THE ARIZONA "PRIVATE AFFAIRS" CLAUSE

Timothy Sandefur*

The Arizona Constitution says "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[1] This language is notably different from that used in the federal Constitution's Fourth Amendment and analogous provisions in other state constitutions. It is found in only one other constitution: that of Washington State, from which it was copied, and where courts have developed a robust and protective Private Affairs jurisprudence.[2] Yet Arizona courts have not done the same. On the contrary, despite repeatedly acknowledging that the Arizona Constitution can and should protect a broader range of rights than the federal Constitution, they have largely failed to give effect to that principle and have so far developed virtually no significant protections of private affairs that differ from federal protections.

Arizona courts have claimed that the Private Affairs Clause is "generally coextensive" with the Fourth Amendment, except in cases "concerning officers' warrantless physical entry into a home."[3] But the Clause expressly protects *both* "private affairs" *and also* the home, indicating that it should protect a significantly broader set of substantive rights. Nonetheless, courts have largely neglected the linguistic and historical differences between the state and federal provisions, with the result that Arizonans now live with an anomaly: Their courts, while giving lip service to the idea that the state constitution is more protective than federal law, apply it no more broadly in practice. At the same time, Washington case law that interprets language identical to the Arizona Clause *does* provide stronger protections than federal law.

This article is the first to attempt an overall interpretation of the Private Affairs Clause.[4] I review the relevant history and text, to explain why and

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* Vice President for Litigation and Duncan Chair in Constitutional Government, Goldwater Institute. Thanks to Jacob Huebert, Jared Keenan, and Christina Sandefur for helpful edits and suggestions.

1. ARIZ. CONST. art. II, § 8.
2. *See* WASH. CONST. art. I, § 7.
3. State v. Hernandez, 417 P.3d 207, 212 (Ariz. 2018).
4. Timothy Stallcup was the first to examine the Clause on its own, but Stallcup's focus was on the privacy tort rather than on the constitutional dimension of protecting citizens from government intrusion. Timothy Stallcup, *The Arizona Constitutional "Right to Privacy" and the Invasion of Privacy Tort*, 24 ARIZ. ST. L.J. 687 (1992).

how the Arizona constitutional privacy right must be viewed as broader than that protected by the Fourth Amendment—and, at a minimum, in line with Washington state law.

I. THE ORIGINS

A. The Background

The Private Affairs Clause was adopted without debate by the Arizona Constitutional Convention of 1910.[5] Like much else in the Arizona Constitution, it was copied directly from the Washington Constitution of 1889.[6] Alas, records of both Constitutional Conventions are thin. But these two provisions cannot be brushed aside as thoughtless redundancies of preexisting federal guarantees. In fact, they were unique at the time; although nearly every state held a constitutional convention in the years between 1875 and 1910, only Washington's and Arizona's included a specific reference to "private affairs" in its final product. By contrast, most state constitutions from that era echoed the Fourth Amendment word for word. These two constitutions alone took a different path, by using none of the Fourth Amendment's wording at all. And these provisions remain unique: Although several states added protections for "privacy" to their Constitutions in the 1970s, none used the term "private affairs."[7]

Understanding the Arizona Private Affairs Clause requires that we begin with its Washington progenitor. And as Justice Charles Johnson and attorney Scott P. Beetham have shown, it is not hard to find what the delegates to the Washington Constitutional Convention had in mind.[8] That state's framers

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5. The poor quality of the records of the Arizona Constitutional Convention has long vexed legal historians. *See, e.g.*, Gordon Morris Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1, 27. There appears to have been neither debate nor discussion of the wording of the privacy provision itself, which was drafted by a committee as part of Proposition 94 and voted on as a package. *See generally* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 (John S. Goff ed., 1991) [hereinafter RECORDS]. Although the Arizona Constitution was resubmitted to Congress in 1912, the Private Affairs Clause remained unaltered in that second go-around.

6. Arizona's borrowing from the Washington Constitution has long been remarked upon. *See, e.g.*, John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 82 (1988).

7. Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 226–27 (1989).

8. *See generally* Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 435–36 (2008). The Arizona Convention also consciously chose to depart from the Fourth Amendment's wording. One initial

began with the text of the Fourth Amendment, and then made the decision to abandon that text and use more expansive phraseology instead. They made that decision as a consequence of contemporaneous controversies—some of which led to important federal court decisions—regarding the power of legislatures and courts to investigate and regulate private behavior, and in particular, the power to compel the production of papers and records relating to financial transactions.[9]

During these decades, legislatures, regulatory agencies, and courts engaged in unprecedented efforts to investigate and publicize economic matters and personal affairs that had previously been considered private. While "muckraking" journalists sought to expose the sordid personal habits of prominent public figures,[10] government officials ramped up their inquiries into alleged monopolies ("trust busting"), labor disputes, price-setting, or product safety standards, often through hearings before public commissions. These inquiries often involved demands for the production of records that, in the eyes of business owners, were simply not matters for public scrutiny. Some viewed this unprecedented degree of publicity as a blessing.[11] But judges and political leaders of the day also saw that such public inquiries also ran the risk of extreme authoritarianism—and recognized the need for constitutional protection against government overreach.

In *Kilbourn v. Thompson*, the U.S. Supreme Court found that Congress's subpoena power did not allow it to "mak[e] inquiry into the private affairs of the citizen,"[12] and in *United States v. Boyd*, it ruled that a federal law enabling government attorneys in certain customs proceedings to compel defendants

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proposal for the Bill of Rights—Proposition 116, in RECORDS, *supra* note 5, at 1293–94—mirrored the Fourth Amendment, but when the language was referred to the Convention's Bill of Rights Committee, that Committee chose instead the "private affairs" language. *See* Johnson & Beetham, *supra* note 8 at 435.

9. *See* Johnson & Beetham, *supra* note 8, at 436.

10. *See* FRED J. COOK, THE MUCKRAKERS 7–12 (1972); *see also Must Newspapers Shriek?*, ARIZ. REPUBLICAN, Nov. 8, 1911 (noting, in an obituary of Joseph Pulitzer, that "he struck boldly for a new kind of 'publicity' in journalism. But that word means many things. It covers not only the exposure of political scoundrels, but it denotes, in practice, a kind of constant clamor rising into a shriek with a daily prying into private affairs as if nothing existed anywhere which should not be dragged into the light of day . . . .").

11. A 1919 biography of Theodore Roosevelt, who championed such legislative inquiries, celebrated them for having put an end to "[t]he double standard of conduct—one standard for private affairs and another for corporate affairs," because public scrutiny of business dealings had made "[n]ot only . . . railroads and other public-service corporations . . . more careful in their conduct, but private corporations as well." FREDERICK DRINKER & JAY HENRY MOWBRAY, THEODORE ROOSEVELT: HIS LIFE AND WORK 200 (1919). This represented an "awakening of the public conscience." *Id.*

12. Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).

to allow inspection of "book[s], invoice[s], or paper[s]" was also unconstitutional.[13] The *Boyd* Court acknowledged that the case did not involve "forcible entry into a man's house," but concluded that "compulsory production of a man's private papers" was nevertheless a search barred by the Fourth Amendment.[14] The "forcible [or] compulsory extortion" of a person's "private papers" may not involve "the breaking of the doors, [or] the rummaging of [the defendant's] drawers," but it qualifies as a search, because it constitutes "the invasion of his indefeasible right of personal security, personal liberty. [sic] and private property."[15]

As Johnson and Beetham have shown, these and other cases were the primary reason the authors of Washington's Constitution chose to use broader privacy language. Washington's framers hoped to provide stronger protections against state-level investigation and regulation—and, given that Fourth and Fifth Amendment guarantees had not yet been incorporated through the Fourteenth Amendment, and that the concurring opinion in *Boyd* showed that the decision was debatable as a matter of Fourth Amendment law, they chose not to adopt what they viewed as antiquated, inadequate Fourth Amendment language.[16] Instead, they fashioned a new Clause that would encompass both the traditional types of searching and seizing and the concerns raised by more recent legislative and judicial inquiries into private affairs. They hoped to "incorporate the principle that the *Boyd* majority failed to persuasively establish"[17]—namely, that private matters should not be invaded by the state—rather than to reiterate the narrower rule against unreasonable seizures or forcible entries.

B. The Conception of Privacy in 1910

American society was becoming more concerned with privacy during the era in which the Arizona Constitution was written.[18] Forensic science was just emerging, and detective work was becoming recognized in society.[19] At the

13. United States v. Boyd, 116 U.S. 616, 620 (1886).
14. *Id.* at 622.
15. *Id.* at 630.
16. *See* Johnson & Beetham, *supra* note 8, at 442.
17. *Id.*
18. *See, e.g.*, Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1892 (1981) [hereinafter *Nineteenth Century Privacy*].
19. The Pinkerton Detective Agency, founded in 1850, became prominent after the Civil War for its investigations of organized labor in the 1880s and 90s. *Our History*, PINKERTON, https://www.pinkerton.com/our-difference/history [https://perma.cc/JZK8-B48T] (last visited June 1, 2019). It was involved in the pursuit of Jesse James and Butch Cassidy. *Id.* The stories of

same time, questions regarding the power of corporations[20] or other business associations[21] to control the private behavior of their members and employees were also the source of litigation.[22] Washingtonians and Arizonans of the time had good reason to be worried about interference in their private affairs.

In their classic 1890 article *The Right to Privacy*,[23] Louis Brandeis and Samuel Warren introduced an innovation by seeking to conceptualize privacy itself as a right *separate from* the long-standing property and contract law principles that for centuries had been viewed as securing individual privacy.[24] So, for example, the publication of a gossip column about a dinner party at a person's home, which would not constitute a trespass or breach of contract, could still violate the sort of privacy right Warren and Brandeis envisioned.[25]

Sherlock Holmes first appeared in 1887. Randall Stock, *Beeton's Christmas Annual 1887: An Annotated Checklist and Census*, BEST SHERLOCK HOLMES, https://www.bestofsherlock.com/beetons-christmas-annual.htm [https://perma.cc/G8DU-4L7Z] (last visited June 1, 2019). They became such a sensation that Mark Twain satirized them repeatedly in his stories, including *Pudd'nhead Wilson*, which appeared in 1894, and *Tom Sawyer, Detective*, which appeared in 1896. This era also saw tort claims brought for invasion of privacy by people who were surveilled by private detectives. *See* Chappel v. Stewart, 33 A. 542, 542–43 (Md. 1896); Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co., 139 N.W. 386, 387–88 (Wis. 1913); *see also* Note, *The Right to Privacy Today*, 43 HARV. L. REV. 297, 299 (1929). An 1888 article in the *National Law Review* complained about the increasing number of private detective agencies and urged the adoption of some type of licensing and government oversight of them. *See The Detective System*, 1 NAT'L. L. REV. 128, 128 (1888). Yet the article recognized that involving the police instead of private detectives could be problematic because that might constitute "interference by government with private affairs of individuals." *Id.*

20. *Compare* People *ex rel.* Gray v. Med. Soc. of Erie Cty., 24 Barb. 570, 576 (N.Y. App. Div. 1857) (holding medical society's restriction on fees physicians charged patients void for "interfere[ing] with their private rights."), *with* Lee v. Louisville Pilot Benevolent & Relief Ass'n, 65 Ky. (2 Bush) 254, 254–56 (1867) (upholding similar restriction as not inconsistent with public policy).

21. *See, e.g.*, Thomas v. Musical Mut. Protective Union, 2 N.Y.S. 195 (N.Y. Gen. Term 1888) (upholding musician union's rule forbidding members from working for nonunion orchestras); Kolff v. St. Paul Fuel Exch., 50 N.W. 1036, 1036 (Minn. 1892) (corporation could not pass by-laws limiting the private business affairs of stockholders); Conniff v. Jamour, 65 N.Y.S. 317 (N.Y. App. Term 1900) (upholding membership requirements imposed by a labor association on members' business affairs).

22. *See* Ken Davis, *Washington Constitution Article 1, Section 7: The Argument for Broader Protection Against Employer Drug Testing*, 16 U. PUGET SOUND L. REV. 1335, 1345–46 (1993) (noting that authors of the Washington Constitution were concerned, among other things, about employers controlling employees' private lives).

23. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

24. *See* Amy L. Peikoff, *Beyond Reductionism: Reconsidering the Right to Privacy*, 3 N.Y.U. J.L. & LIBERTY 1, 2 (2008).

25. *See id.* at 23.

Whatever the merits of this argument—and it is still contested today[26]—it is representative of the concerns being raised at a time when technological advancement and increasing urbanization was making it easier to photograph people, or to listen in on telephone calls,[27] read other people's telegrams,[28] or peer into one another's homes.[29] As G. Edward White has put it, "Brandeis's and Warren's article did not invent privacy; it signified its emergence as a common concern."[30] Americans were emerging from the Victorian era into a modern age with less stringent social and religious attitudes. Thus, concerns about "private affairs," such as religious beliefs or the use of alcohol, were a growing feature of everyday life.

The first case to recognize a standalone right to privacy, as distinguished from a property or contractual right, was the 1905 decision *Pavesich v. New England Life Insurance Co.*, which involved the use of a photograph for advertising purposes.[31] In 1910—the same year as the Arizona Constitutional Convention—the third edition of *Black's Handbook of American Constitutional Law* cited *Pavesich* when defining privacy in this sense as a natural right "which is invaded, for example, by the unauthorized publication

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26. *See id.*; Michael B. Kent, Jr., *Pavesich, Property and Privacy: The Common Origins of Property Rights and Privacy Rights in Georgia*, 2 J. MARSHALL L.J. 1, 1 (2009); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 292–93 (1983).

27. Invented in 1876, the telephone was becoming increasingly common by the 1890s; many telephones were hooked up as "party lines," by which a person could easily listen in on another person's conversations. *See Telephones*, IOWA PUB. TELEVISION, http://www.iptv.org/iowapathways/mypath/telephones [https://perma.cc/PN5N-GSWQ] (last visited June 1, 2019). The invention of the dictagraph listening device in 1905 allowed for an unprecedented degree of government surveillance. *See* Kathryn W. Kelp, *"The Dictograph Hears All": An Example of Surveillance Technology in the Progressive Era*, 6 J. GILDED AGE & PROGRESSIVE ERA 409, 415 (2007). In 1910, dictagraph recordings were used as evidence in a California trial against conspirators who bombed the *Los Angeles Times* building. *Id. See also Road Resists Plan to Build Spur to Line*, ARIZ. REPUBLICAN, Jan. 30, 1917, at 1 (identifying "F.C. Armstrong of the Arizona Hercules Copper company" as one "whose private affairs were pried into . . . through the aid of a dictagraph").

28. *Nineteenth Century Privacy*, *supra* note 18, at 1901; *see also* Henry Hitchcock, *The Inviolability of Telegrams*, 5 S. L. REV. (N.S.) 473, 513 (1879) (referring to "the right of every man to be protected from any unauthorized exposure of his private affairs" in the context of telegrams).

