he dryly observed, "idle to suggest that Anglo-Saxon supremacy is here in danger, even remotely." S. REP. NO. 454, 61st Cong., 2d Sess. 15 (1910).

Democrats argued that only about one to two thousand voters would be disqualified, impacting about equally on both parties.¹¹⁴ Democratic Senator Frazier characterized the literacy test as a prophylactic measure to combat illegal vote-buying and fraudulent voting by Mexican nationals in the border area.¹¹⁵

Although not mentioned in either Committee or on the floor of either chamber of Congress, the rejection of existing territorial law on elections had the additional effect of outlawing the use of a primary election to select candidates for convention delegates, because the same 1909 territorial legislature had also adopted the direct primary.¹¹⁶ The convention delegate candidates were thus selected by party conventions in each of the thirteen eligible counties.¹¹⁷ This addition may well have backfired on the Senate Republicans, for the convention mechanism allowed the Democrats to elect slates of delegates pledged to particular platforms, something that would have probably been more difficult had there been an open primary.

Senator Beveridge's bold strokes to reshape the Enabling Act survived intact, for when the amended bill was sent back to the House, the session was drawing to a close. House Democrats were reluctant to insist on a conference for fear of killing the bill altogether. After a few speeches in which both parties claimed credit for the Enabling Act, Democratic representative Houston of Tennessee criticized the Senate amendments, claiming their restrictions invaded the sovereign rights of the new states, were unfair and unjust, and a burden "for years to come." As a "matter of necessity at this late hour," however, he advocated passage of the Senate bill, which swiftly followed on a voice vote.¹¹⁸

The congressional machinations over the terms of Arizona's admission illustrate the partisan political maneuvering that controlled the entry of new states. Prior to the Civil War, divisions over slavery dominated the statehood admissions process. But congressional concern about how new states would govern themselves scarcely ended with slavery's abo-

114. See J. MCCLINTOCK, *supra* note 29, at 358; J.J. WAGONER, *supra* note 29, at 448. See also 45 CONG. REC. 8232 (1910) (remarks of Senator Frazier). The House Report set out Governor Kibbey's estimate that 13% of Arizona's population of some 200,000 were from Mexico, 11% were Indians not eligible to vote anyway, and 6% were "other foreign." See H. REP. NO. 61-152, 61st Cong., 2d Sess. 5 (1910).

115. See 45 CONG. REC. 8232 (1910).

116. See G.H. KELLY, *supra* note 58, at 266.

117. The fourteenth county, Greenlee, had been created too late to be allotted delegates because apportionment was based on the 1908 election for the territorial delegate to Congress. See J.J. WAGONER, *supra* note 29, at 458.

118. 45 CONG. REC. 8487 (1910).

lition. The Arizona/New Mexico Enabling Act's trek through the national legislative process was not atypical.¹¹⁹ But the Arizona admission process underscored, in a rather dramatic way, the distrust of Washington about how the new state might go about its business, a distrust fueled by the railroad and mining interests' domination of territorial government. Ironically, at the moment the Congress was expressing its mistrust in what would at last emerge as the Enabling Act, those interests were losing their domination to the progressive and labor interests who were coalescing under the banner of the Democratic Party.¹²⁰

D. The Enabling Act's Restrictions on the Arizona Constitution

Congress's power to control the terms on which a new state would govern itself was not free from doubt, then or now. The admission of new states was one of those areas where the federal Constitution spoke mostly by silence, simply giving to the Congress the power to admit them, without elaboration.¹²¹ But the Constitution also rests on the premise that the states are independent sovereign entities. These principles come into potential conflict at the point where they intersect—at the moment when Congress launches a new state into existence. Although the Supreme Court has generally agreed that all new states are admitted on an equal political footing with existing ones, it has rarely explored limits on Congress's power to dictate, in an act of admission, the structure and content of state government.¹²²

Despite the uncertainty, Congress included in the Arizona Enabling Act a number of provisions that effectively controlled some of the contents of the Arizona Constitution. Most of these federal mandates were contained in section 20, which 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. These ranged from matters of religious freedom and

119. See generally H.R. LAMAR, *supra* note 28; Hubbard, *supra* note 35; Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

120. See J. BYRKIT, *FORGING THE COPPER COLLAR* 36 (1982).

121. U.S. CONST. art. IV, § 3.

122. See, e.g., *Coyle v. Smith*, 221 U.S. 559 (1911); *Stearns v. Minnesota*, 179 U.S. 223 (1900); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). *Coyle* struck down Congress' attempt, in the Oklahoma Enabling Act of 1906, to restrict the new state's freedom to move its state capital. Interestingly, the Arizona Enabling Act contains a similar provision, forbidding moving the state capital from Phoenix until December 31, 1925, and allowing it thereafter only by popular vote. ARIZ. CONST. art. XX, Sixth. See also Hanna, *supra* note 119; Wickersham, *supra* note 14, at 7.

polygamy (subsections captioned First, Fourth)¹²³ and racial discrimination in voting (Fifth) to Indian lands (including liquor in Indian Country) (First, Second, Eighth), federal water projects (Seventh), state assumption of territorial debts (Third), the location of the capital (Sixth), public schools (Fourth), and management of federal granted lands (incorporated by reference from sections 24, 25, 27-30 of the Enabling Act).

Taking no chances, Beveridge strengthened the already apparently ironclad mandate to the state to follow these provisions by adding the final paragraph to section 20, requiring all its provisions to be “made a part of [the state] constitution . . . in such terms as shall positively preclude the making of any future constitutional amendment [changing or abrogating] . . . said ordinance in whole or in part without the consent of Congress.”¹²⁴

Two of the most interesting directives in the Enabling Act involved English literacy. This was, as noted earlier, a subject of some sensitivity to the Congress as far as voting rights were concerned. Although Beveridge’s committee expressed concern about disenfranchising Spanish speakers, it stopped short of approving a thoroughly multi-lingual social order. Like the House, it firmly endorsed English as the language of instruction in the public schools, even going so far as to strike the proviso in the House version “that nothing in this act shall preclude the teaching of other languages in said public schools.”¹²⁵ It also strengthened the House’s requirement for English literacy among officials of state government by adding the requirement that such officials “understand” as well as read, write, and speak English, and by extending the requirement explicitly to state legislators as well as state “officers.”¹²⁶ The Committee’s report indicated, however, that the major problem on this score was in New Mexico, because Arizona’s

123. The 1906 Arizona Enabling Act outlawed only polygamous or plural marriages, while the 1910 version added “polygamous cohabitation” to the proscription. *Compare* 34 Stat. 267, 279, § 25, First (1906), *with* 36 Stat. 557, 569, § 20, First (1910). This concern with polygamy stemmed from the sizeable Mormon settlement in Arizona, and the subject had been fully addressed in debates on earlier versions of the Enabling Act. *See, e.g.,* L. Langston, *supra* note 41, at 89-93. *See also* the Utah Enabling Act, 28 Stat. 107, 108, § 3, First (1894).

124. ARIZ. CONST. art. XX, Thirteenth. This language did not appear in the 1906 version calling for a single state of Arizona, formed out of the Arizona and New Mexico Territories, nor did it appear in the other part of the 1906 Act enabling the admission of Oklahoma. *See* 34 Stat. 267 (1906).

125. *See* S. REP. NO. 454, 61st Cong., 2d Sess. 25 (1910). An identical proviso appeared in the 1906 version of the Enabling Act. *See* 34 Stat. 267 (1906).

126. S. REP. NO. 454, 61st Cong., 2d Sess. 25 (1910). The House requirement also appeared in the 1906 version. *See* 34 Stat. at 280, § 25, Fifth (1906).

Spanish-speaking population was smaller and more scattered.¹²⁷

The Arizona framers included these provisions, slightly modified, in an Ordinance that was made article XX of the new constitution.¹²⁸ A few of these restrictions, such as the provisions dealing with assumption of the territorial debt, have faded into irrelevance. Others have been superseded by the passage of time, court decisions, or other laws.¹²⁹ The most important one in this category has been those restrictions dealing with Indian lands.¹³⁰ Other restrictions in the Enabling Act, such as the protection of religious freedom, are substantially duplicated by other parts of the constitution.¹³¹ Some have simply been ignored or abrogated by the unilateral action of the Arizona legislature, without the consent of Congress.¹³² A few provisions of the Enabling Act have

127. See S. REP. NO. 454, 61st Cong., 2d Sess. 25 (1910). The literacy requirement for public officials did not appear in the 1906 Oklahoma Enabling Act.

128. Like the federal Enabling Act, the Twelfth section of this article also incorporates by reference the state lands management restrictions included in separate article X.

129. For example, the limitation on moving the capital. See *supra* note 122.

130. One condition of statehood for Arizona, in common with nearly all states admitted after Colorado in 1876, was for the state generally, by an irrevocable ordinance that had state constitutional status, to disclaim jurisdiction over Indian lands as well as other federal lands. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 562 (1982). In a number of obscure statutes covering particular subjects, Congress has given states some authority over Indian property and activities on Indian lands. See, e.g., 67 Stat. 590 (1953). The courts have regarded these laws as within Congress's power over Indians, but what is perhaps less obvious is the courts' parallel view that the state constitution (or the irrevocable ordinance) need not be amended to repeal the disclaimer of jurisdiction for the state to exercise jurisdiction over Indian matters in a way inconsistent with the statehood promise. See, e.g., *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). This result has been justified generally because the disclaimer was put in the state constitution at the insistence of the federal government. Therefore, if the federal government at some time thereafter no longer wanted it to apply, "the manner in which the states are to modify their organic legislation" is not a federal concern. *San Carlos Apache Tribe*, 463 U.S. at 561. This may not be conventional legal reasoning, which generally holds that formally adopted organic law can be repealed only by a similarly formal process. Perhaps the best explanation is that the statehood process is itself not a conventional legal one, thus justifying giving the states some indulgence in the matter.

131. See, e.g., ARIZ. CONST. art. II, § 12; art. IX, § 10; art. XI, § 7.

132. See, e.g., ARIZ. CONST. art. XX, Fifth and Tenth, dealing with Indian Lands and federal water projects under the reclamation act. The repudiation of these restrictions has been justified on the ground that they constituted an interference with state sovereignty. See Memorandum from American Law Division, Legislative Reference Service, Library of Congress, to Hon. Carl Hayden (April 9, 1956), reproduced in 1A ARIZ. REV. STAT. ANN. 377-81 annot. (1984) (annotation to article 20, Fifth). The federal water project provision seems irrelevant in any event, because it was originally designed as a possible cure for a potential constitutional defect in the federal reclamation act of 1902. The Supreme Court cast some doubt on whether Congress had the constitutional power to extend the benefit of this act to states, as opposed to territories, in *Kansas v. Colorado*, 206 U.S. 46 (1907). See S. REP. NO. 454, 61st Cong., 2d Sess. 27 (1910). The doubt was in part a revival of the classic debate over Congress's power to undertake so-called internal improvements that flowered in the nineteenth century. In an attempt to sidestep constitutional

been changed, but only through the process envisioned by the 1910 Congress: state constitutional amendment in tandem with ratification by Congress.¹³³

Most of these provisions were not discussed at length in the legislative history of the Enabling Act. Several, such as the disclaimer and others dealing with Indian lands, were copied wholesale from prior enabling acts of other states.¹³⁴ In the main, with the exception of those dealing with state lands, these restrictions are only of historical interest.

1. Limitation on Managing Lands Granted to the State in the Enabling Act

The provisions most extensively considered by Congress, and which were somewhat different from previous enabling acts, concerned management of the lands the federal government granted to the states as a benefit of statehood. These restrictions continue to impact state governmental decisionmaking and are, presumably, subject to modification only with the consent of Congress.¹³⁵

difficulties, Congress (and the new states, who eagerly bid for federal help in building water projects) used the Enabling Act as a vehicle for constitutionally undergirding Congress's decision to extend the act to states.

133. For example, article 20, Third, "forever" prohibiting the furnishing of liquor to Indians or the introduction of liquor in Indian country was effectively repealed as of July 1, 1957, by constitutional amendment approved in 1954. Congress had consented to the amendment in 1953. See 67 Stat. 586, § 3 (1953). The Arizona Constitutional Convention itself memorialized Congress to change the Enabling Act to protect the investment of persons who made improvements in state school lands, in the event the lands were leased or sold to someone else. *Phoenix Gazette*, Oct. 28, 1910, at 1, col. 1.; C. Brice, *The Constitutional Convention of 1910*, at 87 (1953) (unpublished M.A. Thesis, Ariz. St. Univ.).

134. For example, on the disclaimer of right to and taxing of Indian lands, compare 36 Stat. 557, 569-70, § 2, Second (1910) (Arizona Enabling Act); 34 Stat. 267, 270, § 3, Third (1906) (Oklahoma Enabling Act); and 28 Stat. 107, 108, § 3, Second (1894) (Utah Enabling Act); and 25 Stat. 676-77, § 4, Second (1889) (Washington, North Dakota, South Dakota, Montana Enabling Act). On the grant of religious freedom, compare 36 Stat. 557, 569, § 20, First (1910) (Arizona Enabling Act); 34 Stat. 269, § 3, First (1906) (Oklahoma Enabling Act); and 28 Stat. 108, § 3, First (1894) (Utah Enabling Act); and 25 Stat. 677, § 4, First (1889) (Washington, North Dakota, South Dakota, Montana Enabling Act). On the enabling clause for public schools, although with the added requirement for Arizona, similar to Oklahoma, that classes "always be conducted in English," compare 36 Stat. 570, § 20, Fourth (1910) (Arizona Enabling Act); 34 Stat. 270, § 3, Fifth (1906) (Oklahoma Enabling Act); and 28 Stat. 108, § 3, Fourth (1894) (Utah Enabling Act); and 25 Stat. 677, § 4, Fourth (1889) (Washington, North Dakota, South Dakota, Montana Enabling Act). On the relation between state and federal judicial systems, compare 36 Stat. 576-78, §§ 31, 33 (1910) (Arizona Enabling Act); 34 Stat. 274-75, §§ 13, 15, 16 (1906) (Oklahoma Enabling Act); 28 Stat. 110, §§ 14-17 (1894) (Utah Enabling Act); 25 Stat. 682-83, §§ 21-23 (1889) (Washington, North Dakota, South Dakota, Montana Enabling Act).

135. For example, an unsuccessful attempt was made in Congress in 1962 to allow some state-granted lands to be used for park purposes "without consideration"; in other words, without reimbursing the state school trust for the "full value" of the lands. See 108 CONG. REC. 4674 (1962).

These "school land" provisions (so called because nearly all these lands were given to the state for the benefit of the common schools) were mostly added by Beveridge's committee in the Senate, and were regarded by Beveridge as "the most important item in the Senate bill . . . throw[ing] very carefully considered safeguards about . . . disposition" of the granted lands.¹³⁶ The House-passed bill contained some restrictions; principally, it fixed a minimum price by which such lands could be sold, and required the sale to be "public."¹³⁷ The House Committee noted that most previously-admitted states had done a poor job of administering and disposing of their granted lands, citing a report by former Secretary of the Interior Garfield to the effect that a minimum sales price was necessary to give the states "the best advantage" and their schools "the full benefit to which [they] are entitled."¹³⁸ The proceeds of the sales would have gone to the school fund under the House bill, but pending sale the lands could have been leased "as the state legislature may prescribe," apparently without any restriction on either the terms of leasing or the use of the revenues derived from leasing.

The Senate bill substituted a detailed set of restrictions on both sale and leasing, requiring appraisal and public auction after advertisement, fixing minimum sale prices, forbidding mortgages, creating an educational trust fund comprised of the revenues derived from both sale and leasing, providing that any transactions in the granted lands in violation of the restrictions were void, and making it the duty of the United States Attorney General to enforce these requirements. These elaborate safeguards were described by the Committee somewhat inconsistently as "careful . . . rigid . . . entirely reasonable and practical. . . ."¹³⁹

Although the web of detail was unprecedented, the principle behind it was not. Congress had for about two decades sought to ensure that lands granted to new states for particular purposes would in fact be used for those purposes. Because the earlier-admitted states had rarely been faithful to Congress's intent, Congress became increasingly strict with each new admittee.¹⁴⁰

Beyond this general experience with new states, Congress had two additional reasons for being careful with state land management when statehood for the territories of Arizona and New Mexico came under

136. 45 CONG. REC. 8227 (1910).

137. H. REP. NO. 152, 61st Cong., 2d Sess. 2-3; 45 CONG. REC. 705, § 27 (1910).

138. H. REP. NO. 152, 61st Cong., 2d Sess. 3.

139. S. REP. NO. 454, 61st Cong., 2d Sess. 18-19.

140. See, e.g., *Lassen v. Arizona*, 385 U.S. 458, 464 (1967).

serious consideration. First, because of naturally arid conditions, Congress resolved to follow the precedent it had established in admitting Utah in 1896 and give these states two extra sections of federal land per township;¹⁴¹ effectively doubling the acreage each state would receive. Second, Congress had already granted several thousand acres of federal land to the territory of New Mexico by special statute in 1898,¹⁴² with exceedingly unsatisfactory results. After ten years of rapid and apparently fraudulent disposition by the territory, the Department of Justice filed several lawsuits to recover the lands allegedly illegally conveyed. These suits were still pending when the Enabling Act was being considered.¹⁴³

Statehood advocates found it difficult to argue against the need for more careful scrutiny to ensure that the objectives of these large land grants were realized. The Senate committee carefully questioned the local proponents of statehood from each territory about the wisdom of the restrictions, and not unexpectedly elicited warm sentiments of approval. Seeing statehood within their grasp, the territories were not likely to jeopardize realization of that long-held goal over a matter as trifling as this. After all, as Senator Beveridge put it, the Senate committee's requirements represented only "good business prudence."¹⁴⁴ Thus Ralph Cameron, the delegate from the Arizona Territory, "heartily agree[d]" with the restrictions, finding them "absolutely right" because such restrictions could "not be made too broad."¹⁴⁵ On the floor of Congress, only Senator Hughes made an issue of the restrictions.¹⁴⁶

As a final measure of his distrust, Beveridge added a "Ninth" part of section 20, requiring the "consent" of the "State and its people" to the restrictions on management of state lands, "in every respect and particular."¹⁴⁷

III. ARIZONA'S CONSTITUTIONAL CONVENTION

A. *The Demographic Setting*

The Census of 1910 showed that Arizona had 204,354 people, up from 122,931 ten years earlier.¹⁴⁸ This was little more than two-tenths of one

141. See Utah Enabling Act, 28 Stat. 107, 109, § 6 (1894).

142. See 30 Stat. 484 (1898).

143. See R.W. LARSON, *supra* note 27, at 255-60.

144. 45 CONG. REC. 8227 (1910).

145. S. REP. NO. 454, 61st Cong., 2d Sess. 21.

146. 45 CONG. REC. 8235 (1910).

147. S. REP. NO. 454, 61st Cong., 2d Sess. 18-21. This did not appear in the 1906 Enabling Act with regard to either Oklahoma or the "jointure" state of Arizona.

148. ARIZONA STATISTICAL ABSTRACT, *supra* note 25, at 15. The Census figures on population

percent of the total United States population of 92.2 million; only three states (Delaware, Wyoming, and Nevada) had fewer people; even the District of Columbia had a larger population. Arizona's large land area meant that its population density was fewer than two persons per square mile, compared to nearly 31 per square mile for the nation as a whole. Still, Nevada and Wyoming had a lower density of population.¹⁴⁹ Arizona had, in fact, a population larger than 28 of the 33 other previously admitted states at the time they joined the union.¹⁵⁰

Arizona's population was not particularly rural. Thirty-one percent of its population in 1910 resided in incorporated areas of 2500 or more inhabitants (the Census Bureau's then-prevailing definition of urban). This represented a dramatic increase from previous censuses—a doubling from 1900. Although still less than the national average of forty-six percent urban, it was more than twice as urban as its neighbor New Mexico, and ranked twenty-fourth among all states in percentage of urban population.¹⁵¹

Fifty-eight percent of the Arizona residents were male, eighty-four percent were white (including Hispanics), fourteen percent Indian, just under one percent black, and a slightly smaller proportion Oriental. Approximately 74,000 were eligible to vote (males over twenty-one); of these, about fifty-three percent were classified as "white natives," thirty-five percent as "foreign white," and twelve percent as "colored." The Indian population was second largest among the states, although less than half of Oklahoma's, and only about thirteen percent of the national total.¹⁵² The territory's 19-1/2 million acres of Indian reservations was, however, far more than any other state, and nearly half the total Indian lands in the entire country at that time.¹⁵³

Nearly a quarter of its population was foreign-born in 1910, as against the national total of about fifteen percent. In this category it

for 1910 were apparently not thoroughly reliable, although the admitted errors seemed less due to fraud than to carelessness and difficulty of surveying remote populations. *See Arizona Republican*, Nov. 28, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 18-19.

149. ARIZONA STATISTICAL ABSTRACT, *supra* note 25, at 16; U.S. DEP'T OF COMMERCE AND LABOR, STATISTICAL ABSTRACT OF THE UNITED STATES 49, 52, 53 (34th ed. 1911) [hereinafter U.S. STATISTICAL ABSTRACT].

150. *See* L. Langston, *supra* note 41, at 136.

151. U.S. STATISTICAL ABSTRACT, *supra* note 149, at 54. For a discussion of the Bureau of Census's changing definition of "urban," see 1 U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 2-3 (1975).

152. U.S. STATISTICAL ABSTRACT, *supra* note 149, at 48; U.S. DEP'T OF COMMERCE AND LABOR, STATISTICAL ABSTRACT OF THE UNITED STATES 50 (35th ed. 1912).

153. The information in this paragraph is derived from U.S. STATISTICAL ABSTRACT, *supra* note 149, at 27, 48-50.

ranked tenth among all states. Of these, about sixty-one percent were born in Mexico, a higher percentage than any other state, and more in absolute numbers than any other state except California and Texas. Still, this was only fifteen percent of the total recorded population in the territory.¹⁵⁴

Other features of life in Arizona in 1910 emerge from the Census figures available at statehood.¹⁵⁵ Arizona had the second highest ratio of sentenced prisoners in penal institutions to total population in 1910 (after Nevada) and nearly three times the national average. It had a higher percentage of home ownership than the national average. It had fourteen public and five private high schools, two public and no private "normal" schools, and one public university. There were no graduate schools and none for the blind, deaf, or feeble-minded. Of the 45,057 residents reporting religious affiliation in 1906 (less than a quarter of the total population), approximately sixty-seven percent were Catholic, fourteen percent Mormon, and twenty percent Protestant, mostly Presbyterian, Methodist, Episcopal, and Baptist, in descending order of proportion.

Within the state, Cochise County had the largest population and the highest assessed valuation of property.¹⁵⁶ Its 34,591 residents were seventeen percent of the state total and 103 more than Maricopa County, which ranked second in both population and assessed valuation. This reflected, of course, the large mining and related railroad enterprises found in Cochise County, which were valued at more than seven and three million dollars, respectively. Maricopa County was the state's center of farming activity, valued at nearly six million dollars in 1910. Graham County, also with large mines, ranked third in population and fourth in total assessed valuation. Pima and Gila Counties ranked fifth and sixth, respectively, in both categories. Yavapai County, with the second largest concentration of mining operations, ranked sixth in population but third in assessed valuation.

The picture that emerges from these statistics is of a state that had already moved beyond the frontier phase. It was no less urban than the average state already in the union, and it was heavily industrial in the sense that mines and railroads dominated the state's economy and employment patterns. It had a growing middle class, and a coterie of educated citizens that was beginning to exercise cultural influence. In these respects, Arizona was not as far out of the mainstream of

154. *Id.*

155. *See id.* at 60-61, 66, 75, 80, 121-24, 126, 130-31.

156. *See* T.A. McGinnis, *supra* note 29, at 21, 21a, & Table I.

American life as one might have imagined by considering only its sparse population and relative geographic remoteness.

Indeed, the drafting of its constitution highlighted trends and cross-currents that mirrored the nation as a whole. Specifically, two movements were, at the time the statehood Enabling Act emerged from Congress, already playing important roles in territorial politics—the predominantly middle-class progressive movement that had come to the fore in the politics of many states and nationally, and the labor movement that was beginning to find fertile ground in Arizona’s mining towns. The emergence of the labor movement had been pronounced since the constitutional convention of 1891. By the midpoint in the first decade of the twentieth century, railroad and mine workers were becoming well organized by local unions, and labor disputes were more frequent. Still, there was no central labor organization in the state as late as 1909.¹⁵⁷

Elsewhere in the country, the progressive and labor movements experienced some difficulty coalescing in politics. In the leading city of the West, San Francisco, the two were often bitter enemies.¹⁵⁸ Historians of the era have noted that the progressives, rooted in the middle class establishment, were continually threatened by the “activities of radical labor.”¹⁵⁹ Mixing metaphors, George Mowry observed that “[a]t various times and places the progressive politicians invited the support of organized labor, but such cooperation was almost invariably a one-way street [working] only if the progressive . . . was in the driver’s seat.”¹⁶⁰ This is perhaps too broad a generalization, but clearly progressives were divided over labor unions and their role. As Herbert Croly, one of the most important progressive intellectuals, put it, “[t]he large corporations and the unions occupy in certain respects a similar relation to the American political system.” Both, he thought, were “frequently too strong for the state governments,” although he was quick to concede that corporations were to be feared more.¹⁶¹ In Arizona, however, the progressives and labor interests achieved a tenuous but tenacious alliance that significantly influenced the Arizona Constitution.

Another important feature of Arizona political life at the time the constitution was drafted was that the Democratic Party, dominant in

157. T.A. McGinnis, *supra* note 29, at 8, 17, 28; *see also* J. BYRKIT, *supra* note 120, at 35-38.

158. *See* E. POMEROY, *THE PACIFIC SLOPE* 200-05 (1965).

159. G.E. MOWRY, *THE ERA OF THEODORE ROOSEVELT 1900-1912* 77 (1958). *See also id.* at 100, 102, 104-05.

160. *Id.* at 102.

161. H. CROLY, *THE PROMISE OF AMERICAN LIFE* 127-31 (1909), *reprinted in* R. HOFSTADTER, *THE PROGRESSIVE MOVEMENT 1900-1915* 99 (1963).

the territory for decades, constituted the core of the progressive movement. Elsewhere the picture was much more mixed; for example, in Oregon, universally seen as a hotbed of progressivism, the movement was substantially Republican.¹⁶² And nationally, the progressive leaders were nearly all Republican, including Roosevelt, Taft, and Beveridge. William Howard Taft, President when Arizona's statehood act was adopted, captured many of the crosscurrents that swirled around the national political scene. He was conservative on many issues and an ardent proponent of an independent judiciary. This impulse would put him squarely in conflict with the progressive Arizonans, who like their counterparts nationally, saw the judiciary as one of their principal opponents. Taft was not, however, totally hostile to progressive initiatives; for example, he supported the eight hour day for government labor and a graduated income tax.¹⁶³

Taft's views were particularly important because he saw his office as having an important role to play in the shaping of the new state constitution. He visited the territory in October 1909, and warned its citizens in speeches in Phoenix and Prescott not to model their new constitution after that of Oklahoma, which he described as a "zoological garden of cranks."¹⁶⁴ Taft openly sought to use his prestige to, as he put it, "restrain the desire of those most progressive . . . from making the constitution other than a fundamental law with simple rules of limitations."¹⁶⁵ This veiled reference seemed aimed at the progressive features of the Oklahoma Constitution, such as the initiative, referendum, and the prohibition of legislative limitations on liability.¹⁶⁶

Taft's concern was realistic, because the progressive spirit was running high throughout the West in 1910. Oregon, for example, enacted a recall measure for public officials two years earlier¹⁶⁷ and Governor Shafroth of Colorado had pushed a wide program of reform in early 1910, including the initiative, referendum, direct primary, and railroad regulation.¹⁶⁸

B. The Delegates

Once the Enabling Act emerged from Congress, attention shifted to selecting delegates to the constitutional convention. The Act fixed the

162. See E. POMEROY, *supra* note 158, at 196; C.G. BOWERS, *supra* note 45, at 267-68.

163. See G.E. MOWRY, *supra* note 159, at 262-63.

164. See Arizona Gazette, Oct. 13, 1909, at 1, cols. 1-2.

165. See *id.*

166. OKLA. CONST. art. V, §§ 1-8, 53; art. XXIII, § 7.

167. ORE. CONST. art. II, § 18.

168. G.E. MOWRY, *supra* note 159, at 77.

number of delegates at 52, and required the governor, chief justice, and secretary of the territory to "apportion the delegates to be thus selected, as nearly as may be, equitably among the several counties thereof in accordance with the voting population" determined by the vote cast at the election for territorial delegates to Congress in 1908.¹⁶⁹ Cochise and Maricopa counties were nearly identical in voting population, but the former was allocated ten delegates and Maricopa only nine. This was a source of irritation for the Maricopa delegation throughout the convention.¹⁷⁰ The Republican officials' decision to favor Cochise was curious because of Cochise's deserved reputation as the center of the state's budding labor movement, whereas Maricopa County was more politically diverse, although it too was stridently Democratic.

