The Arizona Constitution and the Right to Vote

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I. INTRODUCTION

Recent challenges to Arizona legislation impacting elections have typically invoked the federal Voting Rights Act ("VRA") of 1965.[1] But a trilogy of Supreme Court decisions has diminished the sweep of that legislation. In *Shelby County v. Holder*, the Court struck down the preclearance provisions of Section 5 of the VRA, which subjected changes in electoral procedures in states with a history of discrimination, including Arizona, to review by the Justice Department.[2] In *Crawford v. Marion County Election Board*, the Court upheld against a Section 2 VRA attack a state ID requirement, holding that even if it affected protected populations disproportionately, voting necessarily requires some effort and compliance with some rules, and the concept of a voting system that is "equally open" and that furnishes equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting."[3] And in *Brnovich v. Democratic National Committee*, the Court held that disparate impact on minorities of state elections laws alone did not violate Section 2 of the VRA.[4]

The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the United States Constitution protect against discrimination

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* Judge, United States Court of Appeals for the Ninth Circuit. I thank the editors of the Law Journal for the dedication of this issue. I also thank the College of Law, its staff, faculty, and students, for the opportunity to be part of the institution for so long. I have received far more from the experience than I have given. I also thank my colleagues in practice, on the judiciary, and in government for making the legal journey so enjoyable. In the words of the great Joe Walsh, "Life's been good to me so far." JOE WALSH, *Life's Been Good*, *on* BUT SERIOUSLY, FOLKS . . ., (Spirit Music Grp. 1978).

Special thanks to my law clerk for the 2020-21 term, Daniel W. Bernal, Ph.D., for his invaluable assistance in this article. All errors are mine.

1. 52 U.S.C. §§ 10301–10314. For recent federal challenges to Arizona voting laws, *see, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021); Ariz. Democratic Party v. Hobbs, 485 F. Supp. 3d 1073 (D. Ariz. 2020); Mi Familia Vota v. Hobbs, 492 F. Supp. 3d 980 (D. Ariz. 2020).
2. 570 U.S. 529 (2013).
3. 553 U.S. 181, 198 (2008).
4. 141 S. Ct. at 2350.

involving the right to vote on account of race,[5] sex,[6] ability to pay a poll tax,[7] or age.[8] But the federal Constitution does not affirmatively grant the right to vote;[9] indeed, it presupposes that defining the general contours of that right is a state function.[10]

The Arizona Constitution, in contrast, guarantees state citizens "free and equal" elections, and states that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[11] The Constitution also provides, albeit in an awkward negative manner, that the potential electorate consists of all of those at least 18 years of age who meet citizenship and residency requirements.[12] The Arizona Supreme Court has recognized in uncategorical terms that voting is "the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded," and that "[t]o deny the right to vote . . . is to do violence to the principles of freedom and equality."[13]

This "basic civil right" is, however, subject under the Arizona Constitution to legislative regulation. The Constitution directs the legislature "to enact[] registration and other laws to secure the purity of elections and guard against abuses of the elective franchise."[14] Recent legislatures have not been shy in exercising this power. In the last session alone, the Arizona legislature passed a dozen laws involving elections.[15]

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5. U.S. CONST. amend. XV.

6. *Id.* amend. XIX.

7. *Id.* amend. XXIV.

8. *Id.* amend. XXVI.

9. *See* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) ("[T]he Constitution 'does not confer the right of suffrage upon any one' . . . ." (quoting Minor v. Happersett, 88 U.S. 162, 178 (1874))).

10. U.S. CONST. art. I, § 2; *see also* Rodriguez, 457 U.S. at 9.

11. ARIZ. CONST. art. II, § 21 ("All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

12. *Id.* art. VII, § 2 ("No person shall be entitled to vote . . . unless" they meet the citizenship, residency, and age requirements).

13. Harrison v. Laveen, 196 P.2d 456, 459 (Ariz. 1948).

14. *See* ARIZ. CONST. art. VII, § 12.

