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Essay

Arizona, its State Constitution, and its History of Same-Sex Marriage

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INTRODUCTION

Contrary to popular belief, most state constitutions were not meant to be interpreted analogously to the U.S. Constitution.[1] Many state constitutions predate the U.S. Constitution and served as blueprints for the document.[2] It was not until 1868 and the ratification of the Fourteenth

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1. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, 143 (5th ed. 2015). *See* Hon. Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the Edmunds Decision*, 47 DUQ. L. REV. 503, 508 (2009) (noting that the Pennsylvania Supreme Court accords as much weight to U.S. Supreme Court interpretation of the U.S. Constitution as it does the decisions of sister state courts or lower federal courts).

2. WILLIAMS & FRIEDMAN, *supra* note 1, at 143.

Amendment that the Bill of Rights became applicable to states.[3] Before this, state constitutions were the sole protector of individual rights.[4]

The first version of the Constitution of the State of Arizona was signed in 1910—over a century after the U.S. Constitution was in effect.[5] The drafters of the Arizona Constitution did not intend for its constitution to mirror the federal constitution.[6] For Article II, Section 8, the drafters intended for the Arizona Constitution to mirror its sister state, Washington.[7]

Traditionally, the Arizona State Supreme Court presumes that—absent compelling reasons—the Arizona Constitution is interpreted consistently with the U.S. Constitution.[8] The court has held that for "compelling reasons," independent interpretation of the state constitution is both principled and legitimate.[9] Three compelling reasons support an independent interpretation of the state constitution. These reasons include the plain meaning of Article II Section 8, the textual differences between the Arizona Constitution and the U.S. Constitution, and the distinguished history of Arizona.

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3. *Id.*

4. *Id.*

5. *Constitution of the State of Arizona, Documents Leading to Statehood*, ARIZ. STATE LIBRARY, ARCHIVES, & PUB. RECORDS (2023), https://bit.ly/41E3JXN.

6. *An Introduction to Federalism and the Arizona Constitution*, ARIZ. ST. UNIV. CTR. POL. THOUGHT & LEADERSHIP (Apr. 17, 2023), https://bit.ly/3AqQBZV ("When Arizona first sought admission to the Union, its constitution was vetoed by President William Howard Taft for being too progressive.").

7. *See* State v. Mixton, 250 Ariz. 282, 290 (Ariz. 2021) ("This section, entitled 'Right to Privacy' and often referred to as the 'Private Affairs Clause,' was adopted verbatim from the Washington State Constitution."); *see also* WASH. CONST. art. 1, § 7.

8. State v. Casey, 205 Ariz. 359, 363 (Ariz. 2003).

9. *Id.*

STATE COURTS CAN BYPASS CONCERNS OF VIOLATING FEDERALISM

The interpretation of the U.S. Constitution by the U.S. Supreme Court requires an acknowledgment of federalism.[10] Federalism is important because it allows states to act as laboratories and "try novel social and economic experiments without risk to the rest of the country."[11] Because states may make different choices without undermining the unity of the country, the benefits of differing state views and constitutional interpretations outweigh the nearly non-existent costs.[12]

Although federalism must be considered by the U.S. Supreme Court, state supreme courts need not include a federalism analysis in their state constitution interpretations.[13] State constitutions are limited to protecting the people of their state, so other states need not be considered.[14] State judges must interpret their state constitution in congruence with their state's history.[15] State judges are inherently more aware of what the people in the state need and how they would interpret their own constitution. The fact that there are a variety of different rights

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10. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) ("The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action"); *see also* United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.").

11. New State Ice Co. Libebmann, 285 U.S. 262, 311 (1932).

12. *Id.*

13. Michigan v. Long, 463 U.S. 1032, 1041 (1983) (supporting "[t]he principle that we will not review judgments of state courts that rest on adequate and independent state grounds").

14. *See* Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940).

