Second Edition

Understanding the Arizona Constitution

Toni McClory

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Preface to the First Edition

This book is addressed to three overlapping audiences: students, citizens, and government professionals. My original objective was more limited. I simply needed an introductory textbook for my Arizona Constitution students. In fact, I was in the midst of "beta testing" the first draft when colleagues from other disciplines began stopping me in the corridor. It was an election year, and they had questions about propositions on the ballot. Others, of a more activist bent, wanted to know how bills could be tracked, where statutes and administrative rules could be obtained, and so forth. It occurred to me that it wouldn't be a major stretch to make the book equally useful to a second audience, the engaged citizen. So I expanded topics of special interest to voters and included references to online government resources. For the second time, I thought the task was done. Then I began to receive requests for the manuscript from an unexpected, third source: government professionals. Initially I balked. This was an introductory text, I insisted; it wasn't intended for sophisticated audiences. I knew that the professional reader would require detailed citations and a more nuanced analysis—things that might be off-putting to the general reader. It seemed like an impossible marriage, until I considered endnotes: I could keep the body of the book firmly focused on my primary readership (students) and tell the rest of the story in the back pages. This strategy was later validated when my advanced students also began requesting citations and greater supporting detail. Thus, this book is addressed to the novice as well as to the aficionado; it seeks to be accessible and, at the same time, fairly rigorous.

There are three other editorial emphases that should be explained. First, I have endeavored to blend topicality with history. Topicality is important because this is a profoundly dynamic subject. Teaching the Arizona Constitution is not like teaching geometry. The theorems continually change with new court rulings. And when the voters biennially amend the state constitution, they alter the very axioms. As a result, describing the state's political processes is much like trying to hit a moving target. I have struggled to make the text as up-to-date as publication deadlines allow, but this is a

losing game. Inevitably, there will be new developments. Along with topicality, this book heavily emphasizes history. An entire chapter is devoted to the historical underpinnings of the state's government, and linkages to the past are included throughout. This dual focus is not contradictory. Arizona's current political processes cannot be fully understood without this historical backdrop.

Second, throughout the book I emphasize the assumptions and political trade-offs that underlie the state's institutions. To me, the interesting issue isn't that Arizona has a part-time legislature, but why this is so, and what advantages and disadvantages flow from this arrangement. Accordingly, the book contains multiple pro-and-con passages designed to stimulate such critical thinking. In fact, many of the points emerged in classroom debates. Not surprisingly, we didn't always agree as to whether a particular consequence belonged in the plus or the minus column. By including these arguments in the text, I am not trying to resolve these issues, but rather to similarly engage the reader. Arizona citizenship demands such an analytical stance; the voters must make similar evaluations whenever they vote on ballot measures.

Finally, this book contains a more thorough treatment of the state's judicial branch than is found in most other general texts. I defend this emphasis because the court's role in shaping public policy in Arizona is both significant and poorly understood. Arizona's appellate courts not only "make law"—periodically altering major public and private responsibilities—but also play an aggressive watchdog role, nullifying many high-profile acts of the legislature, other public officials, and the voters. I have discovered that even the judges' more routine functions remain shrouded in mystery. Many people are confused by the difference between civil and criminal trials and wonder how they can reach different outcomes (e.g., the O. J. Simpson case). Others are puzzled about the ruckus over "tort reform." While the latter may seem a bit arcane for an introductory text, Arizona voters have been asked to weigh in on the subject three times in recent years. I have drawn heavily on my dual careers (law and teaching) to try to present the courts' role in a more complete, accurate, and accessible way.

With such ambitious goals, I obviously required help. In fact, I've been sweating over these acknowledgments for quite a while. There is simply no way to thank all of the people, in government and out, who generously shared their knowledge and insights with me. But I would be remiss if I did not

single out a few individuals both for their own contributions and as emblematic of others whom I do not name. At the top of my list is Anthony B. Ching, a constitutional scholar and Arizona's first solicitor general. Tony introduced me to the fascinating stories behind Arizona's political institutions more than twenty years ago, and he remains a walking encyclopedia of the state's legal history and lore. He can provide pertinent case references from memory (often with volume numbers) and is always willing to debate any new legal issue that arises. William Lamkin, along with my other colleagues at Glendale Community College, strongly encouraged this undertaking. Bill also read the manuscript, offered valuable suggestions, and helped me keep the presentation balanced. My POS 221 students at Glendale Community College and Arizona State University West (fall 1998 to spring 2000) deserve special thanks as well. They put up with an early version of the manuscript, caught embarrassing typos, offered many useful editorial suggestions, and warmly encouraged this project.

To procure the raw data that underlie much of the text, I pestered overworked government staffers throughout the state. Belying the public's perception of "bureaucrats," these dedicated workers provided not only the requested data but also rich insights and firsthand recollections. I would especially like to acknowledge the secretary of state's Elections Department, which promptly accommodated all my research requests, and Sandra Claiborne, whom I interrupted the most. Laurie Devine, photo archivist for the Arizona Department of Library, Archives, and Public Records; Robert P. Spindler, archivist for the Arizona State University libraries; and Jean McHale, public information specialist for the Arizona Supreme Court, also deserve special mention. All three helped procure the wonderful images that are reprinted in this book. And Patti Hartmann, Anne Keyl, and Sally Bennett patiently guided me through the final publication stages of this manuscript, along with others at the University of Arizona Press.

Finally, special acknowledgment is owed to the members of my family. They provided far more than the support and forbearance that is typically acknowledged in these pages. Each of my three children also made substantial editorial contributions. Andrew interrupted his own studies to proofread the draft, fruitlessly lecture me on comma placement, and offer thoughtful reactions to the text. Bret, the family's network administrator, facilitated my Internet research by keeping a sophisticated home system humming; he also provided expert assistance with graphics and other

technical issues. Emily, the family Web maven, double-checked every URL in the textbook (including those endnotes!), organized the glossary, and provided other assistance with the preparation of the manuscript. However, the person most indispensable to this undertaking has been my husband, Thomas McClory. Tom is a public lawyer who has served the state of Arizona for more than twenty years. I continually drew upon his legal expertise and remarkable memory of cases, people, and events. He generously assisted me with all aspects of this project, read the manuscript more times than the marriage contract decently warrants, and picked up the slack at home. I am disappointed that Tom's professional commitments wouldn't permit him to join me as coauthor (it would have been a much wittier text), but I have high hopes for the next edition. It is customary at this point for the author to assume full responsibility for all errors that may remain. I am, of course, solely responsible, but at least with respect to the family members, you know who I'll be blaming.

Preface to the Second Edition

It is hard to overstate the major constitutional changes that have occurred in the decade since the first edition of this book was written. Some have altered the very structure of state government itself; others have changed sensitive political processes such as redistricting. There have been two new governors, with yet another midterm succession. There have been dramatic veto battles, protracted budget wars, and other inter-branch conflicts that have generated landmark constitutional rulings from the courts. Legislator term limits kicked in for the first time, and some were already calling for their repeal. A major legislative scandal at the decade's start raised troubling questions about the continued efficacy of part-time lawmaking. Reciprocally, the citizens' Voter Protection Act added new rigidity to the governing process, limiting the legislature's options in times of fiscal crisis. In fact, a total of sixty-four propositions reached the ballot, spawning heated controversies over same-sex marriage, immigration, and other hot-button social issues. No branch of government escaped change: Arizona's courts were forced to significantly revise death penalty procedures, relinquishing sentencing power to juries. On the local level, record-breaking population growth triggered new constitutional battles over eminent domain, building moratoriums, and tax incentives for developers. For a second time, governance in Maricopa County reached crisis levels, with officials engaged in seemingly endless turf wars and lawsuits. Charter schools became major education providers, competing with traditional school districts for students. School funding battles continued, and controversial school voucher and tax credit programs led to major constitutional rulings. As the state struggled to cope with the worst fiscal crisis in its history, many were calling for fundamental constitutional change. It was evident that a second edition was overdue.

As before, more people assisted my efforts than I can possibly acknowledge. I'm especially grateful to my students at Glendale Community College (admittedly a captive audience, but nonetheless generous with their feedback and support). In fact, some revisions are the direct result of my own teaching experience. In using this book in the classroom for nearly a decade, I

discovered firsthand what did and didn't work. I'm also grateful to my colleagues in academia, in government, and on the bench who unstintingly shared their expertise. Special thanks are owed to the Honorable George Anagnost, Kathy Hedges, Donna Allen, Hannes Kvaran, and Oriol Vidal-Aparicio, who reviewed portions of the manuscript, and to Patti Hartmann and Barbara Yarrow at the University of Arizona Press, who encouraged my efforts throughout. I am especially grateful to Kirsteen Anderson, who provided expert editorial assistance and was also one of my shrewdest readers.

Finally, the "in-house" assistants who contributed so much to the first edition have now grown up and moved on to creative pursuits of their own. Nonetheless, my daughter Emily interrupted her own law school studies to track down elusive citations for late-breaking cases. Two family members, however, were indispensable: My son Bret McClory took time from his busy schedule to create nearly all the charts in this edition. Data play a vital role in my account because they reveal how the constitution's abstract language translates into real-world politics. Bret's talents not only improved the book's aesthetics, but made the numbers more meaningful. And his insights also prompted me to explore interpretations that I would have otherwise overlooked. Finally, there simply wouldn't be a second edition without my husband, Thomas McClory. This is not the typical spouse acknowledgment, although I am deeply grateful for his exceptional patience and understanding. Rather, Tom's substantive contributions can be found on virtually every page of the second edition. His knowledge of the inner workings of state government, acquired through longtime public service, is somewhat legendary in legal circles. In fact, Tom participated in many of the high-profile events narrated in this book. I am keenly aware that most authors do not have such ready access to a primary source! Finally, Tom extensively helped with research, citation-checking, proofreading, and all the less glamorous aspects of manuscript preparation, making this a collaboration in every sense of the word.

May 2010

Understanding the Arizona Constitution

1 The Arizona Constitution

When people hear the term *constitution*, they usually think only of the U.S. Constitution. In fact, all fifty states have their own written constitutions, and two are even older than the nation's.[1] Arizona's constitution became effective in 1912 when Arizona was admitted as the forty-eighth state. Surprisingly, it is not one of the newer constitutions. This is because most older states have jettisoned their original constitutions in favor of newer models. (Louisiana holds the record here; it has had eleven different constitutions since statehood.) Although Arizona has remained loyal to its original charter, the state's constitution has been repeatedly amended. All of this constitutional activity points to one inescapable conclusion: state constitutions *do* matter. Why?

The Importance of State Constitutions

Written constitutions serve at least two major purposes. First, they establish a government by formally defining its powers, responsibilities, and internal structure. For example, the basic organization of Arizona's government is laid out in Article 3 of the state constitution. It declares:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Articles 4, 5, and 6 deal with each of the three branches in turn. Thus, if you want to know how old you must be to serve in the state legislature, whether the governor possesses a **line-item veto,** or how judges are chosen, you would find the answer in one of these three sections. The remaining articles address such basic matters as the state's official boundaries, its election rules, taxation powers, education system, and local governments. In other words, the constitution is really a blueprint for state government—and the most authoritative guide available.

A second function of written constitutions is to safeguard individual

rights and liberties. Arizona's **Declaration of Rights** is found in Article 2. It guarantees freedom of speech, freedom of religion, the right to bear arms, and many other personal liberties. In modern times, the U.S. Constitution has become the more important source of rights. Arizona's Article 2 is not superfluous, however. Rather, it *supplements* the rights guaranteed to all Americans by the national constitution. More specifically, there are state rights that are simply not found in the U.S. Constitution. For example, Arizona has an express right of privacy. In 1987, the state supreme court used this right to recognize a qualified right to die. This decision preceded national recognition of such a right by three years.[2] Moreover, Arizonans have the power to add new rights to their constitution through the amending process. The voters did this in 1990 when they added special constitutional protections for victims of crime.[3]

Arizona's rights provisions have legal force even when they duplicate rights found in the U.S. Constitution. First, there are often subtle differences in wording. Notably, the state's free speech clause, religious freedom protections, and right to bear arms are more specific than their federal counterparts.[4] Second, state courts have the power to interpret state constitutional rights provisions more expansively than the federal provisions. Arizona's supreme court has done this on several notable occasions.[5] In short, the role of state constitutions in safeguarding personal freedoms, though subordinate to the U.S. Constitution, should not be underestimated.

Finally, a common misconception about constitutions is that they have historic value only—that their importance ceases once the government is established or a new right is added. To the contrary, constitutions serve as a continuing limitation on the powers of government. In essence, officials can do only what the constitution permits. An illustration of this principle can be found in the national debate over **tort** reform. Some Americans believe that juries award too much money for injuries. Accordingly, a number of states have passed laws limiting such awards. Arizona's legislators cannot do so because the Arizona Constitution expressly forbids limits on jury verdicts.

HOW THE CONSTITUTION IS ORGANIZED

The Arizona Constitution currently consists of a preamble and thirty articles. The articles deal with specific subjects, such as education, taxes,

and the three branches of government. Most articles are further divided into individual sections. Because the state constitution is so frequently changed, the amendments are not printed at the end of the document, as they are with the U.S. Constitution. Instead, Arizona's constitution is periodically republished. The new language is then incorporated into the body of the text, and any superseded language simply disappears. For this reason, it is important to check the "freshness date" of the constitution you are consulting. A current version is always available from the Arizona secretary of state's office and can now be accessed online. (See the online resources at the end of this chapter.)

The legislature has asked the voters to remove this barrier from the constitution, but the Arizona voters have repeatedly refused.[6] The idea that the powers of government are thus limited is called **constitutionalism**. It serves as an important check against the abuse of power and is a defining principle of the American system of government.

The Hierarchy of Laws

The Many Sources of Arizona Law

Important as it is, the Arizona Constitution is not the sole authority on state government. Rather, the constitution often leaves key details to another source, the laws. For example, Article 5, section 9 of the constitution reads:

> The powers and duties of the secretary of state, state treasurer, attorney general, and superintendent of public instruction shall be *as prescribed by law* (emphasis added).

Law in this context means state **statutes**. As explained in chapters 3 and 4, statutes are enacted by the legislature and, less frequently, by the voters through the **initiative** process. Arizona's statutes address a wide range of subjects and fill many volumes. Among the thousands of statutes in effect are laws that pertain to the four major offices listed in section 9. Thus, if you wanted to know about the treasurer's office you would have to look in the statutes instead of the constitution. There you would find a curious provision: Arizona's treasurer is required to give formal notice before leaving the state (even for personal vacations). The law—which dates back to Arizona's earliest territorial days—reflects a longstanding mistrust of elected officials

where public money is involved.[7]

Although statutes fill many of the gaps left by constitutional provisions, they too have intentional holes. The state legislature often leaves the details of governing up to executive branch agencies that possess greater expertise. As discussed in chapter 5, this branch of government has the primary responsibility for seeing that the laws are properly carried out. To accomplish this function in a uniform, fair, and efficient way, state agencies promulgate detailed regulations, called **administrative rules**. Sometimes the answer to a specific question about government can only be found in this third body of law.

Unfortunately, our legal inventory is still incomplete. The constitution, statutes, and administrative rules are not the only sources of state law. As explained in chapter 7, local governments—for example, county, city, and town governments—have limited authority to make laws too. These local laws are called **ordinances** and **codes**. They typically address matters of public health and safety. For example, nuisance laws, curfews, parking restrictions, **zoning** ordinances, and building codes are some of the many issues addressed by local governments.

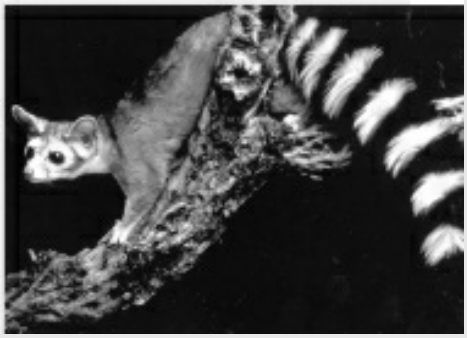
Lastly, judicial opinions constitute an important additional source of state law. As explained in chapter 6, **appellate courts** sometimes make law when they rule in individual cases. Although less accessible to the general public than statutes, ordinances, and constitutional provisions, court rulings are no less authoritative. For this reason, when we study Arizona government, appellate court opinions must always be considered as well.

Resolving Conflicts between Laws

With so many different lawmaking authorities, conflicting laws invariably arise. What happens when a local ordinance conflicts with a state statute or constitutional provision? The answer is that all laws are not equal; the Arizona Constitution stands as the supreme law of the state. That means that *its* provisions prevail over any conflicting language in statutes, rules, or ordinances. The offending provisions are said to be *unconstitutional* and therefore unenforceable. In an analogous fashion, state statutes take precedence over administrative rules and most local ordinances.

RINGTAILS, BOLA TIES, AND DUELING STATE ANTHEMS

Do you recognize the little animal pictured here? It is a ringtail, the "state mammal." Like other states, Arizona has an official bird (the cactus wren), an official flower (the saguaro blossom), and an official tree (the palo verde). Unlike other states, Arizona also has official neckwear—the bola tie. (If you want to know the identity of the state butterfly, reptile, fish, amphibian, fossil, and gemstone, you will have to check the statutes!)[8]



Surprisingly, these designations can be quite controversial. Take the state's official song: in 1919, the Fourth Legislature selected Margaret Rowe Clifford and Maurice Blumenthal's *Arizona March Song* as the state anthem. Set to a rousing march beat, *Arizona March Song* begins:

> Come to this land of sunshine
> To this land where life is young.
> Where the wide, wide world is waiting,
> The songs that will be sung.

In 1982, a Phoenix radio station campaigned for a new state anthem: Rex Allen Jr.'s *Arizona.* The more mellow, country-western song opens:

> I love you Arizona
> Your mountains, deserts and streams
> The rise of Dos Cabezas
> And the outlaws I see in my dreams

Country-western fans battled traditionalists in the state legislature. Ultimately, the controversy ended in a draw: the Thirty-Fifth Legislature officially adopted Rex Allen Jr.'s song as the "alternate" state anthem.[9] Battles over state mascots and emblems continue even to this day. (See chapter 3 for the brouhaha over a state dinosaur.)

Arizona laws must also be considered within the larger, national context. Arizona is a part of a **federal system** that includes the national government and forty-nine other states. The division between federal and state authority is actually quite complex. States are sovereign entities, not subunits of the national government. Both levels of government derive their power from the U.S. Constitution, not from each other. The Constitution gives the national government exclusive power to act in certain areas (e.g., national defense) and reserves regulatory power to the states in other areas (e.g., education, public safety, and health). There are also areas where both governments have jurisdiction (e.g., commerce and civil rights).

In practice, these constitutional distinctions are often blurred. The national government can use its spending power and superior resources to regulate areas that properly belong to the states. It does this by attaching "strings" to grants and other financial aid. For example, in the mid-1980s the federal government wanted the minimum drinking age to be twenty-one. It lacked the constitutional authority to impose this on the nation through direct legislation. Accordingly, the federal government threatened to withhold highway funds from states that did not raise their drinking age.[10] Arizona, like other cash-starved states, complied. Today, all fifty states make twenty-one the minimum age for buying alcohol. The same approach has enabled the federal government to become increasingly involved in public education—another area reserved to the states. For example, the controversial No Child Left Behind Act was imposed on the states by this means. A state can refuse to participate, but it will lose substantial federal education funding.

Conflict is inevitable in any system where power is divided between two separate authorities. Indeed, disputes between the national and state governments have a very long history. The **Supremacy Clause** of the U.S. Constitution anticipates this. It decrees that in cases where both governments have the authority to act, state law is subordinate to the U.S. Constitution, federal treaties, and duly enacted federal laws.[11] The Arizona Constitution

acknowledges this pecking order as well. Article 2, section 3 declares, “The Constitution of the United States is the supreme law of the land.” Accordingly, whenever a provision in the Arizona Constitution conflicts with the U.S. Constitution, the state provision is said to be unconstitutional.

A good example of such federal-state conflict involves Arizona’s Article 28, which requires English to be used in most government and public school settings. It was first added to the state constitution by the voters in 1988 through the initiative process. However, opponents immediately sued to have it declared unconstitutional on federal grounds. After lengthy litigation in both federal and state courts, the Arizona Supreme Court agreed. It ruled that Official English violated the Free Speech Clause of the U.S. Constitution and was therefore unenforceable.[12] The void language of Article 28 remained in Arizona’s constitution as “deadwood” until the voters replaced it in 2006 with a more narrowly worded Official English provision. The hierarchical relationships among Arizona’s statutes, rules, ordinances, and the U.S. and Arizona constitutions are summarized in figure 1.1.

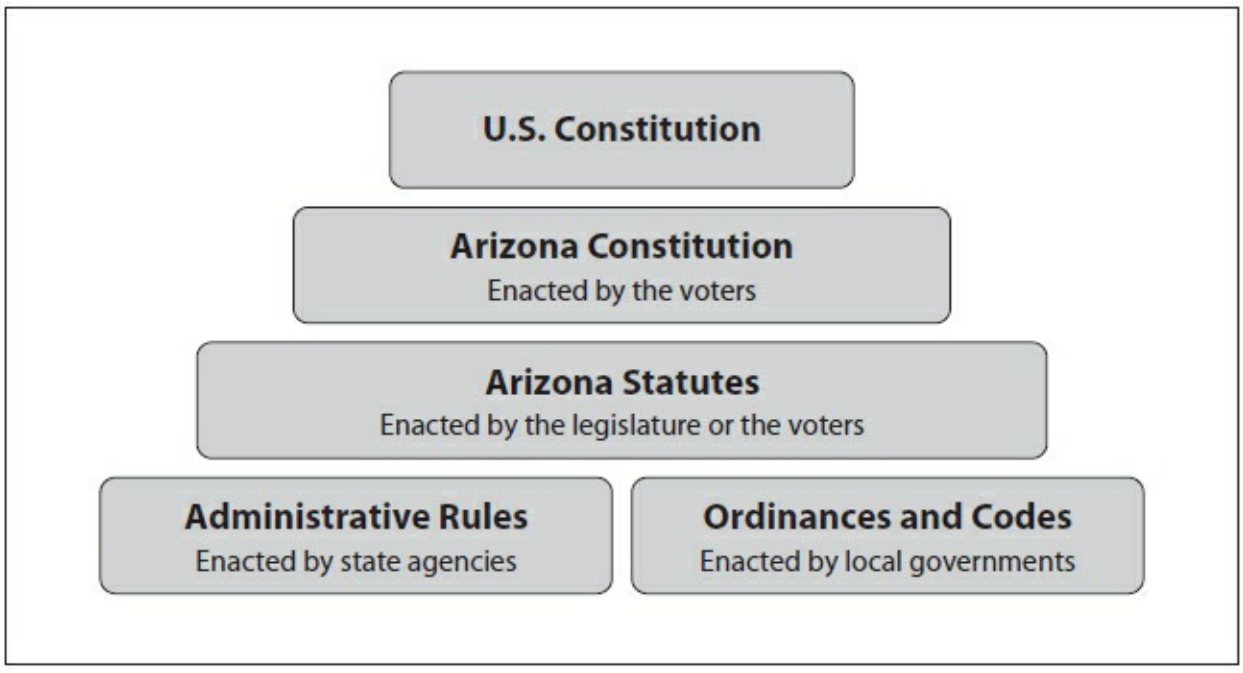


Figure 1.1. The hierarchy of laws.

Amending the Arizona Constitution

Constitutions are supposed to be enduring documents that set forth fundamental principles. The U.S. Constitution fits this description well. It is remarkably succinct (about 7,500 words) and has been formally amended only twenty-seven times. State constitutions differ sharply from this model. Most are fairly long and expanding due to frequent amendments. Arizona's Constitution weighs in at more than 45,000 words—roughly six times the length of the U.S. Constitution—and it has been amended 144 times as of this writing. It is one of the longer state constitutions.

There are several reasons why state constitutions are more frequently altered than the U.S. Constitution. First, some citizens wish to restrict the scope of government activity. To do this, they must put barriers in the constitution because states can ordinarily do anything that is not prohibited. In contrast, the situation is reversed for the federal government. Normally, before it can act there must be an express constitutional authorization. Hence, there is less incentive for national amendments.

Second, **interest groups** use the constitution to preserve group privileges. Because constitutions are more difficult to change than ordinary statutes, "locking" something into the constitution prevents legislators from easily interfering with matters of importance to these groups. As a result, most state constitutions are filled with specialized tax exemptions and occupational privileges. Compared to its sister states, Arizona is not the worst offender. Nonetheless, examples can be readily found. Article 26 gives real estate agents a constitutional right to prepare some legal documents. Ostrich farmers successfully obtained a tax exemption in 1994 for "livestock, poultry, aquatic animals and honeybees."[13] In fact, the article dealing with taxation is one of the longer sections simply because it contains so many specific exemptions. The wisdom of these provisions is not the issue; rather, it is their inclusion in the constitution. Detailed policy matters of this type are more appropriately addressed in statutes and administrative rules.[14]

Finally, most state constitutions, including Arizona's, can be amended more easily than the U.S. Constitution. In order to change the national constitution, the proposed amendment must be approved by two-thirds of both houses of Congress then ratified by three-quarters of the states (i.e., thirty-eight).[15] The difficulty of this process is evidenced by the scant number of amendments that have succeeded.

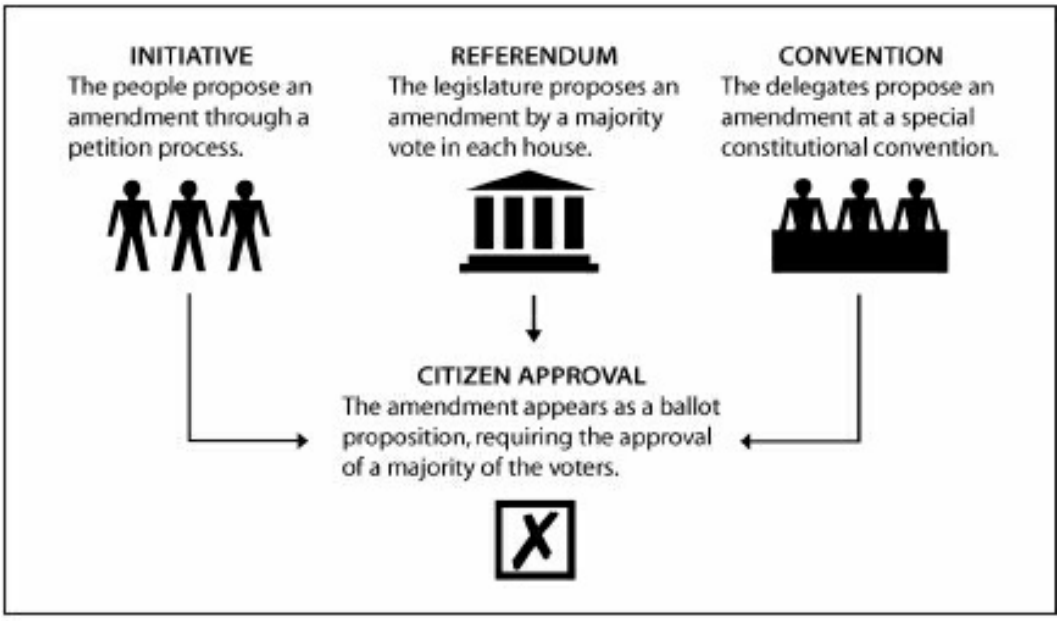


Figure 1.2. Ways to amend the Arizona Constitution. (The convention method has never been used.)

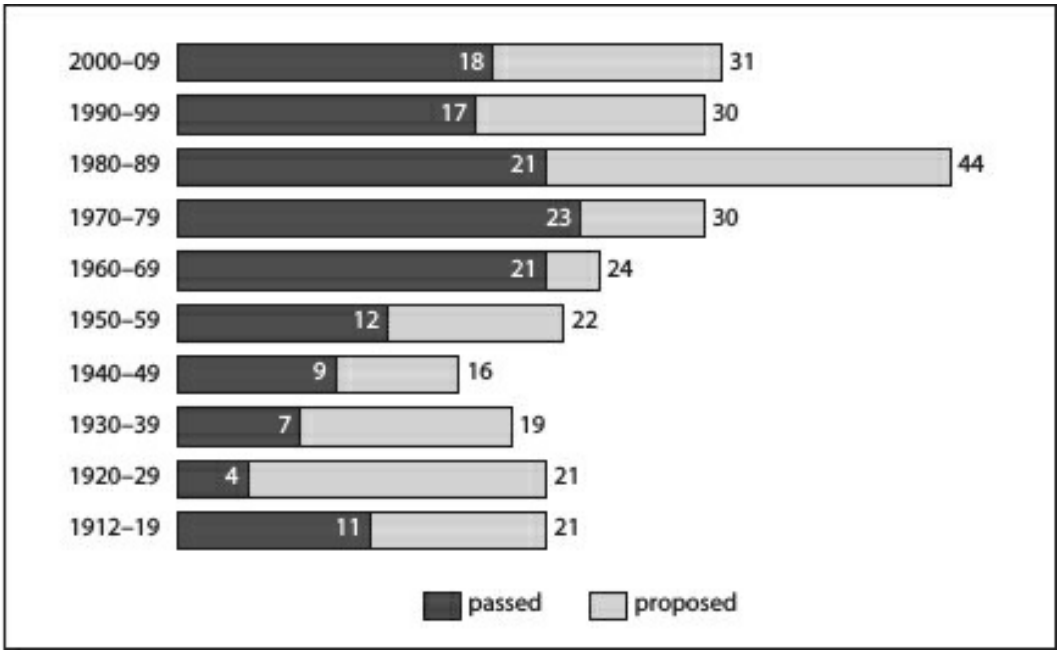


Figure 1.3. State constitutional amendments by decade, 1912–2009.