15. Such efforts included Senate Bill 1485, which automatically removes voters from the state's early voting list if they do not cast a ballot at least once every two years, S.B. 1485, 55th Leg., First Reg. Sess. (Ariz. 2021) (codified at ARIZ. REV. STAT. ANN. § 16-168 (2021)), and Senate Bill 1003, which would require any ballot arriving without a signature to be cured by election day (as opposed to within five days of the election), S.B. 1003, 55th Leg., First Reg. Sess. (Ariz. 2021), (codified at ARIZ. REV. STAT. ANN. § 16-547 (2021)). After the district court granted a permanent injunction, *see* Ariz. Democratic Party v. Hobbs, 485 F. Supp. 3d 1073 (D. Ariz. 2020), *appeal filed*, Ariz. Democratic Party v. Hobbs, No. 20-16759 (7-7-21 SF). For a review of these laws, see Press Release, Off. of the Governor, Governor Ducey Signs Legislation To Further Protect Arizona Voters (May 11, 2021),

What happens when the legislature's efforts collide with the right to vote? Relatively little Arizona Supreme Court jurisprudence addresses that issue. In 1934, the Court held that the legislature could require signers of an initiative to be registered voters.[16] In 1948, interpreting a prior version of the Constitution, the Court held that Native Americans residing on reservations were not "under guardianship" and thus eligible voters.[17] In 1972, the Court upheld a statute requiring that circulators of referendum petitions be qualified electors.[18] Citing the legislature's constitutional duty to protect against fraud, the Court stated that legislation which "does not unreasonably hinder or restrict the constitutional provision [initiative] and . . . reasonably supplements the constitutional purpose . . . may stand."[19]

In 2018, upholding statutes governing initiatives, the Court twice cited in passing the constitutional instruction to the legislature to enact laws "to secure the purity of elections and guard against abuses of the elective franchise."[20] In the second of those cases, the Court cited its 1972 decision and found the statute "permissible if it 'does not unreasonably hinder or restrict'" the exercise of the initiative right.[21] The Court also cited a United States Supreme Court decision interpreting federal law for the proposition that "'the State need not *narrowly tailor* the means it chooses to promote ballot integrity,' including deterrence of fraud."[22]

To date, the Court thus seems to have reviewed election legislation for reasonableness, rather than subjecting it to some sort of strict scrutiny. But even if reasonableness is the measure, an important question remains: how does the Court determine whether legislation impacting the right to vote is reasonable? In addressing that question, Arizona courts should not rely on

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https://azgovernor.gov/governor/news/2021/05/governor-ducey-signs-legislation-further-protect-arizona-voters, [https://perma.cc/8MB5-V7W5].

16. Ahrens v. Kerby, 37 P.2d 375, 380 (Ariz. 1934).

17. *Harrison*, 196 P.2d at 463.

18. Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1972).

19. *Id.*

20. Molera v. Reagan, 428 P.3d 490, 493 (Ariz. 2018). Chief Justice Bales, joined by Justice Timmer, dissented from this opinion on the grounds that the law did not present "a substantial danger of fraud, confusion, or unfairness sufficient to invalidate the initiative petitions." *Id.* at 498 (Bales, C.J., dissenting).

21. Stanwitz v. Reagan, 429 P.3d 1138, 1142 (Ariz. 2018).

22. *Id.* at 1143 (emphasis added) (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 365 (1997)). In 2021, the Court reiterated this review standard in a challenge to a statute requiring registered circulators of initiative petitions in an election challenge to appear for trial. Leach v. Hobbs, 483 P.3d 194, 199–200 (Ariz. 2021). Recognizing the importance of the initiative right, however, it cautioned courts to "remain vigilant to ensure that initiative challengers do not abuse the subpoena provision . . . by wielding it as a procedural sword to disqualify petition signatures rather than using it as a tool to advance the fact-finding process." *Id.*

cases interpreting the federal Constitution or the VRA. Rather, the job of the Arizona judiciary is to interpret our own Constitution.

Examining state laws impacting the right to vote under traditional rational basis review—under which a court defers to the legislative choice if there is any conceivable rational basis for the enactment—is insufficient to safeguard the fundamental right to vote protected by the Arizona Constitution. Imagine that to deter voter fraud, the Arizona legislature passes a law requiring registered voters to bring ten witnesses to attest to their identity on election day. There would clearly be a rational basis for a court to conclude that this law would guard against abuses of the franchise. But it also would plainly prevent voters from exercising the right to vote and make a mockery of the constitutional promise of "free and equal elections."[23]

Respect for the Arizona Constitution requires something other than blind deference when legislation purportedly enacted to protect the purity of elections burdens the right to vote. The history and context of that Constitution requires a more robust inquiry—the judiciary must require that the legislature identify and document the problem it seeks to address, and then determine whether there is a reasonable fit between the identified problem and the legislative solution. Even if the legislature need not choose the "least restrictive means" of achieving its objective, it cannot, under the guise of protecting election integrity, solve problems that do not exist to the detriment of the right to vote or adopt solutions that unreasonably burden the exercise of that right.