Within a week after President Taft signed the Enabling Act on June 20, 1910, Territorial Governor Sloan called a special election to select the delegates for September 12, thus ensuring a particularly hot political summer.¹⁷¹ Senator Beveridge having prevented the use of the direct primary by his amendment making the 1901 territorial election law the governing process, the candidates were determined by a series of party conventions. One was held in each of the thirteen counties eligible to send delegates.¹⁷²

These conventions were used not only to select delegate candidates, but also to hammer out party platforms on the content of the new constitution. The dominant issue was captured in proposals to further what was called "direct democracy"—the initiative, referendum, and recall. These procedures became the litmus test for separating the "progressives" from the "conservatives," and in the election that September, the former won an overwhelming victory. Of the 52 delegates elected, 41 were Democrats. Thirty-nine, including one Republican, had pledged to support the initiative and referendum; thirty had

169. 36 Stat. at 568, § 19. In the House debate on the act, Territorial delegate Ralph Cameron, although a Republican, objected to the fact that the three officials given responsibility to apportion the delegates were all Republicans. See 45 CONG. REC. 707-14 (1910) (see appendix); Farlow, *supra* note 83, at 144 n.1. Cameron apparently wanted to set a bipartisan tone to the process of framing the constitution, because the progressive Democratic insurgency in 1909 clearly threatened the Republicans.

170. See, e.g., JOURNAL OF THE CONSTITUTIONAL CONVENTION OF ARIZONA 597 (Con. P. Cronin comp. 1925) [hereinafter JOURNAL]. In the apportionment of representatives to the state legislature adopted in the Constitution, Cochise was given seven and Maricopa six. See ARIZ. CONST. art. I, part 2, § 1 (original version).

171. J.J. WAGONER, *supra* note 29, at 457.

172. The fourteenth, Greenlee County, having been created too late to be allotted delegates, was represented by the delegates from Graham County from which it had been carved. *Id.* at 458.

pledged to support the recall, and thirty-three to support the direct primary.¹⁷³

Seventeen, including the entire ten-member Cochise delegation and the five Democrats (of six delegates) from Yavapai, were pledged to support an Employer's Liability Law. On the other hand, only seven pledged support for outlawing alien contract labor, mandating an eight hour day, and restricting the courts' power to issue injunctions in labor disputes.¹⁷⁴

A significant feature of the selection process was the influence exercised by labor interests over the Democratic party. Representatives of all unions were called together in Phoenix in July by the Bisbee Miners Union to discuss the upcoming constitutional process.¹⁷⁵ Many of them called for formation of a new Labor Party, but negotiations led by George W.P. Hunt succeeded in keeping the labor interests inside the Democratic Party, which was itself increasingly dominated by the progressives. In return, the Party pledged support for the principles advocated by labor.¹⁷⁶

Unlike the experience elsewhere, in Arizona, labor and the progressives reached a workable compromise. It was helped along when Hunt, just after being elected convention president, stacked the convention's labor committee with union men,¹⁷⁷ and the committee on legislation with supporters of the initiative and referendum.¹⁷⁸ The clearcut victory

173. *Id.* at 460. The lone Republican, Bracey Curtis, a Republican banker from Nogales, issued a statement to the press explaining that he concluded, after reading the speeches of Abraham Lincoln, that the initiative and referendum were "good Republican doctrine." He chided his Republican brethren for being motivated by "fear of defeat of statehood" in opposing these measures, a fear he regarded as "sheerest nonsense." He said these provisions were a "great means of educating the people," because it "sets [them] to thinking." *Arizona Gazette*, Oct. 10, 1910, at 1, cols. 4-5; C. Brice, *supra* note 133, at 37-38 (Researchers might be warned that while Brice's thesis is a readable and useful survey of the Convention, his quotations and citations to contemporary newspaper accounts are replete with errors. The citations given here will often not match with Brice's, but are, thanks to painstaking review by my research assistant, Tom Bartlett, more accurate.).

174. These were the five Democrats from Yavapai, and the two Democrats from Pinal County. See *Arizona Gazette*, Dec. 1, 1910, at 1, col. 1; C. Brice, *supra* note 133, at 118-21 (appendix).

175. C.F. Todd, *The Initiative and Referendum in Arizona 15-16 (1931)* (unpublished M.A. thesis, Univ. of Ariz.).

176. See J. BYRKIT, *supra* note 120, at 37, 41-42; J.J. WAGONER, *supra* note 29, at 464; T.A. McGinnis, *supra* note 29, at 33. Three surviving delegates, interviewed in 1951, each denied that there had been a formal agreement between Hunt and the labor interests. Y. LaCagnina, *The Role of the Recall of Judges Issue in the Struggle for Arizona Statehood 35 (1951)* (unpublished M.A. thesis, Univ. of Ariz.).

177. C. Brice, *supra* note 133, at 9-10 & n.16.

178. C.F. Todd, *supra* note 175, at 25. The compromise extended to patronage matters, for A.W. Cole, a Douglas smelter worker, was named secretary to the convention. C. Brice, *supra* note 133, at 5-6.

of this Democratic/Progressive/Labor alliance immediately sent a chill through many of the pro-statehood interests, who feared difficulty in securing approval of the constitution from the federal government. But the progressive Democrats were elated. The *Arizona Gazette* trumpeted: "Today the whole world is electrified with the glad news that today brave and beautiful Arizona has thrown off the cruel yoke of corporate control."¹⁷⁹

The fifty-two delegates comprised a good cross-section of the men in the territory at the time.¹⁸⁰ They ranged in age from 26 to 76, with an average age of 45; their average tenure of residency in the Territory was a little more than 18 years. Three were natives of the Territory; five were foreign-born (in Mexico, England, Germany, New Zealand, and Canada), and the others had moved to Arizona from twenty-two separate states (regionally, nine hailed from eastern states, eighteen from the midwest, thirteen from the south, and four from other western states). While, as one historian noted, "vocation was a flexible concept in the period and sources vary,"¹⁸¹ fourteen, or just over one-quarter of the total, were lawyers, thirteen had ranching interests, and nine had mining interests. Other vocations represented included eight merchants, four engineers, three miners, two doctors, two machinists, two bankers, two journalists, one meat packer, one railroad engineer, one minister, and one retiree.

Many delegates had wide experience in fields ranging from postmaster to insurance to pharmacy to hotel operation. According to one source, about one-fifth had "professional or academic degrees" and half were "wealthy businessmen."¹⁸² Judging from the names and contemporary

179. Sept. 13, 1910, at 2, col. 1. See also Y. LaCagnina, *supra* note 176, at 48.

180. The information about the delegates in this and the next paragraph was gleaned from several sources, including J.J. WAGONER, *supra* note 29, at 458-76, 514-16, 521-29; the *Arizona Gazette*, which ran a series of short biographies on the delegates on Dec. 16, 17, 19, 20, 24, 26 & 27, 1910; Reaves, *Arizona Statehood—The Constitutional Convention*, ARIZONA, vol. 1, no. 4, at 11-17 (Dec. 1910); and *History of Arizona*, vol. III, BIOGRAPHICAL at 13-14, 58-61, 102-05, 130-34, 217-18, 222-25, 230, 570-73, 306 (1930). Not all these sources agree on such details as birthdates, vocations, or length of residence in Arizona; where conflict exists, I have selected the one that seemed most trustworthy.

181. Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1, 25 n.182.

182. George W.P. Hunt and the Constitution of Arizona 2 (undated) (MSS, author not indicated, in Univ. of Ariz. Special Collections) [hereinafter Hunt and the Constitution]. By contrast, the fifty-five delegates at Philadelphia in 1787 included 34 lawyers, with the rest principally wealthy merchants, businessmen, and planters (except for Benjamin Franklin, who defies categorization). See F. BARBASH, *THE FOUNDING: A DRAMATIC ACCOUNT OF THE WRITING OF THE CONSTITUTION* 43-45 (1987). Furthermore, the delegates in Philadelphia were somewhat better educated for their time, 29 possessing college degrees and virtually all the rest having some formal education. F. McDONALD, *WE THE PEOPLE* 21-37 (1958). They were also somewhat younger, mostly in their twenties and thirties, F. BARBASH, *supra*, at 43-45.

newspaper accounts, only one could readily be classified as other than of European extraction; he was the merchant Carlos Jacome of Pima County, born in Mexico, who was among the most conservative of the Republicans at the convention.

The pronounced divisions between labor and capital and conservative and liberal were neatly captured by the Cochise County delegation. Its labor interests were led by Thomas Feeney, a machinist with the Copper Queen Mining Company since 1904, and widely regarded as a bit of a radical. But also hailing from Cochise was Everett E. Ellinwood, an attorney who had served the railroads and the Phelps Dodge Arizona interests.¹⁸³

Ellinwood was particularly interesting. He had been a leader of the fight against jointure,¹⁸⁴ hardly a surprise given the opposition of the railroad and mining interests to it. He was also active in the maneuvering over the election of the convention president, and was called "Boss" Ellinwood by a Globe newspaper as a result.¹⁸⁵ He refused to caucus with the Democrats even though he had been elected as one,¹⁸⁶ yet had pledged, along with the other Cochise delegates, to support the direct primary, employer's liability act, and the initiative, referendum, and recall.¹⁸⁷ Nevertheless, in the end he refused to sign the constitution, apparently because it included the recall.

As one historian put it, his "exact sentiments . . . were difficult to determine, and his every move was watched with suspicion. . . ."¹⁸⁸ One delegate was quoted as saying he would not second an Ellinwood motion to adjourn "without examining it for a joker."¹⁸⁹ Some historians of the progressive era argued that industrialists themselves did not, for various reasons of self-interest as well as altruism, uniformly resist progressive reforms.¹⁹⁰ Ellinwood's ambiguous position may have neatly captured the schizophrenia of big business on a variety of reform issues.

1. Michael Cunniff

Two delegates deserve particular mention for the pivotal roles they played. One, Michael Cunniff, operated mines in the Bradshaw Moun-

183. T.A. McGinnis, *supra* note 29, at 41.

184. R.W. LARSON, *supra* note 27, at 248.

185. J.M. RICHARDS, *supra* note 59, at 4-5.

186. *Id.* at 9.

187. C. Brice, *supra* note 133, at 118, 120.

188. Y. LaCagnina, *supra* note 176, at 76.

189. *Id.*

190. See, e.g., G. KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963); R. WEIBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* (1962).

tains and lived in Crown King. Born in Massachusetts, he earned Bachelor's and Master's degrees from Harvard, taught English there and at the University of Wisconsin, then pursued a journalism career. He was a delegate to the Democratic National Convention in 1900, then became literary editor and later managing editor of *World's Work* magazine in New York, characterized by one historian as a "middle-of-the-road progressive" publication.¹⁹¹ After six years with the magazine, (during which time he first came to Arizona to investigate the joint statehood question)¹⁹² at the age of 31, he followed his brother to Arizona to seek his fortune in the mines. Just four years later, he was elected a delegate to the convention from Yavapai County. His literary training stood him in good stead, for as chair of the Committee on Style, Revision and Compilation, he was the principal draftsman of the constitution.

Described as possessing "urbanity of mind and resilience of temperament,"¹⁹³ he was also a ready and often eloquent participant in many convention floor debates and a firm supporter of progressive interests. A contemporary newspaper account described him as "undoubtedly of more real value to the convention than any other one man."¹⁹⁴ He went on to serve in the first State Senate, where he was elected President, but died of pneumonia at the age of 39, in December 1914.

2. George W.P. Hunt

The second delegate is much more prominent in Arizona history—George W.P. Hunt, the President of the Convention.¹⁹⁵ Like Cunniff, Hunt had a remarkable career up to the convention, although unlike his Yavapai counterpart, Hunt went on to even greater glory as a seven-term governor and major player in the political life of the state for another 24 years. Although contemporary journalists delighted in writing about his rotund figure and walrus mustache, they could not agree on his middle names—Wylie Paul and Washington Peter crop up with

191. G.E. MOWRY, *supra* note 159, at 304.

192. And wrote about it for his publication. See *The Last of the Territories*, *WORLD'S WORK*, vol. 11, no. 3, at 7108-09 (Jan. 1906).

193. Hunt and the Constitution, *supra* note 182, at 7.

194. Arizona Gazette, Dec. 27, 1910, at 10, col. 4. Another observer described him as "probably the busiest man, from start to finish, in the entire convention." Reaves, *supra* note 180, at 16.

195. On Hunt, see generally J.S. GOFF, *GEORGE W.P. HUNT AND HIS ARIZONA* (1973); M.H. Wilson, *The Gubernatorial Career of George W.P. Hunt of Arizona* (1973) (unpublished Ph.D. thesis, Ariz. State Univ.); A.V. Johnson, *Governor G.W.P. Hunt and Organized Labor* (1964) (unpublished M.A. thesis, Univ. of Ariz.).

about equal frequency.¹⁹⁶ Born in Missouri, he emigrated to Arizona in 1881 at the age of 21, “punching a burro” through the mountains to Globe. He worked as a waiter, cowpuncher, and then a merchant. Eventually he became owner of a mercantile store.

Possessing only about eight years of formal education, he was an avid reader, and soon became interested in politics. He was elected to the territorial legislature in 1893, and four years later was elected to the upper house, the Territorial Council, where he served another four years and had the distinction of being defeated for President of the Council by Morris Goldwater in the 20th Territorial Legislature in January 1899. When he became president of the Old Dominion Mercantile Company in 1900, the owners apparently requested that he keep out of politics, so he did not run for reelection.¹⁹⁷ Four years later, however, he ran again, was elected, and served until statehood, including two terms (1905-07, 1909-11) as Council President.¹⁹⁸

His career in the territorial legislature served notice of his political values. In 1899 he introduced and secured passage of a bill to provide for the initiative and referendum; it was pocket-vetoed by the territorial governor. That same year he successfully sponsored a compulsory school attendance law, requiring children between 8 and 14 to attend school for at least twelve weeks a year. Later he pushed through a bill creating a commission to regulate the railroads. He also successfully sponsored bills in 1907 regulating saloons and prohibiting gambling; hardly the kind of behavior to be expected from the representative of a mining town.¹⁹⁹ But Hunt had a deep streak of idealism, a “sort of Sir Galahad in politics.”²⁰⁰ He promoted prison reform, was president of the Anti-Capital Punishment League, and yet retained popular appeal—he lost only one general and one primary election in a political career that stretched over four decades. A contemporary writer described him this way:

His rude, crude strength; his defiance of money and the money interests; his detestation of snobbery and pretension, whether social or intellectual; his big-hearted humanity; and his extraordinary

196. See J.M. RICHARDS, *supra* note 59, at 10, 46. The Arizona Republican called him derisively “Willie Paul” on occasion. *Id.*

197. F.C. LOCKWOOD, ARIZONA CHARACTERS 194-95 (1928). His retirement was also explained as stemming from his dissatisfaction with the what he felt was the railroad/mining company domination he saw in politics. See MacFarlane, *The Galahad of Arizona: Governor Hunt*, COLLIERS 21-27 (Apr. 15, 1916).

198. J.J. WAGONER, *supra* note 29, at 521-29.

199. *Id.* at 351, 441; G.H. KELLY, *supra* note 58, at 254; F. LOCKWOOD, *supra* note 197, at 203.

200. See MacFarlane, *supra* note 197, at 22.

intellectual shrewdness and political foresight, have made him the trusted champion and advocate of the people and the scourge of the unjust, the dishonest, and the autocratic.²⁰¹

By the time the statehood enabling act was passed, Hunt was reportedly thoroughly disillusioned with politics. He retired from the legislature and, although he was instrumental in negotiating the great labor/progressive compromise in the summer of 1910, laid plans for a trip to Europe in the fall. He mounted no campaign, but his constituency in Globe nevertheless nominated him as a delegate to the constitutional convention, and he was recalled almost literally from dockside in New York to attend.²⁰²

After considerable maneuvering among supporters of Mulford Winsor, Morris Goldwater, Lamar Cobb, Alfred Franklin, and W.T. Webb, Hunt's colleagues elected him President of the convention, even though he did not overtly campaign for that position either. (His own first choice was his friend, Yuma journalist Mulford Winsor.) An ardent progressive, Hunt's popularity was based on his reputation as an honest and capable man. The Convention Journals show that he almost never joined in the debates (he had a lifelong reputation as a poor speaker, given to ungrammatical constructions, mispronounced words, and otherwise unpolished use of the language).²⁰³ Most contemporary accounts nevertheless applaud him for his efficiency in presiding over the deliberations, and his behind-the-scenes maneuvering and committee appointments surely played a significant role in the outcome.

3. The Delegates—Experienced and Ambitious

The convention delegates were for the most part skilled in politics; at least nine (Hunt, Goldwater, Baker, Webb, Wells, Kingan, Morgan, Scott, and Cobb) had served in the Territorial Legislature, Hunt and Goldwater having been president of the upper house (the Council), and

201. F. LOCKWOOD, *supra* note 197, at 210.

202. MacFarlane, *supra* note 197, at 23. Whether this aloofness was studied or not has been the subject of considerable conjecture; his wife, for example, told the *Arizona Republican* on the day of his inauguration as Arizona's first governor that that seat had been his "objective point for years." J.M. RICHARDS, *supra* note 59, at 3, 60. For a more complete description of Hunt's somewhat enigmatic role during the pre-convention maneuvering, see Y. LaCagnina, *supra* note 176, at 54-57.

203. J.M. RICHARDS, *supra* note 59, at 38. But his public pronouncements were sometimes glib, especially when he worked from a prepared text. Winsor, for example, ghosted his inaugural address, which had bursts of eloquence. *Id.* at 57-58. Reacting to his own experience, Hunt advocated free textbooks for school children throughout his career. Y. LaCagnina, *supra* note 176, at 58-59.

Webb having been speaker of the lower house. Two others, Short and Moore, had served in the Colorado and Kansas legislatures before moving to Arizona. At least fifteen had held office in local government. Several of the lawyers in particular were prominent in territorial affairs. Judge E.M. Doe of Flagstaff had been rewarded with an appointment to the Territorial Supreme Court in 1909 for his long service in helping territorial delegate (and later U.S. Senator) Ralph Cameron fight off attempts to stop his lucrative tourist trade built on mining claims on the south rim and Bright Angel trail at the Grand Canyon. Edward Wells (described as one of the wealthiest men in the Territory)²⁰⁴ and A.C. Baker had both served on the same court in the 1890s.²⁰⁵

And they were ambitious for the future as well; they rejected without debate a proposal to disqualify themselves from running for any office created by the constitution for a period of five years. Exhibiting a sense of humor appropriate to the arid state, President Hunt referred this proposal, which had been introduced by Republican lawyer Cooper from Tucson amid "laughter and applause," to the Committee on Militia and Public Defense.²⁰⁶ On another occasion, Cunniff complained that "ten or twelve future Supreme Judges [sic]" were sitting on the convention's judiciary committee, prompting delegate Lynch to point out that twelve or thirteen gubernatorial aspirants were sitting on the committee on the executive branch which was, among other things, recommending the governor's salary.²⁰⁷ Later, when the convention approved a proposal to prohibit requiring candidates for office to pay fees in order to place their names on the ballot,²⁰⁸ Dr. Moeur said the number of "aye" votes "will probably give the number of gentlemen in this convention who will be running for office in the near future."²⁰⁹

This ambition probably served the convention well, by making the delegates more attuned to realism in designing a government in which many of them would serve. Indeed, the convention produced politicians who were active in Arizona government for the next four decades. Three of them, Hunt, Benjamin Moeur, and Sidney Osborn, would

204. Hunt and the Constitution, *supra* note 182, at 13.

205. J. McCLINTOCK, *supra* note 29, at 357, 359, 360. The delegates in Philadelphia in 1787 were even more thoroughly experienced in politics, almost all of them having served in government in some high capacity. F. BARBASH, *supra* note 182, at 47; F. McDONALD, *supra* note 182, 21-37.

206. JOURNAL, *supra* note 170, at 494.

207. *Id.* at 237.

208. Now found in ARIZ. CONST. art. VII, § 14.

209. Verbatim Report of the Constitutional Convention, Dec. 1, P.M., part 3, at 1 [hereinafter cited as Verb. Rep. Because the Verbatim Report is paginated anew at each session, the day and the session (a.m., p.m., evening) is also given].

become governors, serving a total of 26 years.²¹⁰ Two other delegates, Fred Colter and Mit Simms, would be defeated in their quests for governor by Thomas Campbell in 1918 and 1920, respectively.²¹¹

Delegate Alfred Franklin would become the first chief justice of the Arizona Supreme Court, serving alongside delegate D.L. Cunningham. Both would serve four years. Delegate A.C. Baker would serve on the Court from 1921 to 1923. Michael Cunniff would become President of the first state Senate (which numbered six delegates among its nineteen members) and Sam Bradner would become speaker of the first House. F.A. Jones would become one of the three original Corporation Commissioners. Sidney Osborn would serve as the first Secretary of State, winning two terms, and Mit Simms would become the state's second Treasurer. Still others would pursue distinguished careers outside Arizona. One, Jacob Weinberger of Globe, would become a federal district judge in San Diego and serve until his death in 1974, the last survivor of the convention.²¹²

The convention had no set time limit, although the Congress, which had appropriated \$100,000 to fund the proceedings, had presciently required that the convention delegates "shall receive compensation for the period they actually are in session, but not for more than sixty days in all."²¹³ This gave the convention a target to shoot at for completion of its labors, a target that it missed by only one day.²¹⁴

C. The Convention

1. Preserving the Proceedings

The convention was called to order on October 10, 1910. Over the next 61 days²¹⁵ the delegates hammered out the fundamental charter of

210. Hunt defeated fellow delegate Edward Wells in the 1912 race; twenty years later Moeur closed out Hunt's political career by besting him in the 1932 Democratic primary. O.B. FAULK, *ARIZONA: A SHORT HISTORY* 206 (1970). Hunt served but one year of his third term because it took a recount and a Supreme Court decision to secure his seat. *See Campbell v. Hunt*, 18 Ariz. 442, 162 P. 882 (1917).

211. R.K. WYLLYS, *supra* note 54, at 317-18.

212. *See Memorial*, 454 F. Supp. 1-13 (where his career is recounted).

213. 36 Stat. 569, 578-79 §§ 20, 35 (1910).

214. The convention chaplain, Seaborn Crutchfield, thanked the Lord in his opening prayer on the next to last day of the proceedings, December 8, that "there is enough patriotism in these men . . . that they . . . come here a day and work gratuitous [sic]." Verb. Rep., Dec. 8, a.m., at 1. Crutchfield was the father of delegate (and fellow minister) James Crutchfield, and his opening prayer at each session was generally florid, with heartfelt reflections on how the convention deliberations were proceeding.

215. The delegates met in plenary session on fifty of these days.

Arizona state government. The survey that follows is limited by several problems that plague research into the convention's deliberations.

The delegates early on discussed whether even to keep a verbatim report of their proceedings. Michael Cunniff questioned the need for it five days after the convention was underway, arguing that "no one will read [it] except for political purposes," and that it was a "useless expense." Mulford Winsor, a journalist from Yuma and Hunt's confidant, took the opposite tack, contending that "much valuable matter of historical interest" would be preserved. Cunniff's position initially won favor by a vote of 27-19, but later that day the convention reversed itself by a nearly identical margin.²¹⁶ Morris Goldwater then promptly moved that any person having a prepared speech "of which he is proud and which he desires to have perpetuated" leave a typewritten copy, "prepared as his own expense," with the Secretary to be included in the Report. Goldwater's motion also authorized the Secretary to insert, "at such intervals as he may deem proper," such explanatory phrases as "applause," "loud applause," and "laughter."²¹⁷

On December 7, near the close of the convention, a lengthy discussion took place about how to prepare the Verbatim Report for publication and, indeed, whether to publish it. During this debate, a key issue was the accuracy of the stenographic account. Even supporters of publication acknowledged that the record "is crude in a great many respects."²¹⁸ Some delegates' speeches had apparently been omitted from the Report, and questions were raised about the correctness of the stenographers' attribution of remarks to delegates. Michael Cunniff said his examination of "little snatches" from the report convinced him it needed substantial work. Another delegate reported that he had examined some of the early days' reports and discovered that "quite a long speech delivered by Mr. Crutchfield" had been incorrectly attributed to Judge Baker.²¹⁹ The freethinker delegate William Morgan, who had not examined the report, said he had heard that "the few words" he had said in the proceedings sounded "like the insane ravings of a wild man," and for that reason supported the idea of a revision committee.²²⁰

Part of the problem was that often delegates spoke simultaneously in the debates. Because their remarks were transcribed by hand, some

216. JOURNAL, *supra* note 170, at 23-25. See also Verb. Rep., Oct. 15, a.m., at 19; Oct. 15, p.m., at 5.

217. JOURNAL, *supra* note 170, at 24.

218. Verb. Rep., Dec. 7, p.m., unnumbered page (statement of Mulford Winsor).

219. Baker described that as a "pretty hard blow on me," and Crutchfield responded that he was "as much ashamed of it as the Judge is." Verb. Rep., Dec. 7, p.m., handlettered page 10.

220. *Id.* at 11.

mistakes and omissions were practically inevitable. There was also a hint of partisan politics. Sidney Osborn suggested that the Republicans opposed a revision committee because "every time one of [them] made a speech he had it written out and handed to the secretary."²²¹ Still, almost no one appeared satisfied with leaving the report alone; the principal options were to destroy it or to edit and correct it.

The majority favored the latter, and the debate turned to the question of a process for revising the Verbatim Report for publication; specifically, whether to delegate responsibility to a committee of delegates, how much room to allow delegates to correct the written records of their remarks, and how to guard against wholesale rewriting of history. After sometimes contentious discussion, by voice vote the convention authorized President Hunt to create a small bipartisan committee to prepare the report for publication.²²² It seems the job was never completed; in any event, the Verbatim Report has never been published. The principal surviving copy (two others apparently were prepared) is found in the University of Arizona special collections. It was presented to the library by Governor Hunt on November 25, 1927.

Formal publication of the convention proceedings had come two years earlier, labeled the Journal and prepared by state librarian Con P. Cronin from the Verbatim Reports. The Journal is in far better form than the Verbatim Report, but is not nearly as complete. Some three hundred separate delegate speeches (ranging from a paragraph to as many as two or three typewritten pages) are omitted from the Journal. Most but not all of these appear in Hunt's copy of the Verbatim Report.²²³

Although generally more complete, the Verbatim Report is a mess. Perhaps the Revision Committee did its assignment, because extensive passages are crossed out by hand, without explanation, although they are still readable. Hand alterations of other passages are fairly frequent. Some discussions, extending sometimes over several pages, are substantially (but not always exactly) immediately repeated. Some passages are out of order; many pages are not numbered at all, and each session, when it is paginated, is numbered separately.

Moreover, neither the Journal nor the Verbatim Report is indexed. About the only way to locate discussions of particular topics is to

221. Verb. Rep., Dec. 7, p.m., unnumbered page.

222. Because the Committee's expenses would not be paid, Hunt appointed delegates who lived in Phoenix, Hutchinson (a Republican who, despite his residence, represented Coconino County) and Cassidy, to undertake the task. Verb. Rep. Dec. 8, p.m., unnumbered page.

223. But Hunt's copy of the Verbatim Report appears to omit part of the discussion on the afternoon of November 28, which does appear in the Journal, *supra* note 170, at 502-08.

identify the proposition addressing the topic (although the propositions themselves are not indexed either) and to use the Minutes²²⁴ (which are indexed) to identify the days on which those propositions are discussed, and then to go to the Journal or the Verbatim Report for that day and find the discussion.²²⁵ But because neither the Minutes nor the Journal nor the Verbatim Report sets out the specific language of the propositions offered by various delegates, or the propositions as reported from the committees, constant cross-referencing is required, and in some cases the specific language being proposed by the relevant committee does not exist in any of these sources.

Thus the researcher seeking to trace the history of a particular provision has a rather daunting task of cross-referencing and checking the minutes, the propositions, the Journal, and contemporary newspaper accounts.²²⁶ Even then, much of relevance may be missing, especially because much of the convention's real labor was conducted in various standing committees.²²⁷ Thus the floor debates, like those in most legislative bodies, fail to give a clear and complete picture of the convention's deliberations. Some issues or language were undoubtedly settled in committees, in party caucuses, or in informal discussions.

Typically, the process worked like this: A proposition on a particular subject, as broad as an entire Bill of Rights or as narrow as a single sentence, would be introduced by a delegate. The President would then refer it to the appropriate committee. If the committee was disposed to recommend it, it would report it back to the full convention with a "do pass" recommendation. Alternatively, the committee would alter its content completely, or combine it with several other propositions. Such action can only be haphazardly reconstructed from the available materials. Once a committee proposal reached the convention floor, any debate on it would be recorded in the Journal, but important speeches might be omitted, and unavailable or only sketchily reported in newspaper accounts. In the end, it might be said that the delegates'

224. For the most part, the official minutes of the convention merely record dry details such as the opening and closing times of each session, how many delegates were absent, and the results of voting on formal motions and numbered propositions.

225. Some days, particularly toward the end of the convention (when the committee work wound down and the delegates put in long hours, including evening sessions, sitting as a committee of the whole) covered as many as forty pages in the Journal and an even larger portion of the Verbatim Report (because it picked up many of the speeches omitted from the Journal).

226. Delegates voiced complaints about inaccurate press coverage of the convention, but delegate Cunningham vigorously defended the constitutional rights of the free press. Verb. Rep., Nov. 14, p.m., at 1-5.