15. Boswell v. Phx. Newspapers, Inc., 152 Ariz. 9, 12 (Ariz. 1986) (supporting the idea that regarding a given state constitutional provision, state supreme courts may "examine its history, if necessary, to determine the framers' intent.").

established throughout the states does not offend the bedrock principle of federalism so long as no state violates the Supremacy Clause of the U.S. Constitution.[16]

Most courts interpret the text of the Supremacy Clause as establishing the floor for what rights states must guarantee their citizens.[17] A state court violates the Supremacy Clause if it interprets a federal constitutional right more narrowly than the highest federal court has.[18] As Justice Brennan stated, "no state is precluded . . . from adhering to higher standards under state law."[19]

ARIZONA'S CONSTITUTIONAL INTERPRETATION AND THE RIGHT TO PRIVACY

The approach the Arizona Supreme Court conforms to respects uniformity between state constitutional interpretation and federal constitutional interpretation.[20] This uniformity approach has flaws. This approach stifles diverse views even though all 50 states are different and have different perspectives.[21] Particularly when interpreting its *state* constitution, uniformity should not be the primary goal of the court. The goal must be prioritizing its citizens' rights under the Arizona Constitution in a manner that is consistent with the state's history. Indeed, other state courts have already evolved toward a better process.[22]

Other state courts now use a process of proper state constitutional analysis that begins by looking at their own

16. *See generally* U.S. CONST. art. VI, cl. 2.

17. WILLIAMS & FRIEDMAN, *supra* note 1, at 107. *But see* Hulit v. State, 982 S.W.2d 431 (Tex. Crim. App. 1998) (en banc) (rejecting the warrant requirement and demolishing the floor-ceiling analogy).

18. *Id.*

19. *See* Michigan v. Mosley, 423 U.S. 96 (1976).

20. *See* State v. Casey, 205 Ariz. 359, 362 (Ariz. 2003) ("Although this court, when interpreting a state constitutional provision, is not bound by the Supreme Court's interpretation of a federal constitutional clause, those interpretations have 'great weight' in accomplishing the desired uniformity between the clauses.").

21. *See, e.g.*, State v. Hunt, 450 A.2d 952, 956 (N.J. 1982).

22. *Id.*

constitutional provisions and judicial doctrines.[23] This is instead of jumping straight to federal constitution interpretation to decide what the state constitution means.[24] These states tend to use other states' constitutional decisions more steadfastly than the decisions of the U.S. Supreme Court.[25] They find sister states to be more informative since their fellow state courts are not inherently bound by the federalism analysis—like Arizona.

THE PLAIN MEANING RULE

The Arizona State Supreme Court follows the plain meaning rule.[26] Therefore, Arizona courts will follow the plain and unambiguous meaning of the language of its constitution so long as the meaning does not lead to an impossible or absurd result.[27] The plain meaning interpretation of Article II Section 8 of the Arizona State Constitution allows for broader privacy rights than the U.S. Constitution.

The language of Arizona's enumerated right to privacy provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[28] "No person" means that every person must be understood to have been granted the value of this provision.[29] "Private" plainly means something personal and particular to one or a few people.[30] "Affairs" are matters that are of a particular person's concern.[31] Therefore, the plain meaning supports that "private affairs" includes matters that are particular to only a few people. This definition covers the right to marriage. Marriage is between exactly two people and there are not many things that are more private than the things that happen within relationships and marriages.

Beginning with the text of Article II, Section 8, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law," there is a notable language choice since the founders included both "private affairs" and

23. *Id.*
24. *Id.*
25. *Id.*
26. Garrison v. Luke, 52 Ariz. 50 (Ariz. 1938).
27. Morrissey v. Garner, 248 Ariz. 408 (Ariz. 2020).
28. ARIZ. CONST. art. II, § 8.
29. ARIZ. REV. STAT. ANN. § 1-215.
30. Private, NEW WEBSTERIAN DICTIONARY (1912).
31. Affair, NEW WEBSTERIAN DICTIONARY (1912).

"home invaded."[32] The inclusion of both phrases is important because it shows that the drafters wanted to make clear that "private affairs" was not meant to only include one's usual, search and seizure rights. The drafters intended for "private affairs" to be interpreted as something more than just one's right to privacy within the home. The argument that "private affairs" constitute something more than just protection within the home, is supported by other Arizona Constitution provisions. Other provisions of Article II continue to expand on criminal procedure.[33] Unfortunately, the Arizona Supreme Court and the Washington Supreme Court lack any previous interpretations of Article II, Section 8 language that ventures outside the search and seizure context of this provision.[34]

The right itself is related to the "home invaded" language of Section 8. This further supports the proposition that the drafters chose the specific language of "private affairs" so it would stand out from the rest of the language in the Arizona Constitution. Article II, Section 8 protects the sanctity of one's home,[35] but the specific language must have been chosen to signify that this provision protects more than that.