II. IMPORTANCE OF INDEPENDENT CONSTITUTIONAL INTERPRETATION

Among others, former Chief Justice McGregor has eloquently warned against interpreting state and federal constitutions in "lockstep."[24] As she noted, "the drafters of our state constitution could not have operated under the assumption that interpretations of the federal constitution would control the rights guaranteed citizens under the state constitution[,]" because, when the Arizona Constitution was adopted, the Bill of Rights largely did not apply to the states.[25] "The framers thus must have intended that the state constitution

23. ARIZ. CONST. art. II, § 21.

24. Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 ARIZ. ST. L.J. 265, 275 (2003).

25. *Id.* at 275–76. State courts construe state constitutional provisions regarding individual rights either in lockstep with the federal constitution or by independently analyzing whether the state constitution provides greater protection. Justice Brennan, a fervent proponent of the latter, urged state courts to engage in independent interpretations of state constitutions, which he saw as

would provide the 'solitary, fundamental rules shielding our people from government power.'"[26]

The argument for independent interpretation is even more compelling when, as in the case of voting rights, there is no federal counterpart to the state provision. In such an instance, as Justice Bolick has stated, "the proper conservative view should be the same as the liberal position: that courts should independently interpret and actively enforce our state constitution."[27]

Engaging in such independent interpretation, other state supreme courts have given force to state constitutional protections of the right to vote. The Missouri Supreme Court has stated that, because of "the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart."[28] Similarly, in holding a voter ID law unconstitutional,[29] the Supreme Court of Arkansas rejected the contrary conclusions of other state supreme courts, noting "those courts interpreted the United States Constitution or their respective states' constitutions, and here, we address the present issue solely under the Arkansas Constitution."[30] And, in striking down a law switching voters to "inactive" status and then removing them from the voter rolls after a period of inactivity, the Maryland Court of Appeals found that its state constitution is "even more protective of rights of political participation than the provisions of the federal Constitution" and therefore that the "right to vote is not subject to expiration for voter inactivity or for any other non-constitutional qualification."[31]

"a font of individual liberties," with "protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986); *see also* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

26. McGregor, *supra* note 24, at 276.

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

28. Weinschenk v. State, 203 S.W.3d 201, 212 (Mo. 2006).

29. Martin v. Kohls, 444 S.W.3d 844, 852–53 (Ark. 2014); *see also* Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 73 (Ga. 2011) (upholding voter ID law but engaging in independent analysis of state constitutional provisions).

30. *Martin*, 444 S.W.3d at 853.

31. Md. Green Party v. Md. Bd. of Elections, 832 A.2d 214, 222, 228 (Md. 2003). For another example of a state court independently interpreting a state constitution, see Chelsea Collaborative, Inc. v. Sec'y of Commonwealth, 100 N.E.3d 326, 333 (Mass. 2018) (upholding a voter ID law but noting that the state constitution "require[d] application of [the federal] analysis in a manner that guards more jealously against the exercise of the State's police power than the application of the framework under the Federal Constitution").

Most recently, the New Hampshire Supreme Court struck down a voter registration law that changed the definition of domicile, required that citizens must provide "verifiable evidence" that they intend to be domiciled in the state after the election, and provided for a civil fine and criminal liability for failing to timely provide such evidence after an election.[32] The court acknowledged the importance of protecting against voter fraud, but upheld the trial court's factual finding that "the State's perceived need to protect the integrity of New Hampshire's elections was 'illusory.'"[33] The court also noted evidence that the law would impose significant burdens on voters: "confusion arising from the language of forms; increased wait times likely to result from the complexity of the forms; and incurring post-election obligations and being exposed to potential penalties . . . ."[34] In striking down the law, the court found that the State "failed to demonstrate that [the law] is substantially related to the precise governmental interests it set forth as justifications necessitating the burdens the law imposes on the right to vote."[35]

The Arizona judiciary should similarly engage in independent interpretation of our Constitution when reviewing laws impacting elections. A paradigm for such an approach is the Arizona Supreme Court's jurisprudence involving Article 18, Section 6, which provides that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[36] There is, of course, no counterpart to this provision in the federal Constitution and the Court has never looked to federal law in interpreting it. Rather, the Court examined the "historical milieu in which Arizona's constitution was adopted," and concluded that the provision was "intended to take the right to seek justice out of executive and legislative control, preserving the ability to invoke judicial remedies for those wrongs traditionally recognized at common law."[37]