227. As Calvin Brice noted, the "actual provisions [were] written in committee meetings about which there is little or no information." C. Brice, *supra* note 133, at 74 & Preface.

indecision about preserving the floor debates suggests that they had one, but only one, eye on history. In that sense, of course, they did not differ greatly from the founding fathers in Philadelphia, who kept no record of their deliberations, except for James Madison's private notes.²²⁸ The gaps and lack of precision in the records of the proceedings qualify their value as a source of interpretive guidance.

2. The Delegates—Confidence and Camaraderie

Despite their relative indifference to historians, the convention delegates approached their work with a high sense of purpose. James Bryce's observations about state constitutional conventions in general were fully applicable to the Arizona experience. The typical product was, he said, "better in both form and substance" than the acts of ordinary legislatures because they are the "work of abler, or at any rate of honester, men, acting under a special commission which imposes special responsibilities."²²⁹ The Arizona Convention, like others, was "free to bend its whole mind" to the task of drafting a fundamental charter of state government—having "nothing to do with the ordinary administration of government, no influence or patronage . . . [leading to] a sense of individual independence and freedom . . . unknown in legislatures. Proposals have therefore a chance of being considered on their merits."²³⁰ The challenge of fashioning a constitution is "specially interesting to thoughtful and public-spirited citizens," and because the fruit of its labor had to be ratified by the people before it took effect, the convention has "somewhat larger freedom to propose what they think is best than the legislature, courting or fearing its constituents, commonly allows itself."²³¹

Another influence on the framers was their shared experience in migrating to Arizona. This background had, as one historian of the era put it, fostered a "tolerance to change and experimentation."²³² This spirit was manifested politically as well as in other ways. Of the

228. But the federal framers met in secret, whereas the press regularly attended the Arizona convention. For a discussion of similar problems for researchers of the federal constitutional debates, see Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

229. J. BRYCE, *supra* note 13, at 475.

230. *Id.* at 669. Although Willard Hurst challenged this perception by arguing that most state constitutional conventions "did not differ markedly from the state legislatures, in types of business, or in quality of deliberations," see J.W. HURST, *supra* note 15, at 218, in Arizona it would appear Bryce was closer to the mark.

231. J. BRYCE, *supra* note 13, at 669.

232. G.E. MOWRY, *supra* note 159, at 82.

twelve states that had adopted the initiative and referendum by 1912, and the seven states that had adopted the recall, all were located west of the Mississippi. Bryce tied this adventurousness to the dramatic Western landscape: The “most enterprising and unsettled Americans” who came west were “intoxicated by the majestic scale of the nature in which their lot is cast.” As a result, they came to believe that they were “missionaries of civilization and instruments of progress in the greatest work the world has seen.” In short, the “confidence of these Westerners is superb.”²³³

The President of the Arizona Convention, George W.P. Hunt, expressed similar sentiments in his own inimitably florid language penned for *Sunset* magazine the year after statehood:

They are not the sluggards of the world who leave kith and kin to wrest a livelihood from a new and untried region. It takes both courage and enterprise to abandon one's household gods of generations and set up new firesides and shrines on virgin soil. . . . Thus it has come about naturally that Arizona's new ship of state carries a venturesome, hazard-loving people, unafraid to explore uncharted seas in the realms of industry, sociology or in other directions of human endeavor.²³⁴

Confident, yes, but not overbearing. Indeed, one impression that plainly emerges from the Convention Journals is a sense of good will and harmony. In this the delegates were reflecting one of the traits that characterized progressives generally. The leading historian of the progressives described them as “remarkably good natured,”²³⁵ while another said that they were “indignant at times, but scarcely ever angry.”²³⁶ On the first day of the convention, Mulford Winsor set the tone in discussing seating arrangements. He proposed to allow the few Republicans to isolate themselves so as to be “free from association with the unwashed democratic majority.”²³⁷ That same day, with old-fashioned courtesy, Hunt and Edmund Wells, a lawyer from Prescott who was the Republicans' choice for Convention President, voted for each other.²³⁸ On another day, Winsor opposed a motion to adjourn to allow delegates to attend a visiting circus with the observation that “we already have one here.”²³⁹ E.E. Ellinwood joined the discussion on the

233. J. BRYCE, *supra* note 13, at 830, 833-34, 836.

234. Hunt, *The Making of a State*, *SUNSET*, vol. 31, no. 4, at 681-83 (Oct. 1913).

235. R. HOFSTADTER, *supra* note 22, at 5.

236. G.E. MOWRY, *supra* note 159, at 88.

237. *JOURNAL*, *supra* note 170, at 3.

238. *Id.* at 48.

239. *Id.*

state seal by describing the territorial seal as “taken from a baking powder can.”²⁴⁰ And when someone apparently swiped the President’s gavel on the last day, Hunt threatened to withhold final salaries if it was not returned.²⁴¹ It was.

This is not to say that the mood was jocular or the convention frivolous. On the contrary, despite low attendance by some delegates, they collectively worked very hard, considering some 148 separate propositions. To meet their self-imposed deadline, they moved into night sessions on November 15.²⁴² Some issues were hard-fought. Tempers occasionally frayed, especially when die-hard supporters of one idea or another repeatedly brought it up after it had already been rejected. On balance, it was a remarkable performance by a rather remarkable group of men, who proved worthy to the challenge they faced.

3. The Big Issues

The questions commanding much of the convention’s attention were a rather accurate reflection of those dominating the national, or at least the western, scene at the time. First and foremost were the tools of direct democracy popularized by the progressives—the initiative, referendum, and recall. The initiative and referendum had first made their appearance in American politics in 1898, in South Dakota, but it was not until Oregon had adopted them in 1902 that they really gained popularity.²⁴³ The recall made its first appearance a little later, in the City Charters of Los Angeles (1903) and Seattle (1906), before Oregon became the first state to adopt it, in 1908.²⁴⁴ Because inclusion of these three devices had been an overriding issue in the delegate selection process, when the convention came to address the subject, it was already practically a given that these devices would be in the constitution; only the details were in question. The major struggle was over extending the recall to judges.

240. *Id.* at 642. Actually, the first Territorial seal was apparently an almost exact duplicate of the picture used on Pioneer Baking Powder manufactured by Folger of San Francisco. See Report of the State Historian, *reproduced in* Verb. Rep., Nov. 25, p.m., at 2.

241. JOURNAL, *supra* note 170, at 646, 648.

242. C. Brice, *supra* note 133, at 20.

243. See Fordham & Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495, 496 (1950).

244. See H.U. FAULKNER, *THE QUEST FOR SOCIAL JUSTICE* 86 (1969). Arizona Constitutional Convention delegate Thomas Feeney had voted in the very first recall election ever held in the United States, in a Los Angeles city election to recall a city councilman. See Reaves, *supra* note 180, at 14.

The second set of issues that loomed over the convention concerned the rights of workers and labor unions in relation to management. Although the labor movement had fashioned a working alliance with the progressives in the summer of 1910, the detailed joint platform embodied only some general principles, leaving many particulars to be wrestled with at the convention. Closely related to the question of the rights of labor was the whole subject of corporations, their regulation and control.

a. Prohibition, Suffrage, and Home Rule

Three other issues provoked much debate—home rule for counties and cities, prohibition of alcoholic beverages, and female suffrage. Home rule was an issue common to all state constitutions, mirroring the federalism debates of the national Constitution. Prohibition and female suffrage were already national issues, and would culminate in amendments to the federal Constitution within a decade.²⁴⁵ Somewhat surprisingly, however, neither was a major issue in the selection of delegates to the Arizona convention,²⁴⁶ even though proposals to enfranchise women had been before almost every territorial legislature since 1891.²⁴⁷

These three issues were closely linked together in the debates, because of the fervor of the prohibition advocates and the distrust they engendered in others. Some anti-prohibition delegates opposed female suffrage because women were thought generally supportive of prohibition. This helps explain the intensity of some opponents of female suffrage; constituents of delegate P.F. Connelly castigated him in grossly intemperate terms for merely supporting submitting the issue to the voters, warning him: “Do not come back to Douglas. You ought to be shot. We are very sorry that the recall is not in operation.” And further: “You are a bum [for your] idiotic efforts.”²⁴⁸

Anti-prohibitionist suspicions increased when a petition favoring prohibition signed by 3200 women was submitted to the convention on

245. Beveridge received protests from Susan B. Anthony over the lack of provision for female suffrage in the Arizona enabling act in 1905. See C.G. BOWERS, *supra* note 45, at 216.

246. C. Brice, *supra* note 133, at 64-66. In 1909, prohibitionists unsuccessfully attempted to persuade the Territorial legislature to call for a state-wide referendum on prohibition. C. Todd, *supra* note 175, at 18.

247. J. McCLINTOCK, *supra* note 29, at 385-86. Delegate Cunningham observed on the floor that “the people” did not demand female suffrage like they did some other provisions. JOURNAL, *supra* note 170, at 189.

248. Arizona Gazette, Nov. 2, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 70.

October 28.²⁴⁹ This petition called the “open saloon . . . the curse of thousands of our sisters, bringing shame and misery and poverty to them . . . [causing] three-fourths of the crime, insanity, and poverty in our Territory.” It also reminded the delegates that “we, the women of Arizona, [are] helpless and without the ballot to protect ourselves and our children.”²⁵⁰ The last point was driven home even further by postcards distributed to the delegates on November 1, which showed a drunken man opposite a young mother, the former captioned “this man can vote,” and the latter “this woman cannot.”²⁵¹ Still, the influential Cunniff squarely opposed female suffrage,²⁵² and Hunt himself did not push for it because, he judged with telling prescience, the citizens’ initiative would be available to attain it.²⁵³

Home rule became similarly entangled; it was resisted because of concern about whether localities ought to retain their local option over alcoholic beverage sale and control.²⁵⁴ Prohibition influenced other issues as well. A seemingly innocuous provision in the Declaration of Rights would have limited the exercise of constitutional rights so as not to endanger the “lives, safety or moral character” of Arizona citizens. Seeing this as a back-door route to banning alcoholic beverages, prohibition opponents knocked it out.²⁵⁵

The failure of the women suffrage and prohibition advocates to succeed at the convention probably heightened their ardor for including the initiative. This would be the instrument by which they would eventually realize their goals.²⁵⁶ Women gained the right to vote by initiated amendment in 1912,²⁵⁷ and the prohibitionists succeeded two

249. JOURNAL, *supra* note 170, at 67.

250. Arizona Gazette, Oct. 28, 1910, at 1; C. Brice, *supra* note 133, at 64.

251. C. Brice, *supra* note 133, at 71.

252. JOURNAL, *supra* note 170, at 189.

253. *Id.* at 196. Women suffrage was one issue where Arizonans lagged somewhat behind a number of their western counterparts, for the region generally led the way nationally on the issue. Wyoming had been the first to grant women the right to vote in territorial elections in 1869. For a summary of the constitutional debates and outcomes on the issue in other states in the region, see G.M. BAKKEN, *supra* note 44, at 85-100.

254. Additional fuel was thrown on the fire when voters in a local election held in Safford, Arizona about two weeks after the convention got underway approved a ban on liquor by a nearly 4-1 margin. The territorial legislature had granted local option in 1901. 43 ARIZ. REV. STAT. § 3058 (1901). See Arizona Bulletin, Oct. 21, 1910, at 1, col. 13; C. Brice, *supra* note 133, at 65. See also JOURNAL, *supra* note 170, at 154, 158, 355, 360.

255. JOURNAL, *supra* note 170, at 470.

256. C. Todd, *supra* note 175, at 17-18. Hunt supported tabling the female suffrage proposal by remarking that the initiative, referendum, and recall “would be sufficient for the people.” JOURNAL, *supra* note 170, at 196.

257. C. Todd, *supra* note 175, at 57, 65.

years later in an initiated amendment to ban the manufacture, exchange, and sale of liquor, and two years after that, in another initiated amendment prohibiting importation, transportation, or possession of liquor.²⁵⁸

b. Race

Perhaps the ugliest moments in the convention came when the delegates dealt with issues of race. Like the founding fathers in Philadelphia, the Arizona delegates grappled with the conflict between the national ideal of equal rights and prevalent popular prejudices and stereotypes. Across the country the progressive movement was peculiarly ambivalent on matters of race. Although it followed on the heels of, and was influenced by, the populist movement, the progressives “virtually gave up on the Populist attempt to make the Southern Negro an equal citizen,”²⁵⁹ and the federal courts were then in a rather complete retreat on the matter.²⁶⁰ William Allen White, a leading progressive, spoke for many when he explained America’s greatness in terms of “clean Aryan blood.”²⁶¹

The Arizona delegates were not immune from such sentiments. A number of them had migrated to Arizona from southern states, including Texas (3), Alabama (3), Virginia (2), Kentucky (2), Georgia, Tennessee, and North Carolina. From the beginning of Anglo settlement, Arizona immigrants included many southern sympathizers, some of whom had played a role in making Arizona a minor battleground in the Civil War.²⁶²

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.”²⁶³ But civil and political rights were narrowly defined in that era, so that the protection afforded racial minorities by this language was dubious. For example, although section

258. *Id.* at 57, 66, 68. On the other hand, an unnamed delegate whose business was wiped out by the prohibition amendments was quoted as saying he would never have supported the initiative if he had known that was the way it worked. *See* Hunt and the Constitution, *supra* note 182, at 2.

259. E. GOLDMAN, *RENDEZVOUS WITH DESTINY* 63 (1977).

260. *See* Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era., Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 446-60 (1982).

261. *See* G.E. MOWRY, *supra* note 159, at 93.

262. *See* H.R. LAMAR, *supra* note 28, at 109-112, 427-33.

263. New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 569 (1910).

3 of Oklahoma's 1906 Enabling Act contained language identical to section 20, it went on to provide that it "shall not be construed to prevent the establishment and maintenance of separate schools for white and colored children."²⁶⁴ Section 20 of the Arizona Enabling Act substantially parroted the language of the fifteenth amendment to the federal Constitution by requiring that the state "never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude," but this too had not been enforced to prevent the widespread disenfranchisement of blacks in the post-Reconstruction South.²⁶⁵

The issue of race could not be ignored by the Arizonans, and it cropped up in direct and indirect ways. Sheep rancher Albert Jones of Yavapai proposed, for example, that the constitution "forever" prohibit marriages between whites and blacks or Chinese, but this did not receive much consideration.²⁶⁶ Future Governor Benjamin Moeur of Tempe led several attempts to require, or at least authorize, separate schools for blacks (those "of African descent") and whites ("all other children"), with "like accommodation . . . impartially maintained." It was likewise defeated, although only on a tie vote.²⁶⁷ Interestingly, some members opposed it because it did not conform to the Enabling Act. Apparently they construed the clause prohibiting discrimination in civil or political rights to cover school segregation, a construction supported by the separate proviso on the subject in Oklahoma's Enabling Act. The *Arizona Gazette* endorsed school segregation in an editorial,²⁶⁸ although it did point out that a similar provision had been defeated in New

264. Oklahoma Enabling Act, Ch. 3335, § 3, Fifth, 34 Stat. 271 (1906). The same act also made grants of land to the new state for, among other things, a "Colored Agricultural Normal University." 34 Stat. 273, § 8; *id.* at 275, § 12. The progressives' ambivalence on race and the two-edged character of progressive instruments of reform were illustrated in Oklahoma in that same year of 1910. Using the initiative adopted in the 1907 constitution, Oklahoma voters approved a "grandfather" clause exempting from the literacy test for voting anyone whose lineal ancestors could vote in 1866. This transparent attempt to disenfranchise blacks was struck down by the Supreme Court five years later. *See supra* note 113; C.E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900 31-44 (1972).

265. *See, e.g.*, C.V. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).

266. *See* Proposition 145 (on file at Arizona State University Archives); JOURNAL, *supra* note 170, at 505.

267. Propositions 15, 73; JOURNAL, *supra* note 170, at 374-75; C. Brice, *supra* note 133, at 28-29; J.M. RICHARDS, *supra* note 59, at 23-24. Moeur, who was born and spent his formative years in Tennessee, was described in a contemporary account as a "Southerner . . . by tradition and education [who has] never in his life been north of the Mason-Dixon line." Reaves, *supra* note 180, at 15.

268. *Arizona Gazette*, Nov. 11, 1910, at 14, col. 3; C. Brice, *supra* note 133, at 110.

Mexico.²⁶⁹ Future governor Sidney Osborn pointed out in the debate that there was already a law on the territorial books allowing racial segregation in the schools.²⁷⁰ This law, enacted over Governor Kibbey's veto in March 1909, authorized school districts with more than eight "pupils of the African race" to segregate them from "pupils of the White races."²⁷¹

Race also crept into the debates on whether to restrict employers from hiring alien labor,²⁷² and on proposals to require a literacy test for voting.²⁷³ Some of the discussions tracked the debates in Congress on the Enabling Act on the question of voter qualifications, and some were frank. Fred Colter, a cattle rancher from Apache County, opposed restrictions on hiring alien labor: "I want an amendment to work Mexicans. Up in Apache County we cannot get our road work done without Mexicans."²⁷⁴ This suggestion that the racial question had a pragmatic side to it was echoed in another context by Fred Ingraham, a Yuma lawyer, who noted that if Mexicans were excluded from voting, the Republicans would control Yuma.²⁷⁵

In the end, however, the delegates kept the constitution free from the stain of overt racism. Hunt, who was an iconoclastic champion of equal opportunity,²⁷⁶ made sure that Indians were protected from ad-

269. The New Mexicans instead inserted a provision in their constitution that prohibited discrimination in schools against children of "Spanish descent." N. M. CONST. art. XII, § 10. This section also says it cannot be amended except with the approval of three-quarters of those voting statewide and two-thirds approval in each county. *See also id.* art. VII, § 3, forbidding discrimination on the basis of "religion, race, language or color," in voting, holding office, or jury service.

270. JOURNAL, *supra* note 170, at 374.

271. Phoenix accepted this invitation to segregate, and a lawsuit challenging the statute was tried in December 1910 about the time the constitutional convention was winding down. The plaintiffs were represented in the trial court by former Governor Kibbey, now in private practice. The trial court eventually held that the segregation was unconstitutional in the first four grades because of the unjustifiable discrimination in requiring small black children to travel long distance over hazards such as railroad tracks to reach the "Colored School." On appeal, however, the Arizona Supreme Court upheld the law in its entirety. *See Dameron v. Bayless*, 14 Ariz. 180, 126 P. 273 (1912); *see also* Gill & Goff, *Joseph Kibbey and School Segregation in Arizona*, J. ARIZ. HIST. 411-22 (Winter 1980).

272. JOURNAL, *supra* note 170, at 306-09, 315-17, 534, 537-38, 634.

273. *Id.* at 392-97.

274. *Id.* at 541. Orme made the same point for Maricopa County. Verb. Rep., Dec. 2, a.m., at 4. Colter had earlier pointed out that "[w]e do not vote Indians in Apache County," to which Mulford Winsor replied: "It's very evident you do not." JOURNAL, *supra* note 170, at 406.

275. JOURNAL, *supra* note 170, at 446.

276. In his inaugural address as Arizona's first governor, he emphasized that his office was open to all, "of whatever race," on an equal basis. *See* J.M. RICHARDS, *supra* note 59, at 58. Former Governor Raul Castro told of a speech Hunt gave in Douglas in his last term as governor, where he suggested that a Hispanic could one day become governor. *See* Dederer, *Celebrating Arizona's 75th Anniversary*, FORESIGHT 7 (Western Savings and Loan, 1986).

verse effects stemming from proposals to restrict alien labor,²⁷⁷ and challenged W.T. Webb's comment that Indians had "the choicest farming lands . . . in Arizona."²⁷⁸ The lawyers among the delegates acquitted themselves rather well on this subject. A.R. Lynch from Safford made an impassioned "we-are-a-nation-of-immigrants" speech in opposing alien labor restrictions,²⁷⁹ and A.F. Parsons of Douglas opposed disenfranchising Mexicans.²⁸⁰ E.E. Ellinwood offered the observation that if alien labor were prohibited, the monument to local Rough Rider hero Bucky O'Neill could not have been erected because it had been sculpted by a foreigner.²⁸¹

The constitution contained no literacy requirement for voting, although it did repeat the requirement of the Enabling Act that the public schools be conducted in English, and that "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."²⁸² An alien labor provision was also included, but it applied only to governmental employment.²⁸³

c. Governmental Structure and Natural Resources

The delegates devoted substantial time to the mechanics of government. They adopted provisions on the legislative process, taxation and spending, budgets, and the like.²⁸⁴ Reflecting a popular concern that persists to this day, they agonized over pegging the salaries of elected officials.²⁸⁵ Several delegates expressed concern about avoiding a "roar" from the people on the subject; as one put it: "If there is anything which will excite the populace, it is this question of salaries."²⁸⁶ This

277. JOURNAL, *supra* note 170, at 306. At Hunt's suggestion, the words "or ward" were inserted in article 18, § 10, to accomplish that end. In Hunt's words, that "gives the Indian in the territory a chance to live, and they were here long before we ever saw America." JOURNAL, *supra* note 170, at 309.

278. *Id.*

279. *Id.* at 541.

280. *Id.* at 561.

281. *Id.* at 307.

282. ARIZ. CONST. art. XX, Seventh, Eighth.

283. *Id.* art. XVIII, § 10.

284. See *infra* notes 464-96 and accompanying text.

285. See, e.g., JOURNAL, *supra* note 170, at 237-41, 265-68, 418-20, 591, 593. The concern carried over to the salaries of convention aides. A proposal was made early on to reduce the chaplain's stipend, but Judge Baker's protest—that the expenses of the convention ought not to be reduced "at the expense of heaven"—squashed the idea. *Id.* at 13-14.

286. *Id.* at 268.

preoccupation was much ado about very little, because although the constitution fixed salaries initially, it gave the legislature the power to change them.²⁸⁷

The convention spent considerable time on natural resource issues. The federal government endowed the state with a large land base. More than eight million acres were designated for the common schools (four specified sections out of every township) as well as 2.35 million additional acres for sundry purposes ranging from hospitals for disabled miners, penitentiaries, and other public buildings, to the payment of bonds issued by certain counties in the territorial period.²⁸⁸

As noted above, the Enabling Act had set out in considerable detail how the school lands would be managed. Although the delegates did not have a free hand here, they still spent considerable time on the subject.²⁸⁹ The Enabling Act did not prevent the state from selling its school lands; it only required the state to obtain full value and put the proceeds in a trust fund for the common schools. Consequently, there were heated debates on whether to prohibit the sale of the lands in perpetuity, or for a period of years. All such proposals were defeated,²⁹⁰ although a related provision that prohibited any individual, corporation, or association from leasing more than 160 acres of agricultural land or 640 acres of grazing land was included.²⁹¹

The other natural resource issue that commanded considerable attention was water rights. Lengthy and detailed water codes were proposed, but in the end, objections to specific features "wore down delegate endurance,"²⁹² and the convention punted, adopting two short provisions rejecting riparian rights and protecting existing uses.²⁹³

287. See, e.g., ARIZ. CONST. art. IV, part 2, § 22; art. V, § 13; art. VI, § 10 (original version).

288. See 36 Stat. 572-73, §§ 24, 25 (1910). The latter had been a major issue in the Enabling Act fight in Congress. Like other parts of the country, the Arizona territory had gone railroad-mad in the latter part of the nineteenth century. Counties had subsidized bonds for railroads, some of which were never built. The eastern bondholders had enough clout to secure a special statehood grant of a million acres to assure payment on these bonds. ARIZONA, *supra* note 40, at 62-63; see also *supra* note 60.

289. See JOURNAL, *supra* note 170, at 489-93; 558-59; 608-10.

290. Arizona Gazette, Oct. 28, 1910, at 7, col. 3; C. Brice, *supra* note 133, at 84-89. Cunniff among others argued strenuously for sale restrictions, calling these lands a "heritage of greatest value to the children of the future." Verb. Rep., Nov. 26, p.m. (unnumbered page).

291. ARIZ. CONST. art. 10, § 11. See also Arizona Gazette, Oct. 28, 1910, at 7, col. 3; C. Brice, *supra* note 133, at 88-89. This provision was amended in 1918 by changing "lease" to "purchase."

292. G.M. BAKKEN, *supra* note 44, at 72.

293. ARIZ. CONST. art. XVII, §§ 1-2. See JOURNAL, *supra* note 170, at 482-88, 514-19, 536-37. For a comparison to the constitution-making experiences of other Rocky Mountain states, where water rights was also a dominant concern, but where arguments for specificity usually prevailed, see G.M. BAKKEN, *supra* note 44, at 64-73.

d. Length and Depth—Structuring the Constitution

The convention produced a document containing nearly 21,000 words, nearly three times larger than the federal constitution.²⁹⁴ Length *per se* was not an important issue in drafting the Arizona Constitution. There were, however, frequent discussions about whether a particular proposal was appropriate for constitutional enshrinement or whether it was “purely legislative.”²⁹⁵ The latter was, here as in other states, used as a “term of opprobrium to stigmatize” whatever policy it was that the opponents wanted to keep out.²⁹⁶

On occasion delegates became obsessed with particular subjects. Besides debating salaries extensively, they agonized over whether to create such state offices as sanitary and boiler inspectors.²⁹⁷ Another repeatedly debated topic was whether to include a procedure allowing counties to select a new county seat by popular vote. John Bolan of Bisbee in Cochise County chafed at the existing location of the county seat in Tombstone, and argued it was “impossible to move . . . under existing laws.” D.L. Cunningham of Tombstone argued, naturally, that the constitution ought not contain “various gentlemen’s private ideas,” and P.F. Connelly of Douglas widened the split in the Cochise County ranks by proposing that the seat of county government could only be moved to Douglas. In the end, the whole subject was tabled.²⁹⁸

W.T. Webb, a farmer from Graham County, introduced what was probably the most notorious idea. His Proposition 60 would have disabled the legislature from discriminating against “osteopathic, allopathic, homeopathic, eclectic or any other organized school of medicine.” The basic purpose, to protect osteopaths, was debated strenuously

294. J. McCLINTOCK, *supra* note 29, at 366, gives its length as about 25,000 words, but law student research assistant Patrick Sheehan counted somewhat less than 21,000. It has since grown to nearly 29,000 words by subsequent amendments, slightly longer than the average length of 26,150 words. The federal Constitution contains only 7300 words; of the states, only taciturn Vermont, with an estimated 6600 words, has a shorter one. For general information on constitutional length, see Sturm, *supra* note 13, at 74-76.

295. See e.g., JOURNAL, *supra* note 170, at 81, 109, 352, 353, 355, 360, 374, 478, 517.

296. Grad, *The State Constitution: Its Function and Form in Our Time*, 54 VA. L. REV. 928, 942 (1968). Sometimes proponents of pet ideas sank to absurd levels of detail; Edmund Wells weighed in with Proposition 99, directing the legislature to enact laws to protect livestock from, among other things, “pleuro pneumonia, glanders [and] splenetic or Texas fever.” The stylist Michael Cuniff successfully moved to omit the unappetizing recital and eventually the whole section was dropped. JOURNAL, *supra* note 170, at 101; Arizona Gazette, Nov. 1, 1910, at 1, col. 1; C. Brice *supra* note 133, at 96.

297. JOURNAL, *supra* note 170, at 454, 478. Corporate lawyer Ellinwood scotched the latter by pointing out that the railroads would welcome the idea because it meant that the state, and not the companies, would have to bear the expense involved. *Id.* at 478.

298. *Id.* at 612-14.

on both sides. Cunniff called it “one of the most dangerous” ideas put before the convention, for it would have Arizona “open wide her doors to all sorts of quack doctrines and especially to contain some of it in her constitution.”²⁹⁹ E.L. Short, a merchant from Yuma County, scornfully proposed to “fill up” the constitution by protecting dry goods merchants from discrimination as well.³⁰⁰ The idea came to three separate votes, but eventually the rejection stuck.³⁰¹

Following the pattern of several other states, the delegates included what might be the dullest constitutional provision on record, a specification of the boundaries of the state in article I, section I. Although the state constitution could not control federal law on state boundaries, Arizona had previously disputed with California over whether Yuma belonged to the latter by the terms of the Gadsden Treaty.³⁰² The Arizonans might also have been sensitive about cementing their jurisdiction over the area north of the Grand Canyon (the Arizona strip) to its neighbor Utah. This was not entirely fanciful, for Senator Reed Smoot of Utah had proposed an amendment to the Enabling Act that would have excised the strip from Arizona.³⁰³

Perhaps it was inevitable that the constitution would be too detailed. The problem was, in delegate Thomas Feeney’s plaintive words: “Gentlemen claim it would not be constitutional, but I would like to know what is constitutional and what is legislative; where should the line of demarcation go?”³⁰⁴ Or, as Fred Ingraham more colorfully put it: “When does a pig cease to [be] a pig, and become a hog?”³⁰⁵ But the delegates tried to guard against “applying a constitutional remedy to

299. *Id.* at 449, 476. Although Cunniff’s remarks seem like what was, for him, a rare flight of fancy, actually a great portion of the newspaper ads of the day were for treatments and medicines, and consumer protection was a central part of the progressive agenda—Beveridge, for example, had helped enact a federal meat inspection law and the Pure Food and Drug Act that passed Congress in 1906. C.G. BOWERS, *supra* note 45, at 226-33; J. BRAEMAN, *supra* note 50, at 109-10.