Amending the Arizona Constitution is much easier and involves two steps. First, the amendment must be formally proposed in one of three

different ways: (1) the voters can propose amendments using the constitutional initiative process; (2) the legislature can propose amendments using the constitutional **referendum** process; or (3) a new constitutional convention can be called to propose amendments. The second step is ratification. No matter how the amendment is originally proposed, it must always be approved by a majority vote of the people (see fig. 1.2). This requirement makes the citizens the ultimate authors of the state's constitution, since nothing can be added, removed, or altered without their acquiescence. The constitutional initiative and referendum processes are detailed in chapter 4, along with other **direct democracy** procedures.

The initiative and referendum methods for proposing constitutional amendments have been used frequently throughout Arizona's history. The ink was hardly dry on the state's constitution before amendment fever hit: at the state's very first election in November 1912, five proposed constitutional changes were on the ballot, and all five passed. That foreshadowed things to come: as figure 1.3 indicates, the popularity of constitutional amendments has not diminished over the years.

The third method for amending the constitution—a new constitutional convention—has never been used in Arizona. At least in theory, the legislature could call a convention once the people approve its operating rules. Any constitutional change proposed by the convention delegates would still have to be ratified by voters in the same fashion as referenda and initiatives. Although constitutional conventions were fairly popular with government reformers in the 1960s and 1970s, enthusiasm for this procedure has subsided in recent years. Many other states, however, have used this approach to modernize their governments or to revamp overly long and outdated constitutions.

Online resources

Arizona and U.S. Constitutions (PDF version):
www.azsos.gov/public_services/Constitution/Constitution.pdf

Arizona Constitution (HTML version):
www.azleg.gov/Constitution.asp

Arizona Revised Statutes:

www.azleg.gov/ArizonaRevisedStatutes.asp

Arizona Administrative Code:
www.azsos.gov/public_services/rules.htm

Arizona Supreme Court Opinions (since 1998):
www.supreme.state.az.us/opin

2 Origins of the Arizona Constitution

The Arizona Constitution was written in 1910. Although it has been amended frequently, its core features are very much a product of the distinctive **Progressive** Era in which it was written. However, other political forces shaped the constitution as well. European efforts to govern Arizona date back to the sixteenth century. Directly and indirectly, Spanish and Mexican rule, Native American resistance, a lawless frontier period, and an unhappy territorial experience each left a mark on the state's modern government and laws. When it was adopted, the Arizona Constitution was arguably the most radical in the nation. Today, it still offers real contrasts to the U.S. Constitution. To appreciate the differences and understand the logic of the Arizona design, some historical context is necessary.

Arizona's First Governments

The Pre-territorial Period

Archaeological evidence establishes that people lived in Arizona for thousands of years before the first Europeans arrived. In fact, Old Oraibi, a Hopi pueblo believed to have been built in 1150 ce, may be the oldest continuously inhabited settlement in the United States. Arizona's earliest inhabitants lived in small, nomadic groups. As agriculture became more sophisticated in the first millennium ce, semipermanent settlements began appearing. Eventually, three major cultures emerged: the Ancestral Pueblo people, Hohokam, and Mogollon. They left behind striking architecture and artifacts that suggest complex social organizations. Unfortunately, it is not possible to reconstruct the political institutions of these prehistoric communities with any reliability.[1]

The Spanish period: *1539 to 1821* Spain was the first country to claim sovereignty over Arizona. It established the colony of New Spain on the ruins of the conquered Aztec Empire in the early 1500s. Exploration of Arizona began shortly after the first viceroy arrived in Mexico City. A small expedition led by Marcos de Niza was sent to search for the fabled "seven

cities of gold." De Niza entered Arizona in 1539.[2] His distant sighting of a glittering city inspired Francisco Vásquez de Coronado to undertake a larger, two-year expedition the following year. De Niza's city turned out to be a Native American pueblo. Still, the explorations of de Niza, Coronado, and subsequent explorers provided the first written accounts of Arizona and its indigenous peoples.[3] They also fortified Spain's claim over the entire region.

The early Spanish explorers were followed by Jesuit and Franciscan missionaries, prospectors, and a few hardy ranchers. Permanent Spanish settlements, however, were slow to develop and did not appear until much later. Tubac (1752) and Tucson (1775) are credited with being Arizona's first towns. Actually, they were little more than presidios, or forts, and military rule constituted the only real political authority in the region.[4]

Despite Spain's efforts, the colonization of Arizona was never particularly successful. Although other settlements on New Spain's northern frontier flourished, at the peak of Spanish control little more than one thousand Hispanics lived in all of Arizona.[5] The low population was partially due to the region's harsh climate, arid landscape, and limited resources. Additionally, the presence of hostile Native Americans, especially the formidable Apaches, effectively prevented colonization north of the Gila River.[6] Even in the more heavily fortified southern areas, bloody clashes with Apache raiding parties persisted for more than two centuries. Only toward the end of Spanish rule did the government gain some measure of control. It instituted a pacification program in 1790 that provided rations, strong liquor, and inferior firearms to the Apaches who settled in "peace camps" adjacent to the forts. The program was a calculated effort to undermine Apache morale. It did bring relative calm to the region for the thirty years that it lasted.[7]

The Mexican period: *1821 to 1848* Political control of Arizona officially passed from Spain to Mexico when the Spanish government recognized Mexican independence in 1821. Surprisingly, this development had the effect of reducing the Hispanic population in Arizona, because Spain's departure terminated the Apache pacification program. Apache raids resumed with a vengeance, and the Hispanic population, concentrated in Tucson, dwindled as the settlers abandoned their homes and crops. The new Mexican government simply lacked the financial and military resources to control the Apaches; the region was too remote; and the government was plagued with chronic

instability and civil wars. Epidemics and water problems further contributed to the deteriorating conditions on the Arizona frontier.

When Mexico became a federal republic in 1824, southern Arizona was initially made part of the state of Occidente. Although short-lived, the Constitution of Occidente was Arizona's first written constitution. Nominally at least, it was democratic. The constitution declared that the state's government would be "republican, representative, popular, and federal" and prohibited power from being "centered in one person or group."[8] It established a three-branched government not unlike today's state government, and guaranteed many fundamental rights to the citizens. Religious freedom, however, was not one of these rights. The Constitution of Occidente firmly declared that the state's religion would be Roman Catholicism and that "no other whatsoever will be tolerated."[9] In 1831, Occidente was split into two separate states, and southern Arizona became part of the Mexican state of Sonora.[10] (Northern Arizona was essentially an uncolonized no-man's-land, nominally claimed by Mexico but actually controlled by various Native American groups.)

The reality of political life on the remote Arizona frontier was far more primitive and less democratic than the formal language of the Constitution of Occidente suggests. Although Tucson and Tubac now had nonmilitary governments, they were quite rudimentary because the populations were small. (A census taken by the Sonoran government in 1848 reported a mere 249 people living in Tubac and 760 in Tucson.)[11] In the beginning, the local governments of Tucson and Tubac consisted of only an elected mayor (*alcalde*) and a treasurer-attorney. By 1831, the Mexican government had determined that the towns were too small to warrant even a mayor, and the top office was downgraded to justice of the peace (*juez de paz*). Because all the positions required literacy, they tended to be monopolized by a few families on the Mexican frontier.[12] Despite the egalitarian language of the Occidente Constitution, the Spanish political heritage was more elitist. Government in Hispanic Arizona contrasted sharply with the participatory democracies that had long been flourishing in the eastern United States.

Early U.S. control: *1848 to 1863* The U.S. Congress declared war on Mexico in 1846. Officially, the war was triggered by disputes over the Texas border and private claims of American citizens. In reality the United States was

caught up in an expansionist fever known as **Manifest Destiny.** It wanted access to the Pacific Ocean for trade with Asia. War became inevitable when Mexico refused to sell California. The uneven military contest ended with the signing of the **Treaty of Guadalupe Hidalgo** on February 2, 1848. In return for $15 million, Mexico ceded more than one-third of its national territory. In addition to acquiring all of Arizona north of the Gila River (Tucson and the rest of southern Arizona remained part of Mexico), the United States acquired the modern states of California, Nevada, and Utah, and portions of Colorado, New Mexico, and Wyoming, as shown in figure 2.1.

Following acquisition by the United States, Arizona and New Mexico were combined into a single large territory, known as the Territory of New Mexico (fig. 2.2). In contrast, California—with its newly discovered gold—became a full-fledged state almost immediately in 1850. Arizona was a more dubious prize, however. At the time, it was chiefly regarded as an obstacle on the way to California. Few Americans other than mountain men, prospectors, and soldiers had ever visited the region. Furthermore, the land proved no more hospitable to the American settlers than it had to the Spanish and Mexicans. Indian wars continued for four more decades.

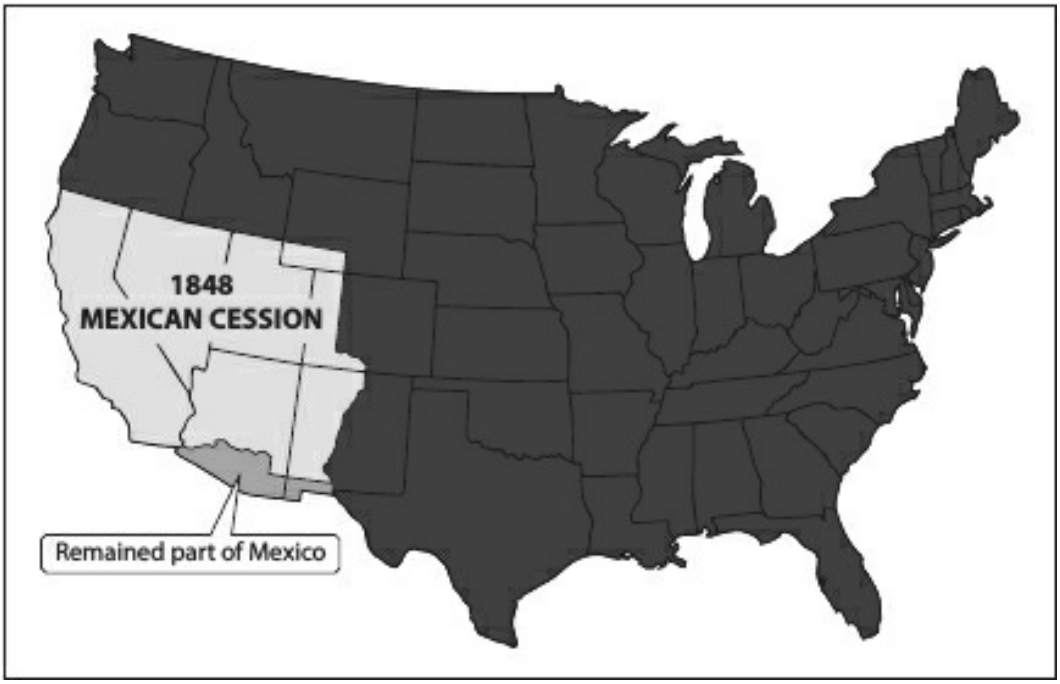


Figure 2.1. Land acquired by the United States from Mexico under the Treaty of Guadalupe Hidalgo (1848).

Figure 2.2. The Territory of New Mexico (1848–1863).

Despite Arizona's unpromising future, the ink was hardly dry on the Treaty of Guadalupe Hidalgo when the United States pressured Mexico to relinquish even more territory: influential businessmen wanted additional land in order to build a southern (all-weather) railroad from New Orleans to San Diego. The favored route along the 32nd parallel was south of the Gila River in Mexican territory. Accordingly, in 1853, railroad promoter James Gadsden was dispatched to negotiate the purchase of additional land. Four of the five deals that Gadsden was authorized to make would have given Arizona beachfront property—that is, access to the Gulf of California.[13] However, Mexican dictator Antonio López de Santa Anna would agree to only a minimal cession of land. The U.S. Senate (which had to approve Gadsden's treaty) wound up reducing the Gadsden deal even further. In the end, the United States paid $10 million for 29,670 square miles of Mexican territory that included Tucson. Many members of Congress viewed the purchase price as an exorbitant sum for worthless desert land. One congressman even quoted Kit Carson's description of the territory as "so desolate, desert, and God-forsaken that a wolf could not make a living on it."[14]

The **Gadsden Purchase** thus established Arizona's modern boundary with Mexico. As figure 2.2 illustrates, the southern boundary angles

northward to the west to give Mexico a land bridge to Baja California and to deny the United States access to the Gulf of California. Mexican troops left Tucson after the new border was surveyed, and U.S. soldiers formally raised the American flag in November 1856.[15]

While many residents of the Gadsden Purchase land welcomed U.S. control,[16] they soon became unhappy with the territorial arrangement. The government was located hundreds of miles away in Santa Fe, and there were no local courts or lawmen to maintain order in the remote Arizona region. In addition to continuing Apache troubles, Tucson and other southern settlements became easy prey for fugitives escaping from Mexico and neighboring states. Accordingly, in 1856, the residents began petitioning Congress for separate territorial status. President James Buchanan took up their cause, reporting to Congress in 1859 that Arizona was "practically destitute of government, of laws, or of any regular administration of justice" and that "murder, rapine, and other crimes are committed with impunity."[17]

After Congress failed to act, the frustrated residents of the Gadsden Purchase region took matters into their own hands. They gathered in Tucson and formed their own territorial government in 1860, complete with a constitution, a governor, and other elected officials.[18] It was short-lived. The American Civil War was underway and the leaders of the self-proclaimed government applied for admission to the southern Confederacy. Many had come from the South and were sympathetic to its cause. However, the decision to secede was also motivated by frustration with Congress and renewed feelings of insecurity following the sudden departure of federal troops at the onset of the war.

Confederate troops entered Tucson in 1861, and John R. Baylor, an army officer, declared himself governor. His proclamation described conditions in the territory as being "little short of general anarchy" due to the lack of law, order, and protection.[19] Confederate president Jefferson Davis approved Baylor's action, and Arizona was officially made part of the Confederacy on February 14, 1862—coincidentally, fifty years to the day before Arizona became a state. The Confederate flag thus became the fourth national flag to be raised in Tucson.

Arizona's Confederate status was also short-lived. A small group of Union soldiers skirmished with Confederate scouts near Picacho Pass in a brief, indecisive battle that resulted in three deaths.[20] (During the Civil War

years, the Apaches inflicted more casualties on Confederate and Union troops in Arizona than either army inflicted on the other.) By June 1862, a larger contingent of Union troops had entered Tucson without resistance, placed the city under martial rule, and reclaimed Arizona for the Union. Although the Confederate episode had little effect on the outcome of the Civil War, it arguably delayed Arizona's subsequent admission as a state.

The Territorial Period: 1863 to 1912

The fear that Arizona would again fall into Confederate hands, plus the discovery of precious metals in the region, finally pushed Congress into granting Arizona separate territorial status. On February 24, 1863, President Abraham Lincoln signed the **Organic Act,** which officially established the Arizona Territory. A federal census taken in 1860 reported a mere 2,423 non–Native Americans living in the entire region. More than 70 percent were male, reflecting the demographics typical of the frontier.[21]

Arizona's territorial government formally began when the first governor, John Goodwin, took the oath of office at Navajo Springs on December 29, 1863. He and a small party of officials arrived under army escort from Santa Fe. They continued on to Fort Whipple, which briefly served as the territory's first capital. (Tucson, the obvious choice, was ruled out because of its Confederate sympathies.) In the summer of 1864, the capital moved to newly founded Prescott, then to Tucson (1867), then back to Prescott (1877), and finally to its permanent home in Phoenix (1889). The frequent moves were instigated by local promoters seeking to spur hometown development. They were usually accompanied by cries of bribery and corruption. (Later on, the U.S. government demanded that Arizona's capital stay put for fifteen years as a condition of statehood.)[22]

The Organic Act expressly contemplated that Arizona's territorial condition would be temporary. After all, neighboring Nevada had become a state in 1864, and California had been a state since 1850. As it turned out, Arizona remained trapped in territorial status for forty-nine years and was the last of the forty-eight contiguous states to be admitted. It was a bad situation for many reasons.

First, the territory's residents had few political rights. Most notably, they had no say in the selection of the territory's chief officials: the governor, territorial secretary, marshal, district attorney, judges, and Indian agents were

all appointed by the president of the United States. Adding to the friction, most Arizona residents were Democrats, whereas the appointed territorial officials were typically Republicans, reflecting the makeup of the federal government during this time. Although the territory had a locally elected legislature, its powers were limited, and its laws were subject to congressional approval. In the final analysis, Arizona was ruled by the federal government. Territorial residents, however, had no say in the election of U.S. officials either. Because Arizona was not a state, its residents were ineligible to vote in presidential elections and they had no voting representation in Congress. In many ways the situation resembled that of colonial America under British rule. Not surprisingly, similar political resentments arose.

Second, the territorial government was weak and at times corrupt. Many of the appointed governors were **carpetbaggers**—opportunists from other states who had no real interest in the territory. They typically got their position in exchange for political favors and did not last long in the job. Given the primitive conditions in the territory—the "governor's mansion" was a simple log cabin (fig. 2.3)—it is not surprising that many of the eastern appointees sought a quick exit. For example, Arizona's first governor was appointed by President Lincoln after losing his House seat from Maine.[23] Within two years, Goodwin left Arizona, never to return.[24] His successor followed a similar course. Some territorial governors, like John C. Frémont, devoted more attention to their private investments than to the job of governing. Frémont (who took the position in 1878 because of personal financial difficulties) spent most of his brief tenure *outside* of Arizona, pursuing his own business affairs. Frémont's case was certainly extreme. However, the territory's governors often had financial stakes in the mining, railroad, or other commercial ventures that they actively promoted.[25] This led to frequent **conflicts of interest** and allegations of more serious corruption.

Some territorial governors behaved in unorthodox ways, reflecting the primitive conditions of the frontier. For example, when Arizona's third governor, Anson Safford, became enmeshed in an ugly marital scandal, he simply ordered the territorial legislature to enact a law that dissolved his marriage. Safford then promptly signed the **bill** in his official capacity as governor![26] The territory's seventh governor, Conrad Zulick, had to be rescued from house arrest in Mexico before he could be sworn in. (He apparently first learned of his **gubernatorial** appointment during his late-

night rescue.)[27]

The other two branches of government were no more illustrious. Throughout the territorial period, legislators were accused of embezzlement, expense account padding, misappropriation of funds, and other financial irregularities. The Thirteenth Legislature became known as the “thieving thirteenth” when a grand jury concluded that it had exceeded its $4,000 operating expense limit by more than $46,000.[28] More seriously, territorial legislators were notorious for taking bribes from the mining and railroad interests seeking to evade taxes and government regulation. Sometimes governors served as middlemen. For example, Governor Safford conscientiously returned $20,000 of a $25,000 bribe. His accompanying note to the Southern Pacific Company candidly explained that the legislature was not as expensive to “fix” as the railroad president had anticipated.[29] From the 1880s onward, Arizona’s major railroads and copper companies were able to block nearly all legislation adverse to their interests.

Figure 2.3. The territorial governor’s mansion (Prescott, Arizona).

The judicial branch was not above scandal either. Competent judges were scarce and some were simply corrupt. (One justice of the peace

purportedly stocked his ranch with cattle that the defendants donated in lieu of exorbitant cash fines.)[30] Judges, like the territorial governors, often had extensive private investments that cast doubt on their impartiality. Many had worked for mining and railroad companies as corporate attorneys before their appointment to the bench. When they enjoined labor strikes, they were perceived as corporate puppets. Above all, the court system was so primitive and understaffed that vigilante justice flourished throughout the territorial period.

Finally, some blame for the poor civic order must be assigned to the citizens themselves. Violence and lawlessness had long been part of Arizona's culture. The territorial period was no exception. When the Apaches were finally subjugated in 1886, rustlers, cattlemen, sheep ranchers, and farmers took up the slack by fighting over land claims and the scarce resources of the open range. In 1887, the lawless Hashknife cowboys (employees of the massive Aztec Land and Cattle Company) drove Mormon farmers from their homes in Heber and Wilford.[31] About the same time, the Pleasant Valley War between cattlemen and sheep ranchers chalked up some thirty to fifty casualties. Mining boomtowns, such as Tombstone, sprang up overnight and attracted a lethal mix of prospectors, speculators, and gamblers. The infamous gunfight at the O.K. Corral in 1881 shocked the nation; President Chester Arthur threatened to send federal troops to Cochise County if order were not restored. Saloons and casinos were not confined to mining towns either. They multiplied throughout Arizona Territory and also contributed to widespread public lawlessness. Ethnic clashes among Chinese, Hispanic, and Anglo laborers intensified toward the end of the century and sporadically erupted into violence. Finally, large-scale land and stock frauds were commonplace throughout the territorial period. Undoubtedly, the newspapers and pulp fiction added to Arizona's Wild West reputation. Nonetheless, by the century's end, many Arizonans viewed statehood as the only means of salvation.

The Push for Statehood

The U.S. Constitution gives Congress the sole authority to determine whether a territory should become a state.[32] Arizona began applying for admission as early as 1872. In 1891, it even drafted a state constitution, which Congress

ignored.

Federal Opposition

There are several reasons why the federal government remained cool to Arizona statehood right to the very end:

1. Arizona was sparsely populated. The federal census of 1900 reported a mere 122,931 residents. (Statehood advocates argued that the census had overlooked prospectors and persons fleeing to California beaches to escape the summer heat.)[33] In any event, Congress believed there were simply insufficient people to sustain the burdens of statehood. Some lawmakers felt that it would be unfair to give Arizona the same voting power in the U.S. Senate enjoyed by the other larger states. (The average state population at this time was more than one million.)
2. The region's long-term economic prospects were not promising. Congress viewed Arizona's agricultural industry as "precarious" due to its dependency upon irrigation systems that had already reached their limits. (The federal government's ambitious Reclamation Act to bring water and hydroelectric power to the West was not enacted until 1902; the Roosevelt Dam was not completed until 1911.) Many in Congress viewed Arizona as a giant mining camp that was likely to disappear when the ore played out.[34]
3. Arizona's politics were out of sync with the national government. At the turn of the century, most Arizona voters were conservative Democrats, reflecting their southern origins. The federal government, however, was controlled by Republicans. Not surprisingly, Congress was unenthusiastic about admitting a state that would presumably send two Democratic senators to Washington, D.C. In addition, the territory's strong support for free silver in the great monetary controversy of the day was also unpopular with the Republican majority. Finally, the Civil War was still fresh in people's memories, and the territory's former disloyalty did not help its statehood cause.
4. Arizona's demographics did not fit Congress's Anglo-Saxon, Protestant ideal. Many voiced concerns about the high percentage of Arizona residents who were non-English-speaking Hispanics. Nearly one-fourth of the population was foreign-born—a figure well above the national

average.[35] Additionally, most of the state's residents were Roman Catholic, and a sizable number were Mormon. At this time national prejudice against both religions ran high.

5. The Arizona statehood movement had a powerful opponent in Senator Albert J. Beveridge. The Republican from Indiana was the chairman of the U.S. Senate's committee on territories. In 1902, he toured Oklahoma, New Mexico, and Arizona to determine whether these remaining territories were finally ready for statehood. According to accounts from frustrated locals, he spent a total of three days whizzing through Arizona and seeking out the worst features of the region. Beveridge was apparently shocked by the territory's arid terrain, by the saloons in Bisbee, and by the region's high illiteracy rate (purportedly 29 percent).[36] He also was disturbed by widespread political corruption within the territory—a concern that was later reinforced by an attempt to bribe him to support statehood.[37] Not surprisingly, Beveridge's initial report to the U.S. Senate painted an unflattering picture of Arizona. It singled out the territory's saloons and gambling houses, which, Beveridge noted, operated day and night and even on Sundays.[38] Simply put, Beveridge regarded Arizona as morally unfit for statehood.

Beveridge successfully killed statehood bills in 1902 and 1903. As pressure continued to mount, however, he supported a compromise plan to admit Arizona and New Mexico as a single state. The "jointure" proposal resolved the issue of insufficient population. More cleverly, it eliminated Congress's fear of a Democratic state because New Mexico was more populous *and* Republican. To placate Arizona, Beveridge proposed that the new state be called "Arizona the Great," and he delivered a rousing speech that lauded its potential.[39] Although New Mexicans favored the jointure idea, Arizonans were furious. When President Theodore Roosevelt supported the plan, angry Phoenix officials changed the name of Roosevelt Street to Cleveland Street in protest.[40] (It was subsequently changed back.) The issue of joint admission was put to the residents of both territories in 1906. Although New Mexicans approved, Arizona voters wound up rejecting joint admission by a decisive margin.[41]

The Enabling Act of 1910

By the end of the decade, even Senator Beveridge could not stop the push for statehood. In 1910, there were 204,354 people living in the territory—not a large number, but more than the population of three existing states.[42] Arizona and New Mexico's disenfranchised status was becoming a national embarrassment. Accordingly, Congress passed the **Enabling Act,** which set forth specific conditions for attaining statehood. For example, it required the territories to draft state constitutions acceptable to both their respective citizens and Congress. More questionable was the requirement that the president also had to approve the new constitutions. (The U.S. Constitution does not give the president a role in the admission of new states.) Nonetheless, the Republican majority in Congress wanted President Taft, a fellow Republican, to serve as an additional check against the anticipated radicalism of the Arizona Democrats. As detailed below, this requirement nearly proved fatal to Arizona's prolonged quest for statehood. Other requirements of the Enabling Act can still be found in Article 20 of Arizona's present-day constitution (see box).

ARTICLE 20: A WINDOW TO THE PAST

Article 20, titled "Ordinance," is one of the more intriguing parts of the state constitution. It was imposed on Arizona by the federal government as a condition of statehood. Unlike the rest of the constitution—which is exclusively within the control of Arizona voters—the provisions in Article 20 cannot be altered or removed without the additional consent of the U.S. Congress. So what are these special provisions, denoted as "irrevocable" in the preface to the article? Among other things they include a ban on polygamy, a requirement that public schools be free of religious control, and *two* separate provisions mandating English usage (i.e., making English proficiency a qualification for holding office, and requiring public schools to "always be conducted in English"). These provisions reflect Congress's unease with the religious and ethnic makeup of Arizona in 1910. The ninth ordinance, which put restrictions on the relocation of the state capital, was also a response to Arizona's territorial past. Other Article 20 provisions are more typical of state enabling acts, and a few have been repealed or superseded by the passage of time. The twelfth ordinance, however, remains very relevant

to this day. It requires the people of Arizona to accept extensive restrictions on the use, management, and disposition of public lands.

School trust lands Prior to statehood, the federal government owned most of the land in Arizona. (As figure 2.4 reflects, it is *still* the state's largest landowner by a wide margin.) It was the national government's longstanding custom to transfer a portion of its land to the new state to help it get started.[43] It gave Arizona some federal land in 1863 when Arizona became a separate territory; more was to be transferred upon statehood. By 1910, however, most of the older states had already squandered their valuable land dowries, selling the land off at corruptly low prices. Senator Beveridge did not want the same thing to happen in Arizona.[44] Accordingly, although the federal government generously gave the state roughly eleven million acres—more land than was given to any state other than Alaska—it heavily restricted the state's future use and disposition of the land. Most of these restrictions are in the state constitution and cannot be altered without the consent of Congress as well as the citizens of Arizona.[45] The key restrictions are:

1. The bulk of the land granted to the state (more than 85 percent) is designated as *school trust land.* This means that it must be managed for the economic benefit of the state's K–12 public schools.[46] The land can be sold, leased, or used in any manner that generates income for schools.
2. The land can be sold or leased only to the highest bidder at a public auction.
3. No land can be sold for less than its appraised market value.