29. Consider the growth of tenements in places like New York City during the era—famously revealed by muckraking journalists such as Jacob Riis. *See generally* JACOB RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1890). In *Bryant et ux. v. Sholars*, 29 So. 350 (La. 1901), and *Moore v. N.Y. Elevated R.R. Co.*, 29 N.E. 997 (N.Y. 1892), plaintiffs complained that building windows through which people could peer into their homes violated their privacy rights.

30. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 173 (1980).

31. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905). *Contra* Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895); Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899).

of a person's picture as part of an advertisement."[32] This historical context may support the contention that the Arizona Constitution could be read as providing a constitutional basis for the invasion of privacy torts.[33] As Johnson and Beetham conclude, the term "private affairs" was used "to refer generally to the 'affairs' of an individual in which 'the community has no legitimate concern.'"[34]

1. Private Affairs and Economic Transactions

But while the new Warren/Brandeis model of privacy likely played a role, it was not the concern foremost on the minds of the Private Affairs Clause's authors. It is worth emphasizing that neither the Washington nor Arizona constitutions use the word "privacy"—which in the 1889–1910 period was strongly associated with the Warren/Brandeis theory.[35] Instead, they used the phrase "private affairs," a term that may have been meant to *include* the Warren/Brandeis concept of privacy, but was generally understood as referring both to the government-investigative concerns addressed in the *Kilbourn* line of cases, and to the realm of personal liberty protected by traditional constitutional rights such as property, contract, and religious freedom.[36]

During this period, discussions over the meaning of "private affairs" occurred most often in the context of debates over government investigation and regulation of the marketplace. In 1876, the pivotal decision in *Munn v. Illinois* upheld the authority of the state to regulate the prices of grain

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32. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 523 (3d ed. 1910).

33. *See* Stallcup, *supra* note 5, at 715–17. On the other hand, Arizona courts at the time did not embrace the Warren/Brandeis theory, and Washington courts rejected it in *Hillman v. Star Pub. Co.*, 117 P. 594, 596 (Wash. 1911).

34. Johnson & Beetham, *supra* note 8, at 446–47 (quoting Warren Willsey, *Equity: Right of Privacy*, 5 CORNELL L. REV. 177, 177 (1920)).

35. The word "privacy" is exceedingly rare in legal literature prior to the Warren and Brandeis article, and the term appears to have been fashioned consciously as the opposite of "publicity." *See* W. Archibald McLean, *The Right of Privacy*, 15 GREEN BAG 494, 494 (1903). One 1903 law review article qualitatively differentiated privacy rights from the privacy-protecting rights of property and contract: "This right is in no sense one of property . . . . It is a personal right, pure and simple." *Id.*

36. In 1911, Judge Thomas Cooley used the same phrase to describe religious liberty: Government, he wrote, is "tyrannical when it punishes as a public offence the management of a citizen's *private affairs* in such a manner as his own conscience approves." Thomas Cooley, *Foreword* to WILLIAM ADDISON BLAKELY, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 21 (1911) (emphasis added).

elevators.[37] That case—which attracted great attention at the height of the Populist Era—drew the line between public and private by establishing the "affected with a public interest" test: The terms of purely private contracts could not be dictated by the government (except where a party was under some legal disability), while the terms of contracts that were "affected with a public interest" could be.[38] Justice Stephen Field, in dissent, warned that this was a vague test which enabled the government to essentially transform "private buildings used for private purposes" into "public institutions."[39] But state constitutions were soon being altered to label various enterprises "affected with a public interest."[40] With the rise of the Progressive Era at the turn of the century, legislatures began more intensively investigating and regulating economic matters that previously would have been considered private affairs, often on the theory that such contracts had consequences for the general public. This led to frequent disputes over whether government investigation and regulation constituted meddling into "private affairs."

Not only did the *Kilbourn* and *Boyd* decisions express Fourth Amendment concerns about government demands for private records, but in 1887, Justice Field, a champion of free enterprise, relied on those cases when he declared that

> [o]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others.[41]

Seven years later, the Supreme Court held that the Interstate Commerce Commission could not compel the production of certain business records because "[n]either branch of the legislative department, still less any merely

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37. Munn v. Illinois, 94 U.S. 113, 121–22 (1876).

38. *Id.* at 126.

39. *Id.* at 138 (Field, J., dissenting).

40. *See, e.g.*, Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use*,*"* 32 SW. U. L. REV. 569, 650–51 (2003).

41. *In re* Pac. Ry. Comm'n, 32 F. 241, 250 (C.C.N.D. Cal. 1887); *see also In re* Attorney Gen., 47 N.Y.S. 883, 887 (N.Y. App. Div. 1897) (involving Attorney General's investigation into alleged monopoly activities; "[i]t is objected that this is an inquisition into the private affairs of private citizens"); Pynchon v. Day, 18 Ill. App. 147, 149–50 (Ill. App. Ct.) ("[The discovery process] should never be exercised so as needlessly to expose the private affairs of those in whose custody the books or writings may be. . . . [I]t is a very proper exercise of discretion . . . to refuse an inspection of those parts of the writings which . . . will tend unnecessarily to expose business or other private affairs with which the party seeking to make the inspection has no concern."), *aff'd*, 7 N.E. 65 (Ill. 1886).

administrative body, established by congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."[42] New York District Attorney Charles Bostwick complained in 1899 that his state "leads in [the] hampering of corporations by inquiring into their private affairs, as they would hardly dare to inquire into the private affairs of an individual to satisfy the public outcry against capital and to be used as the basis of political capital in impending campaigns."[43] Arizonans were deeply concerned about such inquiries, as well. The *Arizona Republican* repeatedly editorialized against legislative investigations during this period that it believed were going too far. In 1912, it criticized Congressman Arsene Pujo's investigative committee in these terms: "'We'll have no d— privacy here!' This is the attitude of congress, which is searching under the bed, jabbing holes in the wallpaper, and probing the chair cushions in efforts to find out what malignant forces are secretly preying on the community."[44] The committee was asking "questions which . . . are unnecessary, some of them unduly inquisitorial, laying bare the private business of banks' patrons."[45] Legislative investigations, the *Republican* warned,

> may be productive of more harm than good. Wholesale attacks upon corporate credit and private affairs excepting when fully justified ought to be deprecated. It becomes an interesting question as to where privacy ends and publicity begins. We are living in a period of inquisition. Institutions as well as individuals have some rights to privacy and ill-considered exposure may easily invite disaster and spread unwarranted distrust among the ignorant.[46]

The *Republican* was also understandably sympathetic to concerns raised by other newspapers that challenged a 1912 federal law forcing newspapers to disclose the identities of their subscribers.[47]

Closely connected to these concerns about legislative investigations were concerns about government regulation and control in general—a matter that grew in importance in light of Progressive proposals for regulatory agencies

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42. Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 478 (1894).

43. Charles F. Bostwick, *Legislative Competition for Corporate Capital*, 7 AM. LAW. 136, 140 (1899).

44. *No Privacy Tolerated*, ARIZ. REPUBLICAN, July 2, 1912, at 7.

45. *The Banking Inquisition*, ARIZ. REPUBLICAN, May 13, 1912, at 4.

46. Henry Clews, *Weekly Financial Review*, ARIZ. REPUBLICAN, Mar. 17, 1912, at 2.

47. *See Newspapers Take up Fight*, ARIZ. REPUBLICAN, Nov. 19, 1912, at 7 (noting condemnation of federal law forcing newspapers to turn over lists of subscribers' names as "perniciously inquisitorial" because "[n]either the government nor the public at large can be benefitted by the knowledge of the private business affairs and financial affairs of the owners of newspapers").

and an income tax that would oversee economic matters once regarded as private affairs.[48] In fact, by the time the Arizona Constitutional Convention convened, the phrase "private affairs" had become something of a catch-phrase on the part of conservatives who sought to resist government intrusion and oversight into the contractual arrangements of private businesses.[49] In 1888, for example, Secretary of State James G. Blaine scandalized Progressives when he told an audience that trusts (i.e., alleged monopolies) were "a private affair" in which the government had no right to intervene.[50] In their view, the trusts were not private affairs, because of the effects they had on the public. Twenty years later, Progressive Senator Albert Beveridge saw the question of government oversight of "evil financial interests that are wickedly profiting at the expense of the multitude" as a "movement for righteousness," and used the federal investigation of the beef industry as an

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48. *See, e.g.*, Henry W. Taft, *The Tobacco Trust Decisions*, 6 COLUM. L. REV. 375, 386 (1906) ("The commerce laws deal with a regulation of interstate trade entirely new a generation ago. Business dealings which had before been regarded as justifiable both in morals and law, became in a day *mala prohibita*.").

49. The Chicago *Blacksmiths Journal* parodied business owners' use of the phrase in a 1906 poem:

> At the mean instigation of kickers and grouchers
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> It seems that we're now to be made
>
> To exhibit all books and agreements and vouchers
>
> To show what's received and what's paid.
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> We are asked to disclose how the public is cheated.
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> The thought of it whitens one's hair!
>
> And this notwithstanding we've repeated:
>
> It's wholly a private affair.

Kennett Harris, *A Violation of Privacy*, BLACKSMITHS J., Aug. 1906, at 7.

50. DAVIS RICH DEWEY, THE AMERICAN NATION: A HISTORY—NATIONAL PROBLEMS 1885–1897, at 196 (1907); *see also* CHARLES A. BEARD, CONTEMPORARY AMERICAN HISTORY 1877–1913, at 134 (1921). *Life* magazine responded to Blaine:

> The voice of one crying from Maine,
>
> "Trusts are private affairs, I maintain."
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> But the people said, "So
>
> Is the ballot, you know,
>
> A private affair, Mister Blaine."

The Retort Positive, LIFE, Nov. 1, 1888, at 3.

example: "The Beef Trust said . . . that what it did was its own private affair, with which the public or the Government had nothing to do. But the public and the Government had to have something to do with it."[51]

A writer in the *Kentucky Law Journal* in 1882 sounded a similar note when he complained that price regulations were intrusive. "Governmental interference with every possible private interest and employment—exerted in every conceivable form, in the whole current of human affairs—has been habitually practised in some European countries," he declared. "What inducement to European emigration is more potent, than the wish to escape this constant and harassing public supervision over private affairs[?]"[52] And only months before the Arizona Constitutional Convention began its work, President William Howard Taft warned an audience in Colorado that the proposed federal income tax would necessarily lead to drastic government intrusions into the personal affairs of citizens: "[T]he power given to collectors of internal revenue and deputy collectors to look into a man's private affairs and to compel him to produce his private papers in order that his actual income may be ascertained" would be "harassing" and "inquisitorial."[53] Many in Arizona shared these concerns about government intervention in private matters.[54]

To these challenges, some Progressives replied with a striking degree of authoritarianism, arguing that all individual rights were subordinate to the interests of society. In an 1887 article on the relationship between democracy and socialism, then-Professor Woodrow Wilson wrote that "[t]he thesis of the state socialist is, that no line can be drawn between private and public

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51. Albert J. Beveridge, *The Issue*, SATURDAY EVENING POST, June 27, 1908, at 3–4.

52. Basil W. Duke, *Legislation Concerning Railroads*, 1 KY. L.J. 211, 212 (1882); *see also* ELIHU ROOT, EXPERIMENTS IN GOVERNMENT AND THE ESSENTIALS OF THE CONSTITUTION 17 (1913) ("The habit of undue interference by government in private affairs breeds the habit of undue reliance upon government in private affairs at the expense of individual initiative, energy, enterprise, courage, [and] independent manhood.").

53. Address at Denver, Colorado (Sept. 21, 1909), *in* 1 PRESIDENTIAL ADDRESSES AND STATE PAPERS OF WILLIAM HOWARD TAFT 245, 251 (1910); *see also* Elihu Root, Address at Saratoga Springs (Aug. 18, 1914), *in* THE UNITED STATES AND THE WAR: THE MISSION TO RUSSIA POLITICAL ADDRESSES 313 (Robert Bacon & James Brown Scott eds., 1918) ("The Trade Commission is to command the disclosure of all the private affairs of all industry, with the tremendous power of blackmail, destruction of credit, and ruin, which that involves. The Internal Revenue Bureau may carry inquisitorial proceedings into the private affairs of every individual.").

54. *See, e.g.*, *Borah's Bill Draws Senate Opposition*, ARIZ. REPUBLICAN, Jan. 31, 1912, at 1 (noting concerns that a federal bill "to investigate and report on all matters affecting the welfare of children" represented "an unwarranted intrusion upon private affairs"); *Which Should Win?* ARIZ. REPUBLICAN, Oct. 27, 1911, at 2 ("[T]he democratic party of Arizona[,] would make government the trustees of the people's private affairs. Its creed is the creed of paternalism. It believes everything and everybody should be regulated by law.").

affairs which the State may not cross at will," and concluded that this was a "radical, but not revolutionary" idea, because it was "only an acceptance of the extremest logical conclusions deducible from democratic principles."[55] The "fundamental theor[ies]" of "socialism and democracy are almost if not quite one and the same," he wrote, because "both rest at bottom upon the absolute right of the community. . . . Men as communities are supreme over men as individuals."[56] This vision—what historian Daniel Rodgers calls "the rhetoric of the moral whole"[57]—made no distinction between the privacy of intimate personal relationships or the privacy of economic transactions, but regarded all types of individual activity as subject to social control.

But more moderate Progressives denied that they were seeking government control over all private matters; they only wanted to regulate activities that affected society sufficiently to justify government intervention.[58] For example, the *Chicago Tribune* replied to Blaine's statement that trusts were private affairs by demanding to know "[i]f the sugar trust, for instance, is a purely private affair, why are its agents haunting the lobby in Washington to influence public legislation in their interests?"[59] And while the Arizona Constitution has long been described as a Progressive document, its authors actually took this more moderate path. They sought to balance a Progressive concern for regulation with traditional constitutional protections for free enterprise.[60] This is not surprising; written at the height of the so-called "*Lochner* era,"[61] the Arizona Private Affairs Clause reflects the authors' understanding of the prevailing legal doctrine of the time: that economic transactions were presumptively private matters, except where they affected the public so significantly that they warranted government intervention.[62]

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55. WOODROW WILSON, *Socialism and Democracy* (1887), *in* WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 78 (Ronald J. Pestritto ed., 2005).

56. *Id.*

57. DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 182 (1987).

58. *The Trend of the Times*, DRY GOODS ECONOMIST, May 24, 1913, at 31 ("'The public has an interest in the industries,' is the word that has gone forth. And what we have been wont to consider our most private affairs will receive the Government's scrutiny when an income law has been enacted.").

59. Reprinted in PUBLIC OPINION, Aug. 25, 1888, at 1.

60. *See* JOHN D. LESHY, THE ARIZONA CONSTITUTION 7–20 (2013).

61. What exactly the "*Lochner* era" is differs based on which scholar is speaking at the moment, but 1910 certainly qualifies, since it was only five years after *Lochner* was decided.