300. JOURNAL, *supra* note 170, at 449.

301. *Id.* at 449, 476, 494, 508-11. Delegate William Morgan, an atheist, supported the proposition, wondering if it were defeated, and Jesus Christ came to Arizona, whether He would be prevented from healing. Delegate (and Doctor) Tuthill replied that Morgan would not be bothered at all if Jesus was not licensed to practice. *Id.* at 510.

302. C. Brice, *supra* note 133, at 96-98. The delegates were told that 21 states had their boundaries in the constitution. See JOURNAL, *supra* note 170, at 165-66.

303. See 45 CONG. REC. 1060 (1910). The Senate had actually passed such an amendment in 1904. 39 CONG. REC. 2003 (1904); C.E. MADDOX, *supra* note 50, at 91. Furthermore, New Mexico would run into serious problems trying to fix, in its constitution, its eastern boundary with Texas. See *New Mexico v. Texas*, 275 U.S. 279, *modified*, 276 U.S. 558 (1928).

304. JOURNAL, *supra* note 170, at 380.

305. Verb. Rep., Nov 16, a.m. (unnumbered page).

cure a local disease,” as A.R. Lynch put it,³⁰⁶ or “shooting a pretty heavy gun at a very small bird,” as Cunniff put it.³⁰⁷

Cunniff’s Committee on Style, Revision and Compilation did yeoman work in sorting out all the disparate propositions and stitching them together into a coherent document. Nevertheless, a couple of minor problems in organization could not be solved as the delegates rushed to complete their work before the congressional appropriation of their salaries and expenses expired. As a result, article XXII, which was basically designed to ensure a smooth transition between territoriality and statehood, contains several substantive provisions that properly belong elsewhere.³⁰⁸

The convention completed its labors on December 9, 1910. In the morning prayer that day, Chaplain Crutchfield asked that “it be in the hearts of the people to adopt this constitution [even though] there are some who think there are some things that ought not to have been put in it, and others think there are too many things in it. . . .”³⁰⁹ The final version was presented to the assembled body, and the roll call taken. The 40-12 vote reflected the Democratic dominance; all members of that party except Ellinwood, the corporate lawyer, approved it; all Republicans except John Langdon, a machinist from Globe, refused. The delegates then closed this chapter of Arizona history by singing a verse of “America.”³¹⁰

D. A Slight Detour on the Road to Statehood

The next step was to secure the approval of the voters of the Territory. Convention President Hunt announced the formation of the Arizona Statehood League the next day, with the leading progressives forming the core of the organization. Two days after that, acting Territorial Governor Young set the ratification election for February 9, 1911. Although there was a spirited campaign, with Territorial Governor Richard Sloan, a Republican, and much of the press expressing opposition or at least concern about whether the constitution’s progressive features would doom approval in Washington,³¹¹ the outcome was never

306. JOURNAL, *supra* note 170, at 260.

307. *Id.*

308. *Id.* at 622-24. See ARIZ. CONST. art. XXII, §§ 13-17; 19-22 (§ 18 was added in 1980).

309. Verb. Rep., Dec. 9, a.m., at 1.

310. JOURNAL, *supra* note 170, at 648.

311. Sloan was quoted on December 8 as saying the proposed constitution was “the worst affair ever turned out, and objectionable to all classes.” He predicted it would be “badly defeated at the polls.” Los Angeles Times, Dec. 8, 1910; see also Farlow, *supra* note 83, at 146 n.* (unnumbered footnote).

seriously in doubt. The final vote was better than 3 to 1 in favor.³¹²

Formal proclamation of statehood was, however, another year away. After separate admission for New Mexico was narrowly averted in March 1911,³¹³ (that state having ratified its constitution by a similar margin in January) a joint resolution approving statehood for both New Mexico and Arizona was approved by Congress on August 10, after a brief debate in which the Senate conservatives, led by Henry Cabot Lodge and Elihu Root, bitterly denounced the judicial recall.³¹⁴ The resolution approved by Congress sought to head off President Taft's objection to the judicial recall by requiring, as a condition of admission, that retention of the recall be put on the ballot at the first general election held in the new state.³¹⁵

President Taft vetoed that joint resolution. In his lengthy veto message,³¹⁶ he defended what he called popular government, twisting the phrasing of Lincoln's Gettysburg Address into a wordy, legalistic definition that robbed it of charm: "government of the whole people, by a majority of the whole people, under such rules and checks as will secure a wise, just, and beneficent government for all the people." The judicial recall, said Taft, is "so pernicious in its effect, so destructive of independence of the judiciary, that it is likely to subject the rights of the individual to possible tyranny [and was] injurious to the cause of free government."³¹⁷

312. See H.R. LAMAR, *supra* note 28, at 503; J. MCCLINTOCK, *supra* note 29, at 369; J.M. RICHARDS, *supra* note 59, at 28-35.

313. See *infra* text accompanying notes 641-43.

314. See 47 CONG. REC. 1528 (1911) (House); 47 CONG. REC. 3742 (1911) (Senate); see also G.E. MOWRY, *supra* note 159, at 265. While the resolution was pending in Congress, Arizona sent a bipartisan delegation headed by Hunt to lobby for it. One member, Republican Dwight Heard, unsuccessfully attempted to persuade the others to drop the initiative and referendum as well as the recall. Hunt and the Constitution, *supra* note 182, at 11.

315. Congressional opponents had held out for a flat rescission of the judicial recall. See Farlow, *supra* note 83, at 149-50.

316. See Y. LaCagnina, *supra* note 176, at 135-43, app. I.

317. 47 CONG. REC. 3964-66 (1911); see also J.M. RICHARDS, *supra* note 59, at 35. It has been suggested that Taft's veto was calculated to influence a proposal that was before the California voters in the fall of 1911 to adopt the recall for all state officials, including judges. See J.P. White, *Progressivism and the Judiciary: A Study of the Movement for Judicial Reform 1901-1917*, at 87 (1957) (unpublished Ph.D. thesis, Univ. of Mich.). If so, the tactic failed miserably because the California voters approved the recall by a better than 3 to 1 margin. *Id.* at 96. White also pointed out that Taft never unequivocally made the argument, in his veto message or elsewhere, that the judicial recall was a violation of the "Republican Form of Government" clause of the federal Constitution, art. 4, § 4. See *id.* at 110 n.10. White suggests that may have been because Oregon had already adopted the judicial recall. Therefore, arguing that it violated the federal constitution might have created a constitutional crisis if the federal government had tried to force Oregon, admitted to the Union more than a half-century earlier, to rescind it. *Id.*

Congress swiftly responded. On August 21, it sent another resolution to Taft, calling for statehood upon the condition that the Arizona voters delete the judicial recall provision at the election in the fall of 1911.³¹⁸ Taft approved this on the same day. Both political parties in Arizona favored deletion of the judicial recall at this point, although they joined in calling on the first state legislature to put the question of its reinstatement to the people at the earliest possible opportunity. The Democrats, however, denounced Taft's action as "dictatorial."³¹⁹

At the election, held on December 12, 1911, the Democrats swept the state offices and, having been forcefully apprised of what the final price of statehood was to be, the voters approved deletion of the judicial recall. At ten o'clock on the morning of February 14, 1912, Taft signed the proclamation admitting Arizona to the Union.³²⁰

IV. AN OVERVIEW OF THE ARIZONA CONSTITUTION

A. *The Dominant Themes*

In considering the Arizona Constitution, it is worth reflecting on the constellation of values and attitudes it embodied; on the political decisions that, in Hans Linde's words, its framers "deemed worthy of constitutional magnitude."³²¹ Overall, 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."³²² The Arizona framers were thoroughly skeptical of concentrating power in the hands of any institutions, governmental or not.

318. S.J. Res. No. 57, 47 CONG. REC. 4127, 4242, 4381 (1911).

319. Y. LaCagnina, *supra* note 176, at 117.

320. The vote for deletion was 14,963 to 1,980. A few months later, the Arizona voters extracted a measure of revenge for this humiliation. A little over a month after statehood was proclaimed, State Senator Homer Wood introduced in the first state legislature a proposed constitutional amendment to reinstate the judicial recall, explaining he wanted to restore the constitution "to its original state of perfection" by reversing Taft's "act of desecration." Y. LaCagnina, *supra* note 176, at 122-23. The legislature approved the proposal on April 27. At the election in November, the voters overwhelmingly agreed, by a margin of 16,272 to 349. At the same time they voted overwhelmingly against Taft's bid for reelection. See AMERICAN YEAR BOOK 48 (1912). Arizona thus joined four other states in adopting the recall and applying it to judges. The others were Oregon, 1908, California, 1911, Colorado, 1912, and Nevada, 1912. (Idaho and Washington also adopted the recall in 1912, but excluded judges.) Y. LaCagnina, *supra* note 176, at 128, table 5.

321. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 131 (1970).

322. J.W. HURST, *supra* note 15, at 241.

Their skepticism was not gloomy. Like progressives in general, they were at least meliorists, confident of the ability of humankind to channel its energies toward worthy and noble ends. As their label attested, they believed in progress, in the idea that the “nation could be redeemed if the citizens awoke to their responsibilities.”³²³ While they were sober enough not to believe that the “future would take care of itself,” they did share an intense faith in the future of themselves and their society.³²⁴

But the Arizona delegates did not allow this optimism to cloud their vision of what was required for an effective political system. They recognized the need for careful arrangement of the machinery of government, and saw the wisdom of suffusing that machinery with a complicated system of checks and balances in an effort to guard against excessive concentration of power. Again like progressives generally, they were concerned with structure and process as much as with ultimate outcomes and values. They “thought in terms of a society characterized by indeterminate process rather than a society of predictable motions under natural law. In response to a new sense of human relations, [they] began constructing a government of flexible power and continuous responsibilities.”³²⁵ This too was a manifestation of optimism, for it rested on the hope that if the government was within sufficient control of the citizenry, social justice could be accomplished. This attitude helps explain the extraordinary attention paid to the mechanics of government in the Arizona Constitution.

B. Power to the People: Popular Sovereignty

Perhaps the most constant thread running through the Arizona Constitution is its emphasis on democracy—popular control through the electoral process. This was, to be sure, a cardinal tenet of the progressive movement, captured in its best-known innovations, the initiative, referendum, and recall. As Eric Goldman put it, “In the early 1900’s, saying ‘democracy’ was semantic magic. One argued for or against anything on the grounds that it did or did not represent the truly democratic way.”³²⁶ In this climate, Republican United States Attorney General Wickersham’s criticism of the tools of direct democracy as facilitating domination and repression by a “small minority of the electorate”³²⁷ rang hollow. The Arizona framers’ enthusiastic embrace

323. R. HOFSTADTER, *supra* note 22, at 11.

324. R. HOFSTADTER, *supra* note 161 at 4-5 (1963).

325. R. WEIBE, *supra* note 190, Preface, at vii.

326. E. GOLDMAN, *supra* note 259, at 132.

327. Wickersham, *supra* note 14, at 29.

of power to the people was strengthened by their long experience as a territory. The territorial governor and judges were appointed by the President, with little input from local residents. Although the judges were often local residents, a number of governors were non-resident political hacks with neither prior experience nor interest in local affairs.³²⁸ The framers were determined to reverse that state of affairs, and they did, with a vengeance.

All of the officers of state government created by the constitution (legislators, governor, judges, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction, corporation commissioners, and mine inspector) were to be elected.³²⁹ Offices of local government were treated the same way; for example, the principal county officers (sheriff, recorder, treasurer, school superintendent, county attorney, assessor, county superintendent of roads, and surveyor) were all to be elected.³³⁰ In fact, whenever the delegates debated whether a particular official was to be appointed or elected, the convention opted for election. For example, even though delegate John Orme, a member of the Maricopa County Board of Supervisors for many years in territorial days, favored appointed assessors as a way of insulating them from political pressures in valuing property, he was overridden by the tide of democratic control.³³¹ E.W. Coker's proposal for a corporation commission with three appointed members met a similar fate.³³² Not even such low visibility jobs as clerks of courts were exempted.³³³

The convention required an "advisory" vote on the selection of United States Senators.³³⁴ This was three years before the 17th amendment to the federal Constitution was ratified, replacing the original system under which state legislatures chose Senators. The delegates knew this idea was not radical.³³⁵ Reaction to the corruption of the

328. See generally H.R. LAMAR, *supra* note 28, at 295, 443, 458-59, 468-71, 476, 482-85. Ellinwood criticized "carpet-bag" territorial governors and judges on the convention floor. See JOURNAL, *supra* note 170, at 256.

329. ARIZ. CONST. art. IV, part 2, § 21; art. V, § 1; art. VI, §§ 3, 5; art. XV, § 1; art. XIX (original version).

330. *Id.* art. XII, § 3.

331. JOURNAL, *supra* note 170, at 348-49.

332. Arizona Gazette, Oct. 20, 1910, at 6, col. 2; C. Brice, *supra* note 133, at 76.

333. JOURNAL, *supra* note 170, at 594.

334. ARIZ. CONST. art. VII, § 9. Although mandatory popular election of U.S. senators would have conflicted with the federal Constitution, see U.S. CONST. art. 1, § 3, and the Enabling Act, 36 Stat. 578, § 34 (1910), the hope was it would take a foolhardy legislature to reject a senatorial candidate approved by "advisory" vote of the people.

335. C. Brice, *supra* note 133, at 49.

state legislatures by wealthy robber barons and others to secure senatorial appointments had already led some 29 states to endorse selection of senators by popular vote.³³⁶ In fact, progressives often linked criticism of the Senate with that of the courts, seeing the same evils and defense of privilege underlying both.³³⁷

Of all the offices subject to popular election, the one that attracted the most attention was the idea of electing judges. The framers of the federal Constitution had opted for appointed judges with life tenure, and even this insulation did not stop Alexander Hamilton from describing the judiciary as the "least dangerous" branch.³³⁸ By the turn of the twentieth century, however, the prevailing attitude had swung sharply away from that degree of independence. By this time, thirty-one states (including nearly all in the west or southwest) elected judges; only four states had opted for life tenure, and the rest went with fixed terms.³³⁹

The progressives generally regarded the judiciary as an obstacle, a bastion of conservatism obstructing needed reform.³⁴⁰ The influential William Allen White wrote in 1910 that the courts' exercise of judicial review was "one of the most ruthless checks on democracy permitted by any civilized people."³⁴¹ Conservatives reacted in kind, for "as the reform movement quickened its pace in the first decade of the new century, the conservative's admiration and devotion to the courts became almost mystical."³⁴²

336. See G.E. MOWRY, *supra* note 159, at 264.

337. *Id.*

338. THE FEDERALIST NO. 78, at 396 (M. Beloff ed. 1948).

339. In five others, the legislature chose, and in eight others, the governors made the appointment. J. BRYCE, *supra* note 13, at 501-06. Bryce did not especially like this trend, describing it as throwing "this grave and delicate function into the rude hands of the masses." But he recognized that the outcome was not as bad as he had feared. *Id.* at 506-07. See also L. FRIEDMAN, *supra* note 15, at 371-76. For a comprehensive summary of state policies on the manner of selecting judges and their terms at the time the Arizona Constitution was drafted, see 47 CONG. REC. 3360-66 (1911) (speech of Oklahoma Senator Robert Owen).

340. Historian Vernon Parrington wrote that "perhaps the chief contribution of the Progressive movement to American political thought was its discovery of the essentially undemocratic nature of the federal constitution." *Introduction*, in J.A. SMITH, THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT xi (1930). For a comprehensive study of the judiciary's position and attacks upon it in this era, see J.P. White, *supra* note 317. White devotes two chapters to Arizona's consideration of the judicial recall and the federal government's response. *Id.*, chs. V, VI; at 109-222.

341. G.E. MOWRY, *supra* note 159, at 265; see also *id.* at 43. They were not, however, unanimous on this score; Herbert Croly, for one, feared that judges elected to short terms would become creatures of political machines. *The Promise of American Life* 127-31 (1909), reprinted in R. HOFSTADTER, *supra* note 161, at 97-100.

342. G.E. MOWRY, *supra* note 159, at 43.

In Arizona, there was not much of a contest on the question of electing judges. Labor and progressive interests were both in favor. Delegate Thomas Feeney, a machinist from Globe, put it simply: "Labor has never suffered under laws made by the legislature. It has suffered under judge-made laws. . . ." ³⁴³ Thus, the requirement that judges be elected was regarded by labor as a supplementary safeguard alongside other, more specific proposals they were advancing. ³⁴⁴ Feeney also opposed low salaries for judges because, as he put it, "[w]e do not want them paid on the side by corporations." ³⁴⁵ Indeed, the salaries the delegates pegged for Supreme Court judges were the highest of all officials in the government, at \$5000 per annum. ³⁴⁶ In the end, delegate Benjamin Moeur perhaps expressed it best when told his colleagues that it is "as impossible to get judges out of politics as to get them into Heaven." ³⁴⁷

Another feature of popular control was embodied in the convention's requirement of a direct primary to select the candidates for "all" elective offices—state, local, and congressional. ³⁴⁸ This was, of course, no more than a recognition that elections could be made meaningless if political machines hand-picked the candidates. It was also an innovation pushed by the progressives nationally. An interesting feature of the Arizona provision was that it applied even to candidates for United States Senator, who were also subject to an "advisory" vote of the people.

Not only was the overwhelming emphasis placed on elections, but the reins of popular control were tightened by means of short terms. Nearly all of these state and local government offices were for merely two years. ³⁴⁹ Once again, every time the question was raised, the delegates opted for more democracy, not less. Thus, four-year terms

343. JOURNAL, *supra* note 170, at 207. Injunctions had been issued in labor disputes in Arizona in at least 1903 and 1907. See Y. LaCagnina, *supra* note 176, at 24-26. In an interview many years later, delegate James Crutchfield said it was not surprising that judges tended to side with management in labor disputes because many territorial judges had represented corporations before going on the bench. *Id.* at 24.

344. Such as one to prohibit injunctions in labor disputes. See *infra* text accompanying notes 445-49.

345. JOURNAL, *supra* note 170, at 238.

346. ARIZ. CONST., art. VI, § 10 (original version). Supreme court judges were renamed justices in the overhaul of article VI adopted in 1960. The Governor was to receive only \$4000, the same as superior court judges in the more populous counties. *Id.* art. V, § 13; art. VI, § 10.

347. JOURNAL, *supra* note 170, at 352.

348. ARIZ. CONST. art. VII, § 10.

349. ARIZ. CONST., art. IV, part 2, § 21; art. V, § 1; art. XII, § 3 (original version). Supreme Court Justices were given a six year term and superior court judges a four year term. *Id.* art. VI, §§ 3, 5. Corporation Commissioners were given six-year terms. *Id.* art. XV, § 1.

for state and local offices were rejected in separate votes.³⁵⁰ Indeed, the Committee on the Executive had called for a four-year term for governor, but that was reduced to two years on the floor.³⁵¹ Although proponents of a four-year term argued that the recall and the direct primary offered sufficient checks on machine influence, their arguments were swept away by the tide of popular sovereignty.³⁵²

State and local officials were further constrained by the possibility of recall during their term of office. This was perhaps the single most controversial feature of the new constitution, insofar as the judiciary was made subject to it. Here again the idea of popular control won out, and President Taft's veto of statehood for extending the recall to judges "earned him the reputation for being a foe of popular government at a time when the word democracy had the power to inspire almost religious veneration."³⁵³

Democratic control was advanced still further by inclusion of the initiative and referendum. Both allowed the people to bypass the legislature and the governor, and take lawmaking authority directly into their own hands. Both had been advocated in Arizona as early as 1894, when W.O. "Bucky" O'Neill, later to achieve fame as a Rough Rider who died in the charge up San Juan Hill, advocated it in his 1894 campaign for territorial delegate on the Populist ticket.³⁵⁴ George Hunt picked up the idea five years later and pushed it through the territorial legislature but it was pocket-vetoed by Governor Murphy, a Republican.³⁵⁵ Ten years went by before Hunt revived the idea in the 25th Territorial Legislature in 1909. Even though that body was overwhelmingly Democratic, the measure failed in the session's closing hours.³⁵⁶

Although a majority of delegates came to the convention bound to support the initiative and referendum,³⁵⁷ the details still had to be worked out.³⁵⁸ On these details, a majority went with proposals to

350. JOURNAL, *supra* note 170, at 253-55, 590, 612.

351. *Id.* at 253-54.

352. Cunniff responded to these arguments by saying that the recall was only for an "emergency" situation and four years was "too long" for a fixed term. *Id.* at 253.

353. G.E. MOWRY, *supra* note 159, at 265.

354. C. Todd, *supra* note 175, at 7-8.

355. *Id.* at 9. Hunt's proposal included a 15% signature requirement for the initiative and 7% for the referendum. *Id.*

356. *Id.* at 12-13.

357. JOURNAL, *supra* note 170, at 127, 144, 159; *see also* C. Brice, *supra* note 133, Appendix B, at 118-21.

358. The proposals and the debates are recounted in detail in C. Todd, *supra* note 175, at 26-32.

extend or facilitate these processes. They were made applicable to local governments, an issue that raised delicate questions of home rule and the relationship between cities and counties.³⁵⁹ In the end, after the debate stretched over three days, the convention sidestepped the issue by making the initiative and referendum available to cities, towns, and counties as to all matters on which they are "empowered by general laws to legislate."³⁶⁰

After considering various percentage requirements (ranging from five to twenty percent) for the number of signatures (as against the total number of voters) needed to trigger initiative or referendum elections, the convention opted for percentages in the lower range of those suggested—five percent for a referendum and ten percent for an initiative.³⁶¹ The percentage for initiated constitutional amendments was set at fifteen percent,³⁶² and for local issues, the percentages were somewhat higher—fifteen percent for the initiative and ten percent for the referendum.³⁶³ These percentages were hotly debated; as one student of the convention has observed, the difference of a mere percent or two "seemed to mark a man as a conservative or liberal Democrat."³⁶⁴

On the other hand, the delegates paradoxically refused to put prohibition and female suffrage on the ballot, rejecting by a vote of 33-15 fervent arguments by Webb, Franklin, and others that the whole idea of popular control would be well served by letting the people settle these contentious issues directly.³⁶⁵ Delegate A.C. Baker charged that "we are false to the principles we have professed."³⁶⁶ One historian thought the best explanation for this inconsistency was that "not many

359. The idea prompted the city of Phoenix to send a special resolution to the convention objecting to any incursion by the counties into city prerogatives. *Arizona Gazette*, Nov. 7, 1910, at 5, col. 3; C. Brice, *supra* note 161, at 40-44. In a tongue-in-cheek manifestation of how sensitive such local jurisdictional issues had become, delegate Jones of Maricopa County successfully moved that the Phoenix resolution be sent to the Committee on Military Affairs. *JOURNAL*, *supra* note 170, at 164.

360. ARIZ. CONST. art. IV, pt. 1, § 1(8). See also *JOURNAL*, *supra* note 170, at 151-55.

361. ARIZ. CONST. art. IV, pt. 1, §§ 1(2) and (3). The delegates rejected a proposal to set the initiative requirement at 8%, even though A.C. Baker of Phoenix argued that a higher percentage would favor "the corporation[s] . . . and the wealthy. . . ." *JOURNAL*, *supra* note 170, at 144. Labor favored the Oregon plan: 5% for the referendum and 8% for the initiative. C. Todd, *supra* note 175, at 30. Cunniff and Winsor, for example, proposed 6 and 8%, respectively, for the referendum. *Arizona Gazette*, Oct. 17, 1910, at 1, col. 2; Oct. 18, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 39.

362. ARIZ. CONST. art. IV, pt. 1, § 1(2).

363. *Id.* at § 1(8).

364. C. Brice, *supra* note 133, at 39. The legislative committee, chaired by Mulford Winsor, had left the percentages blank, passing the hot potato to the convention floor debates to fix.

365. C. Brice, *supra* note 133, at 66-69.

366. *Arizona Gazette*, Nov. 17, 1910, at 1, col. 1; C. Brice, *supra* note 133, at 68.

members of the convention wanted to place in jeopardy the right of a good politician to buy a round for the house.”³⁶⁷ As early as 1887, however, the territorial legislature had addressed the problem of candidates pandering to voters, by making it illegal to furnish alcohol or any “entertainment” wherever an election was in progress.³⁶⁸ For whatever reasons, the delegates in effect decided to require proponents of female suffrage and prohibition to persuade the legislature or gather sufficient signatures to put the question on the ballot.

The recall itself was another device to exercise popular control over elected officials. With strong backing from labor, Oregon had adopted it two years earlier, and the Arizona delegates used Oregon’s provision as a model, with some changes. Although both states required signatures of twenty-five percent of the voters to trigger the election, in Oregon this was calculated on the basis of the total voters casting ballots for Supreme Court justices, while in Arizona it was based on the number who cast ballots for candidates for the office whose occupant was being recalled.³⁶⁹

C. Suffrage and Elections

Bent on insuring popular control of government, the framers of the Arizona Constitution also took pains to define which people would have the franchise. Generally, state constitutional qualifications for voting are now of historical interest because they have been overtaken by developments in federal law. The federal supplanting has been by constitutional amendment,³⁷⁰ by judicial interpretation,³⁷¹ and by statute.³⁷²

Most early state constitutions limited the electorate to male property holders or taxpayers, and some posited religious qualifications as well.³⁷³

367. C. Brice, *supra* note 133, at 69.

368. Ariz. Penal Code, tit. 4, §§ 74, 86 (1887).

369. See ARIZ. CONST. art. VIII, pt. 1, § 1. The Arizona provision also combined the vote on recall with the decision on who should replace the official recalled, while the Oregon provision separated the two. For a complete account of the convention deliberations on the recall, see Y. LaCagnina, *supra* note 176, at 63-76.

370. The fifteenth’s prohibition of racial discrimination in voting, the nineteenth’s provision of female suffrage, the twenty-fourth’s prohibition of a poll tax in federal elections, and the twenty-sixth’s provision of the franchise for those eighteen and older.

371. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (outlawing substantial residency requirements and property qualifications for voting in most elections).

372. See, e.g., Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; *Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) (federal civil rights acts abolishing literacy tests and other devices that restrict the franchise).

373. Sturm, *supra* note 13, at 62-63.

These were substantially overthrown or loosened with the great democratic awakening of the early nineteenth century, especially with the advent of Jacksonian Democracy in 1828.³⁷⁴ Suffrage remained a focus of attention, especially in the matter of race. After all, in Lawrence Friedman's apt phrase, "suffrage was a bottleneck of law; who voted determined who ruled. Hence, constitutional disputes over suffrage and apportionment were widespread and sometimes bitter."³⁷⁵

Concern over a literacy test adopted by the territorial legislature in 1909 led the Senate Republicans to take the extraordinary step of inserting in the Enabling Act a unique federal qualification defining the Arizona electorate eligible to vote on the new state constitution and elect the new state's first officers.³⁷⁶ The Enabling Act also sought to disable the state from "abridging the right of suffrage on account of race, color, or previous condition of servitude."³⁷⁷

Nevertheless, it was doubtful whether the United States Congress could, under then-prevailing constitutional interpretation, go further than prescribing federal qualifications for the electorate in the statehood formation process. At this point the states had, with the exception of the largely unenforced fifteenth amendment and the largely untested fourteenth amendment, successfully resisted federal intrusions into voter qualifications. This practically ensured that suffrage concerns would command considerable attention at the convention, because the delegates' choices about the franchise were, once the constitution cleared the hurdle of federal approval, largely beyond federal purview.

In this context, it was perhaps not surprising that suffrage provoked substantial disagreement at the convention. The framers argued at length about a literacy test, female suffrage, and the extent to which the franchise ought to be limited to property owners or taxpayers. On the literacy test, after heated debate, the delegates decided against the idea. Douglas lawyer A. F. Parsons opposed disenfranchising Mexican-Americans "who have been the pioneers of this land and who sought out an existence here for many years before we came here to disturb them."³⁷⁸ Phoenix lawyer Alfred Franklin counseled against reviving the literacy test issue in light of the strong sentiment expressed by Congress in the Enabling Act.³⁷⁹

374. *Id.* at 63-64.

375. L. FRIEDMAN, *supra* note 15, at 119.

376. *See supra* text accompanying notes 107-15.

377. *See* 36 Stat. 570, § 20, Fifth.

378. JOURNAL, *supra* note 170, at 561.

379. *Id.* at 393.

Of the limits on suffrage the convention did adopt, none have survived intact, although many still appear in the constitution as curious artifacts of an earlier era.³⁸⁰ For example, the convention limited the right to vote and hold office to males, except that women might vote in school elections.³⁸¹ This exception was probably influenced by the fact that more than eighty percent of the public school teachers in the state at the time were women.³⁸²

This proved to be an extremely short-lived victory for opponents of female suffrage. Supporters gathered enough signatures to put the issue on the ballot and, at the first post-statehood election in November 1912, the constitution was amended to allow women to vote and hold office by a margin of better than 2-1.³⁸³ In recognizing this measure of equality for women, Arizona anticipated the nineteenth amendment to the federal Constitution by eight years.³⁸⁴

The framers also limited the franchise to those 21 or older, the standard age limit at the time. Much more controversial, however, was

380. The survival of nullified provisions in the official text of the state constitution is not unusual. Massachusetts, for example, is still operating with a constitution adopted in 1780, yet over half of its 24,000-word text has been nullified by subsequent developments. In Rhode Island, some 7600 out of 11,400 words are no longer in force. See Sturm, *supra* note 13, at 75, Table 3, note i. These artifacts can, of course, be a source of confusion.