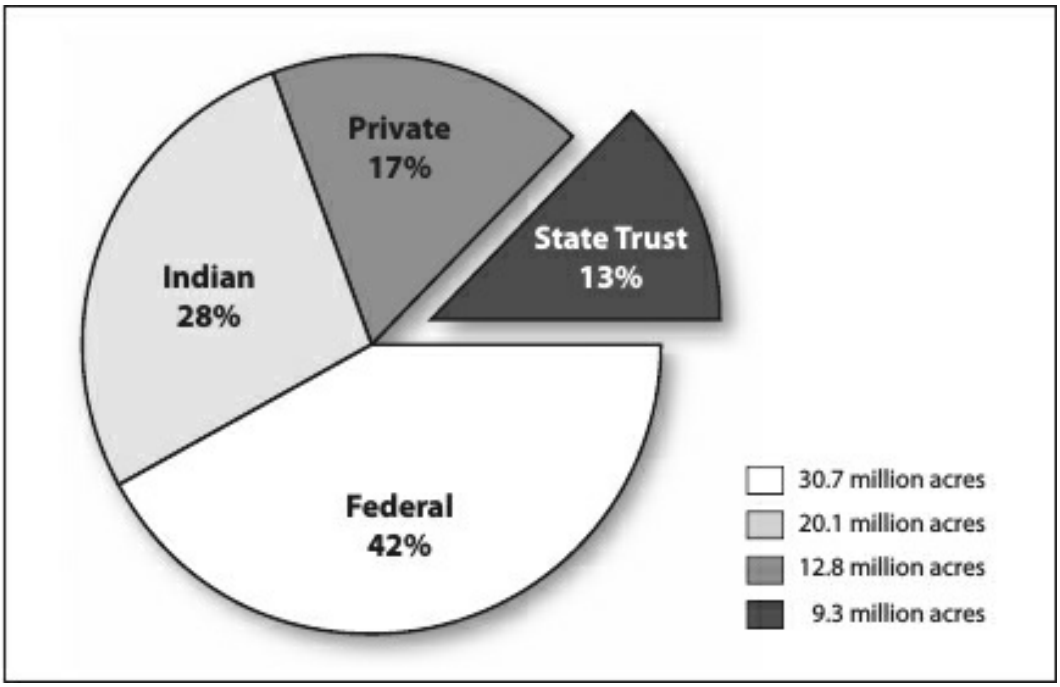


Figure 2.4. Arizona landownership (2008).

As a result of these and other restrictions, Arizona still owns most of its original trust lands—roughly eight million acres. And the land is much more valuable today than when it was originally granted. This, of course, is good news. So why have the state's trust lands become so controversial in recent years?

First, some argue that the federal restrictions—which effectively preserved the land for nearly a century—are too outdated for modern times. They contend that the restrictions are hindering the state's ability to get the maximum benefit from the land. For example, the state wants the power to trade some trust parcels for more desirable land that it can't afford to purchase. The current language of the Arizona Constitution prohibits trades. Although the national government has agreed to relax this barrier, Arizona voters—who must also approve changes to the state constitution—have failed to go along. On six occasions from 1990 through 2004 the voters have refused to give the Arizona State Land Department swap powers, presumably doubting the state's ability to make prudent trades.[47]

Second, the basic structure of the State Land Department—the agency responsible for managing the trust lands—has also come under attack. Some contend that the department is antiquated and lacks the ability to respond

quickly to changing market conditions. Others argue that the department doesn't adequately represent the interests of all stakeholders—for example, schools, ranchers, developers, and taxpayers. Here again, however, the voters have rejected reorganization proposals.[48]

Last but not least, there are fundamental disagreements regarding the best use and disposition of state trust lands. To date, most of the land has been leased to ranchers for livestock grazing. Educators feel that insufficient money is reaching the schools;[49] they want more of the land sold off as real estate prices rise. Developers have been eager to acquire more property—particularly the parcels located near Arizona's rapidly growing urban areas. On the other hand, ranchers don't want the land sold off. They argue that doing so would destroy Arizona's historic ranching industry, and that the schools are better off with a stable, long-term rental income than with a one-time bonanza. Finally, environmentalists don't want to lose Arizona's open spaces to either development *or* overgrazing; they want more land set aside for parks and preserves. Under the present system, however, the state must outbid developers and purchase the land from itself (depositing the money in the school trust fund) if it wishes to put the land to a non-profitable use.[50] With the state's limited revenues, this is usually not economically feasible. These issues will eventually have to be resolved by the voters, the sole guardians of the state constitution.

The Framers of the Arizona Constitution

After the Enabling Act established the conditions for statehood, Arizona voters elected fifty-two men to draft the state's constitution in 1910. Just as the Republican Congress had feared, forty-one were Democrats. More significantly, most of the Democrats were sympathetic to the **Progressive** and labor agendas.

The Progressive agenda Progressivism was a **bipartisan** national reform movement that emerged in the late 1890s. It attracted mostly white, middle-class citizens who believed that American society had become hopelessly corrupted by monopolistic corporations, trusts, and wealthy individuals. The Progressives championed a wide variety of reforms, including trust busting, slum elimination, conservation, social justice, women's **suffrage**, and more. Prominent muckrakers such as Upton Sinclair, Lincoln Steffens, and Ida

Tarbell exposed scandals in the meatpacking industry, local government, and Standard Oil, respectively. In the political realm, the Progressives advocated sweeping structural changes to give ordinary citizens greater political rights. Five specific political reforms were especially high on the Progressive agenda:

1. The **secret ballot** (to enable employees to vote without undue pressure from their employers)
2. The **direct primary** (to enable the citizens, rather than the party elite, to select the candidates for the ballot)
3. The **initiative** (to enable the citizens to make their own laws)
4. The **referendum** (to enable the citizens to reject laws passed by the legislature)
5. The **recall** (to enable the citizens to remove elected officials from office before the end of their terms)[51]

The labor agenda During roughly the same period, an emerging national labor movement was also advocating major political change. Its message was targeted primarily at blue-collar workers, minorities, recent immigrants, and the poor. The movement's major objective was to improve working conditions through legislation. At the time, the workplace was virtually unregulated. There were few laws anywhere in the country regarding wages, length of the work week, child labor, or workplace safety. Moreover, in the aftermath of the Industrial Revolution, working conditions were generally harsh. And the conditions in Arizona's mines—the territory's major employer—were among the worst.[52]

Although Progressives embraced the leading labor reforms, in some parts of the country there was tension between the two movements. Initially, that appeared to be the case in Arizona. By 1910, labor organizers were beginning to make headway in unionizing Arizona's mining communities. Some wanted to form a separate political party to advance the labor agenda. To prevent this from happening, Arizona Democrats promised to promote both the labor and the Progressive agendas at the constitutional convention. This turned out to be a short-lived highpoint for organized labor: it was influential in Arizona for only a brief interlude that happened to coincide with the writing of the state's constitution. Both before and since 1910, internal

conflicts and a powerful employers' lobby effectively reduced labor's political clout. (The infamous kidnapping and deportation of striking mineworkers from Bisbee in 1917[53] and the passage of a **right to work** amendment to the constitution in 1946[54] solidified Arizona's reputation as an "anti-labor" state.) In short, for organized labor, 1910 was an anomaly.

The constitutional convention of 1910 The fifty-two delegates who gathered at the territorial capital in Phoenix (fig. 2.5) chose George W. P. Hunt to serve as the convention's president. Hunt had only an eighth-grade education and had arrived in Arizona by burro seeking gold in the summer of 1881. He became a successful small businessman and served in the territorial legislature. In a period of considerable corruption, Hunt had a reputation for honesty and supporting the cause of the common man. Upon statehood, he became Arizona's first governor and went on to win a record six (two-year) terms in office.

The framers began drafting the constitution in October. While they labored, newspapers in Arizona and around the country closely monitored their activity. Because the new constitution was a blank slate, it offered a unique opportunity for putting the entire Progressive agenda into effect all at once. This worried many prominent public officials. Just the year before, President Taft had visited Arizona and ominously warned the territory not to pursue too radical a course. Newspaper editorialists and political cartoonists took the warning seriously and fretted that the framers were jeopardizing statehood for a "radical, socialistic constitution." In fact, the convention's official chaplain even prayed that Taft would not "turn down our constitution on account of such a small matter as the Recall, Initiative and Referendum."[55] The majority of delegates stubbornly ignored the warning signs and stuck with the Progressive agenda. On December 9, 1910, they formally completed their task, voting in favor of their constitution by a nearly **partisan** vote of 40 to 12.

Figure 2.5. Delegates and staff at the Arizona constitutional convention (Phoenix, 1910). George W. P. Hunt, the convention's president, is seated sixth from the left in the front row.

The Constitution of 1910

In many respects, the constitution that the framers produced was quite traditional. They borrowed heavily from such obvious sources as the U.S. Constitution and the constitutions of sister states. For example, it is no coincidence that Arizona has three separate branches of government and a two-chambered legislature. And much of Arizona's Declaration of Rights (Article 2) was lifted from the constitution of Washington state.[56] In other respects, however, the constitution *was* radical and original. First, it was arguably the most Progressive of the day: the secret ballot, the direct primary, the initiative, the referendum, and the recall all were adopted, along with many other structural features designed to reduce the power of elected officials and increase the role of the citizenry.[57] An elected **Arizona Corporation Commission** with sweeping regulatory powers was established to oversee the railroads, and the constitution firmly declared that "monopolies

and trusts shall never be allowed in this state."[58] Hunt quite aptly pronounced it a "people's constitution."[59]

Second, the Democratic drafters also kept their pledge to labor. They included an entire article devoted to protecting the interests of workers. Article 18 guaranteed an eight-hour workday for government workers, restricted child labor, banned employment contracts that gave employers immunity for their **negligence,** and directed the legislature to enact workers' compensation laws. For their day, these were cutting-edge reforms. The constitution also established a state mine inspector to monitor the safety of the state's largest industry. Significantly, the framers made it an *elective office* to ensure that the people—as opposed to the mines' **lobbyists**—would be choosing the watchdog. Finally, they included several provisions in the constitution to ensure that injured workers and other accident victims would always have full recourse in the courts.[60]

Although the Progressive and labor influences are unmistakable, the state's deeper past left its mark on the constitution as well. For example, multiple English-language requirements were mandated by a U.S. Congress that was uneasy with Arizona's Hispanic heritage.[61] Nonetheless, traces of former Spanish rule can still be found in the state's laws. For example, the new constitution tersely rejected English water law,[62] just as the first territorial legislature had done in 1865. (British rules had never taken hold in Arizona due to the territory's Spanish origins as well as its arid conditions.)[63] Other Hispanic legal influences can still be found in the statutes and **common law** of the state. The clearest example is Arizona's **community property** law. Community property gives married women coequal ownership of marital property. It comes from the Roman legal tradition and was brought to the Southwest by Spain. In contrast, most American states inherited the more paternalistic property laws of Great Britain.[64] These states generally did not give married women comparable rights until fairly recent times.

Arizona's Confederate sympathies (a quarter of the constitution's framers were originally from the South) may have been responsible for several racist proposals that were openly debated at the state constitutional convention. For example, the framers seriously considered a provision that would have mandated separate schools for whites and African Americans. The measure narrowly failed only because some delegates felt that it did not discriminate against enough minority races, and others believed the territory's

statutes already adequately mandated segregated schools.[65] Similarly, the framers also rejected a proposed constitutional ban on interracial marriage, but not because they were tolerant. This proposal was also deemed underinclusive and unnecessary because a broader ban was already part of the state's marriage statutes.[66] Finally, the delegates seriously debated labor provisions that would have discriminated against immigrants and non-English-speaking workers. In the end, they decided to ban noncitizens from public works projects but rejected more sweeping prohibitions.[67]

Arizona's prolonged conflicts with Native Americans also left their mark on the state's constitution and laws. The federal government brought an end to the Apache wars in 1886. The Enabling Act expressly limited Arizona's authority over Indian affairs.[68] Today, Arizona must coexist with twenty-one tribal governments, as well as with a substantial, continuing federal presence. Not surprisingly, this situation has produced many intergovernmental conflicts over such matters as taxation, land use, water rights, law enforcement, natural resources, and gaming operations.[69]

Arizona's troubled territorial experience also left its mark on the state constitution. The period's rampant corruption helped make the Progressives' case for reform, but also inspired remedies targeted at very specific scandals. For example, one constitutional provision prohibits public officials from accepting free rail passes—a routine practice of the territorial period.[70] The problem of absentee governors, such as Frémont, was addressed with an unusual remedy: whenever Arizona governors leave the state, all their powers temporarily pass to the official next in line of succession (typically the secretary of state). The provision takes effect even when the governor travels on official state business.[71] The constitution also prohibits the legislature from enacting various "special laws" that apply only to particular persons, businesses, or localities.[72] Nearly all of the twenty examples of special laws listed in the constitution can be traced to specific territorial abuses. For example, the first prohibits the granting of divorces—evoking the Governor Safford scandal. Another subsection bars the legislature from "granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."[73] Again, this had been a routine occurrence during the territorial period. A more general prohibition, known as the "Gift Clause," was also put in the constitution to prohibit government officials from depleting the public treasury through dubious subsidies such as

those given to the railroads, mines, and other private developers.[74]

It would be misleading, however, to suggest that the Arizona Constitution was solely influenced by the region's colorful past. To the contrary, most of the framers were very oriented toward the future. They wanted to overcome the state's desert image and recast Arizona as an irrigated oasis and modern industrial state. This is best captured by the surprisingly lengthy debate over the state's official seal. As shown in figure 2.6, the seal depicts Roosevelt Dam, irrigated fields and orchards, a quartz mill, a miner, and grazing cattle.[75] Conspicuously absent is the cactus that graced the first territorial seal,[76] along with other symbols that would identify Arizona with the Southwest. There was applause when the new seal was defended as an effort "to get away from cactus, Gila monsters, and rattlesnakes" and depict the industries that would put Arizona on the map.[77] After heated debate, the delegates wound up dumping the cactus by a vote of 28 to 11.

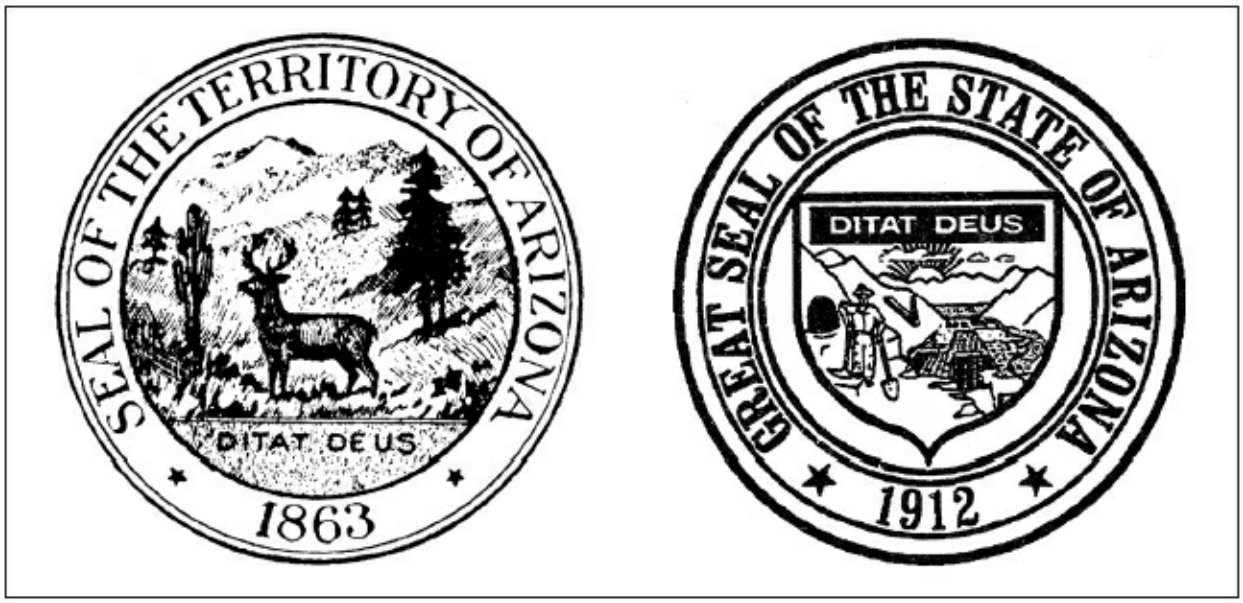


Figure 2.6. Official seals. Arizona's first territorial seal featured the territory's natural beauty and included a giant saguaro in the foreground. The seal adopted upon statehood emphasized Roosevelt Dam and burgeoning industries.

Finally, in at least one key respect, the forward-looking framers lost

their nerve. Despite intense lobbying, they denied women the right to vote (except in school elections). Women's suffrage had been part of the Progressive agenda, and by this time, most of the other western states allowed women to vote. Wyoming had even established women's suffrage in 1869 when it was still a territory. One explanation for Arizona's resistance is that the territorial women had been vigorously lobbying the convention for the prohibition of alcohol. Presumably, the framers feared that the state would go dry if women were allowed to vote.[78]

Although the people of Arizona approved the constitution by a margin of more than 3 to 1,[79] Congress was uneasy about its Progressive features. In the end, it concluded that the constitution was Arizona's business. It sent the statehood resolution on to President Taft in accordance with the terms of the Enabling Act.

The Taft Veto and Its Aftermath

Taft was unmoved by the pressure. On August 22, 1911, he carried out his **veto** threat. His distaste for Progressivism was evident throughout the lengthy veto message. Taft however vetoed Arizona statehood over a *single feature* that he deemed unacceptable: the citizens' right to recall judges from office before the end of their terms (fig. 2.7). Taft had been a judge himself, and he would later become the chief justice of the U.S. Supreme Court.[80] He passionately believed that recall would destroy judicial independence. More specifically, Taft argued that:

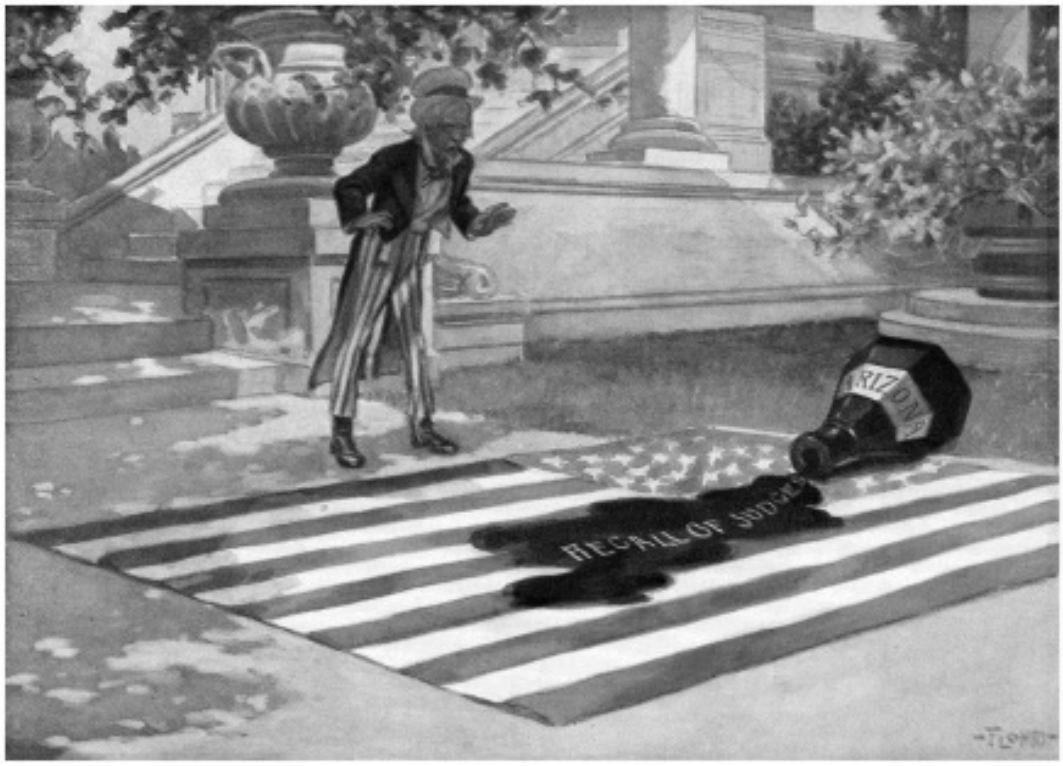


Figure 2.7. "The Blot" by Emil Flohri. Arizona's judicial recall is portrayed as an affront to the nation. The cartoon appeared in *Judge,* a national satirical magazine (May 20, 1911).

1. Recall would put pressure on judges to make popular, rather than proper, decisions. (Taft reasoned that judges are not like other elected officials; they are supposed to apply the law and protect the rights of minorities even when such outcomes are not favored by the majority.)
2. Recall would be unfair to judges. (Taft feared that citizens could precipitously remove a judge on the basis of a single unpopular decision when their passions were running high. Taft favored **impeachment** and periodic elections over recall, because the former allowed a hearing and the latter allowed the judge's entire tenure to be taken into consideration.)
3. Recall would be abused by powerful interest groups and the media. (Taft reasoned that these entities had the resources to stir up the people against judges who were opposed to their agendas.)
4. The threat of recall would discourage honorable persons from becoming

judges. (Taft reasoned that the prospect of arbitrary removal would make the office less attractive to principled individuals.)

Interestingly, Taft knew that his veto was futile: Arizona could always reinstate judicial recall once it eventually attained statehood. Nonetheless, he felt so deeply about the issue that he single-handedly obstructed the territory's prolonged campaign for admission. Taft's veto statement remains one of the most unusual vetoes of any president, and it stands as a striking rebuttal to the philosophy of Progressivism. (The entire veto message is reproduced in the appendix.)

After the veto there was some initial talk in Congress about an **override.**[81] Instead, Congress backed Taft. It decided to grant statehood only if Arizona voters removed judicial recall from their constitution. The territory held a special election on December 12, 1911, and the change was approved.[82] President Taft officially signed the statehood proclamation on February 14, 1912, making Arizona the nation's forty-eighth state (fig. 2.8). When the news arrived by telegraph, jubilant Arizonans celebrated statehood with sirens, fireworks, and parades.[83]

Figure 2.8. President Taft signs Arizona's statehood bill (February 14, 1912).

The story, however, does not end in February. Arizona's first presidential election took place in November. Four men were running for the office: Taft (who was seeking a second term), Woodrow Wilson (a Democrat), Teddy Roosevelt (who was now running as a Progressive with Arizona's old nemesis, Senator Beveridge), and Eugene Debs (a socialist). The state gave Taft the fewest votes of the four and helped Wilson win the election.

On the state level there were other interesting developments at the 1912 election. Arizona voters decisively approved a constitutional referendum to restore judicial recall to the state's constitution![84] The vote pointedly signaled the state's independence from Washington. A critical *New York Times* article accused the voters of bad faith, and reassured readers that "Arizona is not a very large or important member of the great sisterhood of states."[85] That wasn't the only controversial **proposition.** Female suffrage was put on the ballot as well. The male voters approved this amendment by a 2-to-1 margin. Thus, although Arizona women did not have full suffrage from the very beginning of statehood, they did gain it nine months later—well ahead of the Nineteenth Amendment to the U.S. Constitution in 1920. Altogether, Arizonans made five changes to their brand-new constitution, launching an amending habit that continues to this day.

Online resources

Treaty of Guadalupe Hidalgo:
http://avalon.law.yale.edu/19th_century/guadhida.asp

Enabling Act (1910):
www.azleg.state.az.us/const/enabling.pdf

Arizona Constitution (original 1910 version):
http://azmemory.lib.az.us/cdm4/document.php?CISOROOT=/archgov&CISOPTR=218&REC=4

Arizona Department of Library, Archives and Public Records, Documents Leading to Statehood:
www.lib.az.us/is/statehood/index.cfm

3 The Legislative Branch

A common misconception about the Arizona State Legislature is that it is a clone of the U.S. Congress. Certainly, it resembles that body in many ways. For example, the main functions of the two legislatures are quite similar. Both bodies make laws and propose constitutional amendments, control public spending, and monitor the other two branches of government. Nonetheless, there are some significant differences. The men who drafted Arizona's constitution in 1910 were reformers. Their goal in designing the state's legislative branch was to fix perceived weaknesses in the U.S. Congress, not replicate them. Above all, they sought to make the legislative branch more responsive to the average citizen. Whether they succeeded is debatable. But in trying, they did create a legislature that differs from the national model in many interesting ways. Accordingly, this chapter will explore the structure and function of the Arizona legislature, emphasizing the underlying logic of its distinctive features.

Structure of the Legislature

We can study the state legislature from different vantage points. At the farthest distance it resembles most of the world's lawmaking bodies in two fundamental respects. First, it is a *collective* decision-making body. That means that it can take official action only when a majority or more of its ninety members agree. (In contrast, officials in the executive branch and many judges have the power to act individually.) Second, it is a *representative* body. Arizona legislators are elected from small districts throughout the entire state. This enables the legislative branch to reflect the diverse interests of different regions and constituencies.

As we move in closer, the state legislature bears a strong resemblance to the U.S. Congress. Most strikingly, it is **bicameral,** or two-chambered. Even the names of Arizona's two houses are copied: the smaller chamber is called the senate and the larger chamber is called the house of representatives. Like Congress, the two chambers operate fairly independently of each other but must concur in order to pass laws. Although this duplication is somewhat inefficient, it provides a check against hasty or corrupt legislation. (With the

sole exception of Nebraska, all of the nation's states have bicameral legislatures.)[1]

It is only in the close-up view that the distinctive features of the state legislature begin to emerge. This is not surprising. When Arizona drafters sat down to design the legislative branch, they did not have a totally free hand. The U.S. Constitution required them to create a "republican form of government."[2] Today, we call this type of government a **representative democracy** (see chap. 4). The Progressive drafters of Arizona's constitution were not as enthusiastic about representative democracy as were the nation's Founding Fathers. Arizona's drafters favored a greater role for the citizenry. They feared however that if they deviated too much from the national norm, Congress would reject Arizona's statehood application. Accordingly, as outlined below, they made many subtle changes that were designed to make the state legislature more democratic and accountable.

Legislative Elections

Length of terms In Arizona, all state legislators have simultaneous two-year terms. This contrasts with the federal government (where senators serve for staggered six-year terms) and most state governments (where senators serve for four years). Theoretically, short, simultaneous terms make a legislature more responsive to the people in at least two ways. First, voters are able to replace all the **incumbents** at once, producing an immediate change in government. Arizonans can do this at the **general election,** which takes place in November of every even-numbered year. All ninety seats in the state legislature are up for reelection at this time. Second, short terms encourage legislators to be more attuned to their constituencies. In essence, they are continuously running for reelection. A legislator on such a short leash can't afford to act too independently of the voters' wishes. (In contrast, a U.S. senator has far greater freedom in the early years of his or her six-year term. Unless an issue is unusually salient, most **constituents** will not even remember their senator's vote down the road at reelection time.)

Short legislative terms have some downsides, however. A degree of experience, stability, and continuity are sacrificed when lawmakers in both houses have short terms. The other two branches of government—which have longer terms—can take advantage of the legislators' inexperience. Permanent legislative staffers and lobbyists tend to become more powerful as well.

Frequent elections also place added fund-raising burdens on legislators. Historically, legislators have relied upon interest groups for campaign funds, raising troubling questions about what those groups were receiving in return. Although the state adopted a public funding law in 1998 (the Clean Elections Act), this has not eliminated the role of interest groups nor the financial burdens of frequent elections.[3] Finally, there are downsides to making the legislature *too* responsive to the citizens' will. Voters can be uninformed, shortsighted, or impulsive. This is one reason why the nation's Founders counterbalanced short terms in the U.S. House of Representatives with long terms in the Senate.

Term limits In 1992, the voters added **term limits** to the state constitution.[4] No legislator may now serve more than four consecutive terms (i.e., eight years). This is not a lifetime ban, as it is in California. An Arizona legislator has only to sit out a two-year term and the cycle begins anew. Alternatively, the legislator can simply run for the other chamber, or switch back and forth. The fact that the two chambers have identical electoral cycles makes this strategy quite feasible.

Although term limits are popular with the general public,[5] they do have downsides. Critics charge that the limits force the retirement of popular and effective lawmakers, thereby infringing upon voter choice. They also argue that the term limits deprive the legislature of experienced leaders; inflate the power of the other two branches of government and of staffers; increase intraparty friction as legislators compete for leadership positions in shortened time frames; weaken legislative oversight due to the loss of institutional memory; render lawmakers less accountable in their final terms; increase the grip of lobbyists who "assist" inexperienced legislators; and produce more lobbyists from the ranks of lawmakers ousted by term limits. On the opposite side, defenders contend that the limits bring fresh blood to the legislature; increase electoral competition by creating more open races; reduce the number of unresponsive career politicians; lessen the impact of campaign contributions (which ordinarily favor incumbents); and make it harder for lobbyists and special interests to develop longtime, cozy relationships with legislators.