62. Thus, for example, when the proposal to forbid alien labor was debated, one delegate objected on the ground that "the only ground on which this could be sustained is the police power of the state, which allows laws relating to public health, public safety, or public morals. The legislature cannot under the guise of the police power arbitrarily invade the rights of the people."

The Arizona Constitution devoted whole articles to the regulation of corporations[63] and to labor relations,[64] but did so expressly, rather than assuming that the state had this authority or leaving the matter to inference. And while the Constitution prohibited certain forms of immigrant and child labor, and created a worker compensation system, it stopped short of setting an eight-hour work day or imposing other restrictions on commerce.[65]

Even more striking was the balance the framers struck when creating the state's Corporation Commission. They rejected as too intrusive a proposal that would have allowed the Commission to exercise "general supervision of all private corporations doing business in this state."[66] Insofar as this related to public service corporations, said Delegate Andrew Lynch, it was "all right," but "[i]f you stop and think, there are hundreds of little corporations, some doing a mercantile business or cattle companies," and they were "engaged in private pursuits" which they government should not be overseeing.

> For example, if you went into a partnership, what would you say when a state board came to investigate your partnership concern, that is, your particular private business[?] That is exactly what they

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RECORDS, *supra* note 5, at 552. *See generally* DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 69–95 (2011) (detailing protections for economic liberty in the 1910–1912 period); Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L.J. 355, 388–95 (2017) (explaining that Arizona's framers, as "Western Progressives" sought to limit "rent-seeking" and protect individual economic liberty).

63. *See* ARIZ. CONST. art. XIV; *id.* art. XV.

64. *See id.* art. XVIII. Some of these provisions proved highly controversial at the 1910 convention, particularly the prohibition on child labor, which critics feared would deprive people who lacked any other means of the opportunity for employment. The child labor provision passed only narrowly. RECORDS, *supra* note 5, at 440–48.

65. The constitution applied an eight-hour work day only to public employees and businesses working on public contracts. *See* ARIZ. CONST. art. XVIII. In 1904—after ratification of the Washington Constitution, but before the drafting of the Arizona Constitution—the Washington Supreme Court rejected a legal challenge to a restriction on the number of laboring hours in a work day in *In re Broad*, because the restriction in question applied to a business that was working on a public contract, and "the state . . . had a right to do their work in any manner in which they saw fit, and . . . to compel those with whom they contracted to perform the public work in the same manner." 78 P. 1004, 1004–06 (Wash. 1904). Consequently, "there was no question of violation of private right involved." *Id.* at 1006.

In 1915, the Arizona Supreme Court upheld a state law forbidding women from working more than eight hours a day. *See* State v. Dominion Hotel, 151 P. 958, 962 (Ariz. 1915). Relying on *Lochner v. New York*, 198 U.S. 45 (1905), and *Muller v. Oregon*, 208 U.S. 412 (1908), it concluded that regulations that would be unconstitutional with regard to "male operatives" could be constitutional "when female operatives are affected." *Dominion Hotel*, 151 P. at 960.

66. Substitute Proposition 113, *in* RECORDS, *supra* note 5, at 1276.

> could do under this proposition, and I do not believe the members really mean that this corporation commission shall have charge of all private corporations. The intent certainly must be these public service corporations in which the public is interested.[67]

When advocates of the proposal resisted, Lynch doubled down: "[T]he business of a private corporation is not a matter of public concern."[68] While the state should oversee public service corporations, it should not intrude into private businesses.

> There is not a member on this floor, but has some little private business concern . . . . As the public, you have nothing to do with those things; it is none of your business. I want to impress upon you again that this is not a public matter . . . . Why would we expend money as the public to investigate private affairs?[69]

After further debate—some of which has been lost—the delegates chose to strike out the entire proposal.[70] They replaced it with wording that allows the Commission to inspect the "books, papers, business, methods, and affairs" of corporations that sell stock to the public, and of public service corporations.[71] At the same time, they drafted what became Article XIV of the Constitution, which requires that the "records, books, and files" of all "building and loan associations, trust, insurance, and guaranty companies" be "at all times" open to the "full visitorial and inquisitorial powers of the State, *notwithstanding the immunities and privileges secured in the declaration of rights of this Constitution*."[72] This latter phrase, pointing to the Private Affairs guarantee, shows that the delegates viewed the Constitution as barring public inspections except where specifically authorized for particular types of companies. The initial proposal, said delegate Mulford Winsor, would have "put 99 percent of all corporations out of business," but this final arrangement created "reasonable restrictions" instead.[73]

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67. *Id*. at 613.
68. *Id.* at 614.
69. *Id.*
70. *Id.* at 615.
71. ARIZ. CONST. art XV, § 4.
72. ARIZ. CONST. art XIV, § 16 (emphasis added).
73. RECORDS, *supra* note 5, at 613. This did not satisfy all critics. In a long attack on the proposed constitution, Tucson Judge Edwin Jones objected that the Commission had excessive power to demand information from publicly traded corporations, but not enough power to investigate close corporations. *Reasons Why the Constitution of Arizona Should Not Be Ratified*, ARIZ. DAILY STAR, Feb. 5, 1911, at 9.

2. Intimacy and Personal Rights

While government investigation and oversight of business affairs was the primary consideration in formulating the Private Affairs Clause, other factors also played a role. Progressives sought not only to regulate businesses but also to regulate personal moral behavior—forbidding divorce, adultery, prostitution, and, of course, alcohol.[74] The protection for intimacy rights that are today viewed as basic constitutional "privacy" actually originated in legal controversies over economic liberty,[75] and questions over what would today be considered personal freedoms were typically debated in their economic aspects during this period. Rarely were rights of sexual autonomy ever addressed publicly.[76] Thus matters of sexual privacy were never debated at the Arizona Constitutional Convention. Instead, the primary focus of personal privacy debates during this period was over the prohibition of alcohol, a movement that had gone on for decades already and that triumphed statewide in 1914 with an amendment to the new state's Constitution.

Opponents viewed Prohibition as an assault on a person's private affairs.[77] And the individual's right to take intoxicants in his home was widely regarded as within the scope of his private affairs. In 1886, a federal court in Oregon ruled that a Portland ordinance against opium dens did not authorize

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74. *See* MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1910, at 90–92, 267–74 (2003). Even debates over these more intimate dimensions of privacy tended to involve economic affairs; the popularity of liquor, wrote one muckraking reporter, was due to "commercial forces" that were "fighting to saturate the populations of cities" with alcohol. RICHARD HOFSTADTER, THE AGE OF REFORM 289 (1955) (quoting George Kibbe Turner, an investigative reporter for *McClure's* magazine).

75. *See* MAYER, *supra* note 62, at 89–91.

76. *See generally* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA ch. 10 (3d ed. 2010). Arizona had an anti-miscegenation law from territorial days, which was declared unconstitutional in 1959 and repealed in 1962. *See* Roger D. Hardaway, *Unlawful Love: A History of Arizona's Miscegenation Law*, 27 J. ARIZ. HIST. 377, 386–88 (1986); Paul Rees, *A Civil Rights Victory, Pre*-Loving, ARIZ. ATT'Y, July/Aug. 2017, at 84. There is no record of it being disputed on Private Affairs Clause grounds. Nor was polygamy discussed at the Convention or afterwards; Congress had declared in its enabling act that the Arizona Constitution must forbid polygamy, and that requirement was complied with without discussion. *See* LESHY, *supra* note 70, at 408.

77. *See, e.g.*, *Wattersons Lamentation Proclamation,* ARIZ. DAILY STAR, June 27, 1908, at 3. ("Prohibition is the very essence of puritanism . . . . It is laid in the belief that the government may regulate the personal life and private affairs of the citizens."); *Which Western States Will Go Dry?*, SUNSET, Nov. 1914, at 860 ("[O]pponents of prohibition . . . consciously or unconsciously resent[] state interference in what [they] consider [their] private affairs."); *see also Alabama's Antiprohibition Vote*, 39 LITERARY DIG. 1050, 1051 (1909) (quoting Indianapolis newspaper editorial saying that opponents of Prohibition believed "there were limits beyond which the State should not be allowed to go in its effort to control personal habits and the management of domestic and personal affairs").

the prosecution of a person who smoked opium in his own home.[78] "If the language used . . . concerning opium smoking, was used in regard to whisky drinking or tobacco smoking," the court said, "no one would pretend that it authorized the punishment of a person who drank or smoked occasionally or habitually in the privacy of his own or even in his friend's house, and not in a place or 'joint' kept for that purpose."[79] The government could certainly "punish opium or tobacco smoking or whisky drinking on the street, or other public place," but to intrude into the home was something the court could not allow.[80]

The authors of the Arizona Constitution, concerned to avoid a controversy that might delay statehood,[81] chose not to take any position on Prohibition, but instead to leave it to the initiative and referendum process at a later date.[82] And when the campaign to amend the Constitution to prohibit alcohol began, Prohibitionists sought to defuse the criticism that they were seeking unprecedented intrusion into private matters by phrasing their proposal as forbidding the *manufacture and sale* of liquor, rather than its possession and use. "This omission," writes one historian, enabled prohibitionists "to claim plausibly that the law aimed to extinguish the liquor trade but not a citizen's right to consume his or her tipples of choice at home."[83]

Thus the Prohibition Amendment voters adopted in 1914 did not forbid possession or private use of alcohol, but only the manufacturing of it, or its introduction into the state. As a result, arguments over prohibition in Arizona made no reference to the Private Affairs Clause, not only because, as a constitutional amendment, it would necessarily supersede the Clause, but also because, in theory, prohibition did not forbid private conduct or intrude into private affairs; it only prohibited the importation and sale of liquor. In 1916, the Arizona Supreme Court indeed ruled that that the Prohibition Amendment did not forbid people from possessing or drinking alcohol.[84]

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78. *Ex parte* Ah Lit, 26 F. 512 (D. Or. 1886).

79. *Id.* at 514.

80. *Id.* at 515.

81. President Taft had recently given a speech strongly advising the Arizona framers not to include in the constitution ordinary matters better suited to legislation. LESHY, *supra* note 70, at 9; L.J. Abbott, *The "Zoological Garden of Cranks*,*"* 69 INDEP. 870, 870 (1910).

82. *See, e.g.*, RECORDS, *supra* note 5, at 411–17.

83. Harry David Ware, Alcohol, Temperance and Prohibition in Arizona 238 (Dec. 1995) (unpublished Ph.D. dissertation, Arizona State University) (on file with author); *see also id.* at 278 (advocates of prohibition claimed that "any individual should be able to bring in any quantity [of alcohol] for personal use.").

84. Sturgeon v. State, 154 P. 1050, 1053 (Ariz. 1916). A year later, however, the Washington Supreme Court declared that that state's prohibition law did, indeed, make it a crime to make wine on one's own property for personal consumption. State v. Fabbri, 167 P. 133 (Wash.

Yet Anti-Prohibitionists' fears of the impact it would have on privacy soon proved well founded. A follow-up initiative in 1916 forbade possession of liquor, as well—but even here, enforcement foundered on Arizonans' hostility to the notion of police searches. One proposal that would have allowed warrantless home searches proved wildly unpopular; dubbed "the search and seizure act" in the press,[85] it was defeated overwhelmingly in the legislature after one Senator labeled it "the ravings of a prohibition maniac."[86] New legislation was later passed that lacked the provisions authorizing warrantless searches.

Still, the Prohibition era did witness "a proliferation of search and seizure law" simply "because there was a proliferation of searches and seizures."[87] One Oklahoma court complained in 1923 of "[t]he insidious encroachments upon the liberty and private affairs of the individual by boards, commissions, examiners, detectives, inspectors, and other agents of the state and municipalities"—encroachments that had become so prevalent that "self-respecting citizens, in urban communities especially, do not know in the course of a day how many rules or regulations they have violated."[88] It warned that

> [i]f these governmental agencies, contrary to the letter and the spirit of our Constitution, are encouraged or condoned by the courts in their invasion of the privacy of homes, offices and places of business, forcibly and without invitation, for the purpose of procuring evidence to convict one of some misdemeanor, the practice followed to its logical conclusion will make our vaunted freedom a mere pretense.[89]

Not long after nationwide Prohibition went into effect, Washington State courts reacted to the government's increasingly invasive surveillance

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1917). The *Yale Law Journal* viewed this as "the first [case] actually holding it constitutional to forbid the manufacture of liquor for personal use." *Constitutional Law—Due Process—Prohibition of Manufacture of Intoxicating Liquors*, 27 YALE L.J. 286, 286 (1917).

85. *Little Arizona Items*, CASA GRANDE DISPATCH, Mar. 5, 1915, at 2; *99 Bills Introduced in Legislature*, ARIZ. DAILY STAR, Feb. 1, 1915, at 2.

86. Ware, *supra* note 83, at 280; *see also Drachman Bill Is Unpopular in City*, BISBEE DAILY REV., Jan. 21, 1915, at 3 (warrantless search provisions would be unconstitutional); *More Drastic Dry Legislation Than Ever Is Proposed*, BISBEE DAILY REV., Jan. 14, 1915, at 4 ("Probably the most drastic feature of the law is the one that makes it a crime to keep liquor in a private home for the personal use of the owner . . . and also empowers officers to break into a house in search of such evidence without a search warrant.").

87. Wesley M. Oliver, *Prohibition's Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 502 (2018).

88. Gore v. State, 218 P. 545, 549–50 (Okla. Crim. App. 1923).

89. *Id.* at 550.

practices by taking the first steps toward adopting a more protective interpretation of that state's Private Affairs Clause: It adopted the exclusionary rule as a matter of state law, long before federal courts did the same.[90] Arizona courts, however, did not get around to discussing the exclusionary rule until 1963, and then only as a matter of federal law.[91] In fact, even in *State v. Bolt*, the 1984 case that acknowledged that the state Private Affairs Clause provides greater protections than the federal Fourth Amendment, the Arizona Supreme Court refused to endorse the exclusionary rule as a matter of state law—and acknowledged that, as a result, it remained an open question whether the rule would apply "under the Arizona constitution, should that rule be abandoned by the United States Supreme Court."[92]

3. Vigilante Justice, Surveillance, and Lawful Authority

A final factor that may have played a role in the phrasing of the Private Affairs Clause was the frequency of vigilante or mob rule in the frontier west. During their territorial stages, both Washington and Arizona had experienced violent vigilante "justice."[93] As a sparsely populated frontier state, Arizona was often witness to informal law-enforcement processes or outright lawbreaking by government officials such as sheriffs who would encourage or participate in mob activity. As historian Thomas Sheridan notes, "legal proceedings" in Arizona in the 1880s "were often little more than cloaks for the machinations of the power hungry, and lawmen were little more than gunmen."[94]

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90. State v. Gibbons, 203 P. 390 (Wash. 1922); *see* Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 473 (1986).