381. This limited exception was accomplished somewhat obliquely, section 8 of article VII merely saying that eligibility for voting in school elections "shall be as are now, or as may hereafter be, provided by law." Although the delegates made reference to the territorial legislature having previously provided that women could vote in school elections, see JOURNAL, *supra* note 170, at 193, a search of the territorial laws failed to uncover such a provision. The closest thing to it was a February 27, 1891 article in the Phoenix Daily Herald that said House Bill 82 allowing women to vote in "school elections" was referred to a committee, see Phoenix Daily Herald, Feb. 27, 1891, at 2, col. 3, but it was voted down. See *id.*, March 4, 1891 at 2, col. 1. A similar proposal lost a week later. *Id.*, March 11, 1891, at 2, col. 4. See generally C. Brice, *supra* note 133, at 70-73; cf. J. McClintock, *supra* note 29, at 385.

382. Twelve of the seventeen teachers in the normal school were female, as were more than three-quarters of the students (although these proportions were substantially reversed at the university). ARIZONA STATISTICAL ABSTRACT, *supra* note 25, at 122-23.

383. Amazingly, the drafters of the initiative neglected to amend one other key place in the constitution that excluded females. To this day, article V, section 2 provides that only males may become Governor or hold any of the other statewide offices listed in section 1 of that article. It has been universally assumed, however, that this is a dead letter because of the 1912 amendment giving women the right to vote, an assumption finally confirmed by an Attorney General's opinion in 1984. I. Op. Att'y Gen. 84-049. In response to an inquiry from State Senator Wayne Stump, the Attorney General concluded that article VII, section 2 superceded article VI, section 2, and, in any event, was contrary to the "equal privileges and immunities" provision, article II, section 13.

384. And women lost no time entering elective politics. In 1915, the first election in which women could vote, Rachael Berry, a Democrat from St. Johns, was elected to the State House, and Frances Lillian Willard Munds, a Democrat from Yavapai County, was elected to the State Senate. ARIZONA LEGISLATIVE BLUE BOOK: 1915-16, at 6-7, 34-35.

whether certain elections ought to be limited to property owners. After heated debate, in which the pros and cons were led by Fred Ingraham and Michael Cunniff, the convention limited the right to vote on “bond issues or special assessments” to “property taxpayers.”³⁸⁵ Cunniff “serious[ly] doubt[ed]” whether he could support the constitution if the franchise were so limited, and Ingraham countered by warning that unless it was included, “you won’t have any constitution.”³⁸⁶ Crutchfield, the minister, spoke for the property qualification, and it carried by a large margin.³⁸⁷ The same debate was rehearsed in connection with the proposal that only freeholders could be elected to draft city charters. Cunniff opposed this as well, and lost badly.³⁸⁸ Both the property taxpayer limitation and the literacy requirement were brought up again two days before the convention completed its work, but after a brief discussion, the earlier decisions held.³⁸⁹

The convention also tried to ensure that the citizen’s right to cast his vote was meaningful and elections were pure. The secret ballot, now commonplace, was at that time a relatively recent import from Australia. It had been adopted by the territorial legislature in 1891,³⁹⁰ and it was made the first section of the article on suffrage.³⁹¹ The framers also directed the first state legislature to 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.”³⁹²

Concerned about corporate influence on elections, the framers prohibited corporations from making “any contribution of money or anything of value for the purpose of influencing any election or official action.”³⁹³ In the debate on this issue, Cochise County cattleman E.A.

385. ARIZ. CONST. art. VII, § 13.

386. JOURNAL, *supra* note 170, at 400-01.

387. Arizona Gazette, Dec. 3, 1910, at 1, col. 1; C. Brice, *supra* note 133, at 95.

388. See ARIZ. CONST. art. XIII, § 2; C. Brice, *supra* note 133, at 27.

389. JOURNAL, *supra* note 170, at 602. It took six decades, but Cunniff’s view eventually prevailed. The property taxpayer limitation in voting on governmental indebtedness was struck down for most elections by the U. S. Supreme Court as a violation of the fourteenth amendment’s equal protection clause. *Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970). The Court found “no basis for concluding that non-property owners are substantially less interested” than property owners in the matter. *Id.* at 212. The Court has, however, more recently upheld a separate, statutory limitation of voting rights for the directors of the Salt River Project, a special governmental district delivering power and water to Phoenix area residents. *Ball v. James*, 451 U.S. 355 (1981).

390. Laws 1891, no. 64, §§ 26, 32, at 71, 73. The measure had been promoted by Territorial Governor Murphy. See J.J. WAGONER, *supra* note 29, at 286.

391. ARIZ. CONST. art. VII, § 1.

392. *Id.* at § 16; see also Verb. Rep., Nov. 1, P.M., at 4-10.

393. *Id.* at art. XIV, § 18.

Tovrea made one of the few remarks he contributed to the proceedings, saying he “would hate to be deprived of the privilege of contributing to the campaign fund.”³⁹⁴ Because the U.S. Supreme Court has applied the first amendment of the federal Constitution to the states, and decided that corporations have free speech rights, including the right to contribute money to campaigns,³⁹⁵ this limitation is of doubtful validity today.

Of clearer validity is the proscription of “any person holding public office in this State” accepting or using any special pass or privilege for transportation from any railroad or other corporation.³⁹⁶ This stemmed from the same kind of fear of undue influence on government decisions, a concern informed by the corruption of territorial days. The 1887 legislature had, with refreshing candor, prohibited candidates from buying voters drinks,³⁹⁷ but the territorial legislature never interfered with the consistent practice of the railroads to offer (and legislators to accept) free passes in order to influence legislative action.³⁹⁸ The concern about corporate and wealthy interests dominating the electoral process was typical of the progressives. Teddy Roosevelt had advocated such limits in a series of 1910 speeches.³⁹⁹

The framers also directed the legislature to enact “registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.”⁴⁰⁰ They sought to ensure that wealth would not prevent a candidate from running, by prohibiting the exaction of fees in order to have the name of any candidate placed on the official ballot for “any election or primary.”⁴⁰¹ This was contrary to a law then on the books of the territory, a requirement delegate Ingraham scorned as “un-American in principle.”⁴⁰² To drive home the point they included a provision in the Declaration of Rights that “[a]ll 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.”⁴⁰³

Finally, one other feature of the constitution can fairly be described as a device to allow direct popular control of governmental action—

394. JOURNAL, *supra* note 170, at 503.

395. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

396. ARIZ. CONST. art. IV, part 2, § 23. Other states had done this as well. See FRIEDMAN, *supra* note 15, at 349-51.

397. See *supra* text accompanying note 368.

398. J.J. WAGONER, *supra* note 29, at 246.

399. See T. ROOSEVELT, *THE NEW NATIONALISM* 21, 30, 149 (1910).

400. ARIZ. CONST. art. VII, § 12.

401. *Id.* at § 14.

402. Verb. Rep., Nov. 22, p.m., at 12.

403. ARIZ. CONST. art. II, § 21.

the right to trial by jury.⁴⁰⁴ The Arizona framers not only provided that it shall “remain inviolate,” but took further steps to ensure that juries reach decisions without direct outside influence. Judges were forbidden to charge juries with respect to “matters of fact,” and were prohibited from commenting on the evidence.⁴⁰⁵ And, in the special case of actions to recover damages, the framers required that the defenses of contributory negligence and assumption of risk should, “in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.”⁴⁰⁶

D. Separation of Powers

The framers also manifested their distrust of concentrations of governmental power in the way they dispersed power among institutions of state government. This atomistic approach derived from Montesquieu's notion that “there can be no liberty” when the executive and legislative functions “are united in the same person, or in the same body of magistrates.”⁴⁰⁷ It was, of course, one of the cardinal tenets of the federal Constitution drafted in Philadelphia in 1787. The emphasis on separation of powers is, furthermore, fully consistent with the progressive belief that process and structure are key controls on the tendency to abuse power.

The general tone on this question is set by article 3 of the constitution, which states the general principle that, “except as provided in this Constitution,” the powers of the government shall be divided into “three separate departments,” which shall be “separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.”⁴⁰⁸ This rather strident language could be found in the Virginia Constitution adopted eleven years before the federal Constitution was drafted.⁴⁰⁹ The same idea, if not the same language, ran through other early constitutions as well.⁴¹⁰

404. *Id.* at §§ 23-24.

405. *Id.* at art. VI, § 27.

406. *Id.* at art. XVIII, § 5.

407. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Nugent trans. 1966).

408. The “except as otherwise provided” textually modifies only the clause keeping the three departments distinct, and not the preceding clause dividing the government into three branches. But the constitution in effect creates, and allocates power among, more than three branches. *See, e.g.* ARIZ. CONST. art. XV, creating the Corporation Commission. *See infra* text accompanying notes 545-64. Thus the modifier is better read as applying to the whole clause. Article XXX of the Massachusetts Constitution of 1780 was the “classic” statement of separation of powers concern. *See* J.W. HURST, *supra* note 15, at 223.

409. *See* Sturm, *supra* note 13, at 62; MADISON, *THE FEDERALIST* No. 47.

410. Sturm, *supra* note 13, at 62.

Moving beyond the general principle, the Arizona framers incorporated a number of what had long been typical features of governmental structure in America. To begin with, three fundamental branches were established—the legislative, executive, and judicial. The legislature was made bicameral, itself a technique to diffuse power even further. Surprisingly, however, there was a serious proposal made to have a unicameral legislature. The idea seemed to be offered as a way to reduce the expense of state government, and to sidestep a serious dispute about how the state Senate was to be apportioned, a question one delegate called the “most delicate and intricate proposition that we have to contend with.”⁴¹¹ President Hunt and Mulford Winsor favored a single legislative house,⁴¹² but the idea was tabled on a point of order over the objection of F.A. Jones of Maricopa, who protested that the convention “has had no opportunity to vote on a question that I believe a great many are in favor of.”⁴¹³

The convention also adopted detailed provisions prohibiting officials in the various branches from engaging in activities that might pose conflicts of interest. For example, members of the legislature were disqualified from holding “any other office or be otherwise employed by the State of Arizona, or any county or incorporated city or town thereof,”⁴¹⁴ or “any public office of profit or trust under the authority of the United States.”⁴¹⁵ Judges were generally rendered ineligible for any other “office or public employment” during their term in office, and from practicing law in any court in the state during their terms.⁴¹⁶ Officials were also generally protected against salary reductions while in office.⁴¹⁷

E. The Executive Branch

Some have suggested that the constitutional position of the Governor was deliberately made weak by the framers as a reaction to the territorial experience with appointed governors imposed from outside.⁴¹⁸ Such a

411. JOURNAL, *supra* note 170, at 403.

412. *Id.* at 410. Ten years after statehood, a proposed constitutional amendment to abolish the state senate, put on the ballot by the initiative, was defeated by a wide margin. *See* C. Todd, *supra* note 175, at 53.

413. JOURNAL, *supra* note 170, at 408.

414. ARIZ. CONST. art. IV, pt. 2, § 5.

415. *Id.* at § 4; *cf.* U.S. CONST. art. I, § 6, cl. 2.

416. ARIZ. CONST. art. VI, § 28.

417. *Id.* at § 33; *see also* art. IV, pt. 2, § 17. *Cf.* U.S. CONST. art. II, § 1, cl. 5; art. III, § 1.

418. *See, e.g.,* C. Brice, *supra* note 133, at 29.

concern would have mirrored that of the earliest states. There the colonial experience had left a deep distrust of executive power,⁴¹⁹ and features to limit that power were adopted in the early state constitutions.⁴²⁰

Just how far Arizona's founding fathers intended to go to limit the chief executive is, however, debatable. The Arizona convention did distribute state executive power among seven separate, electable offices—governor, secretary of state, auditor, treasurer, attorney general, superintendent of public instruction, and mine inspector.⁴²¹ It also created an independent constitutional agency, the corporation commission, composed of three persons elected to staggered, six-year terms.⁴²² But there is no direct evidence in the convention deliberations to support the idea that the office of the chief executive was to be a weak position. One modern governor, Bruce Babbitt, has demonstrated that the governor can wield considerable power and influence.⁴²³

Many of the Arizona governor's powers mimic those of the United States President.⁴²⁴ The Arizona governor is, moreover, vested with one power the President of the United States has been denied—a "line-item" veto over appropriation bills.⁴²⁵ This suggests that the framers were more concerned with checking legislative action than they were with limiting the power of the governor, at least on the expenditure of

419. See, e.g., L. FRIEDMAN, *supra* note 15, at 121; J.W. HURST, *supra* note 15, at 235; see also Sturm, *supra* note 13, at 60-61.

420. Sturm, *supra* note 13, at 60-61.

421. ARIZ. CONST. (original version) art. V, § 1; art. XIX. This structure was significantly modified by a 1968 amendment lengthening the term of office for these state officials from two to four years, and by another amendment that same year abolishing the office of state auditor. The fact that these amendments were simultaneous and irreconcilable (because the former lengthened the state auditor's term to four years, while the latter abolished the office) required two Supreme Court opinions to untangle. See *State ex rel. Nelson v. Jordan*, 449 P.2d 18 (1968); *rev'd on rehearing*, 104 Ariz. 193, 450 P.2d 383 (1969).

422. ARIZ. CONST. art. XV, § 1.

423. Babbitt, *State Regulatory Reform—A Gubernatorial Perspective*, 1985 ARIZ. ST. L.J. 253, 258.

424. These include those of commander-in chief, *compare* ARIZ. CONST. art. V, § 3, *with* U.S. CONST. art. II, § 2; chief executive officer, charged to "take care that the laws be faithfully executed," *compare* ARIZ. CONST. art. V, § 4, *with* U.S. CONST. art. II, § 3; possessing the power to pardon, *compare* ARIZ. CONST. art. V, § 5, *with* U.S. CONST. art. II, § 2; to call the legislature into special session, *compare* ARIZ. CONST. art. V, § 4, *with* U.S. CONST. art. II, § 3; to communicate *with* the legislature on the "condition of the state," and to recommend to that body "such matters as he shall deem expedient," *compare* ARIZ. CONST. art. V, § 4, *with* U.S. CONST. art. II, § 3; and to veto bills passed by the legislature, subject to override on a two-thirds vote. *Compare* ARIZ. CONST. art. V, § 7, *with* U.S. CONST. art. I, § 7. And the governor is, like her federal counterpart, forbidden from spending money except insofar as it had been appropriated by the legislature. *Compare* ARIZ. CONST. art. IX, § 5, *with* the U.S. CONST. art. I, § 9, cl. 7.

425. ARIZ. CONST. art. V, § 7, cl. 3.

money.⁴²⁶ Moreover, while the line-item veto is limited to appropriations bills, the power it vests in the executive is magnified by two other provisions in the constitution. The first of these 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.”⁴²⁷ The second reiterates this one-subject requirement, and extends it to all bills, whether making appropriations or substantive law.⁴²⁸ Taken together, these provisions are designed to ensure that the executive is given the opportunity to veto legislative action on discrete subjects, reducing the chances of the governor being forced to choose between rejecting a program she favors to veto one she finds unacceptable, or accepting one she opposes to obtain one she favors.

Underscoring their devotion to direct popular action, however, the framers prohibited the governor from vetoing any referendum measure submitted to the people by the legislature,⁴²⁹ and from vetoing any initiative or referendum measures approved by a majority vote of the qualified electors.⁴³⁰

Unlike the President, on the other hand, the governor was not given explicit power to appoint officials in the executive branch, with or without legislative confirmation, except for the state board of education and board of regents, and a limited power to fill vacancies where no law governs.⁴³¹ A power of appointment has, however, come from the legislature in a host of cases,⁴³² although in 1976 the constitution was thrice amended to give the state senate confirmation power over gubernatorial appointments to the state board of education, regents, and the governing boards of other state educational institutions.⁴³³

F. The Judiciary

The third branch of government, the judiciary, was given considerable independence from the other branches but not, as we have seen, from

426. But delegates Cunniff and Ellinwood engaged in a colloquy to the effect that the framers did not intend to give the governor a “pocket veto” over legislation, such as exists under the federal constitution. JOURNAL, *supra* note 170, at 591; compare ARIZ. CONST. art. V, § 7, with U.S. CONST. art. I, § 7, cl. 2.

427. ARIZ. CONST. art. IV, pt. 2, § 20.

428. *Id.* at § 13.

429. *Id.* at art. V, § 7, cl. 4. The same applies to constitutional amendments proposed by the legislature. See *id.* at art. XXI, § 1.

430. *Id.* at art. IV, pt. 1, § 1(6).

431. *Id.* art. XI, §§ 3.5; art. V, § 8.

432. See, e.g., ARIZ. REV. STAT. § 41-511.25(A) (State Parks Board). Cf. ARIZ. REV. STAT. § 38-211 (generally making gubernatorial appointments subject to confirmation by the state Senate).

433. ARIZ. CONST. art. XI, §§ 3, 5.

the people. Although the framers did not explicitly grant the judiciary the power to review and declare unconstitutional the acts of other departments, on numerous occasions the delegates unmistakably demonstrated they understood and assumed the courts would exercise judicial review.⁴³⁴ This can scarcely seem surprising. The Arizona framers met 107 years after *Marbury v. Madison*,⁴³⁵ and five short years after *Lochner v. New York*⁴³⁶ had forcefully reminded the nation of the judiciary's power to thwart legislative judgments on a constitutional basis.

More pertinent than the experience with judicial review at the federal level was the even longer experience with it in other states. The earliest state constitutions, adopted between 1776 and 1780, did not explicitly embody the concept, but several state supreme courts had assumed the power in cases decided between 1780 and 1787.⁴³⁷ By the time *Marbury* was decided in 1803, there had been more than twenty instances of state courts striking down state laws on constitutional grounds.⁴³⁸ The states pioneered the concept of judicial review; therefore, it was natural for the framers of the Arizona Constitution to decide that it needed no formal general sanction in the document they were preparing. As James Bryce noted in 1906, judicial review under state constitutions had been everywhere accepted.⁴³⁹

Some delegates advanced propositions designed to limit judicial review. Eerily echoing modern political debate on the subject, lawyer Fred Ingraham from Yuma proposed that the courts be prevented from holding laws unconstitutional as violating "the general intent or spirit of this Constitution, or . . . public policy." Instead, he would have permitted the courts to declare a law void "only because of some express provision of this Constitution or necessary implication from such express provision."⁴⁴⁰ P.F. Connelly, a railroad engineer from Douglas, proposed that any law approved by a majority of voters at an initiative or referendum election "shall not be declared to be unconstitutional unless [it is] in conflict with the [f]ederal Constitution."⁴⁴¹ And S.B. Bradner, a switchman from Benson, offered the

434. See, e.g., JOURNAL, *supra* note 170, at 130, 318, 319, 320, 380, 382, 386, 416, 577.

435. 5 U.S. (1 Cranch) 137 (1803).

436. 198 U.S. 45 (1905).

437. Sturm, *supra* note 13, at 62.

438. See, e.g., Utter, *supra* note 6, at 1031, n.21.

439. J. BRYCE, *supra* note 13, at 446. Hurst says that after 1850 it became "certain" that public opinion supported the exercise of judicial review of the constitutionality of actions by other governmental branches. J.W. HURST, *supra* note 15, at 266.

440. Proposition 104, § 8 (on file in State Archives).

441. Proposition 45, § 1.

idea that no law ought to be declared unconstitutional except by a vote of two-thirds of the justices of the Supreme Court.⁴⁴²

None of these were adopted or even debated on the floor of the convention. Their introduction by persons generally identified with the progressive-labor interests underscores those camps' fear of judicial power. Given the framers' concern with direct democracy, and their near-obsession with making the Arizona government as susceptible to direct popular control as possible, it may seem paradoxical that they acquiesced in the notion of judges overturning the acts of legislatures.

In Arizona in 1910 there was, in reality, no paradox. Judges were made subject to frequent popular election (including primaries), and to recall, just like the legislators whose laws they would be reviewing.⁴⁴³ Indeed, the much fewer (and consequently more visible) judges would presumably be more likely targets of voter wrath in the event of unpopular decisions than legislators. Furthermore, the relative ease of amending the constitution provided an additional avenue for popular control of the judiciary.⁴⁴⁴

Thus the framers of the Arizona Constitution had no real reason to regard judicial review as antidemocratic; instead, they could welcome it as another repository of political power—an additional check on legislative and executive abuse. If it could be abused, it was not beyond the controls applicable to other governmental institutions. For these reasons, the convention as a whole apparently presumed that the judiciary would be tamed primarily by being made subject to frequent elections and the recall.

This sentiment was plainly spelled out in the debate on Proposition 63, promoted by Michael Cunniff, to restrict the right of judges to enter injunctions against labor interests involved in disputes with employers. In an impassioned speech interrupted several times by applause, Cunniff argued that the courts had displayed a "growing disposition" in recent years to deprive individuals of constitutional rights through such injunctions.⁴⁴⁵ He decried what he saw as a violation

442. Proposition 144, § 4.

443. Although a constitutional amendment adopted in 1974 provided for gubernatorial appointment of judges from a bipartisan slate prepared by a bipartisan committee, judges must still periodically face the voters and are still subject to recall. ARIZ. CONST. art. VI, §§ 35-40; art. VIII, § 1. By the addition of article VI.I in 1970, furthermore, judges are also subject to censure, suspension or removal by the Supreme Court on the recommendation of a nine member commission on judicial qualifications.

444. See *infra* text accompanying notes 681-99.

445. Verb. Rep., Nov. 3, a.m., at 5. The labor injunction—where the courts enjoined workers from interfering with the business of employers—first made its appearance in the late 1870's or

of the notion of checks and balances in that "there are absolutely no checks in the Courts."⁴⁴⁶ The response by the opponents of the proposition (led by the lawyers) was primarily that checks would exist on the judiciary in Arizona. Delegate Lynch pointed out that the troublesome injunctions had been issued by appointive federal territorial courts, "and not the elective courts to be provided under the constitution."⁴⁴⁷ Delegate Ingraham argued that the recall was an additional check the constitution would make available.⁴⁴⁸ Delegate Parsons defended the courts themselves: "[M]en more honorable or of higher ideals do not exist in this country than the men who compose our judiciary."⁴⁴⁹

If the delegates were not troubled by subjecting judges to popular control, they did seek to guard against legislative interference with the judiciary. They overwhelmingly approved a provision giving judgeships and judicial salaries protection against legislative action.⁴⁵⁰ According to its sponsor, Ingraham, the purpose of this provision, similar to one in the federal Constitution,⁴⁵¹ was to "make the judiciary independent of the legislature."⁴⁵²

The delegates' receptiveness to judicial review as a check on legislative action was also illustrated by the only explicit reference to judicial review in the constitution (other than the general reference in article

early 1880's, but by 1890, the cases "grew in volume like a rolling snowball." L. FRIEDMAN, *supra* note 15, at 557. See also F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 21 (1930); C. TOMLINS, *THE STATE AND THE UNIONS* 49-50 (1985).

446. *Id.* at 7. Three weeks later the same point was made. See Verb. Rep., Nov. 25, p.m. at 8; see also JOURNAL, *supra* note 170, at 117, 471.

447. Verb. Rep., Nov. 3, at 12.

448. JOURNAL, *supra* note 170, at 114.

449. *Id.* at 118.

450. ARIZ. CONST. art. VI, § 33 (art. VI, § 24 in original version).

451. U.S. CONST. art. III, § 1.

452. JOURNAL, *supra* note 170, at 252. The Arizona Supreme Court wasted no time in unequivocally asserting its right to strike down legislative acts on constitutional grounds. Barely five months after statehood the court, by *per curiam* opinion in *State v. Osborne*, 14 Ariz. 185, 125 P. 884 (1912), struck down an act of the first state legislature, enacted barely a month earlier, that provided for a general election of all state, county, and precinct officials in November 1912. The court held that this conflicted with article VII, section 11, which authorized the first general election in the first even-numbered year *after* the year of admission. *Id.* The net effect was that the officers elected at the November 1911 general election served until replaced by officers elected in November 1914. The court described its duty to pass on the constitutionality of legislation as one it would "not shirk or evade," 14 Ariz. at 187, 125 P. at 885, and was "strictly a judicial question" even though it may "have a political effect." *Id.* at 188, 125 P. at 885. The court found other defects in the act as well, one of which was, interestingly, nearly identical to the one John Marshall found in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); namely, that the legislature had vested original jurisdiction in the state supreme court on certain matters, which conflicted with the sharp limits the constitution placed on the court's original jurisdiction. See *Osborne*, 14 Ariz. at 194, 125 P. at 888.

VI, section 1 to the “judicial power”), in the eminent domain section of the Declaration of Rights. There the courts were instructed to determine, when the legislature takes property for a use “alleged to be public,” whether the use “be really public, . . . without regard to any legislative assertion” that it is.⁴⁵³ This illustrated what one historian has described as the tendency of all Rocky Mountain state constitution makers to “trust the judicial system to maintain these [individual] rights once defined” in the constitution.⁴⁵⁴

Other important manifestations of the dispersal of powers are the right to trial by jury,⁴⁵⁵ the creation of an independent, directly elected corporation commission to regulate “public service corporations,”⁴⁵⁶ and the creation of largely independent bodies, the State Board of Education and regents of the university, to supervise the system of public education.⁴⁵⁷

G. *Special Controls on Legislative Powers and Process*

Distrust of legislatures has “long been a conspicuous characteristic of American political life.”⁴⁵⁸ The founding fathers in Philadelphia subscribed to this view; consequently they inserted in the federal Constitution a variety of measures designed to restrain legislative power.⁴⁵⁹ Theoretically, concern on this score ought to be even more pronounced at the state level. The federal government conceptually remains one of enumerated powers—if Congress is not given power somewhere in the federal Constitution, it does not have it.⁴⁶⁰ At the state level, by contrast, the poles are reversed. State legislatures are generally conceded to have inherent power to legislate.⁴⁶¹

This distinction is probably more form than substance in the post-New Deal days of broadly interpreting federal legislative powers. But it had considerable meaning when the Arizona Constitution was being drafted, and its drafters were well aware of the difference. As Mulford

453. ARIZ. CONST. art. II, § 17.

454. See G. BAKKEN, *supra* note 44, at 35.

455. See *supra* text accompanying notes 404-06.

456. See *infra* text accompanying notes 545-64.

457. ARIZ. CONST. art. XI, §§ 3, 5.

458. *Forward: Local Government in the Larger Scheme of Things*, 8 VAND. L. REV. 667, 668 (1955).

459. See, e.g., J. MADISON, THE FEDERALIST No. 47 (Beloff ed. 1948).

460. See, e.g., *Garcia v. San Antonio Transit Authority*, 459 U.S. 528, 568-74 (1985) (Powell, J., dissenting).

461. See, e.g., Graves, *Concepts of Legislative Power in State Constitutions*, 14 LA. L. REV. 749 (1954).

Winsor put it in the debate on whether to restrict child labor: “[O]ur constitution is one of limitations, and . . . the legislature or the people can do whatever they are not specifically prohibited from doing.”⁴⁶² As a consequence, the framers placed specific limits not only on what the legislature could do, but also on how they could do it. In taking this approach, the Arizonans were in the mainstream of contemporary reformist thought. Although progressives generally sought to increase the legislature’s responsibility to act for social welfare purposes, the years of their national prominence, from about 1898 to 1914, were characterized by “almost ceaseless constitutional tinkering, and the one constant thought in the minds of the members of the [state constitutional] conventions was to curb the powers of the legislatures.”⁴⁶³

Examples of specific restrictions on substantive legislative powers in the Arizona Constitution include most of the provisions of the Declaration of Rights, and special limitations against enactment of “local or special laws” in twenty different categories of cases.⁴⁶⁴ The framers also sought to control the legislative power to tax, requiring a tax “sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the State for each fiscal year.”⁴⁶⁵ The constitution forbids the legislature from delegating the authority to tax, requiring it to enact all taxes and to “state distinctly the object of the tax.”⁴⁶⁶

Still, on taxation matters the framers responded more vigorously to the social justice concerns of the progressive movement than did the other Rocky Mountain states drafting constitutions a few years earlier.⁴⁶⁷ The territorial experience of large corporations paying low taxes was uppermost in the delegates’ minds, and thus the legislature was given, in the main, “extremely broad discretion” in taxing matters.⁴⁶⁸ Special provisions limiting that discretion in dealing with mining or railroad property were rejected.⁴⁶⁹ In one historian’s words, the progressives in control of the Arizona convention “concentrated on taxing and spending for the social overhead of their state and left the determination of

462. JOURNAL, *supra* note 170, at 302. See also *id.* at 101-02, where Delegate Webb said “we give the legislature greater power by remaining silent than by naming their powers.”

463. H. FAULKNER, THE QUEST FOR SOCIAL JUSTICE, 1898-1914, at 84 (1969).

464. ARIZ. CONST. art. IV, pt. 2, § 19. Hurst has called such limitations, which frequently appear in state constitutions, naive. See J.W. HURST, *supra* note 15, at 229, see also *id.* at 232-33. A number of these limitations in the Arizona Constitution are really equality provisions. See *infra* text accompanying note 605.

465. ARIZ. CONST. art. IX, § 3.

466. *Id.* at §§ 3, 9.

467. G. BAKKEN, *supra* note 44, at 53-63.

468. *Id.* at 63.