So which side is right? It is too early to answer the question definitively.[6] Preliminary data suggest however that Arizona's limits have not been particularly effective in preventing prolonged legislative service. As of

this writing, forty legislators have exceeded the eight-year limit by switching chambers or simply sitting out a term. In fact thirteen legislators have served fourteen or more years in the legislature since the term limits began in 1993; one has served eighteen years! It is evident that if a lawmaker wishes to make a career out legislative service, he or she still can.

The efficacy of term limits can also be measured by their impact on legislative turnover. As figure 3.1 indicates, the percentage of brand-new legislators has not significantly increased since 2000, when the limits began to kick in. One explanation is that legislative turnover was fairly high even before term limits. Like their federal counterparts Arizona incumbents do enjoy a huge electoral advantage.[7] Unlike members of Congress, however, most Arizona legislators do not make a career out of legislative service. As detailed below, low pay, long sessions, and a challenging workload all contribute to natural turnover. At times, Arizona has had a greater problem in getting qualified people to run for the office than in retiring them. In 1998, no party candidates bothered to run for two house seats. (Write-ins were ultimately elected.) In short, when Arizonans overwhelmingly approved term limits in 1992 they were arguably adopting an ineffective solution for a problem that may not have existed.

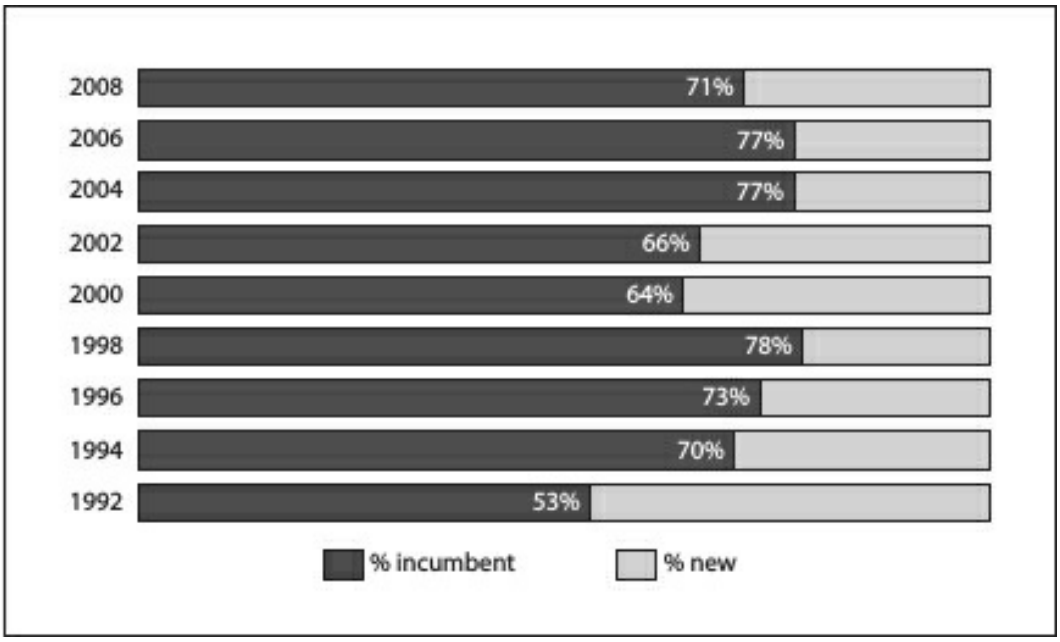


Figure 3.1. Turnover in the Arizona legislature. (Term limits operated against the first group of lawmakers in 2000.)

The district system and gerrymandering State senators and representatives are now elected from thirty equally populated legislative districts across the state. Each district elects one senator and two representatives, giving the senate a total membership of thirty and the house, sixty. The current district system has been in effect since 1966. Prior to that time Arizona used a variety of systems that did not fairly apportion lawmakers to the population they represented.[8] For example, between 1953 and 1966, two senators were elected from every county. This arrangement gave the sparsely populated rural counties far more representation than the heavily populated urban areas. The numbers tell the story: just before the adoption of the current system in 1966 the 7,736 people living in Mohave County had as many senators (i.e., two) as the *663,510* people living in Maricopa County! Similarly inequitable voting districts in other states spawned lawsuits that reached the U.S. Supreme Court in the early 1960s. In a series of landmark decisions known as the reapportionment cases,[9] the Court ordered the states to redraw their legislative districts after every decennial census to ensure that each district had the same number of citizens. Efforts to comply with the Supreme Court rulings triggered an intense partisan battle in the Arizona legislature. Three federal judges wound up dividing the state into the present thirty-district system when Republicans and Democrats could not agree on a plan.[10] The court's solution was officially made part of the state constitution in 1972.[11]

Redistricting had two immediate and profound political consequences in Arizona. First, with the new districts in place, legislative power shifted from the rural counties to Maricopa County, where it has remained ever since. Today, more than half the state's thirty districts are wholly located in this county. Second, legislative control switched to the Republican Party, which won majorities in both houses for the first time in the state's history. This partisan shift occurred because Arizona's rural counties were predominately Democratic. When they lost seats in the legislature, so did the Democratic Party. The results were the most dramatic in the state senate where the party breakdown switched overnight from a 26-to-2 Democratic advantage to a 16-to-14 Republican edge.[12]

Although redistricting solved the problem of numerical unfairness, it didn't cure the problem of **gerrymandering.** Gerrymandering is the drawing of district boundaries to give a political advantage to a particular party, group, or individual. The term comes from an 1812 Massachusetts political cartoon

—indicating that it is neither new nor unique to Arizona.[13] Figure 3.2 provides a simple illustration of how gerrymandering works. Although the practice is deeply entrenched in American politics it is not benign. As explained below, it seriously undermines legislative accountability. In 2000, Arizona voters attempted to put a stop to gerrymandering with the passage of the sweeping Fair Districts, Fair Elections constitutional initiative.[14] The problem nonetheless persists, and therefore warrants a closer look.

Legislative districts are supposed to be compact, contiguous, and aligned with the boundaries of neighborhoods, cities, school districts, and other political subdivisions. The idea is that such natural communities have common political interests. Ideally, the districts should also be as politically competitive as possible. This means that neither of the two major political parties should enjoy too great a numeric advantage over the other. Of course, not all of these goals can be met when there is an unequal number of Republicans and Democrats to begin with, or when large regions are overwhelmingly aligned with a single party.[15] Nonetheless, gerrymandering intentionally exaggerates partisan and other differences in order to make the districts even *more* lopsided and uncompetitive than they otherwise would be.

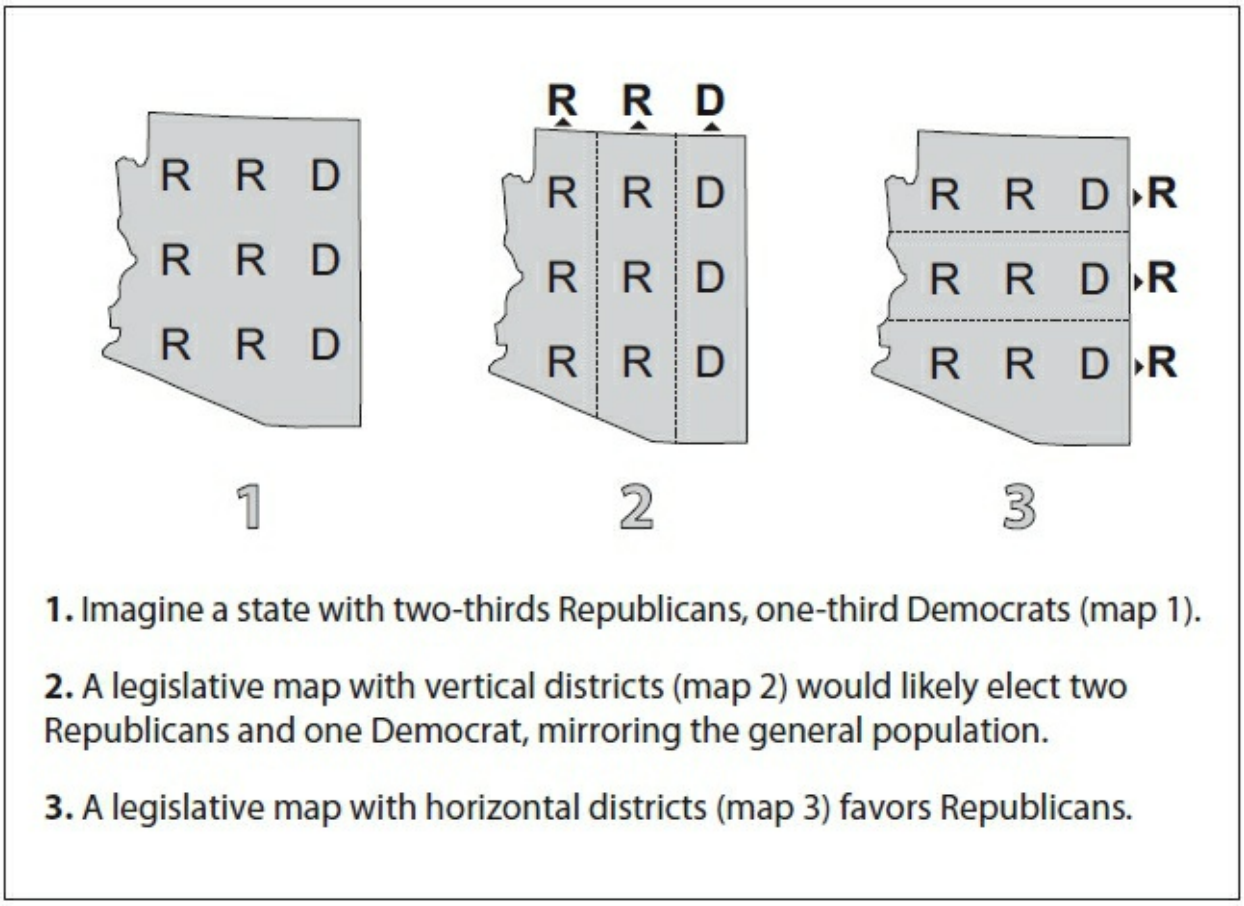


Figure 3.2. A gerrymandering primer: how changing the shape of districts can alter election outcomes.

There are many ways to gerrymander a district map, and modern computers have made gerrymandering easier than ever before. One common technique is **fracturing.** This occurs when natural communities are deliberately split into multiple districts in order to dilute the opponent's voting power. Arizona Republicans tried this tactic in 1971 when they carved the Navajo Reservation (a Democratic stronghold) into three separate districts and combined those districts with adjoining Republican-dominated districts. Observing that "the Indians were done in," a federal judge ordered the map redrawn.[16] (Amazingly, the same thing happened to the San Carlos Apaches the following decade, and they also won their court challenge.[17]) Another common gerrymandering technique is **packing.** This crams opponents into a few, super-strong districts that waste their votes and simultaneously remove them from many more surrounding districts. No matter which

gerrymandering technique is used, the end goal is to maximize the number of "safe" districts—that is, lopsided districts that virtually guarantee a win for a particular party, group, or candidate.

The primary practitioners of gerrymandering are the two major political parties competing for majority control of the legislature. A heavily gerrymandered map can give one party a lock for the entire decade. In fact, Arizona Democrats successfully gerrymandered to preserve their majority status from statehood until 1966. Since 1966 the Republicans have enhanced their control through gerrymandering. This can be seen in table 3.1 by comparing the Republican share of the electorate against seats won in the legislature from 2000 to 2008. Even as the percentage of Republicans declined over the decade, the party maintained its disproportionate share of legislative seats. A major reason for this was a gerrymandered decennial map that created safe Republican districts.

Political parties aren't the only beneficiaries of gerrymandering. Incumbent legislators want the boundaries of their own districts drawn in a way that enhances their personal reelection prospects. Finally, minority groups push for the creation of gerrymandered districts where they make up the majority of voters (called **majority-minority districts**).[18] In recent years such districts have helped Hispanic candidates win more seats in the state legislature (although still below their percentage of the general population). This strategy has however simultaneously benefited Republicans. Because Hispanics are mostly Democrats, combining them into a few Hispanic-majority districts is a form of packing that leaves fewer Democratic voters in many more surrounding districts.

Table 3.1. Voter registration versus legislative seats

Republican voters (%)		Democratic voters (%)	Other voters (%)[a]	Republican seats (%)	Democratic seats (%)
2000	43	38	19	57	43
2002	42	36	22	62	38
2004	40	35	25	62	38
2006	40	33	27	56	44
2008	37	34	29	59	41

Source: Arizona Secretary of State, Voter Registration Counts

[a] These include unaffiliated independents and members of the Green, Libertarian, Natural Law, and Reform parties.

Irrespective of the motive, gerrymandering causes multiple harms. First, as Arizona history and table 3.1 demonstrate, it gives a long-term political advantage to the party that is more successful in manipulating the decennial map. Second, it spawns costly litigation that can leave electoral boundaries in limbo for years. In fact, every decennial map since 1966 has triggered court challenges; the 2000 decennial map went back and forth in the courts for nearly the entire decade!

The most serious harm, however, is that gerrymandering eliminates meaningful elections altogether. When a party has a lopsided numerical advantage in a district, serious candidates from the opposing party do not even bother to run. (It makes little sense to waste time, energy, and money on a campaign that is destined to fail.) Figure 3.3 provides disturbing evidence of this phenomenon. Since 1990, 45 percent of the state's senators have faced *no competition whatsoever* from the other major party; many had no opposition in the primary election either. In essence, they attained their office merely by collecting a few hundred signatures from supporters.[19] The situation in the house was not much different. Over the same period, only 31 percent of the races in this chamber were fully contested.[20]

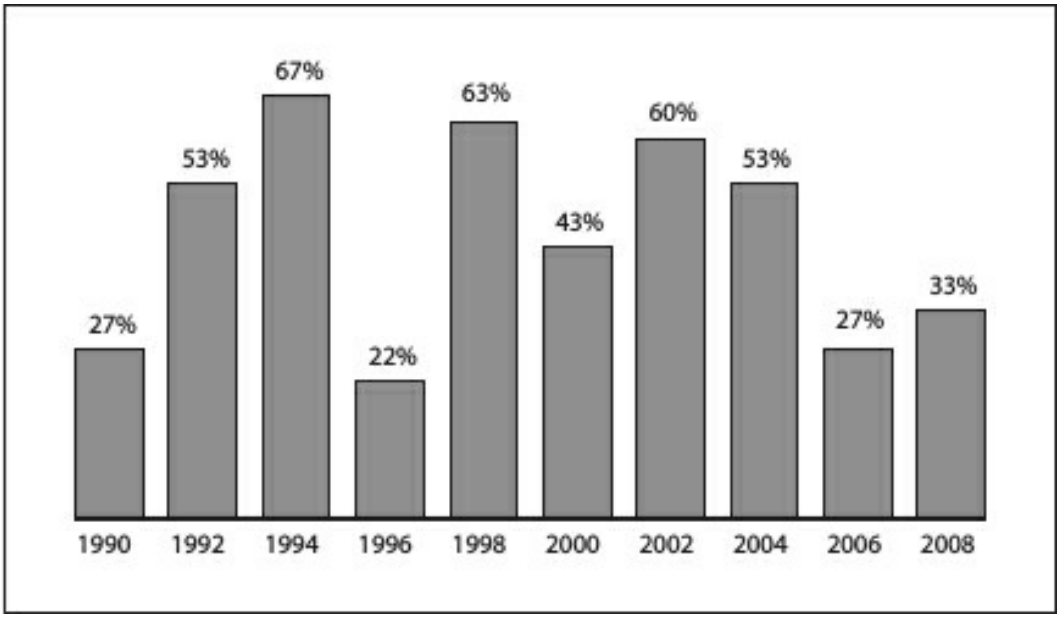


Figure 3.3. Unopposed Arizona Senate races: percentage of races with no general election opposition from the other party, 1990–2008.

Lack of electoral competition is worrisome for many reasons. It allows less qualified candidates to gain and retain office. It causes voters to lose interest in an election and depresses **voter turnout,** affecting other ballot issues. Finally, and perhaps most seriously, lack of competition reduces the accountability of legislators to their constituencies. A legislator who is virtually assured of retaining his or her seat has less incentive to respect the wishes of constituents. In short, the Progressives' extensive efforts to make lawmakers more accountable go out the window when the elections themselves are meaningless.

Unfortunately, there is no easy cure for gerrymandering. The Fair Districts, Fair Elections Initiative (2000) was supposed to solve the problem by creating a bipartisan commission[21] to draw Arizona's future decennial maps. The lengthy constitutional amendment mandated public input, and it detailed specific processes that the redistricting commission had to follow. The initiative was poorly drafted, however. For example, along with other goals,[22] the commission was directed to keep "communities of interest" together in a district. This undefined term opened the door to old-style gerrymandering as ethnic groups, retirement communities, and even owners of historic brick houses demanded that district boundaries be adjusted to accommodate their common interests. The most serious drafting deficiency involved the core issue of political competitiveness. Both the initiative's title and its promoters claimed that the new system would produce less-partisan maps. It didn't happen. When the redistricting commission unveiled the new decennial map in 2002, only *four* of Arizona's thirty districts were competitive! The remaining districts were lopsidedly Republican or Democratic. The redistricting commission essentially concluded—with some basis in the constitutional text—that competitiveness was subordinate to the other goals. Eight years of litigation followed. A lower court twice ruled that more competitive maps were feasible without sacrificing other objectives. In the end, however, the Arizona Supreme Court upheld the commission's map.[23] In 2007, disappointed reformers circulated a new initiative petition to clarify that "competitiveness is a priority,"[24] but the effort fell short of the needed signatures to make the ballot. As of this writing, gerrymandering

remains alive and well in Arizona.

Arizona's Citizen Legislature

The drafters of Arizona's constitution had a low opinion of career politicians. They believed that the state would be better served by a part-time legislature made up of civic-minded citizens. Arizona's **citizen legislature** is fostered by short terms, minimal qualifications, relatively short sessions, and low compensation. This differentiates the Arizona Legislature from the U.S. Congress, which is a full-time body made up of professional politicians.[25]

Qualifications The qualifications for holding legislative office in Arizona are not onerous. The Progressives did not want to create barriers that would limit the office to elites. To serve in either chamber of the legislature, a person has to be at least twenty-five years old,[26] a U.S. citizen, an Arizona resident (minimum three years), a county resident (minimum one year), a registered voter, and English proficient.[27] (The registered voter requirement bars felons and legally incapacitated persons from holding office.)

Of course, such formal qualifications reveal little about the actual composition of the state legislature. Although Arizona legislators tend to be older, better educated, and more well off than the state's population as a whole, the legislature is not a body of elites. More than one-quarter of the legislators elected in 2008 lacked college degrees, and most with degrees earned them in state institutions, not Ivy League schools. In contrast to the members of the U.S. Congress, the typical state legislator is a self-made small-business owner—not a lawyer or millionaire. It is not surprising that business-related occupations dominate in the Arizona legislature (see fig. 3.4). Small-business owners, real-estate agents, and insurance agents have flexible hours that can better accommodate part-time legislative service. For the same reason, many retired persons serve in the legislature.

Arizona's part-time legislature has always attracted a comparatively high number of women after the first woman took office in 1915. Since 1990, roughly 30 percent of the legislature has been female, a higher ratio than is found in most other states.[28] The number of Hispanic lawmakers has also been increasing, although it is still well below Hispanics' proportionate share in the general population.[29] To some degree, therefore, the Progressives succeeded in making the legislature diverse and egalitarian.

Sessions Serving in the Arizona legislature has always been a part-time occupation. Originally, the legislature met for a few months in the winter of every other year. The biennial schedule perfectly accommodated the independent rancher—arguably the drafters' prototype of the ideal citizen legislator. The rancher could leave his homestead in the hands of others during the slow winter season, come to Phoenix, do his civic duty, and return home in short order.[30] Although this schedule may have worked in the state's early years, the challenges posed by Arizona's postwar growth demanded more frequent sessions. Since 1951 the legislature has been meeting on an annual basis with one **regular session** each year. The session begins on the second Monday in January. There is no fixed ending date but legislators strive to adjourn within one hundred days, i.e., by late April.[31] In recent years they have rarely been able to meet this goal. For example, between 1999 and 2009 only one regular session ended in less than 100 days (fig. 3.5). The longest session in this period (2009) ran 170 days; the average session lasted 144 days. Lengthy regular sessions make it difficult for lawmakers to earn a living on the side. This limits who can serve and severely strains the concept of a part-time, citizen legislature.

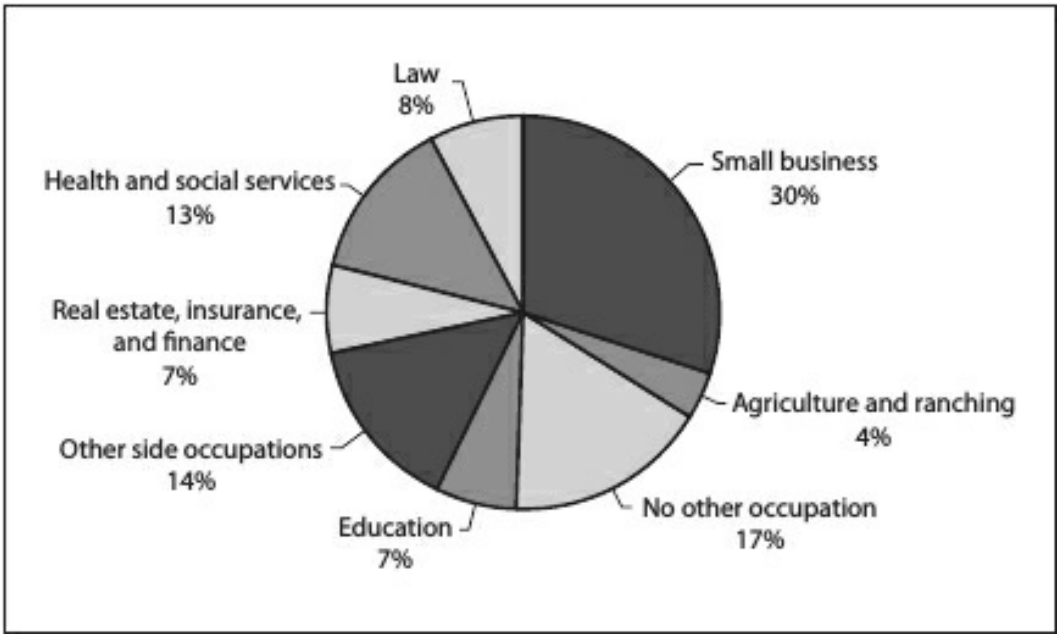


Figure 3.4. Occupations of Arizona state legislators (2008).

In addition to the annual sessions, the state constitution permits an

unlimited number of extra sessions, called **special sessions.** These can be initiated by the governor or the legislature at any time. If the governor initiates the session, the legislature can only enact legislation on the specific subjects mentioned in the governor's call. By contrast, if the legislature initiates the session, there is no restriction as to subject matter.[32]

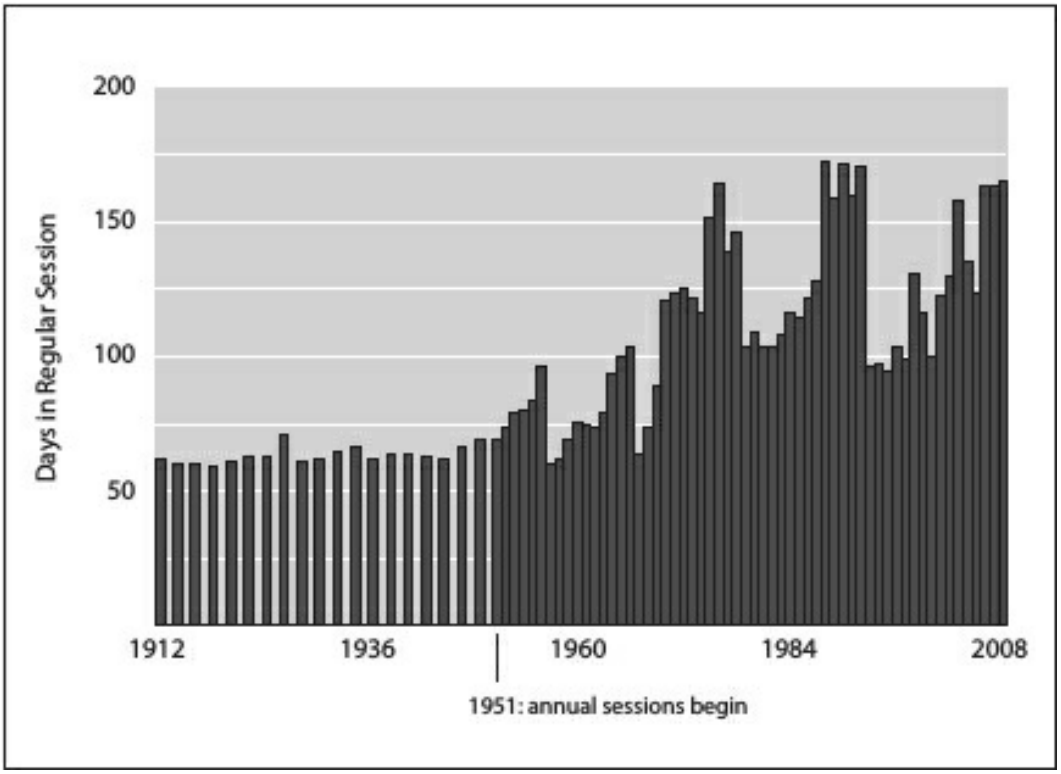


Figure 3.5. Lengths of Arizona regular legislative sessions, 1912–2009 (excludes special sessions).

In recent years there have typically been two or three special sessions a year. The governor has initiated virtually all of them, and they have usually been brief. For example, the legislature might be summoned to the capitol to extend an expiring law, to correct a legislative oversight, or to appropriate money for some unforeseen need. Generally, lawmaking of this type can be accomplished in a few days or even a few hours. On the other hand, a special session may be called to address a complex issue without the distraction of competing legislative business. These sessions can run much longer if there isn't consensus beforehand.[33] Most special sessions occur during the "off season" (i.e., July to December) when the legislature is normally adjourned.

They can however also be called in the middle of an ongoing regular session. The governor does this to focus the legislature's attention on a matter deemed important.[34] While the legislature is in a special session it cannot conduct other business. For example, it is common for the state's budget to be enacted in such a special session because this complex undertaking benefits from the legislature's full attention.

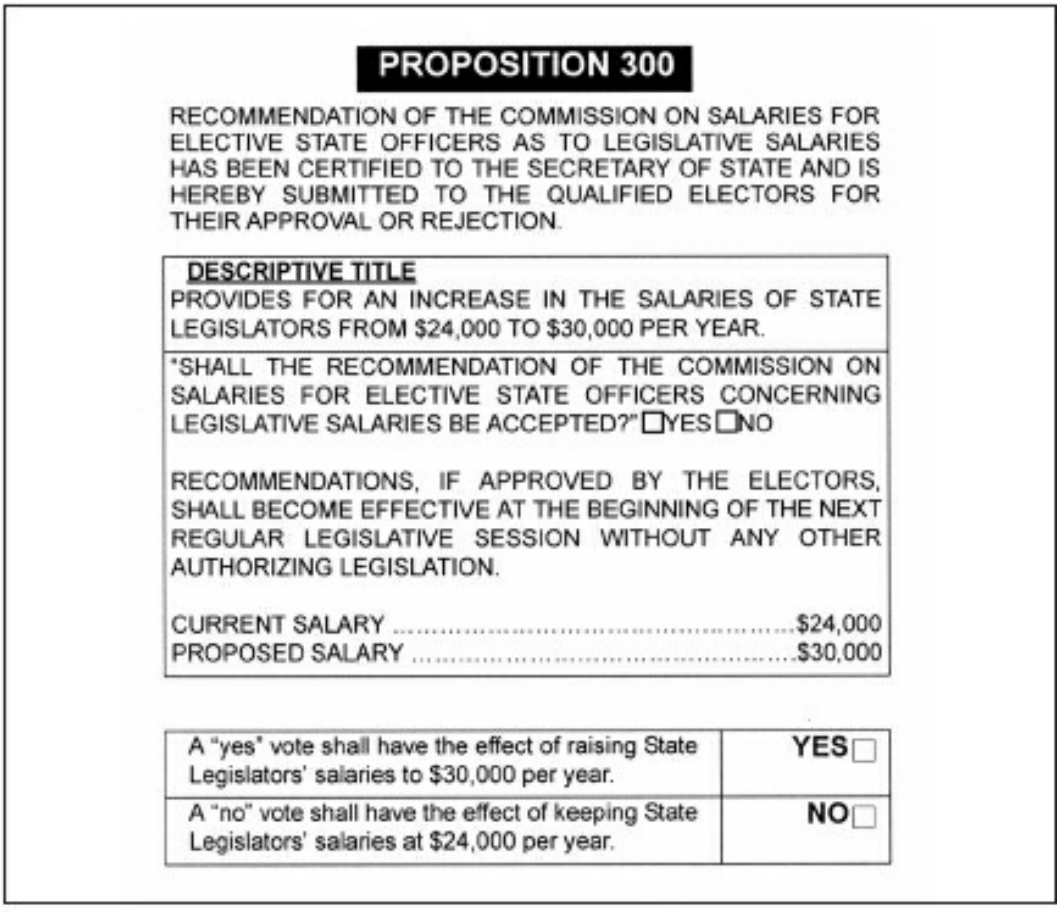
Calling a successful special session requires political skill on the part of the governor. Although the legislature must convene when the governor issues a call, it is not obligated to pass any legislation. For this reason, the governor has to proceed delicately. An unsuccessful or prolonged special session can be costly, disruptive, and embarrassing to the governor's leadership skills. A politically savvy governor will rarely call a special session unless he or she has consulted with legislative leaders and is reasonably confident that sufficient votes are lined up to pass the desired legislation.