91. State v. Pina, 383 P.2d 167, 168 (Ariz. 1963).

92. State v. Bolt, 689 P.2d 519, 528 (Ariz. 1984).

93. In 1882, a mob lynched 19-year-old horse herder Oldie Neil near Spokane, and another mob near Seattle lynched James Sullivan and William Howard, two men suspected of murder. MICHAEL JAMES PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1847–1947, at 30–31 (2006). And the vigilante justice of frontier Arizona hardly needs mention. *See, e.g.*, LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (2001). Certainly the most infamous vigilante organization in Arizona history is the Tombstone Public Safety Committee, which played a role in the violence that climaxed in the gunfight at the O.K. Corral. *See* JEFF GUINN, THE LAST GUNFIGHT 5 (2011). Such organizations at times competed with lawful authority, *see id.*, and at other times worked in concert with lawful authority to accomplish unlawful ends. Even after statehood, vigilante action—including with participation by government officials—sometimes occurred in Arizona. *See, e.g.*, THOMAS E. SHERIDAN, ARIZONA: A HISTORY 191–93 (rev. ed. 2012).

94. SHERIDAN, *supra* note 93, at 160.

Vigilante proceedings run the danger of invading private rights, particularly when officials cooperate with or encourage vigilantes in searching property, harassing unwanted minority groups, or executing suspects—all of which was known to have happened within the lifetimes of the delegates to both Washington's and Arizona's constitutional conventions. In *Sanders v. State*,[95] the Georgia Supreme Court considered whether a property owner could sue an armed mob who came onto his property "without authority of law, in search of somebody against whom they had some cause of quarrel."[96] And in *Weyer v. Wegner*,[97] the Texas Supreme Court allowed a trespass suit to proceed against a group of private parties who went onto the plaintiff's property to search for stolen cowhides; one member of the mob was a justice of the peace who wrote out a search warrant while participating in the unlawful search. Given such concerns, it was sensible for the authors of the Washington and Arizona Constitutions to provide that invasions of the home or of a person's private affairs must be done by *lawful* authority.[98]

In the 1883 edition of his influential treatise *Constitutional Limitations*, Thomas Cooley addressed the issue of privacy, searches, and informal and intrusive investigative procedures in a way that encompasses many of the concerns at issue then. Warrants were "not allowed" in anticipation of a crime, Cooley wrote, but only where evidence existed of a crime already committed.[99]

> Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction.[100]

Legislatures could enact statutes that would authorize, in "extreme cases," the "breaking and entering a man's house, and the examination of books and papers with a view to discover evidence of crime," but even then, it was generally preferable for a crime to

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95. 60 Ga. 126 (1878).

96. *Id.* at 128. The mob ended up leaving peacefully after the clever property owner invited them to have breakfast. *Id.*

97. 58 Tex. 539 (1883).

98. The Arizona Constitution reflects this concern in other in clauses, too—ones that appear to offer little more than redundant requirements that the state follow the law, such as Article VI Section 22, which stated that "[t]he pleadings and proceedings in criminal causes in the courts shall be as provided by law." ARIZ CONST. art VI, § 22 (amended 1960).

99. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 371 (5th ed. 1883).

100. *Id.* at 371–72.

> go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons,—and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others.[101]

Cooley added lengthy footnotes citing "[i]nstances" in which "ministerial officers take such liberties in endeavoring to detect and punish offenders, as are even more criminal than the offenses they seek to punish." These included "the employment of spies and decoys to lead men on to the commission of crime," or "prying into private correspondence." Even though such activities did not involve the same kinds of violent intrusions as a forcible entry into a home, they still "cannot be too often or too strongly condemned."[102]

To summarize, "private affairs" was a contested category in the period between the 1880s and 1910s, just as it is now. As in our own day, and as with many other legal concepts, the phrase seems insusceptible of a rote, literalist type of definition[103] or the type of "exact-list-of-items referred-to"

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101. *Id.* at 372.

102. *Id.* at 372–73 n.2. Among other cases, Cooley cited *State v. Litchfield*, 58 Me. 267 (1870), in which the Maine Supreme Judicial Court held that a telegraph operator could be compelled to testify as to the contents of a telegraph sent to someone else. Cooley regarded this predecessor to today's "third party doctrine" as "directly condemned by the Constitution." *Id.*

103. As a 1902 law review article put it, "[i]t is quite impossible to define with anything like precision what the right of privacy is or what its limitations are, if any." Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 445 (1902). The Supreme Court of Missouri referred to privacy in 1880 as covering "[m]atters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence," which the public "had no right to obtain," and disclosure of which would lead to "the annoyance and shame of the only persons interested." *Ex parte* Brown, 72 Mo. 83, 94–95 (1880). Two years later, the Massachusetts federal district court drew the line between public and private in a defamation case by pointing to the question of whether the parties involved could, in principle, be ascertained: the question the safety of a railroad bridge was a public question because

> [t]he public . . . is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers . . . are the public, in respect to the safety of the bridge, *and as they cannot be pointed out*, you may discuss the construction of the bridge in public, though you thereby [utter statements that might otherwise slander] . . . the builder.

Crane v. Waters, 10 F. 619, 621 (C.C.D. Mass. 1882) (emphasis added). But where the persons whose interests were involved "are easily ascertained," the matter becomes private. *Id.* Lowell analogized the question to "the right of legislative interference," because "[t]he legislature cannot interfere in the purely private affairs of a company, but it may control such of them as affect the public," because "the public, consisting of the unascertained persons who will be asked to take

application.[104] The term "private affairs" meant and still means "not public."[105] But at the time it was written, the term was understood at least cover (a) the traditional security for personal affairs afforded by longstanding property and contract law, guarantees of religious freedom, and similar matters, (b) protections against intrusive governmental investigation powers, such as legislative subpoenas and the abuse of discovery in litigation, and, possibly, (c) the relatively new Warren/Brandeis concept of privacy, which involved unwanted publicity and other privacy torts. One thing is clear: The Private Affairs Clause, by reference to both "private affairs" and also "home[s]," was intended to cover two different things: in addition to home protection, it was designed to protect private personal information against unjustified government investigation and surveillance.

II. THE PRIVATE AFFAIRS CLAUSE CONTRASTED WITH THE FOURTH AMENDMENT

A. The Linguistic Differences

The Fourth Amendment is longer and uses narrower wording than the Washington and Arizona Private Affairs Clauses. It protects "[t]he right of the people to be secure in their persons, houses, papers, and effects" and protects that right "against unreasonable searches and seizures."[106] It then provides for the conditions under which warrants may be issued. Federal courts have interpreted this Amendment in ways that are sometimes not logically defensible.[107] Some have argued that the "right of the people" referred to is a collective, not an individual right.[108] It applies to persons, houses, papers, and effects, and this has led some justices to conclude that its

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shares in it, and those through whose land it will pass or whose business will be helped or hindered by it," was affected. *Id.*

104. TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM 153 (2015) (critiquing originalist scholars who seek a list of exact referents for any legal term rather than the open-ended concepts to which those terms refer).

105. *See, e.g.*, 3 F. STROUD, THE JUDICIAL DICTIONARY OF WORDS AND PHRASES JUDICIALLY INTERPRETED 1557 (2d ed. 1903) (defining "private purpose" as "[see] public purpose.").

106. U.S. CONST. amend. IV.

107. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 69–71 (1998).

108. *See, e.g.*, *id.* at 64–68; David Gray, *Dangerous Dicta,* 72 WASH. & LEE L. REV. 1181 (2015).

protections extend only to the individual before the court.[109] It also forbids only *unreasonable* searches and seizures, not other types of intrusions which might fall short of searching and seizing. Major Fourth Amendment cases in recent years have focused on whether an intrusion, such as using an infrared camera outside a home, or checking cell phone data records, constitutes a search or not.[110] Major precedents have focused on whether certain types of government-issued search authorizations, such as administrative subpoenas, satisfy the warrant requirement.[111]

The wording of the Washington/Arizona version is broader and more general. It forbids not just searches and seizures, but "disturbances," not just of persons, houses, papers, effects, but of a person's "private affairs, *or* his home."[112] The provision also forbids *invasions*, as opposed to searches and seizures.[113] And the exception is for searches that are authorized by law—unlike the Fourth Amendment, which has been interpreted as meaning that warrantless searches are prima facie unreasonable, unless some exception applies.[114]

What significance do these distinctions have? First, the Clause refers specifically to *private affairs,* a term absent from the analogous provisions of other state constitutions of that era. As noted above, a reasonable observer during the 1880–1910 period would have regarded "private affairs" as referring to the traditional property and contract principles forbidding trespass, regulation, or unreasonable searches by the government, as well as the then-new principles against publicizing private facts, unauthorized publication of photographs, and the limitations on legislative or judicial discovery at issue in the *Kilbourn* line of cases. By contrast, the term "privacy" did not begin to appear in state Constitutions until the 1970s, when it was clearly understood as responding to federal jurisprudence regarding the right to privacy and therefore as referring to intimacy rights as well as traditional prohibitions on search and seizure.[115] Notably, the Private Affairs

109. Carpenter v. United States, 138 S. Ct. 2206, 2227 (2018) (Kennedy, J., dissenting) ("Fourth Amendment rights, after all, are personal. The Amendment protects '[t]he right of the people to be secure in their . . . persons, houses, papers, and effects'—not the persons, houses, papers, and effects of others.").

110. Kyllo v. United States, 533 U.S. 27 (2001); *Carpenter*, 138 S. Ct. 2206 (2018).

111. *See, e.g.*, Camara v. Mun. Court of S.F., 387 U.S. 523 (1967); Abel v. United States, 362 U.S. 217 (1960).

112. ARIZ. CONST. art. II, § 8 (emphasis added).

113. ARIZ. CONST. art. II, § 8.

114. Katz v. United States, 389 U.S. 347, 357 (1967).

115. *See* ALASKA CONST. art. I, § 22 (amended 1972); CAL. CONST. art. I, § 1 (amended 1974); FLA. CONST. art I, §§ 23 (amended 1980), 12 (amended 1982); HAW. CONST. art. I, §§ 6, 7 (amended 1978); ILL. CONST. art. I, §§ 6, 12 (1970); LA. CONST. art. I, § 5 (amended 1974);

Clause eliminates any ambiguity that might suggest that it protects a collective instead of an individual right. It is plainly focused on the individual.

Second, the 1910 edition of *Black's Law Dictionary* defined "disturbance" as "any act causing annoyance, disquiet, agitation or derangement to another, or interrupting his peace, or interfering with him in the pursuit of a lawful and appropriate occupation."[116] An 1895 Washington State criminal case, in which a defendant was charged with willfully disturbing a meeting for worship, declared the term's "well-known legal significance" by quoting from John Prentiss Bishop's treatise on criminal law.[117] Disturbance, it said, meant "any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation, in whole or in part.'"[118] "Invaded" is likewise broad; the 1910 *Black's* defines "invasion" as "[a]n encroachment upon the rights of another,"[119] which appears to cover far more than the narrower Fourth Amendment references to "searches" and "seizures."

Finally, the clause forbids invasions of private affairs "without lawful authority." This term has been subject to much wrangling, but it is best interpreted as referring either to a valid warrant or to preexisting statutory or common law principles authorizing an invasion—as opposed to government officials engaging in freewheeling investigations or general, suspicionless inquiries,[120] or to the unlawful or quasi-legal acts of vigilantes.

But the term "without lawful authority" is also *open-ended* in a way that the Fourth Amendment's language arguably is not.[121] The Fourth Amendment refers to "*the* right" to be secure, and specifically refers to warrants—which

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MONT. CONST. art. II, § 10 (amendment adopted 1972); S.C. CONST. art I, § 10 (amendment adopted 1971).

116. *Disturbance*, BLACK'S LAW DICTIONARY (2d ed. 1910).

117. State v. Stuth, 39 P. 665, 666 (Wash. 1895).

118. *Id.* (quoting 2 JOHN PRENTISS BISHOP, COMMENTARIES ON CRIMINAL LAW § 309 (8th ed. 1892)); *see also* State v. Mancini, 101 A. 581, 583 (Vt. 1917) (relying on Bishop as well to conclude that disturbance means the breach of "public order or tranquility").

119. *Invasion*, BLACK'S LAW DICTIONARY, *supra* note 116.

120. Johnson & Beetham, *supra* note 8, at 448, 451–52.

121. In requiring "lawful authority," the Clause in some respects overlaps with the Due Process of Law Clause, ARIZ. CONST. art. II, § 4, which requires, at a minimum, that all government actions be pursuant to lawful authority. *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, or The Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283 (2012). This overlap is unsurprising, since the due process of law requirement overlaps with many constitutional provisions. *See id.* at 312–14. But the Due Process of Law Clause refers only to life, liberty, or property, and the Private Affairs Clause extends its protections to other things that qualify as "private affairs."

invites an historical inquiry into what "the right" was in 1789, and what the requirements for warrants were at that time.[122] The Arizona Constitution's privacy provision, by contrast, does not include the word "the," and makes no reference to warrants. This suggests that a historically oriented focus on defining the Clause's protections is of limited value in understanding the scope of its protection.

Moreover, the Arizona provision does not include the word "unreasonable." In one sense, "lawful authority" is a stricter standard than reasonableness, since nothing that is unreasonable can be lawfully authorized,[123] whereas something can be reasonable even if it has not been authorized by law. That means that an act that is reasonable but unauthorized—good faith reliance on an invalid warrant, for instance—could satisfy the Fourth Amendment's standard but *not* the Private Affairs Clause, which is focused on *lawfulness* instead of *reasonableness*. On the other hand, the wording of the Private Affairs Clause might authorize warrantless searches in some circumstances, if some other type of valid legal authorization exists—the border exception, for example.[124]

What's more, the "lawful authority" requirement provides an express *judicial* check on intrusions into private affairs.[125] This language resists any interpretation that aims at "judicial restraint."[126] Instead—like some other

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122. Judges and academics have argued, for example, that by reference to "*the* privilege of habeas corpus," the Constitution protects only the writ as understood in 1789. *See, e.g.*, Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 580–82, 604 (2008) (emphasis added). Others have argued that the First Amendment's reference to "*the* freedom of speech" confines the First Amendment's protections to those freedoms of speech that were recognized in 1791. *See* David Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 751 (1987) (emphasis added).

123. *See* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 71–121 (2014).

124. York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995, 1004 (Wash. 2008).

125. Johnson & Beetham, *supra* note 8, at 466.

126. In a 1989 article, Steven Twist and Len Munsil urged Arizona courts not to "invent" "new" individual rights via interpretation of the state constitution. *See* Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in the State Constitution*, 21 ARIZ. ST. L.J. 1005, 1048 (1989). But their arguments hinged almost entirely on their policy-driven concern that state power was being hindered by legal protections for individual rights. *See, e.g.*, *id.* at 1012 (arguing that "[t]rue federalism . . . has been irreparably harmed by the 20th-century invention of the incorporation doctrine"). These arguments for "judicial restraint" lack a foundation in legal principle. *See generally* SANDEFUR, *supra* note 123, at 121–55. The contention that the Arizona Constitution's framers weren't that worried about individual rights, *see* Twist & Munsil, *supra* note 126, at 1015, lacks a basis in history, and the assertion that "textual variance" between the federal and Arizona constitutions is *not s*ufficient "to justify a different construction," *id.* at 1018, is puzzling. In fact, if two documents contain different words, that is alone both necessary and sufficient to justify reading them as meaning different things.

provisions of the Arizona Constitution—it anticipates an engaged judiciary that will ensure that intrusions into private affairs are not only reasonable, but also authorized by principles of law.