TEXTUAL DIFFERENCES BETWEEN THE ARIZONA STATE CONSTITUTION AND THE U.S. CONSTITUTION

The historical context surrounding the drafting of the Arizona Constitution is critical in understanding the textual differences between the Arizona Constitution and U.S. Constitution. At the time of drafting the Arizona Constitution, the U.S. Constitution had been in existence for over a century.[36] Had the drafters intended the two constitutions to be interpreted analogously, they could have copied the U.S. Constitution's text verbatim.

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32. ARIZ. CONST. art. II, § 8.

33. *See, e.g.*, ARIZ. CONST. art. II, §§ 10, 15, 22, 23, 24.

34. *See* State v. Mixton, 447 P.3d 829, 835 (2021).

35. *Id.* at 837 (noting that due to Section 8's explicit mention of "the home," Arizona has protected against warrantless physical intrusions into a home otherwise not recognized in Fourth Amendment jurisprudence).

36. *The Constitution*, WHITE HOUSE (Apr. 18, 2023), https://bit.ly/43GcYIn (noting that the U.S. Constitution has been in effect since March 9, 1789).

After seeing how courts interpreted the U.S. Constitution at the time, the drafters ultimately decided on different language. As the 48th state in the nation, the drafters had their choice of language from nearly any other state constitution.[37] The drafters chose the exact language of the Washington Constitution for the constitution's privacy provision.[38] This evinces that the drafters intended for the Arizona Constitution to be interpreted differently than the U.S. Constitution.

The most notable difference between the Arizona and U.S. Constitution is the inclusion of "private affairs." There is no "private affairs" language in the U.S. Constitution. Rather, the U.S. Constitution's right to privacy is implied rather than explicit.[39] However, this implied right to privacy is currently under scrutiny by the U.S. Supreme Court, putting the federal right to privacy in jeopardy.[40] Because the Arizona Constitution has an enumerated right to not be disturbed in one's private

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37. *Territories to Statehood, The Southwest: Topics in Chronicling America*, LIBRARY OF CONGRESS (Apr. 17, 2023), https://bit.ly/3GUsV3J (noting that Arizona was the 48th state admitted to the Union on February 14, 1912).

38. *Compare* ARIZ. CONST. art. II, § 8, *with* WASH. CONST. art. I, § 7.

39. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing a right to privacy).

40. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022). When acknowledging federalism, the scales are always significantly tilted in the government's favor. In *Dobbs,* the Court found that no right to privacy exists with respect to one's ability to terminate a pregnancy. *See Dobbs*, 142 S.Ct. at 2235 (citing Washington v. Glucksberg, 521 U. S. 702, 721 (1997)) (holding that any substantive rights not explicitly mentioned in the Constitution must be "deeply rooted in the Nation's history and tradition," and be "implicit in the concept of ordered liberty"); *see also id.* at 2301 (THOMAS, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous.'"). Justice THOMAS further stated that, at most, the Due Process Clause guarantees process. *Id.* It does not "'forbi[d] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided.'" *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

affairs, it must be interpreted to give greater rights of privacy than the U.S. Constitution.

Similar to the analysis of the textual differences within the Arizona Constitution, the drafters chose the specific "private affairs" language—knowing it does not exist within the U.S. Constitution—to ensure that the state constitution would be interpreted differently than the U.S. Constitution with respect to the right to privacy. The drafters intended for Article II, Section 8 to be interpreted separately from the Fourth Amendment of the U.S. Constitution by guaranteeing a right that had never been expressly guaranteed by the U.S. Constitution. Other provisions of the Arizona Constitution cover many of the other protections of the U.S. Constitution, such as the right to assembly, freedom of speech, and freedom of religion.[41] This further demonstrates that the "private affairs" clause is meant to cover something outside of the U.S. Constitution and thus needs to be interpreted separately.