Finally, it should be emphasized that legislators perform services even when the legislature is not in session. Most bills must be drafted well before the session begins. (A hundred-day session does not allow much slack time.) **Interim committees** meet in the summer and fall to study complex issues that might require legislation. Constituents and interest groups contact legislators and demand services from them on a year-round basis. Arizona lawmakers purportedly devote nearly 80 percent of their time to legislative work—almost as much as professional, full-time legislators do.[35] In short, although serving in the Arizona legislature is not a full-time job, it consumes considerably more than one hundred days a year.

Legislative salaries To foster the concept of a citizen legislature, the Progressives favored low legislative pay. They hoped that this would attract public-spirited candidates instead of individuals seeking office for personal gain. More importantly, they wanted legislators to be part of the same private-sector world as their constituents. Accordingly, the constitution set the first legislative salaries at $7 a day with a $420 cap.[36] This rate was meant to reimburse lawmakers for their expenses—not serve as a living wage. Having an actual dollar amount in the constitution had an important secondary effect, however: it put the voters in charge of legislative salaries since voters must approve all constitutional changes.[37] Not surprisingly, legislators rarely received a raise. By 1970, the annual salary had risen to

only $6,000 a year, and reformers pushed for a new approach.

As a result of a constitutional amendment in 1970, a five-person salary commission now studies legislative salaries and recommends raises when appropriate.[38] The commission members are private citizens chosen by the leaders of each of the three branches of government. If the commission concludes that legislators deserve a higher annual salary, it sends its recommendation to the voters as a special ballot proposition (see fig. 3.6).[39] The raise takes effect at the start of the next regular session if a majority of the voters approve the proposition. As table 3.2 indicates, the voters have followed the salary commission's recommendation only twice in the thirty-six years since the new system was adopted to facilitate more frequent raises.[40]



PROPOSITION 300

RECOMMENDATION OF THE COMMISSION ON SALARIES FOR ELECTIVE STATE OFFICERS AS TO LEGISLATIVE SALARIES HAS BEEN CERTIFIED TO THE SECRETARY OF STATE AND IS HEREBY SUBMITTED TO THE QUALIFIED ELECTORS FOR THEIR APPROVAL OR REJECTION.

DESCRIPTIVE TITLE

PROVIDES FOR AN INCREASE IN THE SALARIES OF STATE LEGISLATORS FROM $24,000 TO $30,000 PER YEAR.

"SHALL THE RECOMMENDATION OF THE COMMISSION ON SALARIES FOR ELECTIVE STATE OFFICERS CONCERNING LEGISLATIVE SALARIES BE ACCEPTED?" ☐YES ☐NO

RECOMMENDATIONS, IF APPROVED BY THE ELECTORS, SHALL BECOME EFFECTIVE AT THE BEGINNING OF THE NEXT REGULAR LEGISLATIVE SESSION WITHOUT ANY OTHER AUTHORIZING LEGISLATION.

CURRENT SALARY $24,000
PROPOSED SALARY $30,000

A "yes" vote shall have the effect of raising State Legislators' salaries to $30,000 per year.	YES ☐
A "no" vote shall have the effect of keeping State Legislators' salaries at $24,000 per year.	NO ☐

Figure 3.6. A legislative salary proposition on the general election ballot (2008).

Table 3.2. Voter response to legislative salary propositions

Year	Current salary	Proposed salary	Voter response
1972	$6,000	$10,000	No
1974	$6,000	$10,000	No
1976	$6,000	No proposal	Not on ballot
1978	$6,000	$9,600	No
1980	$6,000	$15,000	Yes
1982	$15,000	$18,900	No
1984	$15,000	No proposal	Not on ballot
1986	$15,000	$20,000	No
1988	$15,000	$25,000	No
1990	$15,000	$24,000	No
1992	$15,000	$19,748	No
1994	$15,000	$19,750	No
1996	$15,000	$24,000	No
1998	$15,000	$24,000	Yes
2000	$24,000	$30,000	No
2002	$24,000	$36,000	No
2004	$24,000	$36,000	No
2006	$24,000	$36,000	No
2008	$24,000	$30,000	No

The per-diem issue The annual salary is not the legislators' sole public compensation. Like their counterparts in most other states, Arizona legislators give themselves a **per diem** (travel and subsistence reimbursement) that they—not the voters—control. Under current law, legislators outside of Maricopa County receive an extra $60 per day while engaged in formal legislative business; Maricopa legislators receive $35 per day.[41] This extra compensation, and the legislators' mileage reimbursements,

is controversial. Some contend that it circumvents the will of the electorate and has been abused.[42] Others question the propriety of a per diem for Maricopa County lawmakers who are not required to work away from home. (In contrast, legislators from outlying counties typically do have to rent a second residence for the duration of the regular session.) In 1998 the voters attempted to limit legislative per diem. They approved a salary commission proposition that authorized a $9,000 raise coupled with new limits on per diem. Legislators (with attorney general backing) contended that the salary commission had exceeded its authority by addressing per diem. The Arizona Supreme Court agreed and allowed the lawmakers to keep both the raise *and* their unrestricted per-diem powers![43]

Evaluating the citizen legislature Although citizen legislatures are found in most states, this model has come under increasing attack. Reformers regard it as an outdated concept and contend that states would be better served with professional (i.e., full-time, well-paid, well-staffed) legislatures. More specifically, they contend that part-time lawmakers lack sufficient time and expertise to address the complex issues confronting modern states. The alt-fuels scandal (discussed below) is a dramatic example of the consequences of haste. Important issues, as well as routine government oversight, can be neglected when legislators operate under severe time constraints.

Another frequent criticism is that citizen lawmakers rely too heavily upon lobbyists and special-interest groups. Campaign costs can exceed the lawmaker's annual salary. Although public financing through the Arizona Clean Elections Act was supposed to break the troubling dependency upon special-interest money, lobbying expenditures have doubled in the past decade.[44] Once in office, "amateur" lawmakers tend to lean heavily upon the expertise of lobbyists. In fact, Arizona's lobbyist-to-lawmaker ratio is among the highest in the nation. Currently, there are eight registered lobbyists for every state legislator.[45]

Critics contend that part-time lawmakers are more corruptible because of their low pay and long hours. They point to AZSCAM, a sting operation that led to the indictment of seven Arizona legislators in 1991 for taking bribes. Lawmakers were captured on videotape promising to legalize gambling in exchange for surprisingly small sums of money or other benefits.

Citizen legislatures are also criticized for having pro-business and pro-

development biases. This is not surprising given the overrepresentation of these occupations in the legislature (see fig. 3.4). This situation also leads to frequent conflicts of interest, because commercial regulation is a major part of modern-day lawmaking. Some contend that a lawmaker simply can't wear two hats. When legislators vote on matters affecting their own livelihoods, public confidence is eroded.

Finally, critics contend that citizen lawmakers tend to be more ideological, arrogant, and rigid because they regard themselves as civic-minded "volunteers" who are not committed to long-term political careers.[46] Term limits arguably contribute to this mindset as well. In contrast, professional politicians can't afford to alienate constituents if they wish to remain in office for the long haul.

On the other hand, citizen legislatures have many passionate, modern-day defenders. Proponents view it as a more democratic system. They argue that citizen lawmakers better understand the needs of ordinary citizens because they live and work in the private sector along with their constituents. Unlike members of Congress, they are not immune from the regulatory environment that they create. And citizen legislators are often attracted to legislative service because of civic-mindedness, as opposed to careerism.

Defenders argue that *all* legislative bodies—professional or citizen—attract lobbyists, special interests, and potentially corrupting influences. The range and technical complexity of today's issues make interaction with lobbyists unavoidable and necessary. Theoretically, citizen lawmakers should be better able to resist untoward pressures and "do the right thing" since they are not committed to long-term political careers.

Supporters also deflect conflict-of-interest problems arguing that when citizen lawmakers vote on matters affecting their own livelihoods they bring added insight and expertise to the vote. Such legislators are also more sensitive to the negative aspects of overregulation.

As noted previously, citizen legislatures tend to be more diverse, attracting greater numbers of women, minorities, retired persons, and others who traditionally avoid full-time political careers. These legislatures also have higher turnover rates (see fig. 3.1), which also encourages greater participation.

Finally, because citizen legislatures have shortened sessions to accommodate the lawmakers' private-sector careers, they enact fewer laws,

leading to less **bureaucracy.** Shorter legislative sessions are also less costly, reducing the burden on taxpayers.

Organization of the Legislature

Nominally, all legislators have equal lawmaking power. No vote counts more than any other, and a **simple majority** or more is always needed for final, official action. Without leadership and strong organization, however, it is doubtful that the legislature could function at all, let alone accomplish its business in a mere one hundred days. Accordingly, the state legislature is organized around three powerful elements: leaders, committees, and the **majority party.**

Legislative leaders Each chamber of the legislature chooses its own officers and makes its own operating rules.[47] The leader of the senate is called the **president,** and the leader of the house is the **speaker.** Officially, these two officers are chosen by a majority vote of their respective chambers at the start of each new two-year term. In reality, however, the leaders are pre-selected in a private **caucus** by the members of the majority party alone. These two presiding officers wield more power than their counterparts in the U.S. Congress. Their authority lies in four main areas:

1. *Parliamentary powers:* The presiding officers chair the meetings of their chambers, set the agendas, decide who gets to speak, and rule on procedural disputes.
2. *Administrative powers:* The presiding officers hire and supervise legislative staff, handle per-diem and other personnel matters for legislators, and manage the chambers' facilities. Even the last power is not as innocuous as it seems. For example, in recent years one speaker "banished" a reporter from the house for writing newspaper articles critical of the speaker. A senate president allowed the chamber's doors to be locked to prevent members from leaving during an important vote.[48] Needless to say, these actions were widely criticized; nonetheless, they exposed the raw power that legislative leaders routinely exercise.
3. *Appointive powers:* The presiding officers assign the members of their respective chamber to committees and they pick the chairperson of each

committee. Conversely, they have the power to summarily remove legislators from committees and demote chairpersons. As outlined below, merely by threatening to use these powers, the presiding officers can sometimes influence the voting behavior of fellow lawmakers and suppress dissension in the ranks.

4. *Referral powers over bills:* The presiding officers assign bills to committees for study and determine when (or whether) a final vote on a bill will be taken. These powers enable them to speed a bill's passage through the legislature, kill it outright, or hold it hostage for desired changes. A leader can also threaten to "hold" (block) other lawmakers' bills as quid pro quo for failure to support the leader's agenda.

In addition to the president and speaker, the majority party chooses two floor assistants in each chamber: a majority leader and a majority whip. Together with the committee chairpersons, they form the dominant leadership structure in the legislature. The **minority party** organizes itself as well. Each chamber chooses a minority leader, minority whip, and assistant minority leader. Their primary job is to maintain party unity. Without such organization and unity, minority members would be even more powerless in the Arizona legislative process.

Standing and ad hoc committees The state legislature could not possibly accomplish the task of studying roughly a thousand bills in one hundred days without significant division of labor. **Standing committees** perform this function. These committees are semipermanent, although the number, names, and responsibilities of these committees occasionally change. As indicated in table 3.3, in the Forty-Ninth Legislature (2009–1010) there were eleven standing committees in the senate and fifteen committees in the house. (The house usually has more committees because it is a larger body.) Legislators serve on multiple standing committees, and the typical committee has seven or eight members. These committees focus on specific subject areas, as reflected in the committee names. This enables the members to develop expertise and to better coordinate the laws in a particular area. During the regular session, the standing committees meet on fixed weekly schedules to study proposed legislation.

Standing committees aren't the only committees operating in the legislature. There are also special joint committees created by statute. Unlike

standing committees, these committees are composed of members from both houses and often meet when the legislature is not in session. One example is the powerful **Joint Legislative Budget Committee** (JLBC).[49] It monitors the state's fiscal affairs and proposes a budget for the state. The legislature also creates ad hoc committees that exist for a limited time and purpose. For example, when the house and senate pass different versions of the same bill, a **conference committee** is appointed to work out a compromise. Similarly, when the legislature decides to conduct an investigation, it may establish a special committee for this limited purpose as well. Finally, interim committees are created to study particular issues when the legislature is not in session. In short, the bulk of the legislature's work takes place in small committee rooms—not in gatherings of the entire chamber.

Table 3.3. Standing committees in the Forty-Ninth Arizona Legislature (2009–2010)

Senate committees	House committees
Appropriations (has 3 subcommittees)	Appropriations
Commerce and Economic Development	Banking and Insurance
Education Accountability and Reform	Commerce
Finance	Education
Government Institutions	Environment
Healthcare and Medical Liability Reform	Government
Judiciary	Health and Human Services
Natural Resources, Infrastructure and Public Debt	Judiciary
	Military Affairs and Public Safety
Public Safety and Human Services	Natural Resources and Rural Affairs
Rules	Public Employees, Retirement and Entitlement Reform
Veterans and Military Affairs	Rules

Transportation and Infrastructure

Water and Energy

Ways and Means

The majority party The majority party is the single most powerful organizing force in the state legislature. Its authority rests upon legislative tradition rather than constitutional provisions or formal rules. Nonetheless, it controls the legislature's operations in three major ways: (1) the presiding officer is always a member of the majority party; (2) committee chairs are members of the majority party; and (3) each standing committee is carefully structured so that the majority party comprises the majority of members.[50] (The ratio of Republicans to Democrats on each standing committee roughly mirrors the party's strength in the chamber.) This organizational structure allows a unified majority party to control the entire agenda and all vote outcomes. That is, except for the quorum requirement, minority party members might as well be absent.

Of course, in the real world, party members do not always think alike. This is where "party discipline" comes into play. The party's position on important matters is worked out in caucuses, where the members debate, wheel, and deal. During the session, such caucuses may meet one or more times a week. Once there is consensus, the leadership can use various sanctions to promote party unity. For example, as noted previously, a rebellious legislator can be summarily removed from a committee before he or she can cast an adverse vote. A disobedient chairperson can be dethroned.[51] Often the mere threat of reassignment is sufficient to produce the desired voting behavior. The party leadership can also play "tit for tat," threatening to kill the dissenting legislator's pet bills unless the legislator cooperates with the party's agenda.[52] (A legislator who cannot enact bills for constituents is less likely to be reelected.)

Despite these and other disciplinary tools, the party leadership is rarely completely successful in keeping all of its members in line. Accordingly, when the majority party is short of votes on an important measure, it must appeal to minority members. If the minority party is well disciplined, it can leverage these situations into opportunities to advance its own agenda. That is, it will refuse to help out unless the majority party agrees to support some

of its bills. Although the two major parties do not take stands on every matter coming before the legislature, party membership usually determines most legislative outcomes.

Responsibilities of the Legislature

The legislature has two main tasks: (1) to make and revise the laws of the state and (2) to appropriate money for government operations. Each will be examined in turn.

The Lawmaking Process

At any given time, there are thousands of statutes in effect. Some of these are criminal laws that prohibit specific behaviors and impose penalties for violation. The vast majority of statutes, however, are noncriminal in nature. They address such varied subjects as adoption, banking, inheritance, labor, marriage, public health, and taxation, among others. In fact, more than eight hundred laws pertain to education alone—ranging from teacher qualifications to pesticide spraying at public schools.[53]

Approximately three hundred new laws get enacted each year (see fig. 3.7). Many wonder why lawmaking is such an ongoing process; superficially it would seem to be more of a one-time project. One answer is that society changes. New social problems trigger public demand for new governmental solutions. For example, in recent years, the state has enacted laws addressing domestic terrorism, drive-by shootings, school bullying, and identity theft. Reciprocally, outdated laws are repealed, and this requires the passage of a law to remove the old statute from the books.[54] Most of the laws enacted each year are neither brand new-measures nor repealers. Instead, they are revisions to existing laws. Revisions are needed because lawmaking is not an exact science. It is not always possible to anticipate all the consequences of new legislation or to foresee possible loopholes. Time and experience reveal inadequacies in existing statutes and suggest better approaches. While constant overhaul of the laws is certainly undesirable—it breeds confusion and disrespect for law—excessive rigidity creates problems too. The lawmaking process in Arizona attempts to strike a balance between these two pitfalls.

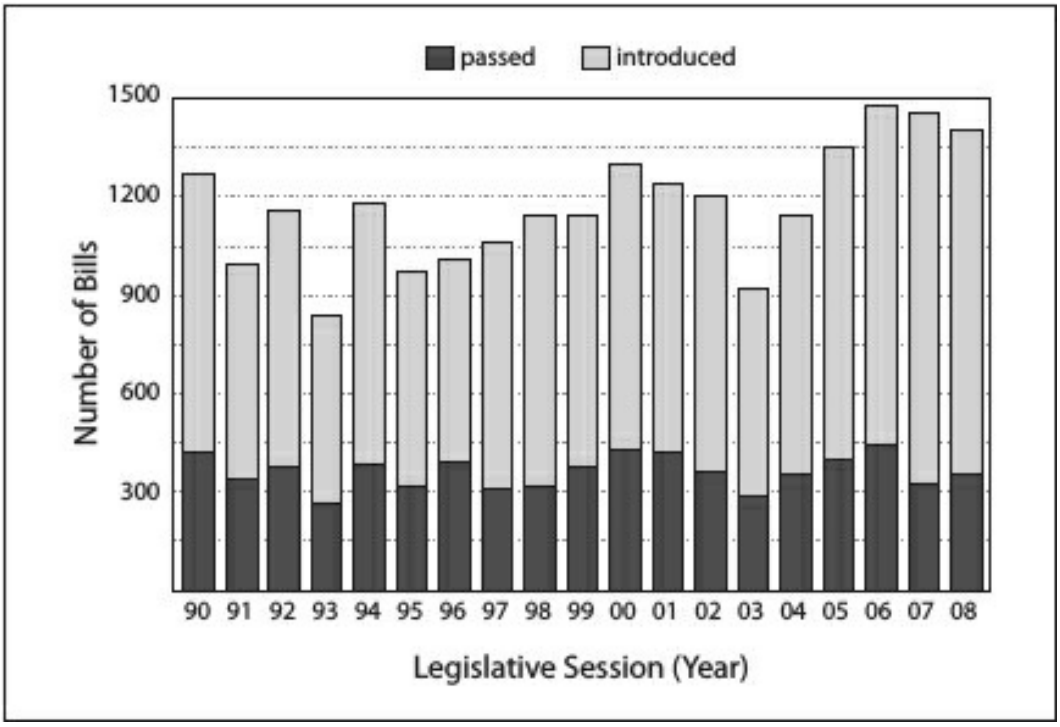


Figure 3.7. Bills introduced and passed, 1990–2008.

The constitution makes the legislature's task appear fairly simple. It merely requires that a proposed law, or bill, be approved by a simple majority or more of the members in both houses and signed by the presiding officers.[55] In actual practice, however, the lawmaking process is far more complex. There are multiple ways that bills can fail within the Arizona legislature, and most bills never come to a final vote. Conversely, successful bills must ordinarily traverse the following five major stages:

Introduction Bills can originate in either chamber of the legislature. Only a senator or representative, however, can formally introduce a bill. This legislator is called the bill's **sponsor;** successful bills usually have multiple sponsors (see fig. 3.8). Legislators do not think up the ideas for most bills themselves. Rather, the ideas come from various outside sources, including the governor, state agencies, local governments, citizens, and interest groups. The actual writing of the bill is usually done by the legislature's professional staff at the request of the sponsoring legislator. Typically, this takes place before the session begins.

There are some constitutional limits on the legislature's lawmaking

powers. As noted in chapter 1, statutes must conform to the provisions of the U.S. and state constitutions because these supersede ordinary laws. In addition, the Arizona Constitution expressly prohibits certain types of laws. For example, as noted in chapter 2, legislators cannot enact "special laws" for the benefit of particular individuals or entities.[56] Arizona's constitution also requires that every bill be limited to a single subject, reflected in its title.[57] This requirement prevents legislators from sneaking bills through the system by burying them within other measures. It also discourages **riders.** (A rider is an unrelated measure that is attached to a more popular bill in order to secure its passage. These are quite common in the U.S. Congress.) The Arizona Constitution is also fairly strict with respect to **appropriation** (spending) bills. The **general appropriation bill** (which establishes the budget for all of the state's major departments, schools, and other institutions) can contain only appropriations. Other appropriation bills must adhere to the single-subject rule.[58] This prevents much of the **logrolling** that takes place in the U.S. Congress when lawmakers tack pet spending projects onto unrelated bills as quid pro quo for their votes. The restriction enables Arizona to better control spending and live within its budget.

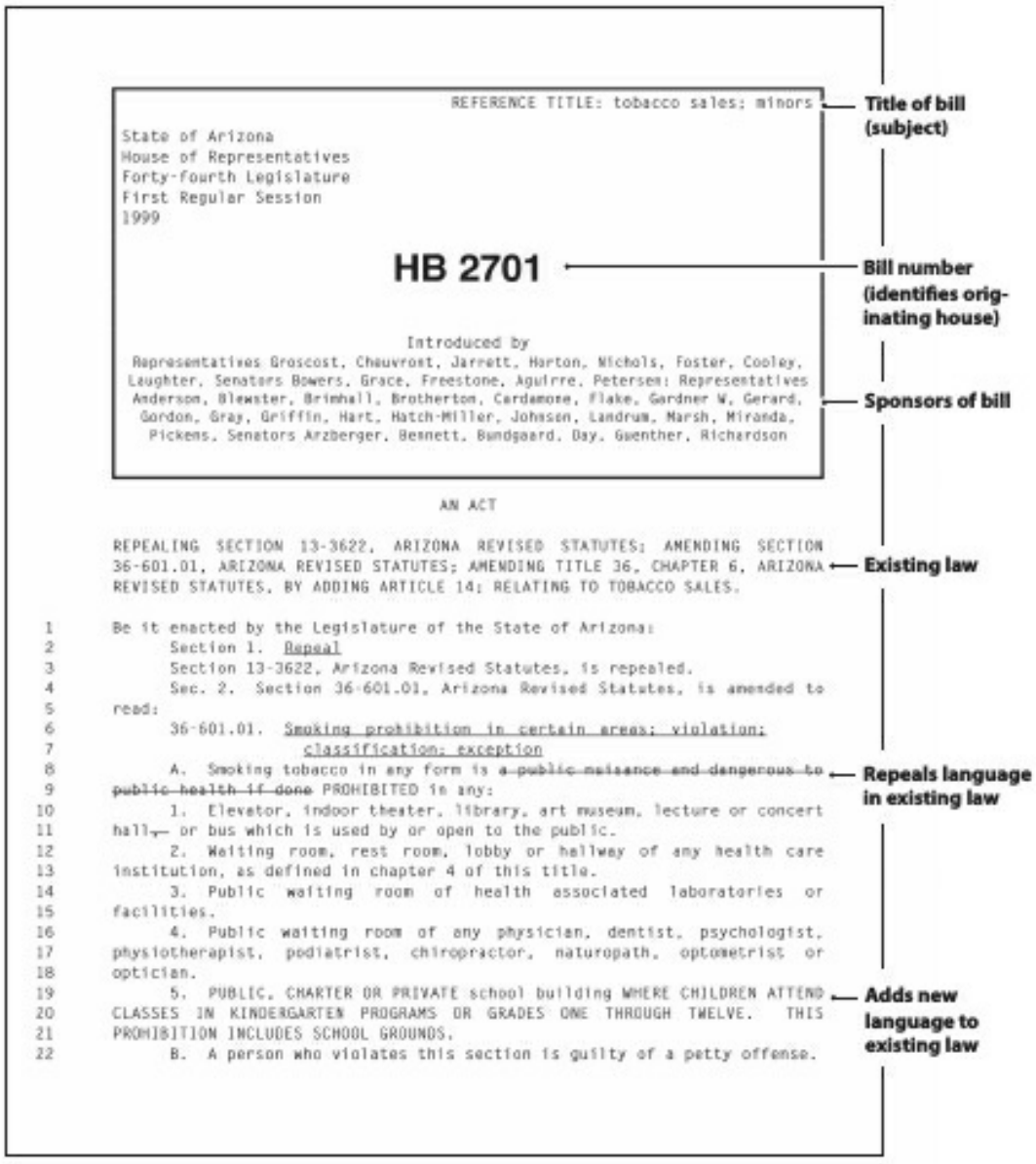


Figure 3.8. A typical bill.

Committee review in the first chamber Once a bill is formally introduced, it embarks on a course that resembles a labyrinth filled with dead ends and quicksand at every turn. As shown in figure 3.9, roughly two-thirds of all bills fail to make it through this process. This is intentional; the system is designed to retard the passage of new laws. Accordingly, there are many more ways to kill a bill in the legislature than to pass it.

At the start of the legislative session all bills go to the presiding officer of the chamber in which the bill is introduced. The speaker or president then

assigns the bills to standing committees for detailed study. Typically, the presiding officer will refer a bill to committees that deal with the bill's subject matter. For example, a bill to lengthen the school year would be assigned to the Education Committee. The bill might also be assigned to the Appropriations Committee for consideration of its fiscal impact. All bills will also be assigned to the chamber's **Rules Committee** for technical scrutiny. These standing committees do not simultaneously study the proposed measure. Rather, bills normally proceed through committees in the order dictated by the presiding officer. Most importantly, if a bill ceases to advance through the chamber it is effectively dead.[59] Bills that begin in the senate can even die at the starting block: senate rules permit the president to kill a bill by not assigning it to any committees for study. The bill is said to be "held."[60] (House rules currently require all bills to be assigned to committees, but this can be a mere technicality. The speaker can assign the bill to a committee whose chairperson has agreed to "hold" the bill, or the speaker can assign it to an excessive number of committees and thereby run out the clock.)

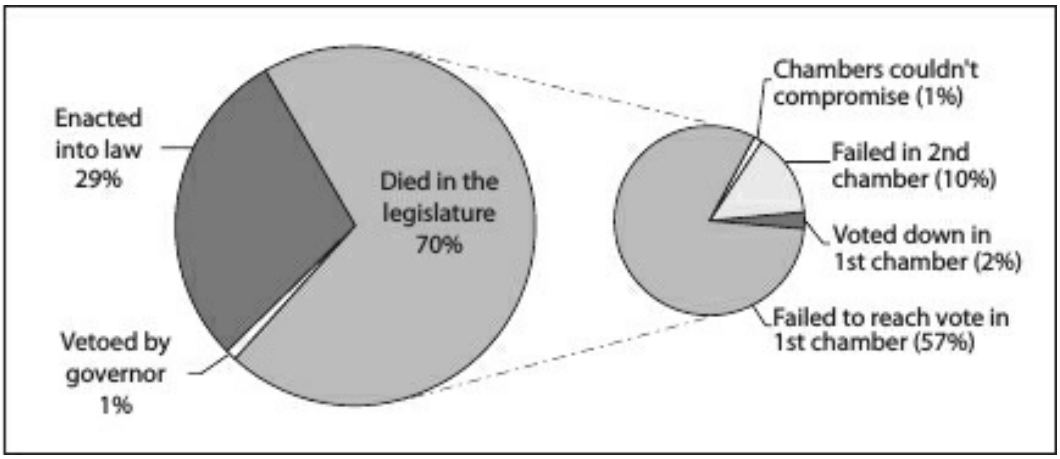


Figure 3.9. How bills die: the fate of bills in a typical legislative session. A total of 1,045 bills were introduced in the 43rd Legislature, First Regular Session; only 300 became law.

The graveyard for most bills is the standing committee (see fig. 3.9). The committee's chairperson has considerable discretion. He or she can kill a bill single-handedly by refusing to schedule it for a committee hearing. When this occurs, we say that the bill has been "held in committee." Although procedural devices exist for dislodging bills, as a practical matter the chair's

discretion is rarely challenged. This powerful prerogative enables legislative leaders to screen bills that are frivolous, flawed, or simply lack sufficient majority-party support. Although the power is sometimes abused, it is arguably necessary given the huge number of measures that are introduced each session and the severe time constraints under which the legislature operates.