Similarly, in addressing the "free and equal" elections clause, the Arizona Court of Appeals has looked to "the intent of the framers," analyzing "the

32. *See* N.H. Democratic Party v. Sec'y of State, No. 2020-0252, 2021 WL 2763651, at *5 (N.H. July 2, 2021). The relevant constitutional provision reads, "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile." N.H. CONST. pt. I, art. 11. In 2015, the New Hampshire Supreme Court held that intermediate scrutiny applies when a voting restriction falls somewhere between "severe" and "reasonable" and "nondiscriminatory." Guare v. State, 117 A.3d 731, 738 (N.H. 2015).

33 *N.H. Democratic Party*, 2021 WL 2763651, at *11.

34. *Id.* at *4.

35. *Id.* at *11.

36. ARIZ. CONST. art. XVIII, § 6.

37. Boswell v. Phx. Newspapers, Inc., 730 P.2d 186, 192, 194 (Ariz. 1986).

context, subject matter, historical background, effects, consequences, spirit, and purpose of the law."[38] After doing so, the court had little difficulty concluding that the constitution was violated when votes were not properly counted.[39] Similarly, the history and context of the "purity of elections" clause strongly militates against blind deference to the legislature's conclusion that a particular law is reasonably required to achieve "purity" or prevent "abuses."[40]

III. THE INTENT OF THE FRAMERS

As John Leshy, in the predominant scholarly work about the Arizona Constitution, has documented, the framers of the state Constitution shared an early twentieth century progressive distrust of government and an opposing broad trust in the electorate.[41] "The delegates' shared belief was that if the citizenry sufficiently controlled the government, social justice could be accomplished."[42] This control was to be exercised not only through elections of officials, but also through the "best-known innovations" of the progressive movement, "the initiative, referendum, and recall—which allowed the people to take a direct role in the operation of government."[43] Indeed, the Supreme Court had described as a "notorious fact that the choice of delegates to the constitutional convention was fought out primarily upon this issue" of whether candidates favored including the initiative and referendum.[44] The scope of the legislature's right to place burdens on the right to vote must be viewed in the context of the centrality of voting to the "popular democracy" that the Constitution enshrines.

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38. Chavez v. Brewer, 214 P.3d 397, 407 (Ariz. Ct. App. 2009) (internal citation omitted).

39. *Id.* at 408.

40. *Id.* at 406–07.

41. *See* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION, at xxi (2d ed. 2013) (finding that Arizona's Constitution "was [] framed at the high-water mark of the progressive movement in Arizona."); *see also id.* at 14 ("The most constant thread running through the Arizona Constitution is its emphasis on democracy, on popular control expressed primarily through the electoral progress."). Indeed, Leshy notes that there was a "growing concern by some in Washington, not the least of whom was President Taft himself, that the progressives might write too radical a constitution." *Id.* at 9.

42. *Id.* at 14.

43. *Id.* Only three other states (Montana, North Dakota, and Oregon) have all three of these tools of direct democracy. *Id.* at 12 n.31.

44. *See* Whitman v. Moore, 125 P.2d 445, 450 (Ariz. 1942).

A. Popular Control over Legislation

Article IV of the Arizona Constitution grants lawmaking power not only to the elected House and Senate, but also independently to the electorate: "[T]he people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature [initiative]; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature [referendum]."[45] This makes the electorate a "coordinate source of legislation" equivalent to, and often in opposition to, the legislature.[46] Because only "qualified electors" can engage in such direct democracy,[47] restrictions on voting necessarily impact these important rights and have the potential of unsettling the constitutional scheme of checks and balances.

B. Popular Control Over Elected Officials

The progressive distrust of government also is evidenced in the constitutional requirement that numerous state officers be elected and subject to recall.[48] The Arizona Constitution requires popular election of a wide swath of statewide officials, including not only the Governor, Attorney General and Secretary of State, but also the Treasurer, Superintendent of Public Instruction, Corporation Commissioners, and even the Mine Inspector.[49] Local government offices are treated the same way.[50] Every time an issue was raised on the floor as to whether a particular office was to be appointive or elective, even such low-visibility jobs as clerks of courts, the delegates opted

45. ARIZ. CONST. art. IV, pt. I, § 1(1). The right to vote on existing legislation is the referendum power. *See id.* art. IV, pt. I, § 1(3). The right to propose new legislation and to enact or reject it at general elections is the initiative power. *See id.* art. IV, pt. I, § 1(2).

46. Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391, 393 (Ariz. 1972); *see also* Cave Creek Unified Sch. Dist. v. Ducey, 308 P.3d 1152, 1155 (Ariz. 2013) ("The legislature and electorate 'share lawmaking power under Arizona's system of government.'").

47. Turley v. Bolin, 554 P.2d 1288, 1291 (Ariz. Ct. App. 1976).

48. LESHY, *supra* note 41, at 15.

49. *See* ARIZ. CONST. art. V, § 1; *id.* art. XV, § 1; *id.* art. XIX.

50. *See id.* art. VII, § 1; *see also* LESHY, *supra* note 41, at 16.

for election.[51] And the Arizona Constitution also provided that these elected officials could be recalled by the electorate before the end of their terms.[52]

Even the judicial branch is subject to the ultimate oversight of the voters; until 1972, all judges were elected and subject to recall, and after the adoption of merit selection for the state appellate courts and superior courts in the most populous counties, merit-selected judges are still subject to periodic retention elections.[53] The debate over judicial recall was a centerpiece at the Arizona Constitutional Convention.[54] Although the provision allowing recall of judges was removed from the original constitution to obtain President Taft's approval of statehood, it was promptly reinserted after statehood was granted.[55]

C. Qualifications of Voters

The Arizona Constitution presumptively confers eligibility to vote on all citizens who meet certain age, residency, and other requirements; except for the incapacitated and felons, the Arizona Constitution imposes no other disqualifying restrictions.[56] Consistent with the view that the potential electorate should be as broad as possible, the constitutional framers rejected a literacy test.[57] And although the Framers excluded women from voting, in the first general election after statehood, the voters exercised their initiative power and approved a constitutional amendment that eliminated gender discrimination.[58]

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51. LESHY, *supra* note 41, at 16. There are some exceptions to this. For example, the governor and some other state executive officers serve four-year terms. *See* ARIZ. CONST. art. V, § 1(A). Another device the framers embraced to promote popular control was the direct primary to select candidates for all elective offices in the state—local, state, and federal. *See id.* art. VII, § 10. This progressive practice ensured that political parties could not hand-pick candidates. *See* LESHY, *supra* note 41, at 239.

52. ARIZ. CONST. art. VIII, pt. 1, § 1.

53. For a review of the transition to the merits selection of judges in Arizona, see Sandra Day O'Connor & RonNell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15 (2008).

54. LESHY, *supra* note 41, at 12.

55. *Id.* at 22–23.

56. *See* ARIZ. CONST. art. VII, § 2.

57. LESHY, *supra* note 41, at 16. The legislature, however, was quick to enact a literacy test only two years later, requiring aspiring voters to read the U.S. Constitution. ARIZ. REV. STAT. ANN. § 16-101(A)(4)–(5) (1956) (amended 1993). *See* James Thomas Tucker et. al., *Voting Rights in Arizona: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 283, 285–86 (2008).

58. LESHY, *supra* note 41, at 236. The legislature's devotion to the right to vote, however, has been historically less than stellar. Until 1948, it interpreted language included in a previous version of the Constitution prohibiting voting by persons "under guardianship" to exclude Native

IV. JUDICIAL REVIEW OF LAWS RESTRICTING THE RIGHT TO VOTE

Given this history, it seems quite unlikely that the Framers intended to grant the legislature, through its power to pass laws governing registration and to preserve the integrity of the ballot, effectively unlimited and unreviewable power to burden the exercise of the right to vote in the guise of avoiding fraud or protecting the integrity of elections. The Constitution placed the voters in direct conflict with the legislature by providing powers of initiative and referendum. By placing burdens on the exercise of the franchise that effectively determine the composition of the voting electorate, the legislature can directly impact the exercise of those powers.