B. Independent State Jurisprudence

Before examining how Arizona courts have interpreted the state's Private Affairs Clause, it is worth examining how other states have approached the question of when they should interpret their constitutions differently from the federal Constitution—a question that often arises in the context of search and seizure law. We will look at Illinois, where the constitution uses language that is similar, but not identical, to the federal Constitution, then at Iowa, where the state and federal constitutions are identical, then at Alaska, where the two are wholly different.

1. When Should States Diverge from Federal Precedent?

State courts have devised four approaches to deciding whether and how it is proper to apply their state constitutions in ways that differ from federal precedent. These have been termed the "primacy," "interstitial," "dual sovereignty," and "lockstep" models.[127] Under the primacy approach, a state court looks to its own constitution first, and only considers federal law if state law is not dispositive.[128] Under the interstitial approach, federal law is presumed controlling, and the court looks to state law only if federal law cannot resolve the case.[129] The sovereignty approach looks at both federal and state law even where federal law could determine the entire case.[130] The lockstep approach simply follows federal precedent.[131]

Because the Arizona Private Affairs Clause uses wholly different wording from the Fourth Amendment, the primacy approach is the only approach that makes sense. It is illogical to rely on federal interpretations of a federal

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Only where there is some reason to believe that different wording was *not* intended to be significant is a reader ever justified in disregarding the *prima facie* distinctions between two written texts. For a court to refuse to do so based on a preferred *policy* outcome—that is, for a judge to disregard the textual differences between two constitutions in order to avoid a result the judge personally wishes to avoid—would seem to be the very definition of "judicial activism." *See* Timothy Sandefur, *The Dogma of Deference*, 18 TEX. REV. L. & POL. 121, 137–41 (2013).

127. West v. Thomson Newspapers, 872 P.2d 999, 1005 (Utah 1994).

128. *Id.* at 1006.

129. *Id.*

130. *Id.*

131. *Id.*

constitutional provision that is not phrased in the same way. Thus in *State v. Gunwall*,[132] a Private Affairs Clause case, the Washington Supreme Court set forth a list of factors to be considered when deciding whether the state constitution should be read as protecting a broader set of rights than the federal Constitution does.[133] These factors include the difference in the language used; the history behind the language; state law that preexisted the adoption of the state provision in question; structural differences between the federal and state governments that might be relevant; and any "matters of particular state or local concern."[134] It was necessary to address these factors, the court declared, "to the end that our decision[s] will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court."[135]

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132. 720 P.2d 808 (Wash. 1986).

133. In *State v. Hunt*, 450 A.2d 952, 962–69 (N.J. 1982) (Handler, J., concurring), Justice Handler set forth a virtually identical set of factors for determining when to apply the state Constitution differently from the federal Constitution. In *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), the Pennsylvania Supreme Court set out another multi-factor test.

134. *Gunwall,* 720 P.2d at 811. James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution,* 66 WASH. L. REV. 1099, 1108–17 (1991), offers a strong critique of this test. He offers a simpler, more straightforward "three-step process" instead, which would begin with all constitutional issues being asserted under the state Constitution, then secondly, considering federal or other state precedent when relevant, and finally that the court should "ensure that its decision upholds the minimum level of civil liberties ensured by the federal Constitution." *Id.* at 1117.

135. *Gunwall,* 720 P.2d at 812–13. The reference to the United States Supreme Court here is puzzling. While state courts arguably owe deference to the state *legislature*, and can be *preempted* by Congress, they owe no deference, when interpreting state law, to federal court interpretations of federal law. Thus, there is no sense in which a state court could improperly "substitute" its "notion of justice" for that of the United States Supreme Court, which has neither authority nor responsibility for adopting either a generalized "notion of justice" for the nation or imposing its understanding of state law on state courts.

Gunwall may have had in mind circumstances such as were presented in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), in which the Minnesota Supreme Court, interpreting the state constitution's equal protection requirement, held that differential jail sentences for crack possession and cocaine possession were unconstitutional under the state constitution despite federal courts having held that it does not violate the federal Constitution. But if so, the aspersion is even more misplaced. It is *proper* for state courts to "substitute" their own "notions of justice" at the state level when interpreting state law and addressing circumstances that affect the state; that's just what state courts are meant to do. As the Minnesota justices explained, doing otherwise would "undermine the integrity and independence of our state constitution and degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens." *Id.* at 889. That view contrasts remarkably with the Arizona Supreme Court's willingness to outsource the state law of the exclusionary rule to federal courts. *See* State v. Bolt, 689 P.2d 519, 528 (Ariz. 1984) ("[W]e propose, so long as possible, to keep the Arizona exclusionary rule uniform with the federal. . . . We do not reach the question of the viability of an

All of these factors weighed in favor of an independent state jurisprudence of the Private Affairs Clause: The language of the two constitutions was entirely different; the authors of the state Constitution specifically refused to adopt the language of the Fourth Amendment; state statutes accorded unusually strong protections to the privacy of telecommunications; differences in state and federal law favored a more protective application of the Private Affairs Clause; and the policy concerns of protecting individual privacy outweighed any need for national uniformity.[136]

States whose constitutions use language similar to, but not identical with, the federal Constitution, are face a more complicated calculus. In *People v. Caballes*, a case involving warrantless searches, the Illinois Supreme Court concluded that it should follow what it called a "limited lockstep" approach.[137] That state's constitution uses the Fourth Amendment language, with the addition of an amendment dating to 1970: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."[138]The Illinois court fashioned its own test to decide whether and how to interpret this provision differently than the Fourth Amendment.[139] Where the state constitution's language is identical to a federal provision, it said, judges should follow federal precedent.[140] Where the two constitutions differ entirely, they would apply wholly independent review.[141] And where the two are similar but not identical, courts should consult federal jurisprudence, but not necessarily follow it.[142]

This seems unobjectionable at first, but it leaves important questions unanswered. First, federal courts often adopt interpretations of federal constitutional language that are consciously designed to preserve the opportunity for state courts to fill in the gaps.[143] For a state court to do the same with its own state constitution would, of course, be logically incoherent,

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exclusionary rule under the Arizona constitution, should that rule be abandoned by the United States Supreme Court.").

136. *Gunwall*, 720 P.2d at 814–15.

137. *People v. Caballes*, 851 N.E.2d 26, 43 (Ill. 2006).

138. ILL. CONST. art. I, § 6.

139. *See* James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine*, 62 DEPAUL L. REV. 63, 116 (2012).

140. *See Caballes*, 851 N.E.2d at 32.

141. *See id.* at 31.

142. *See id.* at 32.

143. *Cf.* Kelo v. New London, 545 U.S. 469, 489 (2005) (supporting broad federal interpretation of "public use" in eminent domain by observing that states can craft more protective eminent domain law).

since the state would then be copying a federal jurisprudence that was designed to maximize state independence. Thus for states, even in cases where state and federal constitutional language is identical, to copy-and-paste federal jurisprudence can result in a degree of imprecision not warranted by the state constitution and dangerous to constitutional values.

Second, this approach does not explain why state courts should follow federal precedent that *postdates* the state's constitution. Even if the wording of both constitutions is identical, there is no constitutional justification for following federal precedent that only originates *after* the people of a state ratify their state constitution.[144] If a state constitution, written in, say, 1887, copies word-for-word a federal provision written in 1787, and the federal courts fashion an interpretation of that language in 1987, why should the state courts—interpreting their state constitution—follow the 1987 federal interpretation? Courts can presume that the people who ratified the 1887 state Constitution expected the precedent in existence in 1887 to apply, and perhaps even that the *federal* precedent in existence then would apply. But the people cannot have anticipated the 1987 gloss.[145]

Third, even where the wording of federal and state constitutional provisions is identical, state constitutions often contain *other* provisions that differ from federal wording, but overlap or interact with the identical provisions. For example, the New York Constitution includes both a Due Process of Law Clause and a Law of the Land Clause[146]—notwithstanding the fact that "law of the land" has long been regarded as synonymous with due process of law.[147] Should New York courts follow the federal judiciary's interpretation of the federal Constitution's Due Process of Law Clause when interpreting their own state version of *that* Clause—and then *not* do so when interpreting the state's Law of the Land Clause? Or should they follow federal Due Process precedent when interpreting both? And how will this choice affect the interaction between the two state clauses? This problem can become quite overwhelming in some cases. The Missouri Constitution

144. Consider the Minnesota Supreme Court's decision in *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018), which addressed the constitutionality of a dog-sniff just as the Illinois Supreme Court did in *Caballes*. The *Erdstrom* court refused to read the state Constitution differently from the federal Constitution because the Minnesota search provision "is 'textually identical' to the Fourth Amendment." *Edstrom*, 916 N.W.2d. at 523. But the court then relied on federal precedent established in the 1960s, when the Minnesota search provision was adopted in 1857.

145. *Cf.* County of Wayne v. Hathcock, 684 N.W.2d 765, 797 (2004) (interpreting state constitution's eminent domain power by reference to how it would have been understood by "an individual sophisticated in the law at the time of ratification of our 1963 Constitution").

146. *See* N.Y. CONST. art. I §§ 1, 6.

147. Hurtado v. California, 110 U.S. 516, 543 (1884).

contains five separate clauses governing eminent domain, including a "public use" clause that mirrors the federal Fifth Amendment, a "no private use" clause that echoes the Washington and Arizona Constitutions' versions but has no federal counterpart, and three others that authorize slum clearance and redevelopment, and which also have no federal counterpart.[148] Simply instructing state courts to follow federal precedent when the provisions are written in the same words does not resolve the question of how all these interrelated clauses interact.[149] These and other factors recently led Judge Jeffrey Sutton to label this "lockstep" approach "[a] grave threat to independent state constitutions."[150]

Courts have tried to devise "neutral" tests like those of *Gunwall* and *Caballes* out of concerns that interpreting state constitutions differently from the federal Constitution on a case-by-case, ad hoc basis would appear results-oriented and arbitrary. But this gets the analysis backwards. In fact, given their place in the federalist system, state courts should presume *against* following federal jurisprudence unless good reason exists to do so. The federal Constitution is simply a different animal than a state constitution. It is a grant of limited, enumerated powers—powers that are "few and defined."[151] It was written to accommodate existing state practices and to allow states authority to govern "all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[152] And it limits legislative powers to those specified, while sharply restricting federal court jurisdiction. It is also harder to amend than the state constitutions.

State constitutions, by contrast, are more malleable and are addressed to a far wider range of topics. They impose fewer limits on legislative authority or the jurisdiction of courts. It makes little sense to assume that just because the language in the two documents is the same, an identical interpretation must follow.[153] Some state constitutions are older than the federal Constitution, suggesting that, if anything, federal courts should follow them,

148. *See* MO. CONST. art. I §§ 10, 26, 27, 28; *id.* art. VI § 21.

149. *See generally* Timothy Sandefur, *The Patrimony of the Poor Man: Reviving Constitutional Protection for Economic Liberty in Illinois*, *in* AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY 11–15 (Joseph E. Tabor ed., 2017).

150. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018).

151. THE FEDERALIST NO. 45, at 313 (James Madison) (J. Cooke ed., 1961).

152. *Id.*

153. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 403 (1984).

not the other way around.[154] Historical changes that affected federal court jurisprudence, such as the advent of the "rational basis" test, do not necessarily apply to state constitutions that may have been written before those circumstances arose.[155] Cultural, historical, and geographical differences from state to state also justify interpreting state constitutions differently than the federal Constitution, even where the language might be

154. *See* Commonwealth v. Edmunds, 586 A.2d 887, 894–95 (Pa. 1991) (emphasizing independent reviews of state constitutional provisions).

155. *See, e.g.*, State v. Lupo, 984 So. 2d 395, 407–08 (Ala. 2007) (Parker, J., concurring) (emphasizing that historical state jurisprudence still matters even if federal jurisprudence has shifted to a different school of thought); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring) ("[E]ven if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.").

identical.[156] For these and other reasons, the "primacy" approach is superior.[157]

In any event, there seems to be little ground for arguing that the federal and state constitutions should be interpreted identically when their language

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156. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 203 (1998). Former New York Court of Appeals Judge Robert Smith has argued that it is "total nonsense" for a state to interpret its constitution differently from federal precedent based on "the history and traditions of [its] people." Robert S. Smith, *Symposium on Economic Liberties and State Constitutions: Keynote Address*, 9 N.Y.U. J.L. & LIBERTY 605, 613 (2015). "There is no New Jersey soul," he declared. "I mean no offense to New Jersey: they're very nice people, but they're like you and me over there. . . . [I]t just isn't a foreign country. It is not Nepal." *Id.* But the reality is the opposite: the historical and cultural differences between New York, Alaska, Illinois, and Arizona are profound. In fact, all that makes a state a body politic, instead of an aggregation of people, are cultural and historical distinctions. To reject the idea that states have "souls" in this metaphorical sense is to reject the idea that they are states. *See* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 87 (2006) ("[S]tate constitutions and constitutional decisions help to create a sense of cultural statehood."). Consider: States like California and Maine are less similar to each other in at least some ways than Maine is from Canada, yet we would not hesitate to affirm that Canadian jurisprudence is only persuasive, not controlling, authority in Maine courts—and we would say so based *entirely* on the different "souls" of these two political communities. Californian jurisprudence, too, is only persuasive, not controlling in Maine courts—*and the same for federal jurisprudence*—and for the same reasons. Yet Maine trial courts are bound to follow the rulings of Maine's supreme court, not California's or Canada's, because it operates within the cultural and historical boundaries that define Maine as a unique institution—that is to say, because it claims legitimacy as a distinct body politic. This demonstrates the fallacy in Smith's reasoning: if one concedes that there is such a thing as the states of Maine or California *at all*, one necessarily concedes that the existence of these intangible political bonds, bonds of history, culture, and self-definition that are both necessary and sufficient for reaching different outcomes in judicial interpretations, even of identical texts.