If a bill is not held, it is scheduled for a brief public hearing before the standing committee. At this hearing, the members debate the merits of the bill and usually propose changes or formal amendments. At the discretion of the chairperson, the bill's sponsors, outside experts, lobbyists, and interested citizens may testify for or against the bill. When the hearing is concluded, the committee ordinarily takes a vote. The chairperson or the committee itself can however hold the bill at this juncture by simply refusing to take a vote. This prevents the bill from further advancing through the legislature and effectively kills the measure. If a standing committee decides to vote on a bill, it has three major options:

1. It can vote *do pass,* meaning that the committee has studied the bill and approves it in its original form.
2. It can vote *do not pass,* meaning that the committee disapproves of the bill. (In contrast to holding the bill back, this option allows the bill to proceed, although it carries the committee's express disapproval.)
3. It can vote *do pass as amended.* This means that the committee supports the passage of the bill only with the specific amendments proposed by the committee. (This is a common vote outcome, because close scrutiny of the bill usually reveals some flaws or unpopular aspects.)

Committee votes operate on the principle of majority rule. This means that if party members vote as a unified block, the majority party can control all committee outcomes, because they outnumber the minority party on every committee. This significantly reduces the likelihood that the minority party's bills will advance.

If a bill makes it through the first assigned committee, it proceeds to the next. Every chairperson and committee along the way has exactly the same holding and amending powers. Accordingly, it is not unusual for a bill to survive the first committee only to die in the second or third. Ultimately, the

hardy survivors wind up in the chamber's Rules Committee. All bills are required to go to this committee before they reach the floor for a final vote. Theoretically, this committee's review is limited to determining whether the bill is constitutional and in proper legal form. In actual practice, however, policy considerations can influence the committee's action. Accordingly, the Rules Committee and its chairperson are especially powerful because they can potentially hold (kill) every bill in the chamber.

Passage by the first chamber If a bill survives scrutiny by the standing committees it returns to the presiding officer. It is then put on the calendar for consideration by the entire chamber. However, the speaker or president can hold the bill at this juncture too. This may occur when proposed amendments have undermined support for the bill; it may also result from increased lobbying efforts. If the presiding officer allows the bill to proceed, it goes before a special meeting of the entire chamber known as the **Committee of the Whole,** or COW. Here the bill is debated along with the various amendments proposed by the standing committees. New amendments can also be offered from the floor by legislators. This gives lawmakers who were not on the standing committees the opportunity to participate in shaping the legislation. If COW approves the measure, the bill is scheduled for the official vote. This vote is usually anticlimactic. As figure 3.9 indicates, most bills that make it to this point pass.

Review and passage by the second chamber Passage by one chamber, however, is not the end of the story. The bill must still successfully traverse the second house—where the process begins anew! It goes to the presiding officer, who normally assigns it to a single standing committee, plus the Rules Committee, for study. Although the process is thus streamlined, the same pitfalls exist: the bill can be held back, further amended, or voted down. And a death in the second chamber generally kills the measure, despite its success in the first chamber. Only if the second chamber approves the bill in *exactly* the same form as it left the originating chamber does the bill proceed to the governor.[61] It is quite common, however, for a bill to be amended in the second chamber. This creates a problem because it means that the two houses did not approve the identical version of the bill. Accordingly, the originating house must take another vote to determine whether it approves of the changes. If it does not, a joint conference committee is created to

negotiate a compromise. The bill is said to have “died in conference” when this committee cannot come up with mutually agreeable language. If a compromise is achieved, however, it must be formally approved by both houses. Only then does the measure finally leave the legislature and proceed to the governor for review. The typical path that successful bills traverse is summarized in figure 3.10.

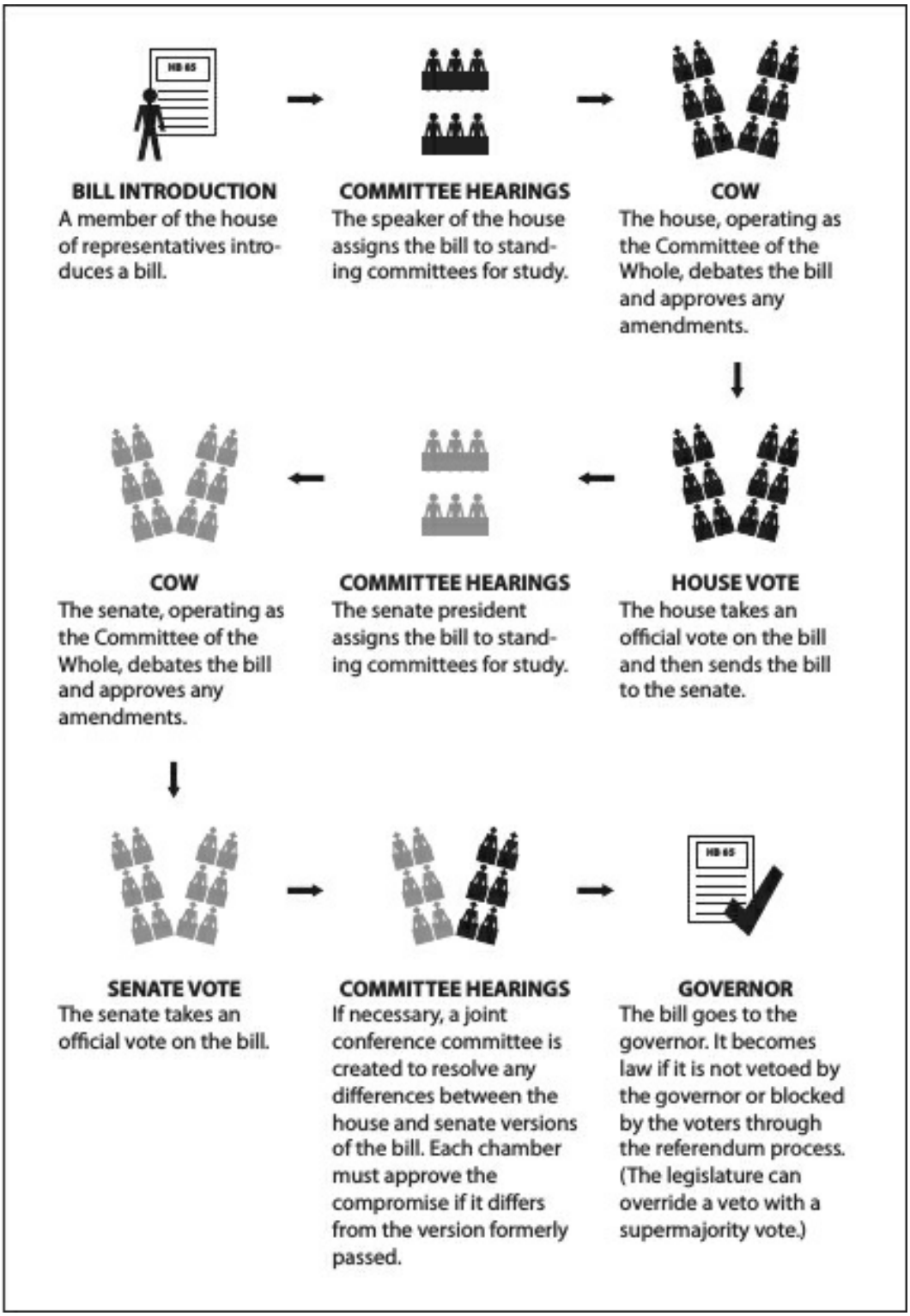


Figure 3.10. Key stages in the Arizona lawmaking process. In this simplified example, the bill starts in the house of representatives. However, bills can be introduced in either chamber.

Approval by the governor or legislative override The governor's power to veto bills is examined in chapter 5. However, a gubernatorial veto does not necessarily kill a bill. The legislature can override a veto by repassing the bill by a higher majority (see table 3.4). Such veto overrides are extraordinarily rare in Arizona. Not only are **supermajority** votes difficult to achieve given partisan divisions, but the legislature often adjourns before the override vote can even be taken. Under these circumstances, the governor's veto kills the bill. Nonetheless, having an override power potentially gives the legislature the final say over lawmaking and appropriations.

Legislative voting rules Voting rules in the Arizona legislature are more complex than in the U.S. Congress. Usually, only a simple majority (i.e., one more than half) is required for legislative approval. This means that sixteen senators and thirty-one representatives are needed for the passage of most measures.[62] The simple majority rule ensures that the numerically larger side always prevails in cases of disagreement. In some circumstances however the state constitution requires a higher, supermajority vote for legislative action.

Supermajorities (passage by two-thirds or three-fourths of the membership) are difficult to achieve. Not only do they put a strain on party loyalty, they usually require bipartisan support (unless one party holds more than two-thirds of the seats). As a practical matter, such votes are also more costly because a well-organized minority party will often demand some favors in exchange for its votes. Proponents of supermajorities argue that weightier matters *should* require a high level of commitment. (This is why the criminal justice system imposes the highest degree of commitment of all —jury unanimity—on decisions that could result in imprisonment or death.) Supermajority votes are also popular with voters because they tend to put the brakes on legislative action.[63] On the other hand, some political theorists contend that these high vote requirements are undemocratic. That is, they enable a small (and possibly misguided) minority to thwart the will of the majority. As summarized in table 3.4, there are four special circumstances in the lawmaking context[64] where a supermajority vote is needed:

Table 3.4. Voting rules for passage of bills in the Arizona legislature

Type of bill	Votes needed to pass	Votes needed to override a veto

Ordinary bills	Simple majority	Two-thirds
Bills with emergency clauses	Two-thirds	Three-fourths
New tax bills	Two-thirds	Three-fourths
Bills altering voter-approved measures	Three-quarters	Not addressed

1. *Emergency bills:* A two-thirds majority is needed to pass any bill with an **emergency clause.**[65] An emergency clause is a legislative declaration that public health or safety requires the immediate enactment of the measure. Attaching this clause to a bill has two important consequences: (1) the bill takes effect immediately (i.e., as soon as it is signed by the governor or the legislature votes to override the governor's veto); and (2) the bill cannot be blocked by the people using the referendum process. These two important consequences are more fully discussed in chapter 4.
2. *New tax laws:* A two-thirds majority is needed to pass bills that impose new taxes or raise existing ones.[66] The voters imposed this requirement on the legislature in 1992, using the initiative process. The intent was to make it harder for the legislature to raise taxes, although it can be somewhat problematic in times of severe economic shortfall.
3. *Modifications of voter-approved laws:* Currently, a three-fourths majority is needed to alter laws that have been approved by the voters through either the initiative or referendum processes. Moreover, the alteration must "further the purposes" of the original measure.[67] This supermajority requirement was added by frustrated voters in 1998 and is discussed in chapter 4.
4. *Veto overrides:* A supermajority vote (two-thirds or three-fourths, depending upon the circumstances) is required to enact a bill that has been vetoed by the governor.[68]

Strikers and the alt-fuels scandal In the real world of politics lawmaking does not always conform to the idealized model outlined previously.[69] There are parliamentary tricks such as the controversial strike-all amendment (or *striker*). It allows a presumptively dead bill to be dramatically revived in the waning hours of a session, or a brand-new bill to be introduced after the

deadline for new bills has expired. Basically, a legislator moves to replace all of the contents of an existing measure with an entirely different bill.[71] This "body-snatching" tactic was used by Senator Huppenthal (see box: "Dinosaur Wars in the Arizona Legislature") in his futile attempt to save the state dinosaur bill. Sometimes a striker can be used to rescue much-needed legislation that has fallen into a parliamentary black hole. Arizona's infamous alt-fuels scandal illustrates however that it can also lead to serious legislative malpractice.

DINOSAUR WARS IN THE ARIZONA LEGISLATURE

The legislature's battle over an official state dinosaur in 1999 gave the state's schoolchildren an unintended lesson in the politics of the lawmaking process. At the request of a nine-year-old constituent, Senator John Huppenthal of Chandler introduced a bill declaring the dilophosaurus the official state dinosaur. (The twenty-foot, poison-spitting carnivore was featured in the movie *Jurassic Park.*) The proposed law would have added the dinosaur to the other state emblems mentioned in chapter 1. Senator Huppenthal thought that Arizona's schoolchildren could learn by monitoring the bill's progress through the legislature. He anticipated smooth passage.[70]

Instead, the bill was mired in controversy from the very start. Southern Arizona legislators vigorously opposed the dilophosaurus. They wanted the honor to go to the sonorasaurus—a gentle plant-eater found only in southern Arizona. (The critics pointed out that the dilophosaurus was not unique to the state and that its bones had been carted off to California.) Accordingly, when the bill came before the first standing committee, opponents introduced an amendment to strike "dilophosaurus" and substitute "sonorasaurus." The ensuing dispute caused the bill to be held in the committee.

Senator Huppenthal, however, refused to give up. Near the end of the session, he dramatically revived his dinosaur bill by using a parliamentary trick known as a "strike-all" amendment. More specifically, the senator struck the contents of a totally unrelated bill and put his dinosaur measure into its empty shell. The ploy nearly worked.

By a vote of 24 to 6, the full senate approved a compromise that diplomatically honored both dinosaurs. The measure then went to the house of representatives. Unfortunately for Arizona's schoolchildren, the controversy reignited in the second chamber. In the end, the house majority whip blocked a vote on Senator Huppenthal's well-intentioned measure. The bill thus died in the house, leaving Arizona without an official dinosaur!

The alt-fuels scandal began in the final days of the 2000 session when the powerful speaker Jeff Groscost (R) used a variety of aggressive tactics to secure passage of a pet bill.[72] His bill was intended to increase the number of Arizona vehicles using alternative fuels. When the speaker missed the deadline for introducing new legislation, he used a striker to circumvent that obstacle. As a result, his complex bill was never fully vetted through the normal standing committee process. The speaker then strong-armed other lawmakers into passing his eleventh-hour bill by threatening to prevent their legislation from coming to a final vote. Finally, the speaker engineered significant changes to the bill in a conference committee that met just as the session ended.

As a result of these tactics, lawmakers were ignorant of mammoth loopholes in the ninety-one-page alt-fuels bill. For example, the law offered as much as $20,000 in tax refunds and subsidies for the purchase of a new vehicle equipped with an alternative fuel tank. (A front-page *Wall Street Journal* headline chortled, "If you Paid Half Price for That New SUV, You Must Be in Arizona."[73]) The law did not even require the claimants to *use* alternative fuel, nor to register the vehicle in Arizona. It did not prevent commercial enterprises from claiming rebates for entire fleets of vehicles, nor prevent resale of the heavily subsidized vehicles for profit. Worst of all, the law lacked a meaningful cap on the state's potential liability.

As soon as the alt-fuels law took effect in July 2000, claims began pouring in. Some feared that the state's potential liability could be as high as $800 million, or nearly 10 percent of its entire annual revenues. An emergency special session was called and the program was prospectively shut down. Because of the speedy action, the state was able to limit its liability to a "mere" $143 million, including litigation costs. The unrepentant speaker was criminally investigated for ties to the alternative-fuels industry but never charged with criminal misconduct. In November the voters inflicted their

own punishment, however: the speaker lost his race for the senate in a district that was stacked 2-to-1 in favor of his party.

Evaluating the lawmaking process The alt-fuels scandal offers a sobering example of what can go wrong in a citizen legislature during the hectic final hours of a session. Fortunately, mistakes of this magnitude are rare. Viewing the process as a whole, the following observations can be made:

1. The process is highly efficient. It allows ninety part-time legislators, operating on an extremely tight time schedule, to review more than a thousand bills a year. This is no mean feat! Of course, as the alt-fuels scandal attests, sometimes the legislature's review process is too hurried and superficial. Critics also contend that the state's needs cannot be adequately addressed in this short time frame.
2. The process is conservative. That is, the system is intentionally designed to make it easier to kill bills than to pass them. This usually retards hasty or misguided measures, discourages excessive regulation, and keeps the laws from changing too frequently. Critics counter that needed legislation often falls by the wayside, and that delayed response to problems also has serious social costs.
3. The process promotes more moderate legislation. Few bills, apart from minor corrective measures, are ever enacted in their original form. The bill's sponsors are forced to compromise with the bill's opponents in order to make it through the committee process and garner sufficient votes for passage. The law that emerges in the end may not be the best approach, but it is usually the least controversial. Critics charge, however, that watered-down legislation is not always desirable, and that tough social problems sometimes require more radical solutions.
4. The system gives a few individuals—the leaders and committee chairpersons—significant power. As the alt-fuels scandal attests, they can leverage this power to force passage of pet bills. More commonly they use their power to kill bills, or reshape them to their liking by threatening to kill them. Clearly, such powers can be abused. And reposing them in just a few individuals makes the legislative process more corruptible. (If a special interest wants to kill a particular measure, it merely has to influence one or more key figures, as opposed to a majority of the legislature.) Defenders of the system argue that the

legislature would bog down if leaders did not have the power to prioritize and screen bills. And while such persons may appear to be acting unilaterally, they are usually carrying out the wishes of the majority (as negotiated in party caucuses). Finally, defenders cite parliamentary rules that theoretically allow the leadership to be overruled by the rank and file.

5. The process is highly partisan. If the majority party can maintain tight discipline, it can (1) prevent the opposition from defeating or altering its bills and (2) prevent the minority party from passing any bills of its own. Party rule promotes efficiency and ideological consistency. It keeps the members from going in ninety different directions on every issue. It also furthers accountability to the electorate: the voters know what they are getting; if they disapprove of one party's stewardship, they can always give the other party a chance to govern. Critics charge, however, that the partisan system essentially deprives 40 percent or more of the state's citizens of meaningful legislative representation; that good ideas are ignored simply because they come from the wrong party; that checks against bad legislation are lost due to the marginalization of the minority party; and that less-ideological approaches are preferable.

Fiscal Powers

The state legislature is said to have the "power of the purse." Raising revenue and deciding how it will be spent is a traditional lawmaking function. It requires difficult policy choices because the public's appetite for services usually outstrips its willingness to pay for them. And unlike the federal government, Arizona must live within its means: the state constitution requires a balanced budget[74] and imposes many other restrictions on spending, borrowing, and taxing. This complicates the legislature's task. Finally, the legislature shares some of its fiscal power with the voters, the governor, and the federal government, making its budget responsibilities even more challenging.

***Raising revenue**s* It currently takes more than $28 billion a year to keep state institutions and programs running.[75] (This figure does not even include the sizable operating costs of local governments and school districts.) Taxes constitute the principal way that the state gets the money it needs. It also

derives revenues from user fees (such as university tuition), from the income earned on its investments (including school trust lands), from license and permit fees, from the state lottery, from the federal government, and from various other sources. All of these revenues barely cover the state's annual operating expenses; they do not produce enough extra money for costly capital projects—such as new highways, prisons, or university buildings. To finance such large projects the state typically borrows money through the sale of bonds. Each revenue-raising option involves difficult policy choices, but none provokes more controversy than taxes.

Arizona's tax policies have long been controversial. During the territorial period, the government relied mostly on property taxes. However, the wealthiest property owners—the mines and railroads—paid little or no taxes. In 1906, Senator Beveridge complained that Arizona had more than $400,000,000 in taxable property, yet the tax rolls listed less than $50,000,000.[76] It was not uncommon for railroads to be given twenty-year tax exemptions as an incentive to build in the territory. The Progressives attempted to put a stop to such practices. As a result, Arizona's constitution contains multiple provisions that ban preferential tax treatment. For example, the main fiscal section, Article 9, opens with the words, "The power of taxation shall never be surrendered, suspended, or contracted away. All taxes shall be uniform upon the same class of property . . . and shall be levied and collected for public purposes only."[77]

These constitutional restrictions cured the worst abuses of the territorial period, but they did not eradicate all controversy over taxes. Today, Arizona's state and local governments rely upon a mix of income, sales, property, vehicle, and other taxes. No tax is perfect, and each affects different groups of people in different ways. However, Arizona's direct democracy procedures (see chap. 4) have enabled interest groups to attack specific taxes and revenue policies. In fact, since statehood more tax measures have appeared on the ballot than any other matter. Two measures in particular have made the legislature's current revenue-raising job especially difficult.

First, in 1980, Arizonans put stringent limitations on residential property taxes. State and local governments are now barred from increasing annual valuations or taxes beyond certain constitutional ceilings.[78] The amendments were spawned by a grassroots taxpayer revolt that began in California in the late seventies. Although Arizona's state government had already reduced its

dependency on property taxes prior to the 1980 vote,[79] local governments—counties, cities, and school and other districts—still derive most of their revenue from these taxes. Living within the 1980 limits continues to be a major challenge for them.

Second, the citizens put a new supermajority requirement in the constitution in 1992. It now takes a two-thirds majority vote before the legislature can impose any new taxes, raise existing taxes, or eliminate tax deductions and exemptions.[80] This citizen initiative was approved by more than 70 percent of the voters. As intended, the provision makes it much harder for the legislature to get revenue from new sources.[81]

As figure 3.11 reveals, the state depends heavily upon sales tax for its revenues. In fact, Arizona relies more heavily on this type of tax than do most other states.[82] Sales tax is politically attractive to state legislators for many reasons. Because it is often paid in small increments, the burden is less visible to taxpayers and therefore arouses comparatively less protest than do other forms of taxation. Private businesses collect the tax for the state, thereby reducing collection costs. It is a tax that targets everyone, including out-of-state tourists, who don't vote in Arizona. Sales tax has serious downsides as well, however. It is a regressive tax—that is, it takes a larger share of the income of the poor than of the middle and upper classes.[83] It is also highly sensitive to fluctuations in the economy. When people cut back on purchases during economic downturns, the state's sales tax revenue plummets.[84] Finally, sales tax can be circumvented through out-of-state purchases, a worry for state officials as Internet sales become increasingly popular.

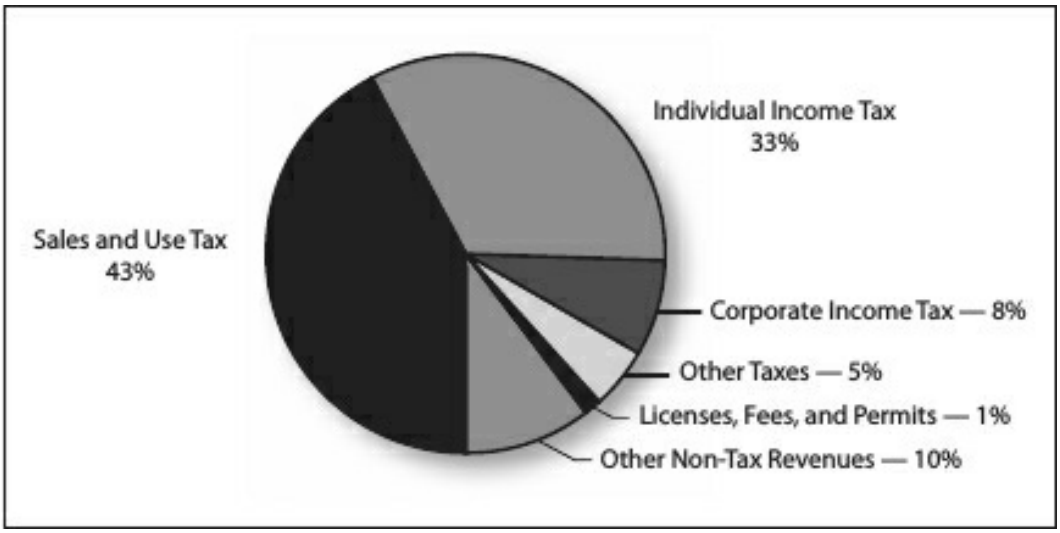


Figure 3.11. Sources of general fund revenues, FY 2008. This does not include all state revenues. For example, it omits federal money and other revenues that do not go into the general fund.

When the state needs more cash than it can raise through taxes, it must borrow. However, the constitution imposes barriers here as well. Notably, it limits the state's maximum annual debt to $350,000.[85] This limit was put in the constitution in 1912 when the dollar was worth considerably more than it is today. A rigid application of the debt ceiling would bar many legitimate undertakings. Accordingly, the courts have sanctioned a variety of creative "workarounds." For example, court decisions have held that the state's retirement system—which owes billions to public employees—does not violate the debt limitation. The state has also been allowed to finance major capital projects through the sale of revenue bonds,[86] which are interpreted as being outside the debt proscription. Lease-purchase agreements are another creative financial device that enables the state to circumvent the unrealistic debt limit. During the past decade lease-purchase agreements have been used to finance new university buildings as well as public school facilities. However, Arizona drew national attention in 2010 when it sold its state capitol buildings, prisons, and other facilities. A twenty-year lease-purchase arrangement was used to raise sufficient cash keep the state running for the balance of the fiscal year.[87]

In summary, over the years it has become increasingly harder for the legislature to raise sufficient revenues to finance the growing demand for

public services. Polls show that Arizonans want improved schools, long-term incarceration for inmates, better health care, more mass transit, more land preservation, and affordable higher education. All of these undertakings are extremely costly. The continuing challenge for the state and its local governments is to come up with sufficient revenues in the face of restrictive constitutional provisions and taxpayer resistance.

The appropriations process Public money cannot be spent unless the expenditure is authorized by law.[88] This technically puts the legislature—and to a lesser degree, the voters—in charge of spending, since they alone have the power to make laws. However, the governor plays a significant role too: the governor proposes an annual budget, has a line-item veto that can be used as a bargaining chip to procure desired funding (see chap. 5), and controls sizable federal funds that typically bypass the appropriation process.

Most of the revenues collected by the state go into the **general fund,** which pays for the ordinary operations of state government. When the legislature appropriates money from this fund, it is really determining the state's priorities, as there is never enough money to go around. Figure 3.12 shows how the funds are allocated. More than half of the general fund currently goes to education (K–12 and universities), a ratio that has been fairly constant over the past decade.[89] The process of determining how much each state agency and program gets is arguably the most complex—and politically charged—task that the legislature undertakes on a routine basis.

The state constitution distinguishes between two types of appropriation bills: (1) the general appropriation bill, which consolidates the operating budgets of state agencies, institutions, and programs into a single, lengthy bill; and (2) individual supplemental appropriations that address the other spending needs that arise from time to time.[90] Supplemental appropriations are handled through the regular legislative process. That is, a bill authorizing a specific appropriation is introduced, studied by committees, voted upon, sent to the governor, and enacted.[91]

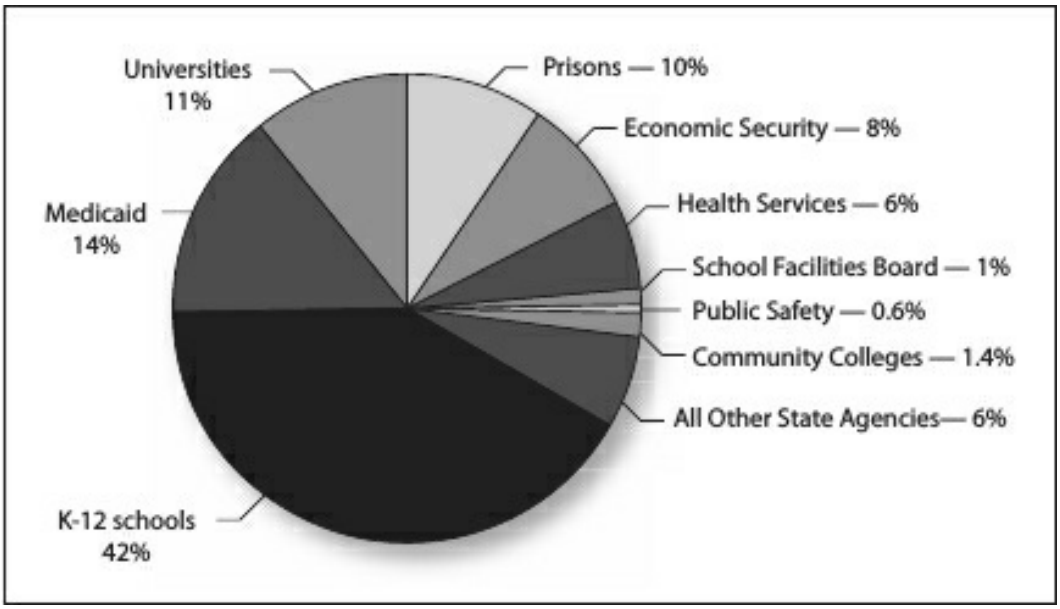


Figure 3.12. General fund appropriations: where the money goes, FY 2008. Some state agencies and programs receive funding from sources other than the general fund.

The general appropriation bill, which functions as the state's annual budget, is handled somewhat differently. Currently, the largest agencies are funded on a yearly basis, with July 1 as the start of the new fiscal year.[92] The remaining agencies have biennial budgets, although the legislature sometimes resorts to one-year funding for all agencies in times of budget shortfall. If the general appropriation bill is not passed in a timely manner, the universities, schools, courts, prisons, and other state institutions would simply run out of money and would have to furlough workers or shut down. Accordingly, passing this bill is one of the legislature's most important tasks.