469. Verb. Rep., Nov. 19; Nov. 26, pt. 5.

relative tax burdens to the beneficiaries, the people.”⁴⁷⁰ Thus, the thrust of taxation was changed by the Arizona Constitution from “a tool of capital enhancement and attraction to one of sorting out the relative equities of the system. The social consequences of taxation, rather than the economic impact, became the dominant concern. . . .”⁴⁷¹

Numerous other substantive limitations on legislative power are scattered throughout the document. The legislature could, for example, “enlarge” but presumably not diminish the responsibilities of the Corporation Commission;⁴⁷² and it was prohibited from abrogating the right to recover damages for injuries or limiting the amount of recovery.⁴⁷³ The framers also quite frequently directed the legislature to enact certain kinds of laws, such as ones dealing with the eight-hour day for public employment,⁴⁷⁴ liability of employers for injury to employees,⁴⁷⁵ a worker’s compensation law,⁴⁷⁶ sale or lease of state lands,⁴⁷⁷ suits against the state,⁴⁷⁸ establishing and supporting reformatories and other penal institutions, and institutions for the insane, blind, deaf, and dumb, and such others “as the public good may require,”⁴⁷⁹ and publicizing campaign contributions and expenditures.⁴⁸⁰ The delegates discussed, inconclusively, whether these constitutional mandates were judicially enforceable. There was, however, general agreement that a legislative failure to carry out these constitutional directions was subject to a powerful political check—the ballot box.⁴⁸¹

The legislature was also empowered to define the duties and responsibilities of a number of state and local officials, such as the State Board of Education,⁴⁸² the Secretary of State, Attorney General, and Superintendent of Public Instruction,⁴⁸³ and county officers.⁴⁸⁴ In the same vein, the legislature was given the right to alter the qualifications

470. G. BAKKEN, *supra* note 44, at 63.

471. *Id.* at 64.

472. ARIZ. CONST. art. XV, § 6.

473. *Id.* at art. II, § 31; art. XVIII, § 6.

474. *Id.* at art. XVIII, § 1.

475. *Id.* at § 7.

476. *Id.* at § 8.

477. *Id.* at art. X, § 10.

478. *Id.* at art. IV, pt. 2, § 18.

479. *Id.* at art. XXII, § 15.

480. *Id.* at art. VII, § 16.

481. JOURNAL, *supra* note 170, at 188, 379-80. *See also* ARIZ. CONST. art. XXII, § 21, providing that the legislature “shall enact all necessary laws to carry into effect the provisions of this Constitution.”

482. ARIZ. CONST. art. XI, § 3.

483. *Id.* at art. V, § 9.

484. *Id.* at art. XII, § 4.

for voters at school elections.⁴⁸⁵ On the other hand, the governor rather than the legislature was given the power to approve city charters.⁴⁸⁶

The framers also embodied a code of legislative procedure in the constitution. Besides the typical housekeeping details of establishing a quorum, keeping a journal, regulating attendance, sessions, and the conduct of members,⁴⁸⁷ the constitution also required all bills to “embrace but one subject,” which “shall be expressed in the title,” and prohibited incorporation by reference.⁴⁸⁸ The one subject and title rule had been widely copied since it first appeared in state constitutions in the 1850’s.⁴⁸⁹ Delegate Ingraham vigorously opposed it on the ground that it gave the courts too much power. It was, he said, “the most dangerous two lines in the constitution” because it “leaves a handle or string upon every law by which the court can declare it unconstitutional.” The referendum was, he argued, an adequate remedy for legislative abuse.⁴⁹⁰ But his plea was to no avail.

The convention also limited the process of appropriating revenues by requiring one general appropriation bill to cover state departments, institutions, schools, and interest on the public debt. All other appropriations were to be “made by separate bills, each embracing but one subject.”⁴⁹¹ All such provisions were designed to promote informed voting and, in the case of the appropriations limitation, to control logrolling—the packaging of disparate measures, none of which could command a majority by itself, together. The legislature was also directed 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.”⁴⁹²

The convention did, however, reject still other restrictions on the legislative process, such as one that would have required newspaper publication of proposed bills and forbidden introduction of new measures or amendments in the last three days of the session. Opposition to these was expressed as an attempt to fix too much detail in the

485. *Id.* at art. VII, § 8.

486. *Id.* at art. XIII, § 2.

487. *Id.* at art. IV, pt. 2, §§ 3, 8-11.

488. *Id.* at §§ 13, 14.

489. For a capsule history of these restrictions, which date back to the Georgia Constitution of 1798, see L. FRIEDMAN, *supra* note 15, at 123, 356-58.

490. JOURNAL, *supra* note 170, at 416-17. Ingraham’s prediction of inconsistent judicial application has been reflected in the experience of numerous states, including Arizona. See Ruud, “No Law Shall Embrace More Than One Subject,” 42 MINN. L. REV. 389 (1958).

491. ARIZ. CONST. art. IV, pt. 2, § 20.

492. ARIZ. CONST. art. XXII, § 19; see also JOURNAL, *supra* note 170, at 529-31.

constitution.⁴⁹³ In any event, as Fred Ingraham put it, “we have clipped the wings of the legislature enough already.”⁴⁹⁴

These procedural and substantive limitations on legislative power were comfortably within the long-term trend away from the practice of the earliest state constitutions, granting nearly uncabined power to the legislatures. This growing circumspection “reflects one of the most important themes in state constitutional law.”⁴⁹⁵ Other states went somewhat further than Arizona, however, particularly in controlling legislative procedure.⁴⁹⁶

H. *The Declaration of Rights*

When the framers addressed the question of protecting individual rights, they understood that these rights were basically the only restraint on state and local governmental action. With one limited exception, the fourteenth amendment to the federal Constitution had not been interpreted to incorporate the basic guarantees of the federal Bill of Rights and thus make them applicable to the states.⁴⁹⁷ The delegates were aware of this. Fred Ingraham pointed out that these individual liberties were “principles for which the English and American people had struggled for centuries . . . salutary [and] valuable to the history and jurisprudence of the United States.” In the same way, he said, the Arizona Declaration of Rights “will be just as valuable in the jurisprudence and history of this Territory.” Their inclusion in the state constitution was necessary, he reminded the delegates, because the protections of the federal Bill of Rights have “no application” to the states; “they are restrictions upon the power of the United States; they are not restrictions upon the states.”⁴⁹⁸

493. JOURNAL, *supra* note 170, at 410-15.

494. *Id.* at 415.

495. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 201 (1983).

496. Wyoming, for example, declares logrolling to be bribery, WYO. CONST. art. III, § 42, and California makes it a felony, CAL. CONST. art. IV, § 15. Colorado prohibits legislative trading of votes, COLO. CONST. art. V, § 40. *See also* 1 J. BRYCE, *supra* note 13, at 61.

497. That exception, the protection accorded private property against uncompensated governmental takings, *see* Chicago B. & O. Ry. Co. v. Chicago, 166 U.S. 226 (1897), was consonant with the emphasis on property in the federal courts of that era, and was not done by an explicit process of incorporation.

498. Verb. Rep., Nov. 29, at 6. Ingraham’s speech was in response to a motion by Webb to delete the Declaration of Rights entirely, which lost on a voice vote. JOURNAL, *supra* note 170, at 511. Later in the same debate, delegate Jones of Maricopa raised a question about the meaning of what was then proposed section 27, and is now art. II, section 1. (“A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”). *See* JOURNAL, *supra* note 170, at 513. Ingraham responded by proposing that it be

Historically, state constitutional protection for individual liberties dates back to the revolutionary constitutions adopted by the former British colonies, aimed at safeguarding citizens and property from oppressive governmental action.⁴⁹⁹ These early charters became the model for the federal Bill of Rights as well as for the counterpart provisions subsequently adopted by all new states. One remarkable fact about this historical development is, considered broadly, how stable the text of these protections has been. Few changes ever occurred in the core rights of freedom of speech, religion, and the rights of those accused of crimes.⁵⁰⁰

The Arizona framers borrowed liberally from the Constitution of the State of Washington in framing the Declaration of Rights that now appears in article II.⁵⁰¹ Like their counterparts elsewhere, especially in the Rocky Mountain states,⁵⁰² the Arizona delegates did not pause very long over the rights to be protected. The rights secured were broadly drafted, often casting protection in the affirmative, rather than following the negative approach that characterized the federal counterpart. Instead of the legislature being forbidden from making any law abridging the freedom of speech, for example, the Arizona Constitution allows that every person may “freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”⁵⁰³ Arizona’s protection of privacy is also substantially different in wording from the counterpart federal fourth amendment to the U.S. Constitution.⁵⁰⁴

moved to the beginning of the Declaration of Rights, arguing “the very fact that certain gentlemen on the floor of this convention have moved that this entire bill of rights be stricken out is the best illustration of the necessity of impressing upon our minds the truth of this section.” Verb. Rep., Nov. 29, a.m. at 7. The Declaration of Rights was then adopted by a vote of 41-7. Journal, *supra* note 170, at 513.

499. See Sturm, *supra* note 13, at 61.

500. *Id.* at 63.

501. Delegate Crutchfield, chair of the committee on the Declaration of Rights, acknowledged that the committee proposal, styled Proposition #94, was “the entire bill of rights from the State of Washington with one or two small amendments and four or five sections added.” Verb. Rep., Nov. 25, unnumbered page (speech omitted from Journal at 462). Later the discussion revealed that the only change in wording from the Washington provisions had to do with the prohibition on imprisonment for debt “except in cases of fraud.” ARIZ. CONST. art II, § 18. The language of the Wyoming Constitution was used instead as the model for the exception. Verb. Rep., Nov. 25, unnumbered page.

502. G. BAKKEN, *supra* note 44, at 23.

503. ARIZ. CONST. art. II, § 6.

504. Compare U.S. CONST. amend. IV with ARIZ. CONST. art. II, § 8. The Arizona provision is captioned “Right to Privacy.” Captions did not appear on any sections of the original version of the Constitution. Despite diligent effort, the source of the captions that now appear in published versions has not been identified. They first appeared in the 1939 Arizona Code, prepared under the supervision of the state Supreme Court by authority of Laws 1939, ch. 89. Certainly the

Freedom of religion, which was a concern of the Congress in enacting the statehood Enabling Act, surfaces at numerous places in the Arizona Constitution.⁵⁰⁵ One delegate, cattleman William Morgan from Lakeside, well-known as a free-thinker, could not keep from tangling with delegate James Crutchfield, a minister from Phoenix whose father was the convention chaplain.⁵⁰⁶ Morgan bitterly attacked the churches' tax-exempt status, quoting Thomas Paine, Washington, Jefferson, and Madison. He claimed preachers were a larger percentage of inmates in the penitentiaries than any other profession, but all this had little effect.⁵⁰⁷ Crutchfield also proposed to allow Bible reading in the public schools, but this too was rejected.⁵⁰⁸ One lighter offshoot of the deliberations over religion was the various phrasings proposed for the preamble. Although it now refers to "Almighty God," earlier versions referred to a "Supreme Being," and "Supreme Ruler of the Universe."⁵⁰⁹

Some sentiments that clash with the contemporary image of pioneer Arizona were expressed in the discussion of the right to bear arms now found in article II, section 26. Two delegates strongly opposed the idea. One, Baker from Phoenix, thought that "[c]arrying arms is dangerous . . . and should not be permitted under any circumstances. . . . It is a most dangerous and vile . . . practice." W.T. Webb, a farmer from Graham County, agreed, describing it as "pernicious." Citing his long experience in "cow camps," he argued that Arizona was no longer a frontier, and in any event "if we did not need arms in the early days of . . . pioneering we do not now."⁵¹⁰ But the provision stayed.

caption to art. II, § 8 is an accurate depiction of the text, and had the framers written captions, they might well have used it, recalling that the celebrated Warren and Brandeis article with the same title had appeared twenty years earlier. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For a helpful review of popular concerns about privacy in the decades before appearance of the Warren and Brandeis article, see Comment, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981). Still, the caption itself, as added by unknown persons subsequent to adoption of the constitution, cannot be taken as altering the meaning of the text. Cf. ARIZ. REV. STAT. ANN. § 1-212 ("[h]eadings to [statutory] sections . . . do not constitute part of the law"); but see ARIZ. REV. STAT. ANN. § 47-108 (Uniform Commercial Code) (section captions are part of the statute).

505. See ARIZ. CONST. art. II, § 12; art. IX, § 10; art. XI, § 7; art. XX, First, Seventh. The Mormon presence cast a long shadow over the freedom of religion issue, in Arizona as well as in other Rocky Mountain states, despite the end of the legal struggle over polygamy. See G. BAKKEN, *supra* note 44, at 24-25.

506. Still, on the last day, Morgan was the delegate who moved that the convention extend a "vote of thanks to our excellent chaplain, Mr. Crutchfield." JOURNAL, *supra* note 170, at 648.

507. Arizona Gazette, Nov. 19, 1910 at 1, col. 1; C. Brice, *supra* note 133, at 92-93.

508. C. Brice, *supra* note 133, at 109.

509. See Propositions 1, 95; C. Brice, *supra* note 133, at 99; JOURNAL, *supra* note 170, at 25.

510. JOURNAL, *supra* note 170, at 472-73.

The Declaration of Rights lists several protections for those accused of crimes. The means of instituting criminal prosecutions concerned all Rocky Mountain constitution makers.⁵¹¹ In Arizona, the response to fears of prosecutorial abuse took the form of requiring an information or indictment for all criminal prosecutions and, where felonies were charged, giving the preliminary hearing constitutional status when charges were brought by information rather than indictment.⁵¹²

There was a short but heated debate over the Committee's proposal dealing with evidence obtained from interrogating any prisoner "under the 'third degree' or [by] use of any physical or mental torture." The proposal would have made the police officer who practiced such techniques guilty of a crime, and in addition, would have excluded evidence gained by these means from any court of law.⁵¹³ The Committee chair, James Crutchfield, defended the idea as "the expression of the fundamental principles connected with the rights and liberties of the human race," and necessary because of "some very striking illustrations of rank injustice that has resulted from the practice the police sometimes follow in extorting confessions from prisoners."⁵¹⁴

The proposal ran into trouble on the floor. Delegate Keegan called it "mischievous" even though he conceded that it was "designed to meet a situation that should be corrected."⁵¹⁵ Cunningham criticized language protecting the accused's right to be "inviolable in person" as "entirely too broad."⁵¹⁶ A. C. Baker of Phoenix, later to serve a term as Justice on the Supreme Court, saw it as "array[ing] this constitutional convention on the side of the criminals. . . . [T]hese gentlemen have run absolutely wild and crazy about a proposition of this kind." It was promptly stricken by a vote of 27-12.⁵¹⁷

The Committee's proposal applied only to confessions obtained in violation of the privilege against self-recrimination,⁵¹⁸ and not other kinds of evidence obtained in violation of the right to privacy.⁵¹⁹ The idea of excluding improperly obtained evidence (later known as the

511. See G. BAKKEN, *supra* note 44, at 25-27.

512. ARIZ. CONST. art II, § 30; see also JOURNAL, *supra* note 170, at 123-26, 156-57. Lawrence Friedman has pointed out how, in the last three decades of the nineteenth century, "fear of unleashing the full powers of government" made people "not so anxious to relax rules of criminal procedure." L. FRIEDMAN, *supra* note 15, at 401.

513. Proposition 104, § 14.

514. Verb. Rep., Nov. 25, at 2.

515. JOURNAL, *supra* note 170, at 469.

516. *Id.*

517. *Id.*

518. ARIZ. CONST. art. II, § 10.

519. *Id.* at § 8.

exclusionary rule) was not applied by the U.S. Supreme Court to federal prosecutions until 1914,⁵²⁰ and to state prosecutions only in 1961.⁵²¹ In 1910, it was a distinctly radical idea with only one state, Iowa, then applying it.⁵²²

The framers also concerned themselves with matters of punishment. They rejected without floor debate Crutchfield's proposal to ban the death penalty.⁵²³ They also discussed the wording of the "cruel and unusual punishment" proscription that now appears in section 15 of article II. The proposal that emerged from committee was that neither "cruel nor unusual punishment" ought to be permitted. On the floor, however, Ingraham argued that the New York courts had outlawed electrocution because it was merely "unusual," and in a rare case of using the federal Constitution as a model, advocated that the federal conjunctive "and" be substituted, which it was.⁵²⁴

The framers also constitutionalized a "substantial justice" standard, providing that no case should "be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done."⁵²⁵ The original proposal prevented reversal of any criminal conviction "except for substantial error." It provoked sharp debate. Michael Cunniff, its sponsor, said it merely reflected what courts were already doing, but others, particularly lawyers,⁵²⁶ saw it as a reflection of a "lynch mentality" or an invitation to "mob rule." Supporters argued, on the other hand, that it would give the courts more credibility. As Crutchfield put it, "instead of suggesting mob spirit, . . . [it] would allay all necessity for any mob."⁵²⁷

520. *Weeks v. United States*, 232 U.S. 383 (1914).

521. *Mapp v. Ohio*, 367 U.S. 643 (1961).

522. *See State v. Sheridan*, 121 Iowa 164, 166, 96 N.W. 730, 731 (1903). For a capsule summary of state policies on the exclusionary rule, see *Elkins v. United States*, 364 U.S. 206, 224-32 (1960). The Arizona delegates were apparently unaware of Iowa's adoption of the practice; at least no mention was made of it in the discussions on the floor.

523. Proposition 98, § 6. Soon-to-be Governor Hunt would shortly lead initiative drives to abolish the state's death penalty by statute. The issue would reach the ballot in three consecutive elections, losing in 1914, winning by a narrow margin in 1916, and then losing in 1918 by a large majority. *See C. Todd, supra* note 175, at 66, 68, 69.

524. *JOURNAL, supra* note 170, at 463. This debate foreshadowed a recent controversy in California, where the state Supreme Court, finding the conjunctive "or" in its state constitution significant, outlawed capital punishment as "unusual," only to have it promptly restored by constitutional amendment. *See People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972); CAL. CONST. art. I, § 27, (added by amendment in 1972 to reverse *Anderson*). *See People v. Superior Ct.*, 31 Cal.3d 797, 647 P.2d 76 (1982).

525. ARIZ. CONST. art. VI, § 27 (§ 22 in the original version).

526. *See C. Brice, supra* note 133, at 24.

527. *JOURNAL, supra* note 170, at 248-50. In an earlier speech on the same subject, Crutchfield

There were also floor debates on whether to require jury unanimity in criminal cases and on the right to bail.⁵²⁸

The convention was also concerned with mitigating the effects of poverty on those accused of crimes. Although one provision of the Declaration of Rights entitled the accused to appear and defend charges "in person, and by counsel," the text did not clearly indicate whether this created a right to counsel at governmental expense for indigents, a matter settled by the U.S. Supreme Court more than a half-century later.⁵²⁹ That same section prohibited compelling the accused "to advance money or fees to secure the rights herein guaranteed" in advance of final judgment in the case. The framers also prohibited bail or fines in "excessive" amounts,⁵³⁰ and forbade "imprisonment for debt, except in cases of fraud."⁵³¹

The *habeas corpus* provision stimulated debate. Corporate lawyer Everett Ellinwood proposed to amend what became article II, section 14, to track the language of the federal Constitution⁵³² and provide that the "privilege of the writ" might be suspended "when in Cases of Rebellion or Invasion the public Safety may require it." This was rejected,⁵³³ reflecting both the majority's belief in the importance of civil liberties and due process and, on this point at least, a greater trust for the courts than for the executive or legislative branches, because it is the judiciary that issues such a writ.

The framers were willing to create exceptions or restrictions on the guarantees fashioned in the Declaration of Rights. One particularly interesting one is found in article 14, section 16, which makes the

defended the proposal as responsive to the "growing demand among our people for plain, simple, old-time [sic] honest justice," to avoid a "revolution." Hunt's prompt rejoinder, that "the revolution is on," was met with applause. Verb. Rep., Nov. 9, at 4-5.

528. JOURNAL, *supra* note 170, at 468, 474. Both later became, in modern times, the subject of formal amendments; with minor exceptions these were the only formal amendments made to date in the Declaration of Rights. In the original version of the Arizona Constitution, the framers retained a unanimous verdict for criminal cases, but allowed the legislature to alter the number required to render a verdict (down to 9) in civil cases in any "court of record." ARIZ. CONST. art. II, § 23 (since amended). There was considerable constitutional innovation among Rocky Mountain states on these questions. See G. BAKKEN, *supra* note 44, at 28.

529. ARIZ. CONST. art. II, § 24. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

530. ARIZ. CONST. art. II, § 15.

531. *Id.* at § 18.

532. U.S. CONST. art. I, § 9, cl. 2.

533. See JOURNAL, *supra* note 170, at 512; Arizona Gazette, Nov. 29, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 33-34. Ingraham sharply attacked Ellinwood's proposed exception, saying to applause "I cannot think of any case in which the State of Arizona would be compelled to shut up a man in a dungeon and not give him the benefit of [its] constitution and laws." Verb. Rep., Nov. 29, at 1. Crutchfield echoed these thoughts, calling the exception an attack on the "rights of man." *Id.* at 2.

records of numerous specified kinds of corporations “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.” Delegate Ingraham vigorously defended this provision, arguing that because corporations were “persons” and thus protected by the privacy provisions of the Declaration of Rights in article II, the clause was needed “to make it plain that the state did have power to investigate corporations.”⁵³⁴ One delegate protested that it was unneeded, and another feared it would “drive out all private corporations in the new state.”⁵³⁵ Nevertheless, it was adopted, although not until its breadth, which as introduced would have applied to all corporations, was reduced somewhat to the form in which it presently appears in the constitution.⁵³⁶

Another provision, aimed at corporate or governmental corruption, compelled testimony from any person having knowledge regarding “the guilt of any . . . person or corporation charged with bribery or illegal rebating,” although it tempered this compulsion with mandatory immunity from prosecution.⁵³⁷

As in other Rocky Mountain states, there was some debate on the eminent domain section, but what eventually emerged was a fairly typical provision.⁵³⁸ The delegates were, however, careful to make the question of what was a “public use” sufficient to condemn property a judicial question.⁵³⁹

The Convention sharply debated a proposal that would have limited the exercise of any constitutional rights or privileges to situations that did not “endanger the lives, safety or moral welfare of the citizens of the state.” James Crutchfield, its leading advocate, saw nothing wrong with the proposal, but a number of others did. Cunniff was alarmed that it could be construed to protect the corporation against the worker. Likewise, machinist Thomas Feeney from Bisbee thought it was inconsistent with the idea that “we gave to all the people the opportunity of getting the assistance of the courts whenever they were in danger.” Republican Samuel Kingan, a lawyer from Tucson, called it “the biggest

534. Verb. Rep., Nov. 28, at 1.

535. *Id.*

536. See JOURNAL, *supra* note 170, at 497-99. It applies to “public service corporations, State banks, building and loan associations, trust, insurance, and guaranty companies.” ARIZ. CONST. art. XIV, § 16.

537. ARIZ. CONST. art. II, § 19.

538. *Id.* at art II, § 17.

539. G. BAKKEN, *supra* note 44, at 29-34; see also *supra* text accompanying note 453.

joker so far” because he perceived it as a back-door way to accomplish prohibition. It was defeated on voice vote.⁵⁴⁰

I. Little Guys Versus Big Guys—Capital Versus Labor

The alliance between the progressive and labor forces was at once most obvious and most tested on questions of regulating corporations and protecting the rights of workers. The two camps were firmly united on the need to provide ample authority to regulate corporations. Richard Hofstadter’s capsule summary of the progressives captures the prevailing sentiment: Their movement attempted “to remedy the accumulated evils and negligences of [the] period of industrial growth” that had preceded it.⁵⁴¹

The framers of the Arizona Constitution were particularly concerned with the need to avoid various pitfalls that they perceived the courts had put in the path of effective regulation. Two separate provisions, for example, reserved to the legislature the right to alter existing or pass new laws regulating corporations, regardless of any limitations in corporate charters previously issued by the state.⁵⁴² The concern here was with decisions like *Dartmouth College v. Woodward*,⁵⁴³ where the federal constitutional clause preventing “impairment of contracts”⁵⁴⁴ was held to prohibit the state of New Hampshire from changing the charter of the College.

1. The Corporation Commission

The delegates were not content simply to give the legislature power to regulate corporate activities. Instead, they established a separate branch of state government, an elected Corporation Commission, vested with broad powers to regulate the activities of “public service corporations,” defined to include private utilities and common carriers. This device had its antecedents in the Granger and Populist movements of a few decades earlier. The Illinois Constitution had been amended in 1870 to authorize state regulation of grain elevator charges; it was upheld against federal due process attack by the U.S. Supreme Court in *Munn v. Illinois*.⁵⁴⁵ In the years that followed, numerous scandals

540. JOURNAL, *supra* note 170, at 470-71; Arizona Daily Star, Nov. 29, 1910, at 4, col. 3; C. Brice, *supra* note 133, at 109.

541. R. HOFSTADTER, *supra* note 161, at 2-3.

542. ARIZ. CONST. art. XIV, §§ 2, 14.

543. 17 U.S. (4 Wheat.) 518 (1819). See L. FRIEDMAN, *supra* note 15, at 188-201.

544. U.S. CONST. art. I, § 10. The idea is echoed in ARIZ. CONST. art. II, § 25.

545. 94 U.S. 113 (1877).

concerning railroads and other large enterprises had quickened the pace of state regulation, but the courts did not always favor these schemes.⁵⁴⁶ As a result, the new Western states attempted to head off such judicial challenges by constitutionalizing their “suspicion of big business.”⁵⁴⁷

Federal legislation regulating large corporations increased substantially in the same period. From the starting point of the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, Congress had enacted statutes in 1903, 1906 and 1910 eliminating railroad rebates and free passes, strengthening Interstate Commerce Commission authority over railroad rates, and adding pipelines, telegraph, telephone and other communication companies to its jurisdiction. It had, as well, enacted a Pure Food and Drug Law in 1906.⁵⁴⁸

An influential book published in 1907, J. Allen Smith’s *The Spirit of American Government*,⁵⁴⁹ described how powerful corporate interests were “securely entrenched behind a series of constitutional and legal checks . . . which makes it extremely difficult for public opinion to exercise any effective control over them.” His analysis proved “tremendously useful to progressives”⁵⁵⁰ and sharpened the wits of lawmakers and constitution drafters. As William Allen White put it, the “people are finding a way around the legislative veto of the state courts” by constitutional reform.⁵⁵¹ Utility and railroad regulation was thus high on the progressive agenda, with almost every progressive governor pushing hard for it.⁵⁵² From this perspective, the Arizona Constitution was drafted at a propitious time.

The convention debates reflect these sentiments. Judge Baker from Phoenix, conservative on many social issues, reflected the prevailing attitude when he announced that he was “not opposed to anything that will restrict those corporations all we possibly can.”⁵⁵³ Michael Cunniff was, as usual, both articulate and representative when he charged that “in almost every state . . . corporations have altogether too much

546. See, e.g., L. FRIEDMAN, *supra* note 15, at 445-51.

547. *Id.* at 351.

548. See, e.g., S. SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920* 249-57, 264, 267 (1982).

549. In this book Smith proposed the judicial recall and the direct primary for judicial nominations. *Id.* at 34-42, 355-56. J. Patrick White said Smith was probably the first to advance these notions. See White, *supra* note 317, at 259 n.50.

550. See E. GOLDMAN, *supra* note 259, at 114.

551. *THE OLD ORDER CHANGETH* (1910), reprinted in R. HOFSTADTER, *supra* note 161, at 135-36.

552. G.E. MOWRY, *supra* note 159, at 82.

553. JOURNAL, *supra* note 170, at 426.

influence in the [state's] direction and control."⁵⁵⁴ Later, he gave an impassioned speech, greeted with applause, that denounced Arizona's poor national reputation stemming from "the permission that it grants to wildcat companies to come here and fleece the public by selling their stock."⁵⁵⁵

However, neither the bulk of the progressives across the country nor, as far as can be discerned, any of the Arizona delegates, were outright socialists.⁵⁵⁶ The great majority of the Arizona framers were themselves small businessmen and entrepreneurs, including seven cattlemen and one sheepman, four farmers, four merchants, two bankers, a plumber, butcher, saloon keeper, several with small mining interests, and one, Alfred Kinney from Globe, who merely described himself, unashamedly, as a "capitalist."⁵⁵⁷ Not surprisingly, they admired local entrepreneurship and small businesses, and believed in competition. Thus, E.E. Ellinwood's proposal to make shareholders personally liable for corporate debts (ironic coming from a corporate attorney unless, as was suspected by some, his purpose was to torpedo the constitution) was defeated after newspapers suggested it would destroy any incentive for outsiders to invest in Arizona business.⁵⁵⁸

As elsewhere, many of the Arizona delegates' reforms were designed to promote popular democracy and a competitive economy, both of which they believed had been diminished by the excesses of the Gilded Age.⁵⁵⁹ Aiming to reestablish "the pristine conditions of competitive business," they realized that "even if the supposed benefits of competition were to be retained, some form of government regulation was needed to restrain monopoly."⁵⁶⁰

Although they created a Corporation Commission with sweeping powers to regulate, they accepted an amendment (offered by Ellinwood) to limit its jurisdiction to "public service" as opposed to all private corporations.⁵⁶¹ Despite vociferous objections that the Commission's

554. *Id.* at 435.