James Gardner terms the notion that identically worded state constitutions might be interpreted differently on account of their culture and history "Romantic Subnationalism" and argues that "[t]he problem" with it is that states are not so clearly distinct from one another as to "mark[] off meaningfully distinct communities." JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 68 (2005). But, in fact, they are meaningfully distinct. Consider an amusing but revealing example: *Webster v. Blue Ship Tea Room*, 198 N.E.2d. 309, 311–12 (Mass. 1964), which determined that traditional Massachusetts fish chowder has bones in it, so that fish bones do not make the chowder unmerchantable under the Uniform Commercial Code. Quaint as this example may be, it is precisely what federalism anticipates: State courts examining the traditions of their states to answer legal questions. *Webster* is thus of a piece with cases such as *State v. Hanapi*, 970 P.2d 485, 492 (Haw. 1998), which determined whether traditional Hawaiian hunting rights are preserved by the state constitution, or *City of Tombstone v. Macia*, 245 P. 677, 681 (Ariz. 1926), which held that ice delivery was a public purpose in Arizona's "torrid climate." Gardner is correct, that it is "at bottom an empirical question" whether one state differs from another enough to justify divergent constitutional interpretations, GARDNER *supra* note 156, at 68, but that hardly undermines the thesis. *Webster*, *Hanapi*, and *Tombstone* were, in fact, empirical analyses.

157. Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 ARIZ. ST. L.J. 505, 509 (2012).

is *entirely* different, as with the Arizona Private Affairs Clause. In such a case, a court should presume in favor of *separate* analysis unless there are strong reasons for doing otherwise.

2. Independent Constitutionalism in Practice

State courts have taken different paths depending on whether their constitutions contain language that is similar to, entirely different from, or the same as, the federal Constitution. In *Caballes*, the Illinois Supreme Court decided that the part of the state Constitution that differs from the Fourth Amendment and "creat[es] an additional right to privacy," is more protective than the federal Constitution but nevertheless concluded that the clause was not violated when police walked a dog around a car at a traffic checkpoint.[158] The additional state protection, it said, added a right of privacy as understood in the 1970s—one that applied governed only two things: matters of personal intimacy (such as having one's body touched[159] or being observed in ways that "may reveal 'intimate details' within a home, such as conduct in the bedroom or bathroom"[160]) or the examination of "private records or documents."[161] Because a dog sniff of a car is neither of these, but only a "noninvasive" way of acquiring "physical evidence," the privacy protection was not violated.[162]

Alaska's Constitution, unlike Illinois's, uses language wholly different from the federal Constitution. It contains a standalone privacy guarantee, added in 1972, which declares, "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this

158. People v. Caballes, 851 N.E.2d 26, 47 (Ill. 2006).

159. *See id.* at 53.

160. *See id.* at 30.

161. *Id.* at 52.

162. *Id.* at 54. The Arizona Court of Appeals took a different view when presented with a similar question. In *State v. Guillen*, 213 P.3d 230, 239 (Ariz. Ct. App. 2009), it ruled that officers violated the state constitution when they walked a dog around a residence to sniff at the house. Analogizing the case to *Kyllo v. United States*, 533 U.S. 27 (2001), the court found that "canine sniff searches of a residence, conducted from the threshold of a home, interfere with reasonable expectations of privacy and violate article II, § 8 of the Arizona Constitution to the extent they are conducted in the absence of reasonable suspicion to believe contraband may be found." *Guillen*, 213 P.3d. at 236. That decision was later vacated by the Arizona Supreme Court, on the grounds that the property owner had consented to the search. State v. Guillen, 223 P.3d 658, 663 (Ariz. 2010). Years later, citing *Caballes*, the Illinois Supreme Court ruled that a dog sniff of a home without a warrant violated the state Constitution. People v. Burns, 50 N.E.3d 610, 625 (2016).

section."[163] In *Ravin v. State*—decided only a few years after the Nixon Administration declared "war on drugs"—the state's highest court held that this provision protects the right of individuals to use marijuana in their own homes.[164] The ruling is notable not only for its examination of the boundary between public and private, but for its emphasis on the distinctive culture and history of Alaska as justifying a broader privacy guarantee. "Our . . . state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states," it noted.[165]

The concurring opinion reiterated this point: Alaskans, "with their strong emphasis on individual liberty," had amended the state constitution "expressly providing for a right to privacy not found in the United States Constitution"; thus "it can only be concluded that that right is broader in scope than that of the Federal Constitution."[166] State courts have a "duty" to recognize

> additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[167]

Where Illinois's Constitution uses language similar to the Fourth Amendment, and Alaska's uses wholly different language, Iowa presents a notable example of a state where the constitutional provision is worded identically with the Fourth Amendment,[168] but where courts have nevertheless interpreted it as providing stronger protections than the federal Constitution. In *State v. Ingram*, the state's high court ruled that police acted illegally when they searched the defendant's car without a warrant—which would have been permitted under the "inventory search" exception that the U.S. Supreme Court has read into the Fourth Amendment.[169]

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163. ALASKA CONST. art. I, § 22. *See generally* Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29 (2003).

164. Ravin v. State, 537 P.2d 494, 504 (Alaska 1975). *Contra* State v. Murphy, 570 P.2d. 1070, 1073 (Ariz. 1977) ("Our state constitution provides no impediment on privacy grounds to the criminalization of the possession of marijuana in the home.").

165. *Ravin*, 537 P.2d at 504.

166. *Id.* at 514–15 (Boochever, J., concurring).

167. *Id.* at 513.

168. *See* IOWA CONST. art. I, § 8.

169. State v. Ingram, 914 N.W.2d 794, 820–21 (Iowa 2018).

The justices expressed what can only be called exasperation at the slow pace of developing an independent constitutional theory of rights against unreasonable searches. "[W]e do not allow the words of our Iowa Constitution to be 'balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail,'" they declared.[170] There is now so much literature justifying state courts in departing from federal precedent that "it would amount to malpractice" for Iowa lawyers to fail to raise the issue.[171] And the court made clear that it viewed the federal Supreme Court's interpretation of the identical wording not as dispositive but as "constitutional choices made by the United States Supreme Court"—in other words, as potentially persuasive, not dogmatic "correct" interpretations.[172]

Ingram then went on to examine and reject the arguments on which the federal courts had based the inventory exception, and to express concern about what it called the federal courts' "ever-increasing expansion of exceptions to the warrant requirement"[173] which had "downgraded and demoted the warrant requirement" to such a degree that it transformed "Fourth Amendment analysis [into] a general, free-floating reasonableness standard which has no relationship to the warrant requirement of the Fourth Amendment and may, in fact, override it."[174] Indeed, the Iowa court concluded that the "essentially unregulated legal framework" federal courts have embraced "amounts to a general warrant regime that is anathema to search and seizure law,"[175] which justified the state courts in taking their own path, notwithstanding the identical wording of the state and federal constitutional provisions.

It is impossible here to examine every circumstance in which state courts consider it proper to diverge from federal jurisprudence. But these examples show that states take a wide variety of approaches—from *Caballes*'s deferential "limited lockstep" theory to the strikingly independent "primacy" approach of *Ingram*, in which even identical wording is treated differently when the state courts consider federal interpretations unjustifiable, to the Alaska Supreme Court's independent interpretation of wholly different language in the state Constitution.

Given that Arizona's Private Affairs Clause uses entirely different wording from the federal Fourth Amendment, the most fitting approach is

170. *Id.* at 797 (quoting Penick v. State, 440 So. 2d 547, 552 (Miss. 1983)).
171. *Id.* at 799.
172. *Id.* at 801.
173. *Id.* at 804.
174. *Id.* at 815.
175. *Id.*

Alaska's: developing an independent state constitutional doctrine. But even under the *Caballes* "limited lockstep" test or the *Gunwall* multi-factor approaches, Arizona courts would be justified in applying their own judgment without deference to federal jurisprudence. Indeed, if Arizona courts should march in "lockstep" with anyone, it should be the courts of Washington State, where the constitutional language is identical, dates from the same period, and was the express model for the Arizona Private Affairs Clause.

III. THE ARIZONA PRIVATE AFFAIRS CLAUSE CASE LAW

A. Slow and Steady: Washington

Washington courts initially ignored the differences in wording between the Private Affairs Clause and the Fourth Amendment, and asserted almost by *ipse dixit* that "these guaranties are in substance the same in both."[176] For years they followed Fourth Amendment jurisprudence as "a proper aid" in interpreting the Clause, and although they acknowledged that the "guaranties as expressed in the federal Constitution" might not be "controlling . . . under our state laws,"[177] they issued no decisions diverging from federal precedent in any significant way, with one major exception: In 1922, the state adopted the exclusionary rule, four decades before federal courts did so.[178] This was not in itself surprising: The earliest version of the exclusionary rule had appeared in the same *Boyd* decision that largely inspired the writing of the Private Affairs Clause itself.[179]

But beginning in 1980, Washington courts began interpreting the Private Affairs Clause as casting a wider net than the Fourth Amendment.[180] That was when, concerned at the federal judiciary's apparent retreat from strong Fourth Amendment protections, they began expanding their separate state

176. State v. Gibbons, 203 P. 390, 395 (Wash. 1922).

177. *Id.*

178. *See id.* at 396. *See generally* Pitler, *supra* note 90. It is possible that one reason Washington courts did not establish an independent state jurisprudence is because litigants failed to raise the argument during this era.

179. *See* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983); Pitler, *supra* note 90, at 521.

180. *See* George R. Nock, *Seizing Opportunity, Searching for Theory: Article I Section 7*, 8 U. PUGET SOUND L. REV. 331, 333 (1985); Johnson & Beetham, *supra* note 8, at 432.

jurisprudence under the Private Affairs Clause.[181] In *State v. Simpson*, the state supreme court ruled in favor of a defendant who lacked standing under existing federal precedent to raise a Fourth Amendment objection to the search of a stolen car.[182] Although he could not raise that federal claim, it held, he could raise his rights under the Private Affairs Clause because "when the language of the state [constitutional] provision differs from the federal, and the legislative history . . . reveals that this difference was intended by the framers," it was "particularly appropriate" for state courts to give their own laws an independent interpretation.[183] In fact, the court said, the difference in the state and federal language "naturally does not permit" the courts to interpret them as though they were identical.[184]

Four years later, in *State v. Myrick*, a case about whether aerial surveillance was a search, the court explained the difference between the Fourth Amendment and the Private Affairs Clause:

> To determine whether a search necessitating a warrant has taken place under [the Fourth Amendment], the inquiry is whether the defendant possessed a "reasonable expectation of privacy." In contrast, due to the explicit language of . . . the Washington Constitution the relevant inquiry . . . is whether the state unreasonably intruded into the defendant's "private affairs." [This] analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment; but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.[185]

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181. Nock, *supra* note 180, at 333.

182. State v. Simpson, 622 P.2d 1199, 1202 (Wash. 1980).

183. *Id.* at 1204.

184. *Id.* at 1205.

185. State v. Myrick, 688 P.2d 151, 153–54 (Wash. 1984) (citations omitted). One notable advantage to the *Myrick* approach is that the federal "expectation of privacy" analysis is subject to change with time, whereas the *Myrick* test considers not the subjective and shifting expectations citizens might have, but the strength of the justifications advanced for protecting privacy. Former Ninth Circuit Chief Judge Kozinski warned that this creates a downward spiral of "reasonableness," at least as far as courts are concerned: over time, a lower expectation of privacy in one area makes it unreasonable to expect privacy in another, which risks destroying all privacy expectations. *See* Alex Kozinski & Eric S. Nguyen, *Has Technology Killed the Fourth Amendment?*, 2011–2012 CATO SUP. CT. REV. 15, 26–27 (2011). The Washington State approach, by contrast, emphasizes *principles*, and is therefore less prone to faddish fluctuation. This is an

Notably, *Myrick* refused to adopt the federal Supreme Court's analysis in *Oliver v. United States*[186] in deciding the "open fields" question.[187] That refusal made sense: *Oliver* found that a warrant was not required because open fields "could not be classified as an 'effect,'"[188] but the Private Affairs Clause does not use the word "effects." It uses the term "private affairs." That, the court said, "precludes a 'protected places' analysis" such as used in *Oliver*.[189]

Since then, Washington courts have fashioned a robust Private Affairs jurisprudence. They apply a two-part test to determine whether the Clause has been violated: First, is the complained-of action a disturbance of one's private affairs?—and second, is the violation justified by authority of law?—which is satisfied by the presence of a warrant, or by one of the "jealously guarded and carefully drawn exceptions to that requirement."[190]

Determining whether something is a private affair requires a court to decide whether the privacy interest in question is one Washington citizens have held, and are entitled to hold, to be secure from unauthorized intrusion. By refusing to rely on subjective expectations of privacy, as federal courts do—expectations that are shaped and often eliminated by technological advancements—the Washington analysis is less prone to fluctuation. It also focuses both on history and on theoretical justification: It examines the protections that have been afforded to the activity in question, and the nature and extent of information that was seized or that *could be* seized by the surveillance method at issue, to determine whether the intrusion is justifiable.[191] Thus a private affair "may be defined as a matter or object personal to an individual such that intruding upon it would offend a reasonable person."[192] This analysis does not seek some authoritative list of the specific things the Clause's framers intended it to cover, but instead seeks principled justifications for intrusions onto matters a person is warranted in considering private. [193] And Washington courts have used that test to conclude

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example of how robust state enforcement of different constitutional language can lead to a *less* "activist," less fluctuating jurisprudence.

186. 466 U.S. 170 (1984).

187. *Myrick*, 688 P.2d at 155.