ARIZONA'S STATE HISTORY SUPPORTS A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE

Arizona became a state in 1912 when its constitution was ratified.[42] The enumerated privacy provision has remained unchanged since.[43] With the benefit of a historical perspective, the broader context of Arizona as a state lends itself to the understanding that the plain meaning of Article II, Section 8 includes protection for the right to same-sex marriage.

Arizona is a state that was built on Native American land and has retained much of the Native American culture throughout the years.[44] This unique state history is shared with Washington, from whom the provision was copied.[45] Native American tribes have a long tradition of recognizing "two-spirit" persons who are considered to be gender-neutral no matter their biology.[46]

Two-spirit persons historically formed relationships, of both a sexual and romantic nature, with those who were their

41. *See* ARIZ. CONST. art. II, §§ 5, 6, 12.

42. *See* LIBRARY OF CONGRESS, *supra* note 39.

43. *See* ARIZ. CONST. art. II, § 8.

44. Gregory Lewis McNamee, *Arizona*, ENCY. BRITANNICA (Dec. 2, 2022), http://bit.ly/3KY9ucI.

45. State v. Mixton, 250 Ariz. 282, 290 (Ariz. 2021).

46. *Two-Spirit*, U.S. DEPT. OF HEALTH AND HUMAN SERVS., INDIAN HEALTH SERVICE (2022), http://bit.ly/3UH11hy.

same biological sex.[47] These relationships would occasionally lead to marriage.[48] These people were commonly accepted by their tribe and were even thought to be lucky when it came to love.[49] Although Native American tribes differed in their views on same-sex relations, many chose acceptance rather than the legal and societal punishments commonly associated with Western cultures.[50] This history of Native American culture is important to understanding how the drafters and voters likely felt about same-sex relations and marriage, as they would have likely been exposed to this thinking during Arizona's founding.

Moving into the era of the "Wild West" to this day, Arizona has a strong presence in that culture due to the long and harsh migration to California that, for some, ended in the hunt for copper within Arizona.[51] Over time, history shows that there were accepted homosexual relationships during this era.[52]

Evidence has been found that when men migrated west to explore the new land with "travel companions;" these companions were sometimes lovers.[53] These types of relationships were quite common due to the harsh nature of exploration and the need for physical and emotional support.[54] This era commonly had same-sex households in which same-sex pairs would run a household together, looking quite a bit like today's common law marriages.[55] This era lasted until the founding of Arizona, and thus further lends itself to what the drafters and voters would have been familiar with at the time of the constitution's ratification.

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See generally* Abel Brodeur & Joanne Haddad, *Institutions, Attitudes and LGBT: Evidence from the Gold Rush*, 187 J. ECON. BEHAV. & ORG. 92 (2021).

52. Hana Klempnauer Miller, *Out West: The Queer Sexuality of the American Cowboy and His Cultural Significance* (22 Nov. 2021) (unpublished manuscript) (on file with author), http://bit.ly/3MIvvh5.

53. *Id.*

54. *Id.*

55. *Id.*

Same-sex marriage was not criminalized in Arizona until 1996.[56] Although there were bans on sodomy, fellatio, and cunnilingus, these laws were applied to both heterosexual and homosexual couples.[57] This can be interpreted as the belief that it was the act itself that was more morally unacceptable rather than the sexual orientation of the couples involved in the act. The 1996 law that banned same-sex marriage came directly after The Defense of Marriage Act was passed by the federal government.[58] The passing of the Arizona equivalent law should be seen as a reflection of the federal government's beliefs rather than a reflection of Arizonans' beliefs.

Overall, the history of Arizona supports that the drafters likely lacked the intent to prohibit same-sex relationships and marriages. History shows that prior to Arizona becoming a state in 1912 and until 1996, same-sex marriage was never illegal. This historical context supports that a plain-meaning interpretation of Article II, Section 8 of the Arizona Constitution includes the right to marriage no matter the couple's sexual orientation.

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56. ARIZ. REV. STAT. ANN. § 25-101.

57. George Painter, T*he Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*, GAY AND LESBIAN ARCHIVES OF THE PAC. N.W. (Aug. 11, 2004), http://bit.ly/3L0SNh6.

58. *Id.*