In many states, legislatures have surrendered most budget responsibilities to the governor's office and play only a limited, ratifying role. This is not the case in Arizona. Arizona's general appropriation bill relies on significant input from the governor, but it is very much a joint product. By statute, the governor is required to submit a proposed operating budget for the state within five days of the start of the regular session. This budget, which reflects the governor's spending priorities, balances the projected needs of all state agencies against anticipated revenues.[93] Meanwhile, the legislature's Joint Legislative Budget Committee (JLBC) prepares its own detailed budget recommendations as well.[94] *Both* sets of recommendations go to the house

and senate appropriations committees and subcommittees. Large state agencies, such as the universities, may appear before these committees to lobby for additional funding. Finally, because of the high political stakes, it is not unusual for legislative leaders to "pull" the general appropriation bill from the committees in the final stages and take over negotiations themselves.[95] In the end, each legislative chamber votes on the final budget, typically in a special session called just for this purpose. The general appropriation bill then goes to the governor for approval or veto. As with all appropriation bills, the governor can exercise the powerful line-item veto. This enables the governor to reject individual appropriations within the bill while approving the remainder (see chap. 5). Once the bill is signed it takes effect immediately because it is exempt from the citizens' referendum (see chap. 4).

Although the legislature has significant control over public spending, its power is heavily constrained. First, the state constitution contains various spending restrictions. For example, unlike the federal government, the state's annual budget must be balanced—that is, ordinary operating expenditures cannot exceed revenues.[96] In addition, in 1978, the voters restricted annual appropriations to a fixed percentage of the projected personal income for the year.[97] The Economic Estimates Commission calculates the complex spending limit (which contains numerous exemptions and is not easy to apply). Supporters contend that this spending limitation prevents the growth of "big government," forces the state to prioritize services, and makes it more accountable. Critics counter that it results in declining levels of service, particularly to vulnerable groups such as school-age children and the elderly, which may grow at rates disproportionate to the general population. They also argue that the spending limit impedes the state's flexibility in times of economic crisis and undermines the authority of elected officials. Needless to say, the spending limit remains controversial.[98]

Second, the legislature has little or no authority over *mandated funds.* These are revenues that are restricted to special uses by constitutional provisions, voter-approved statutes, or conditions attached to federal grants. For example, the state constitution decrees that gasoline taxes must go into a separate fund for street and highway needs.[99] These funds cannot be diverted even if there is a more pressing state need. Similarly, federal grants are usually limited to specific uses, and often are contingent on state matching

funds. Since the state can rarely afford to turn down federal money, this further limits legislative prerogatives.

In recent years a third challenge has come from the voters. Various interest groups, such as educators and health-care professionals, have been dissatisfied with the legislature's spending priorities. They have used ballot propositions (see chap. 4) to mandate spending for specific programs. For example, in 1994 the voters raised taxes on cigarettes and directed that the money go into a special fund for indigent health care, antismoking research, and antismoking education. When the tax generated more money than expected, the legislature attempted to divert some of the excess funds to the construction of a new state health lab. Angry supporters of the original initiative collected sufficient signatures to block the action through the referendum process, and the legislature backed down. This episode, plus the legislature's disregard for the voters' marijuana decriminalization initiatives, led to the passage of the **Voter Protection Act** in 1998. This constitutional amendment essentially prohibits the legislature from redirecting funds from voter-approved projects.[100] Currently, more than $3 billion—or roughly one-third of general fund spending—is tied up in this fashion.[101] These include mandates for increased K–12 spending as well as expanded health-care programs for the indigent and working poor.[102]

Although most voter-mandated spending programs are well intended and undeniably popular, they do raise serious governance issues. Unlike the legislature, the voters who authorize these spending mandates do not have to consider the other programs and constituencies competing for limited public resources. And in times of economic downturn, when other programs face cutbacks, the Voter Protection Act blocks proportionate reductions in the select, voter-mandated programs. This creates funding inequities. Finally, critics charge that these mandates undermine the concept of representative government by limiting the power of elected officials.

On the opposite side, supporters argue that (1) Arizona's Progressive founders intended the public to participate in this very fashion; (2) that voter-mandated programs are the result of legislative neglect of important social issues and constituencies; and (3) they are an appropriate response to the legislature's past disregard for citizen initiatives. In 2004, the legislature won a partial victory with the passage of Proposition 101. This constitutional amendment now requires all voter-approved programs to establish a funding

source apart from the general fund. If the revenues from this source fall short, the legislature is not obligated to make up the difference.[103] The amendment, however, only applies prospectively; as previously noted, a significant portion of the state's revenues are already "tied up" in costly, voter-mandated programs. Accordingly, as the state confronts new fiscal challenges, there are calls for the repeal or modification of voter funding mandates. Whatever the future holds, however, it is doubtful that the longstanding antagonism between the legislature and the voters on spending issues will disappear.

Government Oversight Powers

In addition to lawmaking, and managing the state's budget, the legislature also plays an important watchdog role in ensuring that state officials and agencies are properly discharging their responsibilities. As outlined below, it has a variety of different powers to accomplish its oversight task.

Impeachment powers The **impeachment** process enables the legislature to remove executive-branch officials and judges from office before the end of their terms. It is a time-consuming, extreme remedy that is rarely used. Each chamber performs a separate constitutional function in this two-stage process. First, the house of representatives conducts a formal investigation when credible allegations of official misconduct arise. At the end of the investigation, the house takes a vote to decide whether or not the official should be impeached. To *impeach* a public official means to formally accuse the official of specific wrongdoing. Like the term *indict* in the criminal context, it simply triggers a trial; it does not determine whether the official is guilty of the charges. A vote of impeachment, therefore, merely requires a simple majority vote.[104]

The Arizona Constitution states that an official may be impeached for "high crimes, misdemeanors or malfeasance in office."[105] Interestingly, the parallel provision in the U.S. Constitution does not include the term *malfeasance,* which means misconduct.[106] When Evan Mecham (fig. 3.13) became the first governor in the state's history to be impeached, he sued the state legislature, arguing that the charges against him did not constitute impeachable offenses. (Mecham was accused of obstructing justice, making false statements in connection with campaign filings, and misusing public funds. The last charge arose from his loan of $80,000 from a state protocol

fund to his own Pontiac dealership.) The Arizona Supreme Court rejected Mecham's contentions, holding that it is up to the legislature to determine what constitutes an impeachable offense.[107]

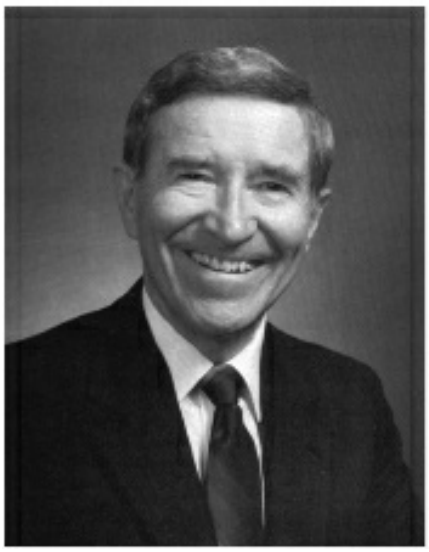


Figure 3.13. Governor Evan Mecham.

Although an impeachment vote is merely the first step in the process of removal from office, it does have serious consequences if the governor is the official being impeached. The state constitution requires that the governor temporarily step down at this juncture.[108] Thus, when forty-six members of the house voted to impeach Governor Mecham on February 5, 1988, Secretary of State Rose Mofford immediately became the acting governor. (This is another difference between the state and federal processes. When President Clinton was impeached by the U.S. House of Representatives in 1998, he remained in control.)

After an official is formally impeached, the process moves to the senate. The chief justice of the Arizona Supreme Court presides over a trial on the house's charges, unless the chief justice is being impeached. (Another justice would be chosen in such circumstances.) In many ways an impeachment trial resembles any other trial: witnesses are summoned to testify, evidence is introduced, and attorneys make legal arguments. Because it is a *political* trial, however, the official is not entitled to all of the procedural protections applicable in **criminal cases** (see chap. 6). The senate serves as the jury. When the trial concludes, senators take a vote to determine whether the

official should be convicted. Unlike the vote to impeach, this vote requires a two-thirds majority.[109]

The impeachment trial of Governor Mecham raised several novel constitutional questions. One involved the appropriate penalty. The language of the constitution is arguably unclear. It states that judgment in such cases, "shall extend only to removal from office and *disqualification to hold any office of honor, trust or profit in the state*" (emphasis added).[110]

Everyone agreed that a senate conviction would have the effect of removing the governor from office. The dispute centered on the disqualification aspect. This portion of the constitution is known as the **Dracula Clause** because it metaphorically puts a stake through the heart of the officeholder, preventing him or her from haunting the state again. Some senators argued that disqualification would automatically result from a vote to convict. Others contended that it was an additional, discretionary penalty to be levied only if the senate so chooses. In the end, the senate chose the latter interpretation and opted to take two separate votes. Governor Mecham was convicted on two of the house's three impeachment charges.[111] He was therefore removed from office and permanently replaced by Secretary of State Mofford, under the constitution's succession rules.[112] When the senate took the second vote on the issue of future disqualification, the vote fell short. (Several key Democrats refused to support disqualification, presumably for political reasons.) Thus, Mecham was removed but not "Dracula-ized." This allowed him to run for governor in the very next election, but he lost in the Republican primary.[113]

Impeachment is a rarely used procedure. (Governor Mecham's impeachment trial attracted national attention because it was the first time in fifty-seven years that any governor in the country had been impeached.)[114] No other state official has ever been removed through Arizona's impeachment process.[115] Clearly, legislators are exceedingly reluctant to use this power. Apart from the political repercussions, there are serious practical downsides. The Mecham trial lasted five weeks, not counting the house investigation that preceded it. This was a significant disruption for a hundred-day session. It delayed the passage of routine bills and took a major toll on the state's part-time lawmakers, many of whom subsequently retired from the legislature.

Legislative expulsion The impeachment process does not apply to legislators themselves. Instead, the constitution gives each chamber the power to expel its own members by a two-thirds vote.[116] In 1991, Senator Carolyn Walker was removed from the senate through this means. Walker was one of the seven legislators involved in the AZSCAM bribery scandal. Unlike the others, she refused to resign her seat even after she was criminally indicted. Accordingly, the senate expelled her.

Other governmental oversight powers The legislature continuously monitors the performance of the state's large bureaucracy in a variety of ways. First, its fiscal powers give it important leverage over all state agencies and departments. The legislature can effectively kill a program simply by refusing to fund it.

Second, state agencies and programs are subject to **sunset review.** This is a process that forces the legislature to reevaluate the efficacy of agencies and programs on a periodic basis. Agencies are given an automatic termination date, much like the shelf life stamped on perishable grocery products. Then, as the termination date approaches, the legislature's Joint Legislative Audit Committee conducts a thorough review of the agency's performance. It is typically assisted in this process by the auditor general, who is appointed by the legislature to a five-year term.[117] The sunset review investigates whether the agency is making proper use of public resources, complying with all applicable laws, and following appropriate accounting and budgeting procedures. If the legislature doesn't vote to renew the agency before its automatic expiration date, the agency *sunsets*, or dies. An interesting exception to this process involved the state lottery, which was due to sunset in 1999. Instead of renewing it themselves, the legislature decided to refer the matter to the voters as a ballot proposition.[118] Although the voters did extend the lottery, placing the proposition on the ballot may have brought the lottery's existence within the purview of the Voter Protection Act.

Third, even without the formal sunset review process, the legislature has the power to alter or abolish any state agency or program that it creates. For example, in 2009 the legislature abolished the seven-person License Plate Commission, which among other duties, approved specialty plates. (The commission had been embroiled in federal litigation over its refusal to approve an anti-abortion license plate.)[119]

Fourth, the legislature has the power to conduct investigations into virtually any matter of governmental concern. It can hold formal hearings and subpoena witnesses to testify. Refusal to testify can result in contempt charges and imprisonment for the duration of the legislative session.[120] Finally, the senate has the power to approve or reject high-level executive-branch appointments made by the governor. This authority extends to most state agency heads and the members of state boards and commissions. If the senate rejects the governor's nominee, the governor is required to nominate a new person.

Other Legislative Powers

Most of the legislature's time is devoted to the lawmaking, appropriations, and oversight functions described in this chapter. The following additional responsibilities, although less frequently exercised, are nonetheless significant.

Proposing state constitutional amendments The legislature periodically proposes amendments to the state constitution using the constitutional referendum process (see chap. 4). Proposed amendments are processed through the legislature in much the same way as ordinary bills and require only a simple majority vote for passage. Once they are approved by both houses, they must always go to the people for a vote, rather than to the governor for approval or veto. As of this writing, the legislature has proposed 193 changes to the constitution, and 117 (61 percent) have passed voter muster. In fact, every general election ballot since 1944 has had one or more constitutional amendments proposed by the legislature.

Amendments to the U.S. Constitution The legislature approves or rejects amendments to the U.S. Constitution on the rare occasions when such amendments are sent to the states for ratification.[121]

Online resources

Arizona State Legislature (home page):
www.azleg.gov

Arizona Legislative Council:

www.azleg.gov/az_leg_council/default.htm

Arizona Joint Legislative Budget Committee:
www.azleg.gov/jlbc.htm

Arizona Citizens Clean Elections Commission:
www.azcleanelections.gov/home.aspx

Arizona Independent Redistricting Commission:
www.azredistricting.org

Arizona Office of the Auditor General:
www.auditorgen.state.az.us

4 Direct Democracy

Arizona's direct democracy procedures have no counterpart in the national government. Few states give their citizens as much power either.[1] The initiative, referendum, and recall have been part of Arizona's constitution since statehood. They remain just as popular with the voters today. In 1998, Arizonans amended the constitution to make the procedures even more robust. Nevertheless, as explained in this chapter, direct democracy procedures continue to generate controversy in theory as well as in practice.

The Theory of Direct Democracy

The term *democracy*, which comes from the Greek, can be loosely translated as "rule by the people." For nearly two thousand years, the term referred to a government in which the citizens literally ruled themselves. The most famous example of such a system was the government of ancient Athens, which flourished in the fifth and fourth centuries bce. Approximately forty times a year the citizens of this city-state would assemble, debate, and make all major governmental decisions themselves.[2] Most government positions were filled by lot; ordinary citizens would simply take turns performing these functions.

When America's Founding Fathers met in Philadelphia to establish a new government in 1787, they were fully aware of the Athenian model. However, they deliberately rejected it. A primary reason was the country's vast size. The Greek city-state was small enough that all of the eligible citizens could regularly assemble in one place. In contrast, even when the United States consisted of only thirteen states, this was not physically possible. Size, however, wasn't the only concern. Many of the Founding Fathers did not believe that ordinary citizens would make the best rulers. For example, James Madison and Alexander Hamilton, writing in the *Federalist Papers*, described pure democracy as a form of mob rule. They argued that democracy was likely to generate decisions based upon passion rather than reason; produce demagogues and divisive factions; trample the interests of minorities and the wealthy; and ultimately lead to civil or foreign wars that would destroy the country.[3]

For these and other reasons, the Founding Fathers favored a "republican form of government" over democracy.[4] Today we call their design a *representative democracy* and refer to the Greek version as a *direct democracy*, or a *pure democracy*. In a representative democracy, the citizens do not actually govern. Instead, representatives govern on their behalf. The representatives, however, must remain accountable to the people in some fashion. (The most common mechanism of accountability is election to a fixed term of office.)

Madison believed that representative democracy was superior to direct democracy for several reasons: (1) it would allow the people's raw opinions to be "refined" through the representative process; (2) it would enable popular government to be extended over a large territory; and (3) such a large territory would prevent the emergence of dangerous factions that could trample personal liberties or destroy the state.[5]

Many modern political theorists share these views. However, harsh economic conditions in the 1880s spawned a **Populist** movement in America that was highly critical of representative government. Essentially, the Populists believed that the political system was serving the interests of big business and neglecting the interests of farmers, workers, debtors—in short, "the little guy." At the century's end, the more broad-based Progressive movement (see chap. 2) took up many of the Populists' themes. The Progressives were especially critical of state and local governments. They believed that these smaller governments were being controlled by corrupt party bosses, political machines, and powerful corporate interests.

Both the Populists and Progressives concluded that radical change was necessary. Specifically, they wanted to engraft elements of direct democracy onto the representative structure. Their thinking was that this would give ordinary citizens better control of their government. Thus, in the late 1890s the Progressives began aggressively promoting the initiative, referendum, and recall. South Dakota became the first state in the nation to adopt the initiative and referendum in 1898; eight other states quickly followed suit in the next decade; and Oregon added recall to the mix in 1908.[6]

When Arizona included six major direct democracy procedures in its constitution of 1910, it was therefore in the vanguard but not setting precedent. In contrast to its predecessors, however, Arizona's adoption of direct democracy required the approval of the federal government because

Arizona was applying for statehood.[7] The framers of Arizona's constitution were acutely aware of the risks. A lawsuit challenging Oregon's initiative provision was already pending in the U.S. Supreme Court.[8] The **plaintiffs** in that case were arguing that the initiative violated the U.S. Constitution's guarantee of a "republican form of government." Nonetheless, Arizona's framers refused to abandon direct democracy. As chronicled in chapter 2, their stubbornness led to President Taft's initial veto of Arizona statehood. His veto, however, was targeted at a single direct democracy provision, the judicial recall. Arizonans removed the provision, won statehood, and promptly reinstated it. Meanwhile, the U.S. Supreme Court refused to rule on the constitutionality of the initiative in the Oregon case, holding that it was a "political question" for Congress to decide. Fortunately for Arizona, that ruling was issued five days after the territory had become a state! Today, the initiative, referendum, and recall are firmly established in Arizona.

How the Procedures work

Arizona has five separate initiative and referendum procedures. Most voters don't differentiate them, because the resulting measures all appear on the ballot as numbered propositions. There are, however, some fundamental differences. Initiatives allow the voters to approve or reject measures that have been *drafted by the citizens themselves.* In other words, they are entirely a people's process. In contrast, referenda enable the voters to approve or reject measures *drafted by the legislature.* Initiatives and referenda can be further categorized by what they are attempting to alter: either the state constitution or the state statutes (ordinary laws). The differences are summarized in table 4.1.

The Initiative

The constitutional initiative The constitutional initiative allows citizens to make changes to the state's constitution on their own. The voters can use this process to add, modify, or remove language. Only seventeen states besides Arizona give the people such power.[9]

Table 4.1. Summary of Arizona's initiative and referendum procedures

Procedure	What the procedure does	Who triggers the process	Signature requirement[a]
Constitutional initiative	Allows voters to approve or reject constitutional amendments proposed by citizens	Citizens	15%
Statutory initiative	Allows voters to approve or reject new statutes proposed by citizens	Citizens	10%
Constitutional referendum	Allows voters to approve or reject constitutional amendments proposed by the legislature	Legislature	None (referred to voters by a majority vote of the legislature)
Statutory referendum by legislative referral	Allows voters to approve or reject new statutes proposed by the legislature	Legislature	None (referred to voters by a majority vote of the legislature)
Statutory referendum by voter petition (“popular referendum”)	Allows voters to approve or reject new statutes proposed by the legislature	Citizens	5%

[a]Percentage refers to the total number of votes cast for governor in the most recent election.

A successful constitutional initiative must survive two separate stages: petition and ballot. The petition stage begins with the drafting of the proposed amendment. Any registered voter in Arizona can do this on a form supplied by the secretary of state.[10] The measure can be typed or handwritten, crafted in perfect legalese or written in ungrammatical prose. Because this is entirely a people’s process, the government provides no legal or editorial assistance.

The constitution imposes one important limitation: proposed amendments can embrace only one subject. This requirement protects voters from having to accept unrelated and undesired constitutional changes as part of a package deal. The so-called single amendment requirement is however often exploited by opponents who challenge propositions on this technical basis.[11]

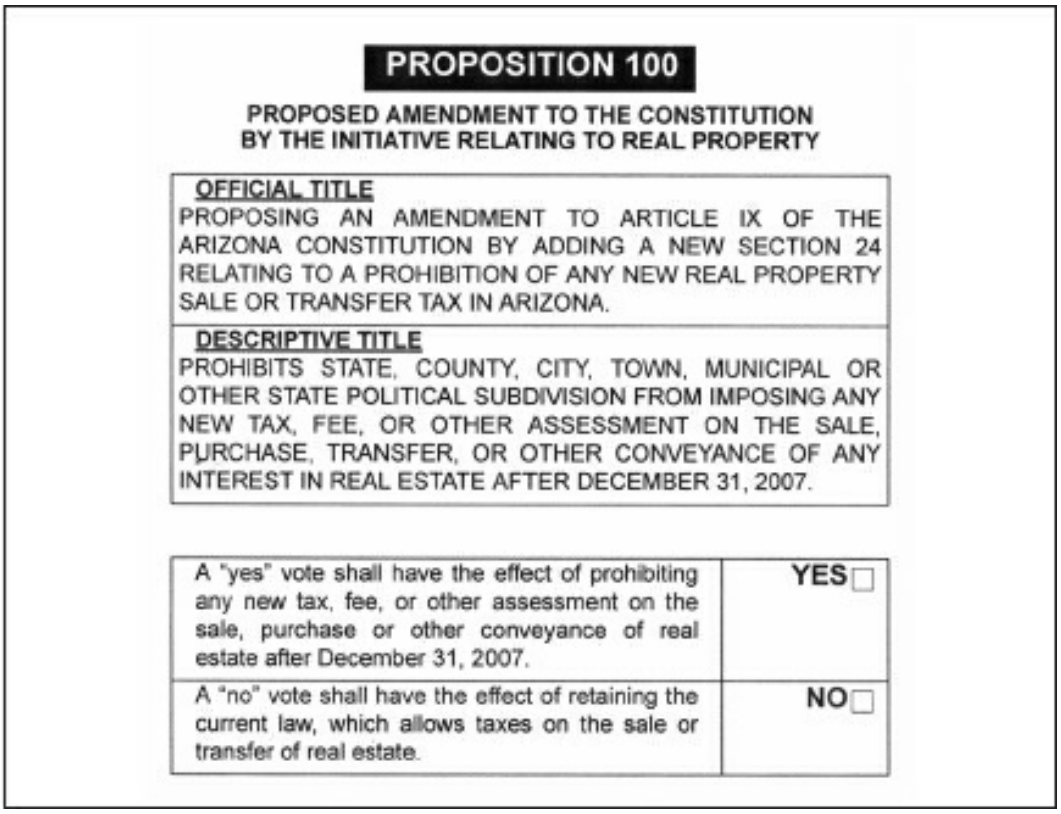
After the petition is drafted, it is filed with the secretary of state and then circulated among registered voters. An initiator needs to collect supporting signatures equal to 15 percent of the number of voters who cast ballots in the preceding gubernatorial election. This currently equates to roughly 230,000 signatures, although the precise figure changes every four years after the gubernatorial election. As a practical matter, successful petitioners must collect considerably more than the constitutional minimum to allow for the roughly 20 percent that are typically invalidated. The initiator can begin collecting signatures any time after the general election, but all petitions must be returned to the secretary of state four months prior to the next general election. This deadline gives petitioners a maximum of twenty months to circulate the petition. (A petitioner who fails to collect sufficient signatures can try again during the next general election cycle, but the filing process begins anew and the signatures do not carry over.)

The constitution's signature requirement is intended to filter out proposals that are frivolous or that lack widespread public support. However, some contend that the barrier is too high. In fact, Arizona has one of the steepest signature thresholds among the initiative states. California requires only 8 percent and Massachusetts, 3 percent. Today, most successful initiative campaigns use paid circulators to meet the signature threshold. This can pose a serious financial obstacle for many grassroots efforts, and it increases the likelihood of signature fraud, because circulators are typically paid by the number of signatures they collect.[12] Finally, unlike some states, Arizona has no requirement that the signatures be geographically distributed; a single large county (e.g., Maricopa) can put a measure on the ballot. Although there have been efforts to amend the constitution to address these issues, ironically, they have fallen short of the necessary signatures to reach the ballot.

If the secretary of state determines that there are enough valid signatures,[13] the second stage of the initiative process commences. The proposed amendment goes to the voters at the next general election. The

amendment appears on the ballot as a numbered proposition, with “yes” or “no” voting options (see fig. 4.1). If more people vote yes than no, the measure becomes part of the constitution.[14]

The vast majority of constitutional initiatives die during the petition-circulating phase. Supporters simply fail to collect enough valid signatures to make it to the ballot. Even if they get past the signature hurdle, passage is not assured. Between 1912 and 2008, sixty-six constitutional initiatives appeared on the ballot; of these, only twenty-seven (41 percent) were approved by the voters. Nonetheless, many of Arizona’s citizen-initiated amendments have been note-worthy. Some changed fundamental aspects of state government. For example, citizen initiatives gave women the right to vote (1912); adopted **merit selection** for judges (1974); imposed a supermajority requirement for new taxes (1992); established term limits (1992); restricted the legislature’s ability to alter voter-approved measures (1998); and created the Arizona Independent Redistricting Commission (2000). Other citizen initiatives addressed social concerns of the day. For example, the initiative process was used to experiment with alcohol prohibition (1914, 1932; see fig. 4.2); to make Arizona an anti-union, right-to-work state (1946); to establish new rights for crime victims (1990); and to punish serious juvenile offenders as adults (1996).



PROPOSITION 100

PROPOSED AMENDMENT TO THE CONSTITUTION BY THE INITIATIVE RELATING TO REAL PROPERTY

OFFICIAL TITLE

PROPOSING AN AMENDMENT TO ARTICLE IX OF THE ARIZONA CONSTITUTION BY ADDING A NEW SECTION 24 RELATING TO A PROHIBITION OF ANY NEW REAL PROPERTY SALE OR TRANSFER TAX IN ARIZONA.

DESCRIPTIVE TITLE

PROHIBITS STATE, COUNTY, CITY, TOWN, MUNICIPAL OR OTHER STATE POLITICAL SUBDIVISION FROM IMPOSING ANY NEW TAX, FEE, OR OTHER ASSESSMENT ON THE SALE, PURCHASE, TRANSFER, OR OTHER CONVEYANCE OF ANY INTEREST IN REAL ESTATE AFTER DECEMBER 31, 2007.

A "yes" vote shall have the effect of prohibiting any new tax, fee, or other assessment on the sale, purchase or other conveyance of real estate after December 31, 2007.	YES ☐
A "no" vote shall have the effect of retaining the current law, which allows taxes on the sale or transfer of real estate.	NO ☐

Figure 4.1. A constitutional initiative on the ballot. This anti-tax amendment was approved by the voters in 2008 and is now part of the state constitution.

The statutory initiative The statutory initiative allows citizens to propose, write, and enact everyday laws. These can be criminal laws, education laws, tax laws, spending mandates, and so on. They can be entirely new statutes, or they can alter or repeal existing laws. The only constraint is that they must conform to the Arizona and U.S. constitutions like all other laws.[15] In essence the statutory initiative permits ordinary citizens to function as elected legislators. Only fifteen other states give voters such power.[16]

Figure 4.2. Prohibition supporters. Four constitutional initiatives on the ballot between 1914 and 1932 dealt with the prohibition of alcohol.

Except for a lower petition signature requirement, the process is identical to that of the constitutional initiative. As with constitutional initiatives, the citizens are on their own; the government does not provide any legal or editorial assistance in drafting the proposed law. While some statutory initiatives are quite professional, others are handwritten, ungrammatical, and amateurish. In short, this is a what-you-see-is-what-you-get process. Once the proposed initiative is filed with the secretary of state, supporters must collect signatures equal to 10 percent of the votes cast in the last gubernatorial election—currently about 150,000 signatures. The time frame for collecting the necessarysignatures is the same as that for the constitutional initiative: up to twenty months if the initiator begins immediately after the general election.

As figure 4.3 indicates, most statutory initiatives do not make it past the petition stage; since 1980, fewer than one-quarter have reached the ballot.

Even if the initiative attracts enough signatures, it has only cleared the first hurdle. It still must pass a harder test: voter approval. The initiative goes on the ballot as a numbered proposition at the next general election. If a majority votes “yes,” the citizen-proposed law goes into the statute books and is enforced like any other state law.