188. *Id.*

189. *Id.*

190. State v. Hinton, 319 P.3d 9, 12 (Wash. 2014).

191. State v. Miles, 156 P.3d 864, 867–68 (Wash. 2007).

192. State v. Goucher, 881 P.2d 210, 213 (Wash. 1994) (quoting Talbot, *supra* note 134, at 1113).

193. *Cf.* Hadley Arkes, *The Argument Renewed: Who's Afraid of Substantive Due Process?*, 16 GEO. J.L. & PUB. POL'Y 365, 371 (2018) ("[T]he work of judges . . . what judges are called upon to do every day" is to "test the reasons that may supply a 'justification' for a [state action.]").

that the Clause bars warrantless searches of private bank records,[194] or the contents of trash bags set by the curb,[195] or the obtaining of phone numbers a person has dialed,[196] none of which are protected under the Fourth Amendment's less specific, more subjective reasonable-expectation-of-privacy jurisprudence.[197]

Lawful authority is established by a valid warrant, or some exception to the warrant requirement.[198] But Washington courts have not adopted the federal courts' warrant-exception jurisprudence wholesale, and have refused to create exceptions that allow mandatory traffic checkpoints,[199] or the searching of the trunk of a car during an inventory search,[200] or the passing of laws that allow administrative agencies to command information by subpoena, not issued by a neutral magistrate, or supported by reason to believe a crime has occurred.[201] And the state does not recognize the "good faith"[202] or "inevitable discovery" exceptions.[203]

This last matter illustrates well the uniquely attentive way Washington courts address the Private Affairs Clause. In *State v. Winterstein*, the state supreme court explained the different exceptions to the warrant requirement and the considerations that give grounds for adopting some exceptions and not others.[204] The "independent source" doctrine—whereby evidence obtained without a warrant is admissible if the police can show it would have been obtained in a manner untainted by the improper search—was acceptable because that doctrine employs a logical analysis akin to other, objective inquiries: "[I]f, after excluding the illegally obtained information, the remaining information in the search warrant independently established probable cause," then the warrant remains valid, although the improperly obtained evidence is still suppressed.[205] Such analysis is consistent with the exclusionary rule. By contrast, the "inevitable discovery" doctrine—which assesses whether the police investigation would have inevitably discovered the evidence even absent the unlawful search—"is necessarily speculative

194. *Miles*, 156 P.3d at 867–70.
195. State v. Boland, 800 P.2d 1112, 1115–16 (Wash. 1990).
196. State v. Gunwall, 720 P.2d 808, 814–17 (Wash. 1986).
197. *See Miles*, 156 P.3d at 868 (citing *Gunwall* and *Boland*).
198. *Id.* at 867–68.
199. City of Seattle v. Mesiani, 755 P.2d 775, 777 (Wash. 1988).
200. State v. Stroud, 720 P.2d 436, 441 (Wash. 1986).
201. *Miles*, 156 P.3d at 869–72.
202. State v. Nall, 72 P.3d 200, 202 (Wash. Ct. App. 2003).
203. State v. Winterstein, 220 P.3d 1226, 1230–33 (Wash. 2009).
204. *Id.* at 1232–33.
205. *Id.* at 1232.

and does not disregard illegally obtained evidence."[206] Rather, it admits illegally obtained evidence if the court thinks it likely that it would have ultimately been found anyway. *Winterstein* therefore rejected the inevitable discovery exception because it clashed with the state constitution, "which we have emphasized guarantees privacy rights with no express limitations."[207]

B. Abdication: Arizona

Arizona's development of the Private Affairs Clause has been quite different. During Prohibition, the state supreme court ruled in *Malmin v. State* that police officers did not violate the law when they searched a car without a warrant.[208] Sheriff deputies had "received information" that the defendant "was coming into Prescott along this road with a load of intoxicating liquor," and, thinking they had no time to obtain a warrant, "posted themselves" on the road and stopped the car when it appeared.[209] They then searched the car and found the alcohol. The court found the Fourth Amendment inapplicable, because the warrant requirement had not then been incorporated to the states. But it also rejected a Private Affairs Clause challenge: "[A]lthough different in its language," it said, the Clause "is of the same general effect and purpose as the Fourth Amendment, and, for that reason, decisions on the right of search under the latter are well in point."[210] It then adopted the automobile exception to the warrant requirement that had been established by the U.S. Supreme Court a year earlier in *Carroll v. United States*.[211] No warrant was required under state law, either, it held.[212]

This was problematic because, among other reasons, the Arizona Constitution was written after the advent of the automobile,[213] and before the creation of the automobile exception. It is doubtful that those who wrote or ratified the Arizona Constitution expected automobiles to be outside its

206. *Id.*
207. *Id.*
208. Malmin v. State, 246 P. 548, 549 (Ariz. 1926).
209. *Id.* at 548.
210. *Id.* at 549.
211. 267 U.S. 132 (1925).
212. *Malmin*, 246 P. at 549.
213. The Model T was first produced in 1908. *Ford Motor Company Unveils the Model T*, HIST. (Nov. 13, 2009), https://www.history.com/this-day-in-history/ford-motor-company-unveils-the-model-t [https://perma.cc/56WW-NR68]. While cars were available before then, they became widespread only in the first decade of the twentieth century.

protections.[214] Worse, the court did not consider whether the fact that the Private Affairs Clause is worded differently from the Fourth Amendment should bear any legal significance. And it appears that it should have, given that *Carroll*—like the *Oliver* "open fields" decision—depended entirely on considerations *unique to federal law*.

Carroll turned on the definitions of "probable cause" and "reasonableness"[215]—phrases that do not appear in the Arizona Constitution, and placed great weight on the idea that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when *it* was adopted."[216] For that reason, the Court pointed to federal statutes from 1789 and 1815 that allowed naval officers to search ships without suspicion.[217] These, the it said, proved that "contemporaneously with the adoption of the Fourth Amendment" the law recognized "a difference . . . as to the necessity for a search warrant" with regard to contraband in "a movable vessel."[218] And that, in turn, showed that the Fourth Amendment had always been understood "as recognizing a necessary difference between a search of a . . . structure . . . and a search of a ship, motor boat, wagon, or automobile . . . where it is not practicable to secure a warrant."[219]

None of these considerations, of course, bear any relevance to the Arizona Private Affairs Clause, written in 1910 for a state with no Navy. The *Carroll* decision was based on factors unique to the definition of "reasonable" in the Fourth Amendment, whereas the Arizona Constitution makes no reference to "reasonableness." Perhaps the kind of policy arguments the Court found persuasive in *Carroll* would also have persuaded the Arizona justices, but they never bothered to consider that question. Instead, they followed in "lockstep" with the federal courts. *Malmin* therefore stands at the opposite extreme from the Washington Supreme Court's *Myrick* decision, which refused to rely on federal precedent precisely because the federal precedent was interpreting language not found in the state constitution.

In the years that followed *Malmin*, Arizona courts never questioned its reliance on *Carroll*.[220] Not until the 1980s did the Arizona Supreme Court

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214. Prior to *Carroll*, some state courts, including Washington's, had held that warrants were required to search cars. *See, e.g.*, Butler v. State, 93 So. 3, 3 (Miss. 1922); State v. Gibbons, 203 P. 390, 393–94 (Wash. 1922); Hoyer v. State, 193 N.W. 89, 90 (Wis. 1923).

215. *See Carroll*, 267 U.S. at 156, 159.

216. *Id.* at 149 (emphasis added).

217. *Id.* at 151.

218. *Id.* at 150–51.

219. *Id.* at 153.

220. In 1936, the state supreme court rejected reliance on federal law when holding that no legal principle barred the issuance of an arrest warrant that was obtained based on information

resolve a case expressly in reliance on the state Constitution, as opposed to the Fourth Amendment. In *State v. Bolt*, police officers were surveilling the house of a suspected drug dealer. While some of the officers were preparing the affidavit to obtain a search warrant, the suspect drove away from the house in a pickup truck.[221] Officers stopped him, then "'secured' the house and its occupants" until the warrant was obtained, whereupon the search was conducted.[222] The court found that this violated the Private Affairs Clause, because "securing" the house constituted a search of the premises.[223] This was unconstitutional because "[w]hile Arizona's constitutional provisions generally were intended to incorporate the federal protections . . . they are specific in preserving the sanctity of homes and in creating a right of privacy."[224] The court concluded that the state constitution forbids warrantless entries of the home in the absence of exigent circumstances or "other necessity."[225]

Two years later, in *State v. Ault*,[226] the court again held that officers violated the Private Affairs Clause when they entered a suspect's apartment and searched it without a warrant, without his permission, and without arresting him.[227] Because the Arizona Constitution is "even more explicit than its federal counterpart" with regard to the security of the home, the court ruled the search invalid "[a]s a matter of Arizona law."[228] It listed the recognized exigent circumstances exceptions to the warrant requirement,[229] and found

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and belief, as opposed to the declarant's personal knowledge. Turley v. State, 59 P.2d 312, 316 (Ariz. 1936). When the defendant relied on federal precedents holding that the stricter personal-knowledge requirement applied under the Fourth Amendment, the court rejected reliance on those precedents, noting that state courts "have the right . . . to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions based on that Constitution." *Id.* at 316–17. But the court was essentially *reducing* the constitutional restrictions on criminal law, because it was rejecting a stricter federal standard—a standard that had not yet been incorporated to the states under the Fourteenth Amendment. *Id.* at 316.

221. State v. Bolt, 689 P.2d 519 (Ariz. 1984).

222. *Id.* at 521.

223. *Id.* at 524.

224. *Id.* at 523–24 (citations omitted). The *Bolt* court did not *reject* any Fourth Amendment precedent, but simply found that there was no governing Fourth Amendment precedent on the question. *See id.* at 523.

225. *Id.* at 524. As an example of "other necessity," the court cited *State v. Fisher*, 686 P.2d 750 (Ariz. 1984), which involved the emergency aid exception.

226. 724 P.2d 545 (Ariz. 1986).

227. *See id.* at 548, 552.

228. *Id.* at 549 (citing State v. Martin, 679 P.2d 489, 496 (Ariz. 1984); *Bolt*, 689 P.2d at 524).

229. *Ault*, 724 P.2d at 549 (listing "1) response to an emergency, 2) hot pursuit, 3) probability of destruction of evidence, and 4) the possibility of violence").

that none applied; neither did the "plain view"[230] or "inevitable discovery" rules.[231] The court emphasized that the decision was based on its interpretation of the state Constitution's specific reference to homes, and that it "strongly adhere[s] to the policy that unlawful entry into homes and seizure of evidence cannot be tolerated."[232]

Since then, however, Arizona courts have done little to elaborate on the differences between the state and federal constitutions. Most notably, they have never applied the clause to outside of the search and seizure context, with a single exception: In *Rasmussen by Mitchell v. Fleming*,[233] the Arizona Supreme Court relied in part on the Private Affairs Clause to uphold the right to refuse medical treatment, anticipating federal jurisprudence by several years.[234] "An individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile," it noted.[235] But Arizona courts have otherwise never acknowledged that the Private Affairs Clause provides protection for rights outside of the search and seizure context, and have applied no analysis or historical consideration to the question.[236]

Instead, they have largely reverted to following federal Fourth Amendment precedent, or to interpretations that disregard the differences between the federal and state provisions. The Arizona Court of Appeals concluded in 2009 that there is "no authority" for concluding that the Private Affairs Clause is "broader in scope than the corresponding right to privacy in the United States Constitution," except for cases involving home searches.[237]

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230. *Id.* at 550.

231. *Id.* at 551.

232. *Id.* at 552. As in *Bolt*, the *Ault* court did not expressly reject any federal Fourth Amendment precedent. Although "[t]he dissent cites a number of [federal] cases which it believes hold that direct evidence is admissible under the inevitable discovery doctrine," the majority said, "[w]e disagree with their interpretation of those cases and . . . believe that the [U.S.] Supreme Court would require suppression of this evidence under the fourth amendment." *Id.* Thus, neither *Bolt* nor *Ault* reached a conclusion at variance with what was understood to be federal Fourth Amendment doctrine.

233. 741 P.2d 674 (Ariz. 1987).

234. *Id.* at 682. In *Cruzan by Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278–79 (1990), and *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the U.S. Supreme Court held that the same right was protected by the Fourteenth Amendment's Due Process Clause.

235. *Rasmussen*, 741 P.2d at 682.

236. *See, e.g.*, Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) (rejecting claim of same-sex marriage rights); Washburn v. Pima County, 81 P.3d 1030, 1038 (Ariz. Ct. App. 2003) (rejecting right to be free from aesthetic architecture regulations).

237. State v. Johnson, 207 P.3d 804, 810 (Ariz. Ct. App. 2009).

Seven years later, in *State v. Peoples*,[238] the Arizona Supreme Court ruled that police acted unconstitutionally when they looked at information on a suspect's smart phone without first obtaining a warrant, and cited the Private Affairs Clause for that holding. Yet in doing so, it still treated that Clause as redundant of the Fourth Amendment, which had already been interpreted as requiring a warrant for cell phone searches.[239]

Thus, even where criminal defendants do prevail in Arizona Private Affairs Clause cases, courts treat that Clause as paralleling the Fourth Amendment.[240] Mostly, courts simply say that "the federal and state protections are coterminous except in cases involving warrantless home entries,"[241] even though there is no evidence that the Clause was designed to grant extra protection only to home entries, and in fact, the record shows the opposite: that it was designed specifically to provide additional protection in cases *not* involving home entries, such as government demands for private records.

The anomalous state of Arizona's Private Affairs Clause jurisprudence is made clearest by comparing two cases: Washington's *State v. Miles*,[242] which held that a statute allowing state regulators to demand certain records violated that state's Private Affairs Clause,[243] and Arizona's *Carrington v. Arizona Corporation Commission*,[244] which held the opposite.

Miles involved the subpoena power of Washington's Department of Financial Institutions, charged with regulating the sale of securities in the state. The Department was statutorily authorized to investigate companies suspected of illegal dealing in securities and could issue subpoenas of certain business records. During an investigation, it issued an administrative subpoena to a bank to obtain records showing that the defendant, Miles, was dealing illegally in securities.[245] Miles argued that the evidence was inadmissible because the statutory subpoena power violated the Private Affairs Clause.[246] The state supreme court agreed. Refusing to adopt "a pervasively regulated industry exception to the warrant requirement,"[247] it

238. 378 P.3d 421 (Ariz. 2016).
239. *Id.* at 424–25 (citing Riley v. California, 573 U.S. 373, 401 (2014)).
240. *See also* State v. Wilson, 350 P.3d 800, 802, 805 (Ariz. 2015).
241. State v. Meza-Contreras, No. 1 CA-CR 15-0458, 2016 WL 3021977, at *2 (Ariz. Ct. App. May 24, 2016) (citing State v. Teagle, 170 P.3d 266, 271 n.3 (Ariz. Ct. App. 2007)).
242. 156 P.3d 864 (Wash. 2007).
243. *Id.* at 872.
244. 18 P.3d 97 (Ariz. Ct. App. 2000).
245. *Miles*, 156 P.3d at 866.
246. *Id.* at 867.
247. *Id.* at 871.

applied Washington's two-step Private Affairs Clause test. First, it found that "a person's banking records are within the constitutional protection of private affairs" because such records "potentially reveal[] sensitive personal information," including data about a person's purchases, political and religious affiliations, travels, reading and television viewing habits, and so forth.[248] The court emphasized that it was not the content of Miles's *own* information that was determinative, but the information that could *potentially* be disclosed by that *type* of search.[249] Second, it found that the statute allowing the issuance of administrative subpoenas did not qualify as lawful authority. Such subpoenas were issued by the regulatory agency itself, not by a neutral magistrate.[250] And the statute provided no evidentiary standard for the issuance of subpoenas; they could be sent "for little or no reason."[251] Finally, the statute made no provision for pre-compliance review, such as a hearing to quash such a subpoena in the event that it was wrongly issued.[252] Thus the subpoena was not an adequate substitute for a warrant, and the search of Miles's records was an unconstitutional intrusion into his Private Affairs.