The Arizona Court of Appeals recognized this in striking down a statute that would have required initiative petitions to be filed five months before Election Day.[59] Conceding that a constitutional provision requiring filing "not less than four months" could literally be interpreted to allow the legislature to advance the deadline, the court emphasized the Framers' profound concern that the tools of direct democracy not be subordinate to legislative power.[60] The court found that this "substantial shortening of the filing period . . . could seriously limit the reserved rights of the people to initiate legislation."[61] Thus, the court could not "say that this substantial reduction when viewed in this context would not 'unreasonably hinder or restrict' the right of the people to initiate legislation."[62]

The same approach is needed in addressing the conflict between the legislative power to address "purity" of elections and the exercise of the right to vote. The judiciary must do more than blindly defer to the legislative choice or simply consider whether the legislature could "rationally" determine whether a particular law will reduce fraud or abuse. It must instead examine the law and determine whether it will *reasonably* serve its intended purpose without *unreasonably* impacting the exercise of the franchise so central to the Arizona constitutional scheme.

American voters residing on reservations. *See* Harrison v. Laveen, 196 P.2d 456, 458, 463 (Ariz. 1948). More recently, one Arizona legislator even proposed a bill that would allow the Arizona Legislature to overturn the results of a presidential election, even after the count is formally certified by the governor and secretary of state. *See* H.B. 2720, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

59. Turley v. Bolin, 554 P.2d 1288, 1293 (Ariz. Ct. App. 1976).

60. *Id.*

61. *Id.* at 1292.

62. *Id.*

The critical issue is not, as it is under the VRA, simply whether a state law facially applies equally.[63] A law, for example, that restricts voting to the hours of ten a.m. to noon on Election Day meets that standard. But it is hard to see how such a law could pass muster under the Arizona Constitution, whatever its intended purpose. Surely such a provision would conflict with the constitutional guarantee for "free and equal elections."[64]

This is not to say that strict scrutiny of all election laws is required. There is almost always a less restrictive provision that could be adopted—for example, a law requiring registration one month before an election might serve to prevent fraud or abuse no better than a law with a three-week deadline. But any review of legislative enactments must begin with the recognition of the critical nature in the Arizona Constitutional scheme of the right of the voters to control the operations of government.

The courts therefore should not just simply assume that a law was passed in response to some unarticulated problem or serves some undefined purpose. When adopting laws affecting the franchise, the legislature should identify and document the problem being addressed. And, even if some legislative action is warranted, it cannot unreasonably burden the exercise of the right to vote. Just as in the "intermediate scrutiny" applied by the United States Supreme Court to various constitutional challenges,[65] there must be a reasonable fit between the problem and the solution.

Arizona courts have adopted a similar approach when addressing other rights under the state constitution. In *Bailey v. Myers*, the Court of Appeals struck down a city's attempted seizure of a brake shop to allow a hardware store to expand.[66] The court found that article 2, section 17 of the Arizona Constitution provided greater protections for property owners than the federal constitution.[67] More importantly, the court found that, under the Arizona

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63. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008). In *Crawford*, the Court rejected a challenge to an Indiana voter ID law under the Fourteenth Amendment's Equal Protection Clause as not imposing a "substantial burden" because the state was applying it to everyone. *Id.* The Court explained that "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious." *Id.* at 189–90 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

64. ARIZ. CONST. art. II, § 21; *see also* Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) ("Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted.").

65. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate scrutiny to statute discriminating on the basis of gender); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 570 (1980) (applying intermediate scrutiny to determine whether commercial speech can be regulated); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (applying intermediate scrutiny to a compelled speech case).

66. 76 P.3d 898, 904–05 (Ariz. Ct. App. 2003) (interpreting ARIZ. CONST. art. 2, § 17).

67. *Id.* at 903.

Constitution, whether such a taking is for public use is a "judicial question" that must be made "without regard to any legislative assertion."[68] In *Turken v. Gordon*, the Arizona Supreme Court held that the "gift clause" of the Arizona Constitution prohibited governments from giving subsidies to developers.[69] The court independently examined, despite findings by the city legislative body, whether the transaction really served a public purpose.[70] When the centerpiece of democracy, the right to vote, is at stake, no less judicial diligence is required.

V. CONCLUSION

As Justice Bolick has stated, "State constitutions can provide a mighty bulwark for individual freedom."[71] But courts cannot provide such protection if litigants do not present them with the opportunity to do so. In future challenges to laws affecting the franchise, litigants should consider reliance on the Arizona Constitution. And the Arizonan judiciary, applying the same kind of rigorous review recently engaged in by the New Hampshire Supreme Court, should give real meaning to its promises.

68. *Id.* at 900–01.
69. 224 P.3d 158, 160 (Ariz. 2010) (en banc) (interpreting ARIZ. CONST. art. 9, § 7).
70. *See Turken*, 224 P.3d at 164–65.
71. Bolick, *supra* note 27, at 512.