555. *Id.* at 627.

556. This was illustrated by a bit of byplay when the state seal was being discussed. Sidney Osborn proposed, out of "deference . . . to one of my friends in Cochise County," that a red flag be put on top of one of the cacti in the seal. Delegate Thomas Feeney of Bisbee, a machinist and a leader of the labor interests, responded to applause that the Star and Stripes was the only flag he paid tribute to, "and the red flag does not go for me." JOURNAL, *supra* note 170, at 642-43.

557. J.J. WAGONER, *supra* note 29, at 462.

558. See C. Brice, *supra* note 133, at 77.

559. See generally R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 9 (rev. ed. 1955).

560. *Id.* at 120.

561. JOURNAL, *supra* note 170, at 434-36.

powers were too sweeping and inconsistent with the idea of separating powers (the commission could both write and enforce regulations), the language creating a strong Commission survived intact.⁵⁶² F.A. Jones, a Phoenix “traffic expert”⁵⁶³ who shepherded the proposal on the floor, offered telling arguments on the need for regulation. He pointed out, for example, that the Maricopa and Phoenix Railroad had estimated the value of its property for taxation at \$300,000 to the Territorial Equalization Board, and six weeks later had showed a value for the same property for ratemaking to the federal Interstate Commerce Commission of \$1.8 million.⁵⁶⁴

2. Other Limits on Corporations

Although the framers limited Commission jurisdiction to “public service” corporations, they included an entire separate article, with nineteen sections, of direct limits on the power of private corporations, mostly aimed at protecting consumers and small investors. Perhaps the broadest limitation was a strong statement of the virtues of the free market: “Monopolies and trusts shall never be allowed in this State and no [company, partnership or association] shall directly or indirectly combine [with others] . . . to fix the prices, limit the production, or regulate the transportation of any product or commodity.”⁵⁶⁵ The public interest in dealing with market failures and corporate abuses was amply provided for in other ways as well, in such disparate provisions as one broadly proscribing corporate influence on “any election or official action,”⁵⁶⁶ and another abolishing secrecy of records for a wide variety of corporate entities.⁵⁶⁷ Finally, perhaps out of an abundance of caution, the framers included a specific provision subjecting corporate property to the power of eminent domain “the same as the property of individuals,”⁵⁶⁸ and prohibited the legislature from “granting irrevocably any privilege, franchise, or immunity.”⁵⁶⁹

562. C. Brice, *supra* note 133, at 81.

563. This apparently referred to traffic on rails rather than the automobile, then in its infancy.

564. JOURNAL, *supra* note 170, at 636. The Arizona Gazette reported even greater disparity with the Pacific Gas and Electric Company, which was paying dividends on a valuation of \$1.5 million but whose property was assessed for taxation at \$150,000. Arizona Gazette, Nov. 24, 1910, at 7, col. 2; *see also* C. Brice, *supra* note 133, at 81-82.

565. ARIZ. CONST. art. XIV, § 15. *See also id.* at art. IX, § 7, prohibiting the state or any of its subdivisions from giving or loaning its credit, or making “any donation or grant, by subsidy or otherwise, to any individual, association, or corporation. . . .” On the use of such provisions in state constitutions, *see* J.W. HURST, *supra* note 15, at 242-43.

566. ARIZ. CONST. art. XIV, § 18.

567. *Id.* at § 16; *see also supra* text accompanying notes 534-36.

568. *Id.* at § 9.

569. *Id.* at art. II, § 9; *see also* art. XIII, § 4 (prohibiting municipal corporations from

3. Labor

On the labor side of the ledger, the record was a bit more mixed, for here some tension was revealed in the otherwise firm alliance between the progressives and the labor movement. One labor wish list was contained in a letter to President Hunt from labor unions in his home town of Globe. It included the initiative, referendum, and recall, the right of the state to engage in industrial pursuits, restrictions on the courts' power to issue injunctions in labor disputes, direct election of Senators, and allowing for constitutional amendment by majority vote.⁵⁷⁰ Still, labor had a "vital interest in almost every phase of the new Constitution," ranging from taxation to social reform.⁵⁷¹ The large Cochise and Gila County delegations were, surprisingly, not formally pledged to many of the labor reforms⁵⁷² but Michael Cunniff was a very strong advocate who pushed the inevitable compromises "a little further to the left than they would otherwise have been."⁵⁷³

The convention approved a number of specific provisions that were very high on labor's agenda, most of them contained in a separate article captioned "Labor." These included outlawing blacklists,⁵⁷⁴ establishing an eight-hour day for public employment,⁵⁷⁵ prohibiting employers from contractually rendering themselves immune from employee actions based on employer negligence,⁵⁷⁶ prohibiting abrogation of the right of action for damages for injuries, and any limitation on the amount of damages to be recovered,⁵⁷⁷ abolishing the fellow servant

granting, extending, or renewing franchises "without the approval of a majority of the qualified electors)." Willard Hurst has written: "The persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege,." J.W. HURST, *supra* note 15, at 241.

570. JOURNAL, *supra* note 170, at 27; *see also* C. Brice, *supra* note 133, at 52.

571. C. Brice, *supra* note 133, at 52.

572. *Id.*, App. B, at 118, 120.

573. *Id.* at 54.

574. ARIZ. CONST. art. XVIII, § 9; *see also* C. Brice, *supra* note 133, at 58-59.

575. ARIZ. CONST. art. XVIII, § 1.

576. *Id.* at § 3.

577. *Id.* at § 6; *see also* art. II, § 31. For the explanation of the relationship between these two sections, and why they appeared where they did, *see* Kenyon v. Hammer, 142 Ariz. 69, 79-81 n.9, 688 P.2d 961, 971-73 n.9 (1984). They were taken directly from the Wyoming Constitution. *See* Verb. Rep., Nov. 1, at 14 (statement of delegate Parsons); *see also* Wyo. CONST. art. 10, § 4. For more background on the debates in Wyoming, and labor and corporate provisions of Rocky Mountain state constitutions generally, *see* G. BAKKEN, *supra* note 44, at 75-84. Bakken concluded that the Arizona Constitution was, on this score, a "marked contrast to its predecessors," being much more sensitive to the rights of labor and the need for regulation of corporate activity. *Id.* at 84.

doctrine,⁵⁷⁸ and requiring the defenses of assumptions of risk and contributory negligence to be questions of fact for the jury “in all cases whatsoever.”⁵⁷⁹ In addition, the framers directed the legislature to enact both an Employer’s Liability Law to “protect the safety of employees in all hazardous occupations,”⁵⁸⁰ and a broad Workmen’s Compensation Law.⁵⁸¹

Although Congress had abolished the fellow servant rule for railroad workers in 1906,⁵⁸² many of the Arizona constitutional provisions went well beyond the accomplishments of the labor movement elsewhere, and firmly stamped Arizona as pro-labor. This was a decided reversal from territorial days. As delegate Feeney said: “For twenty-five years labor has been knocking at the doors of the legislature for an employers’ liability act, and has not gotten it, and this is one method of impressing it upon them that we want it.”⁵⁸³

However, labor did not always command a majority of the Arizona delegates. A few were downright hostile to its interests. Farmer W.T. Webb thought the miners were better paid than any other “class of laborers” in the territory, and accused them of sending their income

578. ARIZ. CONST. art. XVIII, § 4.

579. *Id.* § 5. For a brief history of the fellow-servant doctrine, contributory negligence, and assumption of risk, see Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 59-79 (1967).

580. ARIZ. CONST. art. XVIII, § 7. Breaking his normal silence, cattleman Thomas Wills of Pinal County opposed the liability law because he feared that “cowpunching” would be regarded as a hazardous occupation. JOURNAL, *supra* note 170, at 387.

581. ARIZ. CONST. art. XVIII, § 8. New York had become the first state to enact a workers’ compensation scheme earlier in that same year of 1910; it was declared unconstitutional in *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431 (1911). Wisconsin enacted the first surviving workers’ compensations’ law in 1911, and in 1917 the United States Supreme Court generally upheld both compulsory and elective workers’ compensation plans. See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917). Delegate Everett Ellinwood noted the path-breaking New York law on the floor of the Arizona convention. JOURNAL, *supra* note 170, at 383-84, 568.

582. Federal Employer’s Liability Act, 34 Stat. 232 (1906). This was held unconstitutional on unrelated grounds in *The Employers’ Liability Cases*, 207 U.S. 463 (1908), but a new act curing the constitutional problem was enacted that same year. Federal Employer’s Liability Act, 35 Stat. 65 (1908). The FELA also established a comparative negligence standard, a fact noted in the floor debates of the Arizona convention. In fact Michael Cunniff, prime mover of many of these provisions, cited the FELA to show there was “nothing novel” in the pro-labor provisions under consideration. He justified the employers’ liability provision as “more important for the protection of industrial workers than anything else that will appear in this constitution,” because it would give employers the incentive “to ensure the using of every possible safety appliance and devise [sic] and to make the employers hold life less cheaply.” Verb. Rep., Dec. 5, a.m., unnumbered page following p.4. See also JOURNAL, *supra* note 170, at 378 (remarks of delegate Crutchfield), and 566-67.

583. JOURNAL, *supra* note 170, at 380.

"to Russia, or some other foreign country."⁵⁸⁴ Lawyer D.L. Cunningham from Tombstone and Judge Baker of Phoenix both objected to some pro-labor proposals on the ground that they infringed upon freedom of contract, not an idle assertion in light of some then-recent decisions from the United States Supreme Court.⁵⁸⁵ Baker, Ellinwood and a few other lawyers objected to the Workman's Compensation provision on the same ground, that it conflicted with the federal Constitution.⁵⁸⁶ Such arguments were, however, less well-received as the convention debates wore on.⁵⁸⁷

Labor lost a number of its progressive allies on several issues. The convention rejected proposals to restrict the courts' power to issue injunctions in labor disputes, which had been high on labor's list. Michael Cunniff's proposal on this point called for impeachment of judges who abused the rights of labor. Twenty-one Democrats and eleven Republicans thought the proposal too harsh.⁵⁸⁸ Thomas Feeney, a Bisbee machinist, proposed a seemingly innocuous prohibition against the militia interfering in industrial disputes "except to preserve order and enforce the mandate of the people,"⁵⁸⁹ but this never emerged from committee. Proposals to guarantee workers the right to organize and strike were also rejected.⁵⁹⁰ Judge Baker attacked the proposal as "absolutely unnecessary and uncalled for [because] people at all times [already] have the right to organize into unions for the advancement of their interests and [to] refrain from any work for any purposes."⁵⁹¹ Delegate Cassidy took a somewhat different tack, arguing that a general right to strike violated the Enabling Act by impairing the obligations of contracts.⁵⁹²

584. *Id.* at 335. Cunniff, himself an operator of mines, responded to the wage charge that "[i]f it is true . . . they earn every cent of it, and then some. . . ." *Id.*

585. See JOURNAL, *supra* note 170, at 382; C. Brice, *supra* note 133, at 56; Arizona Gazette, Nov. 21, 1910, at 1, col. 1. On the federal courts' contemporary interpretation of freedom of contract, see L. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917 138-66 (1971).

586. JOURNAL, *supra* note 170, at 382.

587. C. Brice, *supra* note 133, at 56.

588. Arizona Gazette, Nov. 3, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 61; see also *supra* text accompanying notes 445-49.

589. Proposition 77.

590. Proposition 94, § 29; JOURNAL, *supra* note 170, at 471; C. Brice, *supra* note 133, at 62.

591. JOURNAL, *supra* note 170, at 471.

592. Verb. Rep., Nov. 25, at 7. The Enabling Act does not contain such a provision, but it does forbid the state constitution from being "repugnant" to the federal constitution; and the latter forbids states from passing any law "impairing the Obligations of Contracts." U.S. CONST. art. 1, § 10, cl.1.

This unwillingness to rubber-stamp all labor proposals was consistent with progressive sentiment in the country at large. The progressives generally regarded unions as “a necessary evil.”⁵⁹³ Furthermore, delegate Connelly’s proposal to create a department of labor failed,⁵⁹⁴ as did Ingraham’s proposal to make all shareholders liable for labor performed for a corporation,⁵⁹⁵ and Tovrea’s proposal to require corporations to pay their employees no fewer than twice a month.⁵⁹⁶

Nevertheless, labor interests succeeded in defeating several proposals they deemed inimical to their interests. Late in the proceedings, Judge Baker proposed a “right to work” measure. Taken from the South Dakota Constitution,⁵⁹⁷ it would have added to the Declaration of Rights a guarantee to every citizen of freedom “to obtain employment wherever possible,” and making it a misdemeanor for anyone to “maliciously interfer[e] or hinder . . . in any way any citizen from obtaining or enjoying employment already obtained.” Baker defended it on the ground that he had “heard a great deal about protection of labor and workmen at this convention. Here is a proposition that will aid you.” Labor was not convinced; its spokesmen Feeney and Connelly, joined by many progressives, urged that the proposal be rejected. Fred Ingraham opposed it on grounds of fairness to the labor delegates, pointing out that they had sought a number of measures that the convention, in a majority of instances, had “seen fit to refuse.” Baker’s proposal lost by a vote of 13-28.⁵⁹⁸ A related proposal by Ellinwood would have made it a crime for any person or corporation “maliciously” to interfere with or hinder any person from obtaining or enjoying employment. Although it was allegedly aimed at blacklisting, Ellinwood’s proposal was defeated because of its possible restrictive effect on picketing.⁵⁹⁹

4. Wealth and Taxation

The delegates generally authorized curbs on the accumulation of great wealth. They gave the legislature the power to levy graduated income and other taxes.⁶⁰⁰ This was specifically inserted by floor amendment

593. G.E. MOWRY, *supra* note 159, at 102.

594. C. Brice, *supra* note 133, at 61-62.

595. *Id.* at 62.

596. *Id.*

597. S.D. CONST. art. III, § 2 (1889).

598. JOURNAL, *supra* note 170, at 577; *see also* T.A. McGinnis, *supra* note 29, at 78-85.

599. Arizona Gazette, Oct. 26, 1910, at 2, col. 2; C. Brice, *supra* note 133, at 77-78.

600. ARIZ. CONST. art. IX, § 12.

to counter the notion that the already adopted provision requiring "uniform" taxation (now appearing in article IX, section 1) might prohibit graduated taxes.⁶⁰¹

The delegates sought to ensure, by a variety of individual measures, that the players in the economy were on a level field, and that government would not unfairly favor particular enterprises or individuals, especially in taxation. Besides the uniformity clause just mentioned, they limited taxation to "public purposes only,"⁶⁰² and outlawed any unit of government from giving or loaning its credit or making any donation or grant, by subsidy or otherwise, to any individual or entity.⁶⁰³ The state constitution's counterpart to the federal equal protection clause expressly includes private corporations within its ambit, forbidding the granting of "privileges or immunities" to any "citizen, class of citizens, or corporation other than municipal" that do not belong, "upon the same terms . . . equally . . . to all citizens or corporations."⁶⁰⁴ Finally, to drive the message even more firmly home, the legislature was forbidden from enacting any "special laws" regarding interest rates or "[a]ssessment and collection of taxes," or that granted "to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."⁶⁰⁵

J. Children

The most important of the provisions regarding children related to the creation, funding and operation of a public school system. The Arizona Constitution, like those of most other states, devoted a separate article to the subject, reflecting that its framers took education seriously.⁶⁰⁶ Congress prodded the delegates here, because the Enabling Act required them to provide "for the establishment and maintenance of a system of public schools . . . open to all the children."⁶⁰⁷ The Enabling Act also directed that the income from more than eight million acres of federal land granted to the state be used to support the common schools.⁶⁰⁸

601. JOURNAL, *supra* note 170, at 318-19.

602. ARIZ. CONST. art. IX, § 1.

603. *Id.* § 7.

604. *Id.* at art. II, § 13.

605. *Id.* at art. IV, pt. 2, § 19(9), (10), (13).

606. This was in contrast to the federal Constitution, which was drafted before public school systems took hold, and which does not mention the subject of education.

607. 36 Stat. 570 (1910), (§ 20 (Fourth)).

608. 36 Stat. 572-73 (1910), (§ 24).

The framers directed the legislature to establish and maintain a “general and uniform” system of public schools.⁶⁰⁹ A “free” so-called “common” school was required in every school district, to be operated at least six months in each year and open to all pupils between the ages of six and twenty-one.⁶¹⁰ Above the common schools, up through the university level, the instruction furnished must be “as nearly free as possible,”⁶¹¹ but the constitution also directs, somewhat ambiguously, that state laws “shall enable cities and towns to maintain free high schools, industrial schools, and commercial schools.”⁶¹²

Although part of the funding for the school system was to be derived from the sale or lease of the lands granted to the state by the federal government, the framers recognized that this would probably not be sufficient, for they directed the legislature to “make such appropriations, to be met by taxation, as shall insure the proper maintenance of all State educational institutions, and . . . such special appropriations as shall provide for their development and improvement.”⁶¹³ The legislature was also instructed to “provide for the education and care of the deaf, dumb, and blind.”⁶¹⁴ None of these provisions provoked much comment on the floor of the convention.⁶¹⁵

The framers also wrestled with the problem of child labor, then a growing national concern and favorite target of both the progressives and labor. After considerable discussion,⁶¹⁶ a general prohibition was adopted against gainful employment of children under fourteen at any time during the hours that the local public schools were in session, and against employing children under sixteen for more than eight hours a day, or at night, or in underground mines or any occupation “injurious to health or morals or hazardous to life or limb.”⁶¹⁷

Finally, the convention provided special protections for juveniles in the criminal justice system. Persons under eighteen were not to be

609. ARIZ. CONST. art. XI, § 1.

610. *Id.* § 6. Common schools were, by implication, the equivalent of elementary and junior high schools in modern parlance, because the first section of article 11 differentiates among kindergarten, common, and high schools. *See also* art. XI, § 8, which differentiates between common and high schools.

611. ARIZ. CONST. art. IX, § 6.

612. *Id.* § 9.

613. *Id.* § 10.

614. *Id.* § 1.

615. The Convention did, however, discuss a number of provisions involving race and religion in the schools. *See supra* text accompanying notes 267-71, 505, 508.

616. JOURNAL, *supra* note 170, at 454-60.

617. ARIZ. CONST. art. XVIII, § 2. Delegate Thomas Feeney led the fight for this provision, invoking a familiar image: “[s]ociety [cried] its eyes out for the widow and orphans, and here is an opportunity to act.” Verb. Rep., Nov. 18, at 13.

confined in the same section of any jail or prison as adults,⁶¹⁸ and superior courts were given exclusive and quite flexible jurisdiction in all proceedings and matters “affecting dependent, neglected, incorrigible or delinquent children, or children accused of crime, under the age of eighteen years.”⁶¹⁹ Both of these provisions, interestingly, stemmed from propositions originally introduced by J.J. Keegan, who apparently had operated a saloon in Globe,⁶²⁰ although they were pushed on the floor by Ingraham of Yuma, who described bleak conditions at the Yuma jail.⁶²¹ When E.E. Ellinwood attacked the segregation of youthful offenders as “purely legislative,” F.A. Jones vigorously responded, to applause, that it was simply a “declaration of the rights of the children” of Arizona.⁶²² An unsuccessful attempt was made to lower the cut-off age from 18 to 16.⁶²³

K. *A Tradition of Stubborn Independence*

Unquestionably, the convention delegates were attentive to other states’ experiences. Prior to the convention, President Hunt reportedly made trips to Oregon and California—both then hotbeds of progressivism.⁶²⁴ The Minutes reflect that the Committee on Standing Committees looked at “other recent constitutional conventions,” as well as “all the State Constitutions promulgated in the past forty years.”⁶²⁵ The delegates also exchanged propositions with New Mexico, whose convention was meeting at about the same time, having started two weeks earlier,⁶²⁶ and accepted Oklahoma’s offer of the journals of the Oklahoma Constitutional Convention held four years previously.⁶²⁷

The framers schooled themselves rather thoroughly in counterpart constitutions. The Journal is liberally sprinkled with references to provisions in other states.⁶²⁸ The more recent, Western, and progressive

618. ARIZ. CONST. art. XXII, § 16.

619. *Id.* at art. VI, § 15. This appeared in art. VI, § 6, cl. 3 of the original version.

620. Propositions 139, 140; *see also* J.J. WAGONER, *supra* note 29, at 462.

621. Verb. Rep., Nov. 16, unnumbered page. *See also* Arizona Gazette, Nov. 16, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 35.

622. Verb. Rep. Nov. 16, unnumbered page.

623. JOURNAL, *supra* note 170, at 443.

624. H.R. LAMAR, *supra* note 28, at 502.

625. MINUTES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA 12 (1910).

626. JOURNAL, *supra* note 170, at 14, 23, 42, 63.

627. MINUTES, *supra* note 625, at 39; Arizona Gazette, Oct. 15, 1910, at 1, col. 2.

628. *See* JOURNAL, *supra* note 170, at 4, 8, 11, 89, 101, 104, 105, 131-35, 138, 144, 149, 159, 165, 168, 169, 197, 234, 238, 239, 251, 258, 262, 263, 265, 266, 302, 303, 307, 310, 318, 330, 333, 334, 350, 354, 355, 357, 360, 369, 379, 392, 393, 409, 414, 416, 417, 423, 424, 427, 433, 438, 463, 472, 473, 478, 480, 490, 498, 501, 512, 518, 530, 538, 540, 548-49, 555, 565, 567, 575, 592. Recall, however, that the Journal omits many speeches. *See supra* text accompanying note 223.

constitutions commanded the most attention. Oklahoma's Constitution was mentioned more than a dozen times, and Oregon's nearly as often. Of the others, California, Washington and Wyoming were cited six times, Utah five, and Oregon and Colorado four each. By contrast, the federal Constitution was expressly mentioned only in connection with protection of judicial salaries⁶²⁹ and cruel and unusual punishment.⁶³⁰

The Journal reflects that the framers looked at other constitutions on a variety of issues—the initiative and referendum (Oklahoma, Oregon, California, and Colorado); the recall (Oregon); provisions dealing with labor (Wyoming and Oklahoma), the judiciary (Colorado and Washington), the Declaration of Rights (Washington), legislative procedure (Idaho), and alien labor (Utah, Wyoming, and Idaho). Still, it would be a mistake to assume that the Arizona framers borrowed unthinkingly from these other sources. A mere copying cut too much against the grain; instead, their disposition was to think independently. Delegate Alfred Franklin, a Phoenix lawyer (and later to serve four years on the Supreme Court), reflected a widely shared attitude when he said he was “very much opposed to putting in the constitution of Arizona things that we have simply gathered from other constitutions.”⁶³¹ Even if it did provide a bit of comfort when a particular idea had a counterpart in another state, that was never a conclusive argument for adopting it in Arizona. Michael Cunniff, ever ready with thoughtful observations, reminded the delegates that they “are not making a constitution for [other states],”⁶³² and while there was nothing wrong with borrowing language, there should likewise be no objection to tailoring it “to suit . . . local conditions.”⁶³³

There was no indication that the contemporaneous New Mexico deliberations had any influence on Arizonans. Indeed, there are marked contrasts between the two constitutions, even though both conventions were operating within the same congressional strictures. Although New Mexico made a modest bow toward progressive sentiments by adopting a watered-down version of the referendum,⁶³⁴ it did not include the

629. JOURNAL, *supra* note 170, at 251.

630. *Id.* at 463.

631. *Id.* at 424.

632. *Id.* at 239.

633. *Id.* at 132; *see also* Williams, *State Constitutional Law Processes*, 24 WM. & MARY. L. REV. 169, 174 n.14 (1983).

634. *See* N.M. CONST. art. IV, § 1. It exempted numerous kinds of laws, including general appropriations, laws maintaining schools or state institutions, and local or special laws, as well as the standard “emergency” exception that appears in the Arizona referendum provision. *See* R.W. LARSON, *supra* note 27, at 278-79.

initiative or the recall. Similarly, while it established a corporation commission, it gave it only limited power.⁶³⁵ Moreover, it made its constitution relatively difficult to amend.⁶³⁶ One commentator called what emerged in New Mexico as a “perfect 1810 model,” while Arizona’s was a “1910 one.”⁶³⁷

The lack of cross-fertilization with New Mexico reflected factors other than the Arizonans’ stubborn independence. Although the New Mexico delegates were more racially and culturally diverse,⁶³⁸ they were, as historian Howard Roberts Lamar has noted, “Republican, cautious, and conservative,” in “stark contrast” to the Arizonans.⁶³⁹ The relatively narrow escape from the shotgun marriage of jointure was yet another reason for the Arizonans to put as much constitutional distance as possible between the two states.

Just how radical a constitution would pass muster in Washington D.C. was something the Arizona delegates could not help pondering. The territorial newspapers harped on the subject, the more conservative among them frequently warning that a radical constitution threatened statehood.⁶⁴⁰ On the national scene, the Arizona and New Mexico Constitutions came to symbolize the struggle between conservatives and progressives. It was inevitable, then, that their bids for congressional approval would become entwined. New Mexico’s Constitution was ratified by its territory’s voters on January 21, 1911, almost three weeks before Arizona’s. That left the 61st Congress with six weeks to approve New Mexico’s before adjourning, and gave the conservatives who favored New Mexico’s admission, but not Arizona’s, an opening. The prospect of the lame duck Congress separately approving New Mexico’s Constitution was particularly appealing to conservatives because in the elections for a new Congress the previous fall, the Democrats gained control of the House of Representatives for the first time since 1842, and gained working control of the Senate in a coalition with insurgent

635. R.W. LARSON, *supra* note 27, at 278-79.

636. *Id.* at 279-82. The House Democrats criticized the difficulty of amending the New Mexico Constitution when it came before Congress. See J.P. White, *supra* note 317, at 165.

637. J. MURDOCK, CONSTITUTIONAL DEVELOPMENT OF ARIZONA 30 (1930), *cited in* H.R. LAMAR, *supra* note 28, at 500 n.37. See also Wickersham, *supra* note 14, at 20-31, where the Attorney General described the Arizona Constitution, “[i]n very marked contrast with” its New Mexico counterpart, as making “life, liberty and property” subject to the “uncertain sands of shifting popular inclination.” *Id.* at 21, 24.

638. This feature was captured by the name of the convention secretary, George Washington Armijo. H.R. LAMAR, *supra* note 28, at 500.

639. *Id.*

640. C. Brice, *supra* note 133, at 106.

Republicans.⁶⁴¹ President Taft lent his weight to the strategy by approving the New Mexico Constitution on February 24,⁶⁴² but Senator Robert Owen of Oklahoma filibustered New Mexico's hopes for quick statehood to death in the waning hours of the session.⁶⁴³ This preserved the balance by ensuring that both states would have to petition the 62nd Congress for admission.

Although these events would unfold in the months after the Arizona convention, the Arizona delegates were already aware of the tenuous support they had in the Congress. This led many delegates to question how far they could go with progressive ideology without losing support in Washington for statehood. The focal point for the progressives and the conservatives became the recall, particularly as it applied to the judiciary.⁶⁴⁴ This, in turn, provided the clearest manifestation of the stubborn independence of the Arizona framers—they were willing to jeopardize their long-held dream of statehood by standing firm on judicial recall. The subject came up repeatedly on the convention floor, with numerous delegates expressing grave concern about dooming the whole enterprise over that single issue. John Orme of Phoenix thought

641. See J.P. White, *supra* note 317, at 139-57.

642. 46 CONG. REC. 3306 (1911).

643. *Id.* at 4130-34, 4155, 4157, 4288, 4290-320. Refusing to yield the floor, in the end Owen forced a final vote on statehood for both Arizona and New Mexico, but it lost 39-45. See *id.* at 4320. Owen went on to propose the recall for all federal judges by Congress, and popular election of federal judges below the Supreme Court. See J.P. WHITE, *supra* note 317, at 251; 47 CONG. REC. 3226, 3359-77 (1911).