Carrington ruled the opposite way. That case involved an investigation by the Arizona Corporation Commission, which is charged with regulating the sales of securities. The Commission has subpoena power similar to that at issue in *Miles*, and it issued a subpoena to a defendant it suspected of unlawful activities.[253] He filed a special action seeking to quash the subpoenas—no pre-compliance review procedure is provided by statute—and proved to the court that he was not engaged in the sale of securities.[254] Yet the court still upheld the legality of the subpoenas on the grounds that the Commission was entitled to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[255] A person receiving a subpoena could still file a special action to quash on the grounds of

248. *Id.* at 868–69.
249. *Id.* at 869.
250. *Id.*
251. *Id.* at 870.
252. *See id.* at 871.
253. Carrington v. Ariz. Corp. Comm'n, 18 P.3d 97, 98 (Ariz. Ct. App. 2000).
254. *Id.* A special action is analogous to a writ of mandate; it is not a form of "precompliance review" contemplated by cases such as *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015). Rather, it is a lawsuit in itself—an extraordinary proceeding under which a court can decline jurisdiction for any reason. Stapert v. Ariz. Bd. of Psychologist Exam'rs, 108 P.3d 956, 961 (Ariz. Ct. App. 2005).
255. *Carrington*, 18 P.3d at 99 (quoting Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n, 652 P.2d 1023, 1029 (Ariz. 1982) (citation omitted)).

irrelevancy or harassment, it held, and that was sufficient protection[256]—despite the fact that irrelevancy or harassment are extremely difficult to prove, particularly since the Commission "has the right to determine for itself whether [a suspect] has fully and accurately described the activities of its business."[257] Such a broad interpretation of the Commission's mandate makes it hard to imagine what demand of information could possibly be deemed excessive. Under *Carrington*, Commission officials can do just what the *Miles* court found unacceptable: issue administrative subpoenas with no evidentiary basis whatsoever and without any opportunity for pre-compliance review by a neutral magistrate.[258]

C. Why Have Arizona Courts Failed to Develop a Private Affairs Jurisprudence?

Arizona courts have often said that the Arizona Constitution is more protective than its federal counterpart. But actions speak louder than these words, and state courts have simply not followed through. Indeed, there appears to be no Arizona case in which a search that would clearly have satisfied Fourth Amendment scrutiny has been held unconstitutional under the Private Affairs Clause.[259]

In part this failure to develop a Private Affairs jurisprudence is the fault of attorneys who have not raised the question in litigation. Justice Bolick recently admonished attorneys who failed to "develop[] and argue[]" a Private Affairs challenge to police GPS surveillance of the defendant's vehicle.[260] Had they done so, he said, he would have suggested that the installation of a GPS tracker on a car constituted a disturbance of the right to travel, which is a fundamental right, and pointed to Washington State

256. *Carrington*, 18 P.3d at 99.

257. *Id.* at 100.

258. *See* Kadima Ventures v. Ariz. Corp. Comm'n, LC2018-000163-001 DT (filed Apr. 17, 2018) (on file with author) (challenging Commission subpoena).

259. The *Bolt* court was unsure whether the Supreme Court's holding in *Segura v. United States*, 468 U.S. 796 (1984)—in which officers entered a home without a warrant and "secured" it for hours before obtaining a warrant, and then searched it—meant that warrantless "securing" of a home violated the Fourth Amendment. *See* State v. Bolt, 689 P.2d 519, 523 (Ariz. 1984). That question has still not been definitively resolved. *Compare* Illinois v. McArthur, 531 U.S. 326, 333 (2001) (allowing "securing"), *with* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (disallowing it). Assuming such "securing" satisfies the Fourth Amendment, *Bolt* would be more protective than the Fourth Amendment. As for *Ault*, the Arizona Supreme Court made plain that "[w]e also believe that the Supreme Court would require suppression of this evidence under the fourth amendment." State v. Ault, 724 P.2d 545, 552 (Ariz. 1986).

260. State v. Jean, 407 P.3d 524, 546–47 (Ariz. 2018) (Bolick, J., concurring).

decisions holding that similar surveillance tactics violated that state's Private Affairs Clause.[261] But he agreed with the majority that the defendant waived recourse to these arguments by only raising them in his reply brief and failing to explain "why or how our constitution should afford greater protection than the Fourth Amendment in this context."[262]

A few months later, in *State v. Hernandez*, state-based arguments *were* raised, preserved, and presented—and the court again rejected them, in a conclusory statement that it was "not persuaded that the scope of the Arizona Constitution's protections exceeds the Fourth Amendment's reach under the circumstances of this case."[263] In fact, those circumstances should have provided ample justification for a broader, state-based protection. There, officers followed the suspect's car and initiated a stop despite the fact that he followed all applicable traffic laws. When they initiated the stop, he stopped on private property, and the officers then followed, without a warrant—and then detected the smell of marijuana coming from his car.[264] The court disposed of the case by saying the suspect's conduct amounted to consenting to the officers' entry onto the property.[265] But certainly the facts provided ample reason for the court to at least *address* whether the officers intruded onto the suspect's private affairs without sufficient authority.[266]

Thus, despite the fact that the Arizona Private Affairs Clause satisfies all of the factors for the courts to develop an independent jurisprudence—entirely different text; unique legislative history; significant cultural and historical differences between Arizona and other states, etc.—Arizona courts appear reluctant to develop a significant state constitutional theory to put the Private Affairs Clause into effect. What accounts for this hesitation?—or for "intermittent state constitutionalism" more generally?[267]

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261. *Id.* (citing State v. Jackson, 76 P.3d 217, 223 (Wash. 2003)).

262. *Id.* at 535.

263. State v. Hernandez, 417 P.3d 207, 212 (Ariz. 2018).

264. *Id.* at 209.

265. *Id.* at 211.

266. After all, the Florida Supreme Court had reached an opposite conclusion in a case with very similar facts. *See* State v. Markus, 211 So. 3d 894 (Fla. 2017). In that case, suspects were spotted smoking marijuana, but went inside the house before officers obtained a warrant. The officers followed the suspects into the house. Even though the Florida Constitution expressly does *not* provide stronger protections than the Fourth Amendment, the court found the entry unlawful. *Id.* at 911–12. In *Hernandez*, by contrast, the Arizona Supreme Court—which has claimed that the Arizona Constitution provides stronger protections than the federal Constitution specifically when it comes to warrantless entries into the home—*inferred* the defendant's consent. *See Hernandez*, 417 P.3d at 211. It is difficult indeed to square *Hernandez*'s "implied consent" theory with the Arizona Constitution's purported solicitude for the home.

267. Long, *supra* note 156, at 86 ("[E]ven states with the greatest rhetorical commitment to consistently autonomous state constitutionalism depart from their stated approach sometimes.");

John W. Shaw,[268] Michael Esler,[269] and Barry Latzer[270] have shown that even when state courts claim to be interested in developing an independent state jurisprudence, they often fail to do so as a result of various incentives, including "differing judicial perceptions of constitutional values" and "popular political pressures."[271] The latter is particularly a factor in criminal procedure cases, because state voters often have a "'conservative orientation'" that discourages judges—even those not subject to the pressures of retention elections—from taking stands that might be seen as "'soft' on criminals."[272] In the early 1980s, after Florida courts issued a series of rulings that interpreted the state constitution's search warrant requirements as more protective than the federal Constitution,[273] voters amended the state Constitution to specify that, no, it meant nothing more than the federal version.[274] And voter backlashes against state judges whose interpretation of their state constitutions was perceived as too extreme—most notably in California, where three justices lost retention elections after issuing such decisions[275]—likely sent a message to some judges that it was imprudent to follow their own thinking in such matters. Shaw concluded that such circumstances give state judges an incentive to rely on federal law when

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see also Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 25 (1994) (showing empirically that even states with leading decisions supportive of autonomous state constitutionalism still fail to employ independent analysis in most cases); Lawrence Friedman & Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 126–27 (2001) ("While numerous state courts today invoke their sovereign authority to interpret their states' constitutions independently of the federal constitution in cases involving correlative provisions of the state and federal constitutions, many continue to rely upon past and present federal precedents as the analytical beginning and end for state constitutional interpretation.").

268. John W. Shaw, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993).

269. Esler, *supra* note 267.

270. Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190 (1991).

271. Shaw, *supra* note 268, at 1046.

272. *Id.* at 1046–47 (quoting BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 170 (1991)).

273. *See, e.g.*, Hoberman v. State, 400 So.2d 758 (Fla. 1981); State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

274. *See* FLA. CONST. art. I, § 12 ("This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.").

275. Shaw, *supra* note 268, at 1047.

defending the rights of the accused, as a means of "displac[ing] criticism" and shifting voter anger onto federal courts.[276]

Other influences are also at work, no doubt. For one thing, there is relatively little scholarship on state constitutions.[277] Arizona is at a disadvantage here, given the relative paucity of historical records relating to the drafting of its constitution. Educational factors are also involved: Law schools tend to overemphasize federal law and to relegate state law to secondary status, or even treat it as quaint. This develops among lawyers a habit of looking primarily to federal law as simpler and more prestigious—a habit that never entirely disappears.

In addition, there is reluctance within the legal community to see state courts focus serious attention on their state constitutional language, partly as a political matter by advocates of "judicial restraint,"[278] and partly because state court judges may feel conflicting loyalties as members of both a state political community and a national political community.[279] Legal and commercial interests might bridle at a state jurisprudence that mandates a state-law rule on top of a rule already required by federal jurisprudence—potentially doubling the number of legal standards, proceedings, and documents, required for various enterprises. Lawyers value uniformity, and will try to reconcile laws rather than establish differences that might burden other professional communities, such as law enforcement officers or business owners, who would rather deal with a single national standard when possible.[280] This desire for uniformity has sometimes trumped differences in legal text in state and federal constitutions. For example, in Georgia, where the state constitution guarantees the right to an education, unlike the federal Constitution, the Georgia Supreme Court set aside that crucial difference in a 1981 decision and embraced federal precedent on the constitutional status of the right to education because "[c]onsistency in constitutional

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276. *Id.* Note how this thesis parallels Michael Greve's argument that state legislatures welcome federal takeover of their prerogatives because it enables state governments to displace responsibility or politically unpopular choices. *See* MICHAEL S. GREVE, REAL FEDERALISM 63 (1999).

277. *See* Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are a Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1538–44 (1998) (noting as an example the poor quality of historical analysis in one Pennsylvania case's effort to develop an independent state jurisprudence). *See also* Van Cleave, *supra* note 156, at 203 ("By becoming accustomed to independently examining their state's charter . . . [and] more familiar with their state's constitutional history," state courts can "become more adept at developing theories of constitutional interpretation.").

278. *See, e.g.*, Twist & Munsil, *supra* note 126, at 1006–08.

279. Long, *supra* note 156, at 86.

280. *See* Esler, *supra* note 267, at 31.

adjudication, though not demanded, is preferred."[281] It is bizarre indeed, to seek a "consistent" interpretation of state and federal constitutions that *do not have the same language*.

These factors and more play a role in state courts' failure to develop an independent constitutional doctrine, and suggest the need for reinforcing incentives to encourage them to do so.[282] One hopeful sign may be the recent increase in concern regarding government surveillance, particularly with relation to smart phones and social media. Cases such as *United States v. Jones*[283] and *Carpenter v. United States*[284] have revealed the need for, at a minimum, a more focused attention to warrant requirements, given the sophisticated new technologies that enable government to monitor our activities in astonishingly sophisticated ways.

Another hopeful sign may be the recent resistance by states to federal overreaching on a number of fronts. For example, after the Supreme Court announced its massively unpopular eminent domain ruling, *Kelo v. New London*,[285] states began imposing stronger state-level protections against the taking of private property.[286] That included state courts, some of which expressed hostility toward the *Kelo* decision,[287] or adopted restrictive views of certain aspects of eminent domain that, although not at issue in *Kelo*, are important to the takings process.[288] Americans look to state courts for protection when federal courts have failed; rarely before then.

James A. Gardner has argued that state courts confronted with the question of developing an independent jurisprudence should first look to their mandate as actors in the federalist system: If citizens "trust their courts enough to consider them able guardians of liberty and have authorized them to act as

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281. McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981).

282. That is, lest we commit what Eric Posner and Adrian Vermeule call the "inside/outside fallacy," of "offer[ing] deeply pessimistic accounts of the . . . motives of relevant actors in the legal system," and then "turn[ing] around and issu[ing] an optimistic proposal for public-spirited solutions." Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

283. 565 U.S. 400 (2012).

284. 138 S. Ct. 2206 (2018).

285. 545 U.S. 469 (2005).

286. *Id.* at 489.

287. *See, e.g.*, Bd. of Cty. Comm'rs v. Lowery, 136 P.3d 639, 651 (Okla. 2006) ("[W]e determine that our state constitutional eminent domain provisions place more stringent limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution. We join other jurisdictions including Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine, which have reached similar determinations on state constitutional grounds.").

288. *See, e.g.*, Mayor of Balt. City v. Valsamaki, 916 A.2d 324, 339–40 (Md. 2007) (addressing "quick-take" procedures in eminent domain).

agents of federalism, with an eye not only toward achieving good self-governance within the state, but also toward resisting abuses of national power," the people will expect their courts to adopt an independent jurisprudence.[289] On the other hand, where a state court appears to be acting as an obstructionist, or pursuing goals the citizens view as radical or out of touch, voters are likely to rebel, as they did in Florida in the 1980s. But today's political culture is drastically different than it was in the 1980s. In the interim, the logic of federalism has been more thoroughly developed, and the path to independent state grounds has been laid more fully by federal courts, not only with doctrines such as the anti-commandeering principle or the Spending Clause limitation of *South Dakota v. Dole*,[290] but also by federal precedents that were written with an eye to preserving a role for states. The baton is there for state courts to pick up.

CONCLUSION

The wording of Arizona's Private Affairs Clause is entirely different from that of the Fourth Amendment. It was written more than a century after the federal provision, at a time when concerns about intrusion into private affairs were on the rise—after the invention of the telephone, telegraph, photography, and mass media; after the advent of the automobile and before the creation of the automobile exception to the Fourth Amendment. Most importantly, it was written with a specific concern in mind: the growth of government intrusion into both personal matters and confidential business affairs that many during this period considered outside the proper scope of government inquiry. It is anomalous, therefore, that Arizona courts have failed to give this provision the separate and distinct interpretation to which it is entitled.

That anomaly is even more notable given that a sister state, whose constitution contains identical wording and was the express model for Arizona's, *has* developed a robust independent jurisprudence that emphasizes these and other justifications for reading the Private Affairs Clause more broadly. Yet despite the fact that Arizona courts have frequently acknowledged that the Clause is more protective than the federal Constitution, they nevertheless read it in concert with federal case law that interprets a *differently worded* provision of a *federal* constitution that was written a *century* before, in line with jurisprudence that largely *postdates* the Arizona Constitution.

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289. GARDNER, *supra* note 156, at 229.

290. 483 U.S. 203 (1987).

Whether a state court decides to develop a separate state jurisprudence, and whether that decision is viewed as a valid instance of judicial engagement and a legitimate exercise of jurisdiction, or as an exercise in results-oriented "activism," will depend on many factors, including the political culture within states. But it will depend most crucially on the ability of judges to advance their legal positions in the form of generally acceptable legal principles—meaning an emphasis on such objective considerations as the text of the constitutional provision, the history of writing, the precedent based upon that text, and so forth. Given the resources at hand, Arizona courts are well poised to develop an independent jurisprudence of the Private Affairs Clause. That Clause differs from the Fourth Amendment in text, history, and intent. It promises different things. Whether courts will enforce it in a manner that comports with those promises now depends on only a single factor: the willingness of courts to follow through.