644. Support for the judicial recall was not unanimous among prominent progressives on the national scene. Teddy Roosevelt opposed it, and did not hesitate to say so in a speech in Arizona in the spring of 1911. See J.P. WHITE, *supra* note 317, at 32, 79, 144. Beveridge also opposed it. *Id.* at 54 n.38. Roosevelt instead proposed a recall for specific judicial decisions, *id.* at 364-65, n.102, but quickly ran into a buzz saw of criticism that cost him considerable support. *Id.* at 384-418. Colorado was the only state to act on Roosevelt's suggestion, adopting a constitutional amendment establishing a procedure for recalling individual judicial decisions in November 1912. COLO. CONST. art. VI, § 1. The measure had been placed on the ballot by initiative petition. It allowed citizens comprising 5% of the state's qualified electors who voted for governor at the previous election to petition within 60 days of a state Supreme Court decision striking down any state law on state or federal constitutional grounds to put the offending provision on the ballot at the next general election. See Northcutt, *The Recall in Colorado*, THE GREEN BAG 372 (1913). The judicial recall provision was itself struck down by the state Supreme Court as a violation of the due process and supremacy clauses of the federal constitution a few years later. *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146 (1921); *People v. Max*, 70 Colo. 100, 198 P. 150 (1921). Roscoe Pound, generally in sympathy with progressive thought, suggested half-jokingly that what was needed was recall of law teachers rather than judges, because "what we must insist upon is recall of much of the juristic and judicial thinking of the last century." Pound, *Social Problems and the Courts*, 18 AM. J. SOC. 339 (Nov. 1912); see also Dodd, *The Recall and the Political Responsibility of Judges*, 10 MICH. L. REV. 79 (1911); Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. LEGAL HIST. 257 (1980).

the judicial recall “will absolutely prevent us from getting statehood,”⁶⁴⁵ and he and E.E. Ellinwood separately made unsuccessful proposals to exempt the judiciary.⁶⁴⁶

The newspapers divided on the issue. The *Arizona Democrat* chastised proposals to exempt the judiciary, arguing that judges ought to be treated the same as other public officials because “a lawyer is as liable to error as any other man,”⁶⁴⁷ but another local newspaper described the judicial recall as “the final nail in the coffin of statehood for Arizona.”⁶⁴⁸ A.M. Tuthill, a doctor from Morenci, cited what was on many minds as the recall came up for final vote—President Taft’s opposition⁶⁴⁹—but the delegates voted 32-14 to reject a motion to delete it.⁶⁵⁰

The same concern pervaded the debates on the initiative and referendum. As one delegate pointed out, Congress had accepted the Oklahoma Constitution, whose initiative and referendum provision had served as one model for the Arizonans.⁶⁵¹ Nevertheless, Republican E.W. Wells strongly warned the convention that Congress would reject the constitution because of the initiative and referendum, but he was not heeded.⁶⁵² As it became clear that the delegates would not be deterred on the issue, the Convention Chaplain, Seaborn Crutchfield, provided a nugget of lore for Arizona historians by importuning God in his prayer opening the November 28 session to influence President Taft not to turn down the constitution “for a little thing like the initiative and referendum; Lord, don’t let him be so narrow and partisan as to refuse us self-government.”⁶⁵³ It was reported that “only a strong

645. JOURNAL, *supra* note 170, at 523.

646. C. Brice, *supra* note 133, at 46.

647. *Arizona Democrat*, Oct. 14, 1910, at 4, col. 1; C. Brice, *supra* note 133, at 46-47. *See also* JOURNAL, *supra* note 170, at 179-82.

648. J.M. RICHARDS, *supra* note 59, at 22. For opposing editorial views on the judicial recall, see the Prescott Courier, Nov. 12, 1910, at 4, col. 2 (pro); and The Oasis, Nov. 19, 1910, at 6, col. 1 (con). *See also* C. Brice, *supra* note 133, at 112-13.

649. JOURNAL, *supra* note 170, at 594.

650. *Id.* at 595. Taft had apparently just defended an independent judiciary in a message to Congress supporting higher salaries for federal judges: “nothing is so important to the preservation of our country and its beloved institutions. . . .” Tuthill quoted him from a newspaper Tuthill had just purchased. Verb. Rep., Dec. 6, p.m., part 4, at 1.

651. C. Brice, *supra* note 133, at 44.

652. JOURNAL, *supra* note 170, at 506-07.

653. *Id.* *See also* J.M. RICHARDS, *supra* note 59, at 25; J. MCCLINTOCK, *supra* note 29, at 366. The prayer set out in the Verbatim Report is “Oh Lord we are not willing to believe President Taft will turn down our Constitution on account of such a small matter as the Recall, Initiative and Referendum which is written in the Constitution as the people of this great State of Arizona desire to be governed by.” Verb. Rep., Nov. 28, a.m., at 1.

sense of decorum . . . restrained the delegates from breaking into applause at the expression of this sentiment.”⁶⁵⁴

Opponents of the recall were not content to rely solely on divine help. W.T. Webb and Lamar Cobb, conservative Democrats, wired Democratic U.S. Senator Joseph W. Bailey of Texas to inquire whether inclusion of the judicial recall would hurt the chances for statehood. His sobering answer was read on the convention floor: It is, he said, “apt to provoke opposition of the President and might invite the disapproval of Congress. . . . I advise our friends there to adopt a constitution free from all debatable provisions so as to secure statehood without delay.”⁶⁵⁵

Bailey suggested patience as the most prudent course: “After becoming a state the people of Arizona can then adopt such amendments to her constitution as her people desire without consulting anybody or incurring the risk of being kept in a territorial condition.”⁶⁵⁶ Bailey’s advice was not easily disregarded, for he was a Democrat and, as Michael Cunniff pointed out to applause, “we should feel very grateful to him for his sincere and ceaseless labors in our behalf.”⁶⁵⁷ Once again, some delegates counseled caution. Judge Baker of Phoenix proposed to submit the matter of judicial recall to the people separately from the constitution itself,⁶⁵⁸ but that went down to defeat by a vote of 17-30. A.R. Lynch from Safford then proposed to exempt judges from the recall, but that lost by an even larger margin, 15-36. Thereafter, article VIII, with the recall intact, was adopted 38-9.⁶⁵⁹

The struggle over recalling judges speaks clearly about the dominant attitude of the framers of the Arizona Constitution, for the judicial recall “had become the distinguishing mark of Arizona’s determination to assert her progressivism and independence to the nation as a whole.”⁶⁶⁰ The delegates’ fierce expression of independence from Washington D.C.

654. Arizona Gazette, Nov. 28, 1910, at 1, col. 1. Cf. C. Brice, *supra* note 133, at 45.

655. JOURNAL, *supra* note 170, at 599. There was an irony in the fact that it was Bailey who delivered this advice on how Arizona might best go about securing statehood. More than eight years earlier, Bailey had attempted to physically choke Albert Beveridge on the floor of the Senate over a matter unrelated to statehood. C.G. BOWERS, *supra* note 45, at 184-87.

656. JOURNAL, *supra* note 170, at 599.

657. *Id.* at 600.

658. Separate submission of some matters was specifically contemplated by the Enabling Act, §§ 21 and 22 of which referred to submission to the people of “said constitution and . . . provisions thereof separately submitted.” Enabling Act, 36 Stat. 557, 571 (1910). Well before the convention, the Arizona Republican had advocated separate submission of “advanced” propositions like the recall so as not to jeopardize statehood. July 14, 1910, at 2, col. 1.

659. JOURNAL, *supra* note 170, at 601.

660. J.P. WHITE, *supra* note 317, at 137.

reflected a willingness, just when the long struggle for statehood seemed on the brink of culmination, to jeopardize that goal if it could not be reached on Arizona's terms. In the face of firm indications from both the Republican President and a leading Democratic supporter of statehood in the Senate, prudence counseled postponing inclusion of the judicial recall until after statehood had been achieved. It was well understood, as U.S. Attorney General Wickersham said in a speech at Yale Law School some six months later, that "except in so far as it might conflict with some provision of the [f]ederal Constitution, the new State might immediately after its admission into the Union, amend its Constitution or adopt a new one and Congress would be powerless to prevent [sic]." ⁶⁶¹

The proclamation of statehood would, therefore, substantially free the state and its constitution from federal control. Some uncertainty still remained, however, about whether not only the judicial recall, but also the initiative and referendum, might conflict with the federal Constitution. That charter obligated the United States to "guarantee to every State in this Union a Republican Form of Government." ⁶⁶² In the *Dorr's Rebellion* case decided more than a half century earlier, the Supreme Court assumed that it could decide whether a state government was in violation of the guaranty clause ⁶⁶³ although neither that case nor any that followed it actually found a transgression of that clause. ⁶⁶⁴ At the very moment the Arizona framers were debating the judicial recall, another case raising the issue was before the Supreme Court, in the context of another of the progressives' newfangled instruments of direct democracy—the 1902 Oregon constitutional amendment providing for the citizens' initiative. An initiated tax on telephone and telegraph companies, approved by the voters in 1906, was resisted by a local utility and the state brought suit. The utility responded by challenging the validity of the initiative. ⁶⁶⁵ When the state supreme court rejected the challenge on February 2, 1909, the company appealed to the U.S. Supreme Court, raising the guaranty clause issue. Five days after Arizona became a state, the Court rejected the company's argument, finding that the federal courts are not competent to determine whether

661. Wickersham, *supra* note 14, at 19. The propriety of this course was also conceded in the congressional debates on the Arizona constitution. See 47 CONG. REC. 3731 (1911); J.P. WHITE, *supra* note 317, at 190.

662. U.S. CONST. art. IV, § 4.

663. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

664. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 98-100 (2d ed. 1988).

665. See *State v. Pacific States Tel. & Tel. Co.*, 53 Ore. 162, 99 P. 427 (1909). The utility did not argue the possible violation of the guaranty clause in state court.

the guaranty clause has been violated; instead, it is a political question for the Congress.⁶⁶⁶ Delegate William Cooper of Tucson adverted to the pendency of this case before the Supreme Court in a long speech attacking the initiative and referendum, arguing that because the “universal opinion of text writers on constitutional interpretation” was that such provisions violated the guaranty clause, they should be deleted so as not to jeopardize statehood. Specifically, Cooper said, President Taft being an “eminent constitutional lawyer” would not approve Arizona’s Constitution if it contained these measures.⁶⁶⁷

Yet the Arizona framers persisted. They clearly wanted to demonstrate their independence and resolve to their constituents. Because a majority of the delegates had committed themselves to support these tools of direct democracy in their election campaigns, they resisted pressure to yield. As Globe lawyer Jacob Weinberger put it, “the people did not send us down here to refer this matter back to them. They sent us down here to put it in the constitution.”⁶⁶⁸ Perhaps also, chafing at the bitter disappointments and rebuffs they had encountered in their long wait for statehood, they could not resist flexing their collective muscle. And perhaps their resolve was bolstered by a belief that statehood was now inevitable, and could not be denied.

History did teach that the statehood process, once set in motion, was hard to deflect. But history was not particularly comforting on the length of time necessary to bring it to fruition. Arizona’s own experience provided an object lesson—its proposed 1891 constitution had been rejected by the Senate largely on a single, transitory issue (free silver)—yet nineteen years had passed before the territory was given another opportunity to become a state. Moreover, during the struggle over jointure, newspapers like the *Chicago Tribune* and seasoned politicians like Teddy Roosevelt and Beveridge had warned that statehood might be postponed for fifty years if the territory did not bow to Congress’s will.⁶⁶⁹

Nevertheless, most framers were proud of their willingness to take the risk. When a few proposed to strike the final debate on the judicial recall from the record, the majority refused. Judge Baker was livid

666. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912).

667. Verb. Rep., Nov. 5, a.m., at 4. E. E. Ellinwood and Edward Doc had earlier made similar arguments. *Id.* Nov. 3, a.m., at 21 (Ellinwood); and Nov. 4, p.m., at 4 (Doc). See also J.M. RICHARDS, *supra* note 59, at 21. Republican lawyer Edmund Wells of Prescott raised the same issue three weeks later, and also suggested these measures conflicted with the Enabling Act, but once again the convention voted to retain them, this time by a vote of 36-6. JOURNAL, *supra* note 170, at 506-08.

668. JOURNAL, *supra* note 170, at 523.

669. R.W. LARSON, *supra* note 27, at 232, 243, 250.

about the proposal, saying it would make them "jellyfish and spineless;" that it was a "disgrace," "unmanly," and "improper." "Everyone ought to stand by what he has said."⁶⁷⁰

Although the framers initially refused to blink when they went eyeball to eyeball with Washington, Arizona finally was forced to remove judicial recall from its constitution after President Taft kept his promise to veto any constitution that contained it. Nevertheless, in September 1911, before the Arizona voters had even approved its deletion, Hunt publicly promised, as part of his campaign to become the state's first governor, to reinstate it.⁶⁷¹ A month later, he underscored the point: "My first official act, if elected governor, will be to recommend to the legislature the submission to the people of the recall for the judiciary."⁶⁷² Hunt was true to his word. Within two-and-a-half months of statehood the first legislature put the question on the ballot, and at the fall election the voters overwhelmingly agreed to reinstate the judicial recall into the constitution,⁶⁷³ where it remains today.

The debate over judicial recall and the related discussions of the initiative and referendum were by far the most prominent of the potential conflicts with the federal government that surfaced in the convention, but they were not the only ones. On several occasions, conflicts with the Enabling Act were brushed aside with equal stubbornness. On the question of using the direct primary in the first election for state officers, several Republicans pointed out that this seemed to conflict with the Enabling Act, section 23 of which did not expressly contemplate a primary. Their proposal to delete it was rejected on nearly a party-line vote.⁶⁷⁴ A second incident involved the advisory vote for U.S. Senators. Republican lawyer Samuel Kingan of Tucson thought it in conflict with the federal Constitution, but his argument

670. JOURNAL, *supra* note 170, at 610-11. More pragmatically, Morris Goldwater suggested that the motion to strike would be on the record anyway, even if it were adopted. *Id.*

671. J.M. RICHARDS, *supra* note 59, at 39.

672. *Id.* at 47.

673. See *infra* text accompanying note 704. One of Arizona's original U.S. Senators, Henry Ashurst, wasted little time in proposing, in August 1912, that lower federal court judges be subject to recall by voters in their respective judicial districts. See J.P. WHITE, *supra* note 317, at 270. The new state of Arizona also enacted legislation in 1912 establishing a procedure for an advisory recall of federal district judges, and United States Senators and Representatives as well. See 1912 Ariz. Sess. Laws 275-80, 290-96, chs. 56, 65 (codified at 19 ARIZ. REV. STAT. ANN. §§ 221-22, 231-34 (1975) (§§ 221-22 apply to members of Congress and §§ 231-34 apply to federal district judges). This apparently stemmed from "local irritations with the issuance of injunctions in labor disputes," as well as a "desire to popularize all departments of government." J.P. WHITE, *supra* note 317, at 420-22. Apparently the advisory recall has never been invoked, but the procedure remains intact in Arizona law.

674. Prescott Courier, Nov. 5, 1910, at 1, col. 2; C. Brice, *supra* note 133, at 48.

was rejected, a majority being assuaged by the fact that almost two-thirds of the states then used some variant of that process.⁶⁷⁵ A third apparent conflict concerned whether to have a literacy test for voting (initially approved, later deleted);⁶⁷⁶ a fourth involved whether to grant a property tax exemption for resident widows.⁶⁷⁷

A final illustration was played out with some humor. In a ringing statement of religious freedom, the Enabling Act required the convention to provide that "perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship. . . ."⁶⁷⁸ The sharp-eyed and independent Arizonans noticed that this was couched solely in terms of protecting the right to worship, and not the right to eschew it. Therefore, the relevant committee recommended that the words "or lack of the same" be added. James Crutchfield, the only clergyman among the delegates (and the son of the convention chaplain), argued the addition was inconsistent with the Enabling Act and moved to strike it. Breaking his customary silence on the convention floor, Morris Goldwater objected, finding it "very probable that a great many people in the United States have no mode of worship, [and furthermore t]he mere fact that the gentleman wishes it out, convinces me that it is highly necessary it should be in." Judge Baker then took Crutchfield's side, protesting that the convention should not "go beyond or fall short of" what Congress had put in the Enabling Act. Michael Cunniff responded that while the convention should not fall short of what Congress had specified, he disagreed "as to going beyond it."⁶⁷⁹ Goldwater and Cunniff prevailed on a 32-14 vote.⁶⁸⁰

675. JOURNAL, *supra* note 170, at 90-93. See also Arizona Gazette, Oct. 31, 1910, at 1, col. 1; C. Brice, *supra* note 133, at 48-49.

676. JOURNAL, *supra* note 170, at 393.

677. *Id.* at 327. The objection was that a property tax exemption for widows who were Arizona residents (now appearing in ARIZ. CONST. art. IX, § 2 (5)) contravened the provision of the Enabling Act that forbade taxing property of non-residents at a higher rate than property of residents. See 36 Stat. 569-70, § 20, Second (1910). This attitude of independence even colored discussion of issues where conflict with federal authority was not easy to discern. Delegate James Crutchfield, for example, raised the matter when speaking on alcohol prohibition: "I am not very particular about seeing what Washington has to say about our constitution because in case we prepare a constitution that will be acceptable to our people, [even] if it be turned down by the President and Congress, we have done our duty, but if we adopt a constitution which is rejected by the people of Arizona, we will have to come back and do this over again. I am tired of this. . . ." JOURNAL, *supra* note 170, at 360.

678. 36 Stat. 569, § 20, First (1910).

679. JOURNAL, *supra* note 170, at 285.

680. *Id.*

L. Humility

The final major theme sounded by the convention was one of reluctance to regard its work as permanent. The Arizona framers were more skeptical of their wisdom than the Enlightenment philosopher John Locke was of his. Locke made no provision for amendment in his Fundamental Constitutions of Carolina. Instead, that document insisted that "every part thereof . . . shall be and remain the sacred and unalterable form and rule of government of Carolina for ever."⁶⁸¹ Locke was not alone in his view. Six of the early state constitutions entirely lacked a mechanism for amendment.⁶⁸²

The Arizonans sought to ensure that their handiwork was not beyond ready review and reconsideration by the people. The result is that the constitution they adopted is one of the easiest to change. This was deliberate; Cunniff, for example, spoke of the "idea . . . demanded by practically all the people in Arizona . . . [and] many of the various political parties [that the] method of amending the Constitution . . . shall be easy."⁶⁸³ It is, in fact, quite rare in authorizing all three of the most popular ways to amend a constitution: by legislative proposal, by popular proposal (initiative), and by a new convention.

The framers adopted the most traditional method, followed in nearly all states, of a legislative proposal followed by submission to the electorate.⁶⁸⁴ The degree of support necessary under the Arizona Constitution for proposal and adoption is, however, considerably less than in most other states. A mere majority (albeit of those elected, not just those voting) of the members of each legislative house is needed to put a constitutional amendment on the ballot, and only a majority of those voting on the proposed amendment is needed to adopt it.⁶⁸⁵

681. Grad, *supra* note 296, at 972-73 (1968).

682. J.W. HURST, *supra* note 15, at 202. By contrast, in urging approval of the federal Constitution, with its clear provisions for amendment, Benjamin Franklin asked each fellow delegate to "doubt a little of his own infallibility." See F. BARBASH, *THE FOUNDING* 205 (1987).

683. Verb. Rep., Nov. 26, a.m., unnumbered page.

684. Delaware is alone among the states in not requiring constitutional amendments to be submitted to the voters; it requires instead a two-third's vote by each of two successive elected General Assemblies. See DEL. CONST. art. XVI, § 1.

685. See ARIZ. CONST. art. XXI, § 1; see also 26 *THE BOOK OF THE STATES* 16, 18 (1986-87 ed.). Cunniff also noted that some other states, especially in the east, required a popular majority of two-thirds on constitutional amendments, and others required a majority of those voting at the election, and not just those voting on the amendment. Because, he said, voters tend more to vote for candidates than on ballot propositions like amendments, to require a majority of all votes cast at the election in effect requires a super-majority vote for amendments. See Verb. Rep., Nov. 26, a.m., unnumbered page.

The decision to require only simple majority approval was consciously made. The proposal that originally came before the convention required a sixty percent approval margin.⁶⁸⁶ Delegate Connelly from Douglas proposed to reduce this to a simple majority, and it was adopted over the protest of Fred Colter from Apache County, who argued that sixty percent was “a very easy way of amendment . . . and I think will answer the purpose very well.” It was, he said, not only the margin required in progressive Oklahoma, but was lower than eighty-five percent of the other states, who required approval by two-thirds or even three-quarters of the voters.⁶⁸⁷ By contrast, the federal Constitution allows the Congress to propose amendments “whenever two-thirds of both Houses shall deem it necessary,” which then need ratification by the legislatures of, or conventions in, three-fourths of the states, the choice between the latter two being up to Congress.⁶⁸⁸ Samuel Kingan’s proposal for the Republicans tracked the federal Constitution and did not embrace the initiative. Fred Colter’s proposal would have required the support of three-fifths of the members of each house of the legislature and a majority vote of the electorate.⁶⁸⁹

Arizona joins only sixteen other states in allowing amendments to be proposed by initiative. Oregon led the way in 1902. Reflecting the progressive insurgence, thirteen states adopted the initiative method between 1902 and 1920; Arizona was the fifth state to do so.⁶⁹⁰ In Arizona, proposed amendments from the populace require the signatures of qualified electors equal to fifteen percent of the votes cast for all candidates for Governor at the last general election. This percentage is higher than most other states that have this method; eight or ten percent is more typical.⁶⁹¹ The result in Arizona was a compromise: The delegates dropped the final figure down from the twenty percent requirement originally proposed,⁶⁹² and the eighteen percent supported by Colter⁶⁹³ but also rejected a ten percent requirement by a vote of 13-34.⁶⁹⁴ Unlike a few states, Arizona does not limit the subject matter of

686. Arizona Gazette, Oct. 25, 1910, at 1, col. 1; C. Brice, *supra* note 133, at 50.

687. JOURNAL, *supra* note 170, at 479.

688. U.S. CONST. art. V.

689. Proposition 54, § 1.

690. A long hiatus followed after 1920, then between 1968 and 1972 four other states adopted this method. See Note, *Judicial Review of Proposed Constitutional Amendments*, 14 U.C. DAVIS L. REV. 461, 492-93, App. Table 1.

691. *Id.*

692. Proposition 14 (Cunniff).

693. Arizona Gazette, Oct. 19, 1910, at 1, col. 1; C. Brice, *supra* note 133, at 49.

694. JOURNAL, *supra* note 170, at 479. The delegates did, however, change the committee

initiated constitutional amendments.⁶⁹⁵ As with legislative proposals, only a simple majority of those voting on the amendment is required for adoption under the Arizona Constitution.⁶⁹⁶

The Arizona Constitution also provides for a third method of revision, the convention, a device expressly authorized by the constitutions of forty other states as well as the federal Constitution.⁶⁹⁷ The Arizona legislature may call a convention to propose replacing or amending the constitution. The proposal must first be submitted to the people on a referendum vote, and any proposals from the convention itself must be approved by a majority of the electorate voting thereon to become effective.⁶⁹⁸ Like the national government and eight other states, Arizona has never used that method since adopting its original constitution.⁶⁹⁹

M. Amending the Arizona Constitution

The susceptibility of the Arizona Constitution to change is borne out by statistics. The federal Constitution has been amended 26 times in 200 years, or an average of once every 7.5 years. The Arizona Constitution has been amended about ten times as often, slightly more than 100 times in 75 years, or an average of 1 and 1/3 times a year.⁷⁰⁰ In short, contrary to the advice of one commentator that advocates of state constitutional reform "should be endowed with the patience of Job and the sense of time of a geologist,"⁷⁰¹ the Arizona experience shows a relative ease of amendment. This is not to say, of course, that the constitution drafted in 1910 has been altered in any drastic way by these amendments, for it has not.⁷⁰²

Of the 101 amendments adopted, more than eighty percent have been referred by the legislature, and that body has quite a good track record with the voters, meeting success a little better than two-thirds of the

recommendation on the floor, by substituting "equal to" for "not less than" the 15% figure. This change was, in the words of its sponsor, to prevent future legislatures "not in sympathy with the easy amendment of our constitution as suggested and recommended to us by our ex-President Colonel Roosevelt" from elevating the figure by statute. Verb. Rep., Nov. 26, a.m., unnumbered page.

695. Massachusetts, for example, forbids initiated amendments of, among other things, its Declaration of Rights Article. See Note, *supra* note 690, at 478 n.90.

696. ARIZ. CONST. art. XXI, § 1.

697. THE BOOK OF THE STATES, *supra* note 685, at 19.

698. ARIZ. CONST. art. XXI, § 2.

699. Sturm, *supra* note 13, at 76-81.

700. B. MASON & H. HINK, CONSTITUTIONAL GOVERNMENT IN ARIZONA 26 (7th ed. 1982) (101 amendments). Cf. Sturm, *supra* note 13, at 75 (102 amendments).

701. Graves, *State Constitutions*, 8 WM. & MARY L. REV. 1, 6 (1966).

702. See *supra* note 20.

time. By contrast, the electorate has rejected amendments proposed by the initiative method about sixty percent of the time.⁷⁰³ One group of amendments might fairly be placed in a special category. Those approved in 1912 and 1914 probably ought to be considered part of the original constitution, unfinished business left over from the 1910 convention, in the same way that the federal Bill of Rights is generally regarded as part of the original document even though added after the convention. The package of 1912 amendments included reinstating the judicial recall,⁷⁰⁴ female suffrage,⁷⁰⁵ and an addition to the Declaration of Rights allowing the state and municipal governments to engage in "industrial pursuits."⁷⁰⁶ The first had been adopted at the 1910 convention and the others had been seriously considered there. Reinstatement of the first stood as a declaration of independence; in one historian's words, "reaffirm[ing Arizona's] determination to govern itself the way it saw fit."⁷⁰⁷

V. THE ARIZONA CONSTITUTION—A CONCLUDING ASSESSMENT

The document fashioned by Arizona's founding fathers has proved, despite its relatively frequent amendment, to be a durable base for Arizona government for more than three quarters of a century. Former Governor Samuel P. Goddard has called it Arizona's "greatest accomplishment," an "amazing document" inspired by the "wonderfully forward-looking leader" George P. Hunt.⁷⁰⁸ Drafted at virtually the pinnacle of the progressive movement, it reflects the reformist zeal of the progressive era. It shared some of the faults that the progressives, like all political movements, had, but a balanced assessment of the Arizona Constitution is decidedly positive. If it did not make politics and government clean or perfect, it made them better. "[I]n those happy days," Grant Gilmore has written, reform "meant building up, not tearing down."⁷⁰⁹ Many of the progressive ideas like the secret ballot, the direct primary and, to a lesser extent, the initiative, refer-

703. B. MASON & H. HINK, *supra* note 700, at 26.

704. ARIZ. CONST. art. VIII, § 1. This was referred by the legislature and passed by a better than 4-1 margin. See ARIZ. SEC'Y OF STATE ELECTION RETURNS, CONSTITUTIONAL AMENDMENTS, AND INITIATIVE AND RECALL MEASURES (1912).

705. ARIZ. CONST. art. VII, § 2. This was proposed by initiative and adopted by a 2-1 margin. See ELECTION RETURNS, *supra* note 704.

706. ARIZ. CONST. art. II, § 34. This was referred by the legislature and approved by a 4-1 margin. See ELECTION RETURNS, *supra* note 704.

707. E.H. PELOW, JR., HISTORY OF ARIZONA 27 (1958).

708. DEDERA, *supra* note 276, at 6.

709. G. GILMORE, THE AGES OF AMERICAN LAW 69 (1977).

endum, and recall, are today second nature to students of American government. We tend to forget how controversial they were in 1910, and how tenacious their advocates had to be to overcome the resistance to their novelty.

If the Arizona Constitution is progressive with a capital "P", it is also progressive with a small "p." It has demonstrated an ability to adapt to the vastly changing circumstances that have visited the state since it was drafted. Indeed, it deserves renewed attention today in part because it has worked reasonably well. The principles it collects within its four corners were assembled in 1910 with a measure of political skill that seems, considering how much the state has changed, astonishing.

The framework of government that it erected is not necessarily one that would make sense anywhere. Rather, it was the peculiar expression of Arizonans—of their special attitudes and beliefs about what is fundamental for this community. The framers of the Arizona Constitution could not have divorced themselves from their own experience in carving out a meaningful existence in this landscape; those experiences and attitudes are reflected in a constitution pictorial of, and unique to, Arizona. The most telling evidence of this special character is found in comparing it to the New Mexico Constitution. Drafted practically simultaneously, the two charters are markedly different on numerous issues. It should not be surprising that the two states' different histories, cultural traditions, and characters found expression in different fundamental governing documents.

A lot of tiresome debate is heard these days about the "intent of the framers" of the federal Constitution, but one thing about the intent of the framers of the Arizona Constitution is absolutely clear—they fully expected the document they crafted to be the primary charter of state government and the primary check on it. Above all, they expected it to have a validity, and a meaning, independent of the federal Constitution.

Giving contemporary meaning to the framers' expectation of independence by paying more attention to the document they drafted has a number of benefits. It furthers the idea that the states are useful settings for economic, social, and political experiments that can, and should, influence federal policy making.⁷¹⁰ Failing to take it seriously, by binding its application root and branch to its federal counterpart, in effect padlocks the door to the laboratory of ideas that it contains.

710. See *supra* note 2. For a later, more famous expression of the same idea, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Another benefit flowing from renewed attention to the Arizona Constitution is that it furthers what is perhaps the single most fundamental idea in American government—the dispersal of governmental power. This notion applies to the exercise of judicial as well as executive and legislative powers. It is fundamentally inconsistent with that idea to allow the U.S. Supreme Court to answer all the important constitutional questions in this country, when such questions may fairly be addressed within the state constitution. A dialogue among courts on these issues is more illuminating, and safer, than a monologue from the national Supreme Court.

In the same vein, focusing on the state constitution helps educate the public, by stimulating thought about constitutional values and the role of constitutional principles in our society. If our liberties depend in the end upon an interested and informed citizenry, shedding more light on the constitution closest to the people should advance that cause, sparking interest by Arizonans in their state and local governments. Despite the enormous expansion of the federal government in this century, these remain, after all, the branches of government that most touch the lives of ordinary citizens.

A final reason to think more seriously about the Arizona Constitution is that it stands up rather well to serious examination. Of course it has its failings, but it has fewer of these than most other states, and its blemishes are 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 is still giving the state generally adequate service.

The founders of the State of Arizona bequeathed to us a document that expressed a noble vision of government—a healthy skepticism about concentrations of power balanced by a deep-seated optimism that government ought to play a positive role in social betterment. It is a charter in which all Arizonans can justifiably take pride.