Between 1912 and 2008, only forty-three statutory initiatives were approved by the voters and enacted into law. This low number demonstrates that the vast majority of the state’s laws are made by elected officials and not by the people. Nonetheless, citizen-initiated laws are typically significant and often controversial. For example, the process was used to restrict the employment of noncitizens (1914);[17] to abolish and then reestablish the death penalty (1916, 1918); to change the name of Arizona State College to Arizona State University (1958)(see box); to create a state lottery (1980); to impose limits on campaign contributions (1986); to increase cigarette taxes (1994); to ban steel-jawed animal traps (1994); to allow medical use of marijuana and other controlled substances, and to reduce the penalty for simple marijuana possession (1996); to provide public financing for election campaigns (1998); to criminalize cockfighting (1998); to restrict bilingual education (2000); to mandate more funding for indigent health care (2000); to expand reservation gaming (2002); to ban smoking in public places (2006); to increase the minimum wage (2006); and to ban inhumane treatment of farm animals (2006). At the same time, the voters rejected citizen initiatives that would have legalized off-reservation gambling (1942, 1952); desegregated public schools (1950); imposed a nuclear freeze (1982); banned abortion under most circumstances (1992); and rewarded a random voter with a million-dollar prize as a voting incentive (2006).

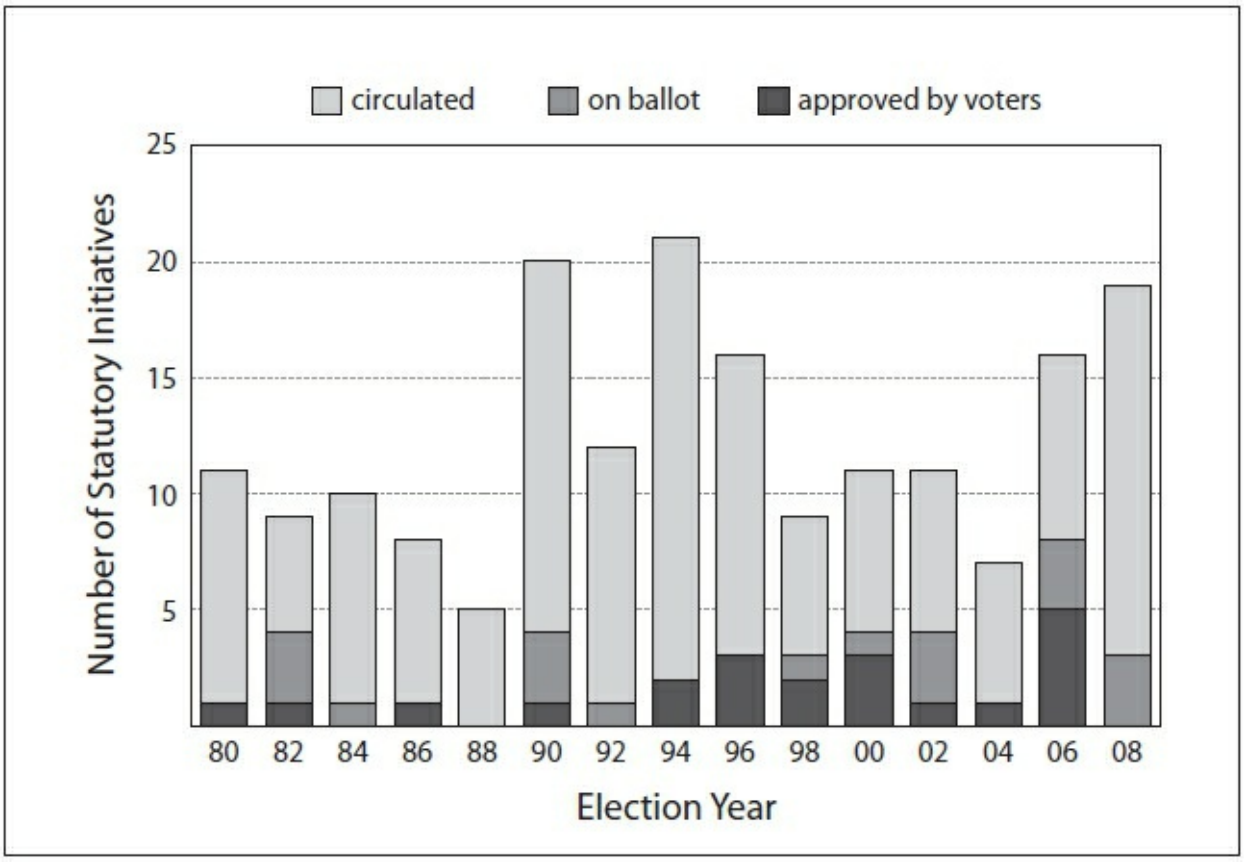


Figure 4.3. Statutory initiative success rate, 1980–2008.

USING THE INITIATIVE TO FIGHT FOR A SCHOOL NAME[18]

There used to be only one public university in Arizona—and the University of Arizona wanted to keep it that way. The U of A and its upstate rival were created on the same day in 1885, but Tucson got the university; Tempe instead got a teacher-training school, originally called the Arizona Territorial Normal School. Over the years, the U of A used its political clout to prevent its Tempe rival (later named Arizona State College) from adding *university* to its name. The fight became serious in the mid-1950s. Multiple bills were introduced in the legislature to authorize the name change to reflect the school's expanded curriculum. Two thousand Tempe students marched to the state capitol, but the bills still stalled. (This was before redistricting, at a time when Maricopa

County was badly underrepresented.) In 1958, the frustrated college president, Grady Gammage, decided that a grass-roots initiative campaign was the only hope. Even though the petition was filed late in the election cycle, students and alumni managed to collect double the needed signatures in a mere two months' time. Once the measure passed the ballot hurdle, an enthusiastic advertising campaign kicked in. Billboards, bumper stickers, a barnstorming airplane, and a thirty-second spot by TV celebrity Steve Allen were all enlisted in the cause. On election day, students staffed the phones and went door-to-door to turn out the vote. That night they packed the Memorial Union, anxiously awaiting the results. Voters in Maricopa County resoundingly supported the name change by a vote of 105,152 to 15,854. It was no surprise that Pima County voters rejected the measure by a lopsided margin of 9 to 1. Overall, however, the measure passed by 72,460 votes. The letters ASU were lit on the Tempe Butte for the first time, the Sun Devil band played, and exultant students hoisted President Gammage in the all-night victory celebration. Arizona State College was now Arizona State University, thanks to the statutory initiative process.

Initiative wars and the Voter Protection Act It is not surprising that public officials view citizen initiatives with skepticism. From the legislature's perspective these measures are often costly, flawed, or extreme. Reciprocally, voters regard the passage of initiatives as evidence of legislators' indifference to their concerns. To some degree this reflects the philosophical divide between representative and direct democracy. At various times in Arizona history, however, it has erupted into a full-scale turf war. As early as 1914, the citizens attempted to prevent elected officials from subsequently altering or repealing their measures. It didn't work. The Arizona Supreme Court interpreted the citizens' constitutional amendment narrowly, effectively nullifying it.[19] Nonetheless, for political reasons, the legislature would usually tread carefully with citizen measures. It would typically wait a few years—that is, until voters' memories had dimmed—before tinkering with them. In contrast, the Forty-Third Legislature was not so deferential. It boldly

went after several high-profile measures enacted by the people. Most notably, it gutted a controversial marijuana initiative approved by the voters just months before. An upset citizen group launched a counterattack in 1998. It not only blocked the legislature's action, it also won passage of a constitutional amendment known as the Voter Protection Act. As a result of this initiative, Arizona's constitution now unambiguously states that (1) the governor cannot veto any measure approved by the voters; (2) the legislature cannot repeal any measure approved by the voters; and (3) the legislature can modify a citizen-approved measure or divert earmarked funds only if the modification "furthers the purpose" of the citizen measure and is passed by *three-quarters* of the members of both houses.[20] Because such a high supermajority is virtually unattainable, from a practical standpoint this means that citizen-approved measures can be altered only by the voters themselves. This is problematic for several reasons.

First, it makes it harder to correct the minor technical flaws, loopholes, or unanticipated side effects that often accompany brand-new laws. In fact, citizen-initiated laws are quite likely to have such defects because they do not go through the committee review process that bills undergo in the legislature. Needed fixes must now await the next general election (two years down the road), and survive a costly and uncertain *second* ballot campaign. This actually happened to a popular education sales tax referendum[21] approved by the voters in 2000. A drafting mistake prevented the law from being fully implemented. It required a costly second ballot campaign in 2002 to belatedly get the funds into the classroom. Second, the Voter Protection Act creates inequities in times of economic shortfall. As discussed in chapter 3, voter-mandated spending cannot be reduced by the legislature. This means that other worthy programs must suffer deeper cuts. Finally, statutes are supposed to be more malleable than constitutional provisions, to enable them to adapt to changed circumstances. The Voter Protection Act introduces a significant level of rigidity into Arizona's lawmaking process.

The Voter Protection Act clearly shifted the balance of power in the citizens' favor, but since 1998 there has been some pushback. At various times the legislature, fiscal conservatives, and groups unhappy with specific types of initiatives (e.g., animal rights measures) have attempted to limit the citizens' lawmaking powers. For the most part these efforts have failed. For example, the voters twice rejected proposals to raise the voting requirements

for passage of select types of initiatives.[22] They also rejected a legislative plan to shorten the petition process, making it harder for citizens to respond to unpopular governmental actions.[23] In 2004 the voters did however approve a constitutional amendment intended to put the brakes on spending initiatives. Now, whenever a ballot measure calls for new or increased state spending, it must also create a dedicated funding source. And when the money in this source is exhausted, the legislature is under no obligation to fund the initiative from other revenues.[24]

The Referendum

The constitutional referendum The constitutional referendum is the most commonly used method for altering the Arizona Constitution. As with all constitutional amendments, voter approval is required. In contrast to the initiative process, the legislature is the one that proposes the change. The house and senate must independently approve the proposed amendment, but only a simple majority vote is needed. This makes it much easier to amend the Arizona Constitution than to amend the U.S. Constitution or the constitutions of most other states, where a supermajority vote is required.[25]

Once the proposed amendment is approved by the Arizona legislature, it goes to a vote of the people. Ordinarily this vote occurs at the next regularly scheduled general election. On rare occasions the legislature calls a special election instead. In either event, the amendment appears on the ballot as a numbered proposition and is voted on in the same fashion as other ballot measures. It should be emphasized that the governor plays no role in the amending process. In fact, the governor cannot veto any voter-approved measure.[26]

Over the years, the legislature has proposed constitutional amendments on a wide range of subjects, with fiscal measures dominating the list. Nearly one-quarter of all constitutional referenda have involved tax, debt, or spending issues. Some constitutional referenda have altered the basic structure and operation of government itself. For example, constitutional referenda were used to restore judicial recall following Taft's veto (1912); change the method of execution in Arizona (1933, 1992); switch to annual legislative sessions (1950); alter the size and composition of the Arizona State Board of Education (1964, 2004); abolish the elected state auditor's office (1968); lengthen executive-branch terms to four years (1968); change

the vote rule for determining who wins a public office (1988, 1990); open primary elections to independent voters (1998); and expand the Arizona Corporation Commission from three to five members (2000). The legislature has also proposed some controversial social measures, such as restricting the employment of aliens (1956); declaring English the official language of the state (2006); prohibiting bail for undocumented immigrants (2006); and banning same-sex marriage (2008).

Lastly, just because the legislature proposes a constitutional amendment doesn't mean that the voters will go along. Between 1912 and 2008, the legislature sent 192 constitutional amendments to the voters, but only 117 (61 percent) were approved. As the numbers indicate, Arizona voters do not always rubber-stamp their legislature, although the legislature's amending success rate is substantially higher than the people's through the initiative process.

The statutory referendum by legislative referral The statutory referendum enables the legislature to refer ordinary laws, as opposed to constitutional amendments, to the voters for approval. The process is fairly straightforward. Whenever the legislature passes a bill it has the option of sending it either to the governor (the traditional method) or to the voters. If it chooses the latter course the measure is held until the next general election (unless a special election is called). The proposed statute then appears on the ballot like any other numbered proposition, with "yes" and "no" options. If a majority of the voters approve it, the law takes effect. Otherwise, it is killed by the people's vote. In essence, the statutory referendum transfers the governor's veto power to the voters.

Historically, the statutory referendum has been used infrequently. From statehood through 2008, only twenty-six proposed statutes were sent to the voters through this device. More often than not, when a legislative referendum is on the ballot the people approve the proposed law.[27] Nonetheless, the legislature almost always prefers to send its bills to the governor using the traditional lawmaking process. This is a quicker, more certain, and less costly way to enact legislation.

In recent years, however, the number of statutory referenda has significantly increased, with nine (35 percent) occurring since 1998. There are several explanations for this trend. First, the statutory referendum gives the legislature a way of circumventing an anticipated gubernatorial veto.

Second, it allows the legislature to "pass the buck" with respect to high-profile issues that are likely to generate an angry voter backlash. Sending a controversial measure—like a tax—to the voters allows the legislature to acknowledge a problem without officially endorsing a particular solution. This is what the legislature did following the flap over the Martin Luther King Jr. holiday (see text box). Third, it provides a way of bypassing the two-thirds supermajority needed to raise taxes, since only a simple majority is required to refer a measure to the voters. In fact, Governor Hull's popular educational sales tax probably wouldn't have passed without this workaround. Similarly, in 2009 and early 2010, Governor Brewer pressed for a temporary sales tax increase to address an unprecedented budget shortfall. A staunchly anti-tax contingent in the legislature made it impossible to achieve the two-thirds majority needed for passage. In the end, the legislature barely mustered the simple majority needed to send the tax proposal to the voters. Fourth, since the advent of the Voter Protection Act, a statutory referendum is the only way the legislature can repeal or significantly modify voter-approved statutes. Fifth, it gives the legislature a way of combating disfavored citizen initiatives. The legislature can send a countermeasure to the voters, hoping either that its version will pass or that voter confusion will cause both measures to fail. Since 1998, it has used this tactic on six occasions.[28] Lastly, the legislature may use the statutory referendum process to attract particular voting blocks to the polls. Research indicates that wedge issues such as same-sex marriage bans, anti-immigration propositions, or minimum wage boosts can enhance turnout of select voters in midterm (gubernatorial) elections.[29] All these factors have undoubtedly contributed to the recent upsurge in statutory referenda and suggest that this trend is likely to continue.

The statutory referendum by citizen petition (popular referendum) The last of the initiative and referendum procedures is arguably the most assertive. It permits the voters to interject themselves into the traditional lawmaking process and attempt to kill a bill already passed by the legislature and approved by the governor. This procedure is sometimes called the **popular referendum** (from the root meaning "people") to distinguish it from the statutory referendum that is triggered by the legislature itself.

Most Arizona statutes do not take effect immediately. Rather, they remain on hold for ninety days after the end of the legislative session to allow

citizens the opportunity to launch a statutory referendum. Any registered voter can do so by circulating a petition attacking a newly passed measure. The voter must obtain supporting signatures equal to 5 percent of the votes cast for governor in the most recent election. (Currently this equates to roughly 75,000 signatures.) Although this is a much smaller number than is required for initiatives, the shorter signature-collection period (ninety days) makes this task relatively difficult.

If enough valid signatures are collected, the targeted measure does not take effect with the other laws passed during the same legislative session. Instead, it remains on hold until the next general election. The challenged measure then appears on the ballot as a numbered proposition, and voters must decide whether or not it should be approved. If the majority votes "yes," the referendum fails. The voters have sided with the legislature, and the law belatedly takes effect. If the majority of voters reject the proposition, the referendum has succeeded. In essence, the people have "vetoed" the law.

There are three types of laws that cannot be blocked using the popular referendum. These laws don't sit for ninety days, but take effect immediately:

1. *Laws with emergency clauses.* The legislature can insulate any law from the popular referendum simply by attaching a paragraph to the bill that declares that the law is immediately needed to "preserve public peace, health, or safety."[30] (This does not have to be actually true.) As noted in chapter 3, emergency bills require a higher, two-thirds vote to pass. This is a barrier that prevents the legislature from abusing the referendum exemption. Of course, real emergencies requiring a quick governmental response *do* occur. Without the exemption, needed governmental action would be delayed ninety days or longer.
2. *Laws necessary to the support of government.* The state's general appropriation bill and other funding bills needed to keep government running are also exempt from the popular referendum.[31] Without this exemption, a small, cranky minority could temporarily shut down all state institutions, including prisons and universities.
3. *New tax laws.* Tax laws are also exempt from the voter-triggered referendum.[32] This exemption is presumably based upon the fear that 5 percent of the voters could always be found to block a tax. It should be noted, however, that citizens still have the power to repeal a tax *after* it

takes effect by using the initiative process. (This may not always be practical with short-term taxes, such as the Bank One Ballpark levy [now Chase Field], assessed to build a new baseball stadium in downtown Phoenix. The tax expired before the initiative process could be successfully completed.)

Between 1912 and 2008, only thirty-four popular referenda reached the ballot, and the voters sided with the legislature half the time. Superficially, this would suggest that the people's referendum is not a very powerful or effective tool. The potency of the procedure, however, cannot be judged by these figures alone. The mere threat of a popular referendum can operate as a significant check on legislative behavior. For example, in 1995, at Governor Fife Symington's behest, the legislature passed a bill giving the governor the power to fire his appointees to state boards. (Board members normally serve for fixed terms.) Citizens who opposed this expansion of gubernatorial power immediately launched a referendum and obtained enough signatures to put the measure on the 1996 ballot. However, the voters never got the chance to vote. Instead, the legislature quietly repealed the bill prior to the general election. Similarly, a group calling itself Stop the Raid! also collected enough referendum signatures to stall the legislature's attempt to divert cigarette tax revenues that had been previously earmarked by a citizen initiative (see chap. 3). Once again, the legislature quietly repealed the bill rather than allow the referendum to proceed. Although the people were ultimately successful in both instances, neither of these episodes shows up in the total referendum statistics because the process was not completed. Moreover, it is impossible to estimate how often the legislature has altered its course simply because a popular referendum was threatened or anticipated. In short, the numbers probably understate the effectiveness of this direct democracy device.

REFERENDUM WARS: KING DAY AND THE SUPER BOWL

Arizona's referendum procedures got a real workout during the state's six-year struggle to create a state holiday honoring Martin Luther King Jr. Paid holidays in Arizona are normally established by statute. In 1986, Governor Bruce Babbitt simply declared a King holiday by executive

decree after the legislature balked. (Arizona was one of the few states that lacked such a holiday.)

Babbitt's term expired before the January observance took place. His successor, Evan Mecham, repealed the holiday as one of his first acts in office.[33] The controversial repeal helped launch a recall effort against Mecham six months later. It also brought Arizona unwanted national attention and hurt the ongoing effort to lure its first Super Bowl to the state. Accordingly, when Mecham was ousted from office in 1988, Governor Rose Mofford was able to persuade the legislature to establish a King holiday. Because the lawmakers didn't want state workers to get an additional paid day off, their measure eliminated the Columbus Day holiday. This upset Italian American voters, who quickly collected enough signatures to trigger a popular referendum. The holiday measure was thereby put on hold until the voters could decide the issue at the next general election in 1990.

In the meantime, prominent entertainers and national conventions began boycotting Arizona. When the legislature came under increasing pressure from the tourism industry, it decided not to wait for the outcome of the referendum. Instead, it passed a new holiday law that restored Columbus Day and established King Day as an additional paid holiday. Governor Mofford promptly signed the new bill into law. Before this second measure could take effect, another coalition of voters collected sufficient signatures to trigger a referendum!

When the 1990 election rolled around, Arizona voters were thus confronted with two conflicting holiday propositions on the same ballot.[34] Not surprisingly, this created voter confusion. Heavy-handed lobbying by the NFL on the eve of the election only worsened the situation. The NFL's commissioner publicly threatened to remove the newly awarded 1993 Super Bowl from Tempe if one of the two measures didn't pass. This antagonized many voters, who resented outside interference in state affairs. In the end, both holiday proposals failed, although the second measure lost by a mere 17,882 votes.

The NFL followed through on its threat. The 1993 Super Bowl was yanked from Arizona and played in Pasadena instead. The national boycott of the state intensified, causing the legislature to go back to the drawing board. Its third attempt made room for a new King Day by

combining Lincoln's and Washington's birthdays into a single holiday. And instead of sending the bill to the governor, as it had done on the two prior occasions, the legislature opted to refer the measure directly to the people using the statutory referendum. The third time was the charm. In November 1992, Arizona voters approved the King holiday by a wide margin (325,999 votes). The Super Bowl was played in Tempe in 1996.

Evaluating the initiative and referendum Initiatives and referenda have appeared on the ballot at every general election since statehood. There were thirteen propositions in the first election, and a record nineteen in 2006. Despite President Taft's concerns, it is evident that direct democracy is alive and well in Arizona. Nonetheless, these procedures continue to provoke controversy.

Critics contend that ordinary citizens lack the expertise to make sound laws. Propositions can be lengthy and complex. The problem is compounded when there are a dozen or more measures on the ballot at the same time—the norm in recent years. Although voter guides are supposed to help, some exceed two hundred pages, taxing even the most conscientious voters. Misleading media ads, flyers, and sound bytes probably have greater influence. Citizens are justifiably outraged when their elected officials vote on measures without proper study (e.g., the alt-fuels scandal). Critics charge however that voters do the same thing when they decide the fate of ballot measures.

Second, although direct democracy is supposed to be a people's process, it can be co-opted by wealthy special interests. Arizona's steep signature requirements, plus the substantial sums needed to finance a successful advertising campaign, doom many grassroots efforts. For example, a 1992 initiative to ban steel-jawed animal traps was favored in the polls until the National Rifle Association launched a $1.4 million media campaign against it.[35] Conversely, big business, trade associations, unions, and wealthy individuals have the resources to hire petition circulators, run multimedia advertising campaigns, and otherwise exploit the processes for their own financial or ideological ends. In fact, Arizona originally got its lottery in 1980 through this means. An out-of-state gaming company was seeking to expand its own business. When the company couldn't persuade the Arizona legislature and governor to allow gambling in the state, it financed a

successful initiative campaign. (Native Americans used the same approach to expand tribal gaming over state government opposition in 2002.) Corporations and other industry interest groups typically camouflage their role with labels like “People for a Fair Legal System” (the insurance industry); “Fair” (trial lawyers); “No More Taxes” (RJ Reynolds, a major cigarette company); “Arizona Non-Smoker Protection Committee” (RJ Reynolds again); “Protect Our Homes” (Realtor organizations); and “Arizonans for Financial Reform” (payday loan industry).

A third complaint is that Arizona’s ballot processes can be exploited by outsiders seeking to advance a national agenda. For example, three millionaires (two nonresident) spearheaded drug legalization ballot campaigns in Arizona in 1996, 1998, 2000, and 2002.[36] Out-of-state animal rights organizations bankrolled a landmark initiative for the humane treatment of farm animals in 2006. And in 2008, a California businessman pumped millions into a five-state assault against affirmative action. His effort fell slightly short of the required signatures in Arizona but he vowed to try again. Irrespective of the merits of these measures, it is questionable whether nonresidents should be able to influence the state’s laws.

Fourth, critics complain that initiatives are too extreme. Initiators don’t have to make compromises the way bill sponsors must do in the legislature. Consequently, the voters are often given all-or-nothing choices instead of the middle ground that polls show most voters would prefer. Examples include a 1992 anti-abortion measure that lacked a woman’s health exemption; a 1996 “medical marijuana” initiative that actually extended to heroin, PCP, and 113 other hard drugs; and a 2006 same-sex marriage ban that also covered heterosexual domestic partnerships.[37]

Fifth, citizen initiatives are likely to have more technical flaws than legislative measures, because they do not undergo public hearings and committee review. Poorly drafted laws can generate costly legal challenges. Not only do Arizona taxpayers bear the expense of such litigation, but simple legislative fixes are no longer feasible under the Voter Protection Act. Two of the most significant initiatives of the past decade illustrate the problem. The Clean Elections Initiative (1998), which authorized public financing for campaigns, was attacked on technical grounds before it even reached the ballot. Since passage, it has been the target of multiple lawsuits, and some of its provisions have been judicially invalidated.[38] The Fair Districts, Fair

Elections Initiative (2000) also turned out to be a litigation magnet. Intended to end gerrymandering, it spawned nearly a decade's worth of litigation.[39] As discussed in chapter 3, poor drafting arguably stymied a central purpose of the initiative: to produce competitive districts.

Sixth, critics charge that ballot propositions exacerbate social tensions by targeting minorities and unpopular groups. For example, numerous Arizona ballot measures have been aimed at noncitizens. There were three such propositions in 2006, along with propositions in 1914, 1956, 1960, 2004, and 2008. Other propositions have targeted non–English speakers (1988, 2000, 2006), and homosexuals (2006, 2008). Emotional pro/con arguments in the voter's guides only partially capture the divisiveness of these campaigns. Moreover, as mentioned previously, controversial "wedge" issues are sometimes put on the ballot to lure select voting groups to the polls in order to gain an advantage in candidate races.

Finally, spending initiatives attract special criticism. When the voters approve earmarks for schools, indigent health care, and other popular programs, they typically aren't considering the whole economic picture. Rather, they are responding to the successful advocacy of one particular group in isolation. Additionally, most voters lack knowledge of the revenue side of the equation. Unfortunately, when inflexible spending mandates are adopted without consideration of available resources, fiscal irresponsibility can result. The 2004 requirement that initiators must now provide their own funding sources,[40] only partially alleviates these concerns.

Supporters of direct democracy counter these criticisms with arguments of their own. First, they point out that initiatives provide the only realistic way of reforming government itself. This is especially true when the proposed measures are not in the legislators' own self-interest. For example, Arizona's stringent campaign contribution limits (1986), term limits (1992), clean elections (1998), and redistricting (2000) reforms were enacted by the citizens; it is doubtful that any would have been approved through the traditional legislative process.

Second, direct democracy procedures give citizens a way to counter the cozy relationship that wealthy special interests have always enjoyed with government officials. For example, for years the tobacco industry was able to block tougher antismoking measures. This ended in 1994 when health advocates did an end run around this powerful lobby using the initiative

process. Proposition 200 raised cigarette taxes and earmarked the new revenues for antismoking education and health care. And in 2006, the voters approved the Smoke-free Arizona Act, which prohibited smoking in most public places. RJ Reynolds spent millions opposing these initiatives, but the antismoking forces prevailed in each instance. Similarly, despite a $14 million campaign in 2008, the payday loan industry was unable to pass an initiative designed to stave off morerigorous regulation of its industry. And in the same election, a consortium of powerful business interests failed in their effort to put the brakes on future citizen spending initiatives even though they also heavily outspent the opposition. This is not to suggest that spending is irrelevant to proposition outcomes, but rather that the picture is more complex than money alone. Research indicates that it is easier for wealthy special interests to defeat a ballot measure than to pass one.[41] A negative campaign exploits voter doubts, and most voters are predisposed to reject propositions.[42] As RJ Reynolds's experience attests, even costly negative campaigns don't always carry the day. In short, while money usually determines outcomes in *candidate* elections, the correlation is less strong with ballot measures.

Third, direct democracy procedures compel the government to be more attentive to citizen concerns. Even a part-time legislature can be out of touch with constituents. Because of their private-sector occupations, citizen legislators tend to reject antigrowth, environmental, minimum wage, and other regulatory measures traditionally opposed by the business community. Moreover, the Arizona legislature has always attracted fiscal conservatives who are philosophically opposed to big government and public spending. Accordingly, if the public has different views—for example, if it wants more social services or business regulations—initiatives and referenda may be the only viable way to accomplish these ends. This was the workaround that Governor Hull pursued when the legislature repeatedly rejected her calls for increased education spending. Finally, the mere threat of a petition can prompt the legislature to address issues that it would otherwise prefer to ignore, or cause it to refrain from taking action contrary to the electorate's wishes.

Fourth, although some ballot measures have unleashed bigotry, initiatives have also enabled politically powerless groups to take their case to the people. For example, women gained the right to vote in Arizona through this means in 1912. In 1996, the Salt River Pima–Maricopa tribe used the

initiative process to win the right to operate casinos. The small tribe, which had little political clout, simply presented a fairness argument to the voters after the governor refused to negotiate. A decade later, Native Americans used the same strategy to expand tribal gaming. Other politically weak constituencies—for example, children, animal rights groups, the poor, crime victims, and the disabled—have all had success with initiative campaigns.

Fifth, supporters argue that ballot measures foster a more engaged electorate and a healthier democracy. Propositions stimulate interest in elections in off-presidential years, educate the citizens, focus attention on issues as opposed to candidates' personalities, permit creative societal solutions to come from a broader pool, and in theory provide a safety valve for otherwise alienated citizens.[43]

Sixth, direct democracy procedures allow governors and other public officials to achieve their policy goals in the face of legislative resistance. For example, when Governor Symington couldn't persuade the legislature to enact his juvenile justice proposals, he launched his own citizen initiative. The governor was able to exploit his high-profile position to promote and easily win passage of the measure in 1996. Later on, State School Superintendent Lisa Keegan and Governor Hull threatened similar action when the legislature rejected their demands for increased education funding. In the end, Governor Hull successfully pressured the legislature to put an education sales tax referendum on the ballot. Even legislators have sometimes resorted to this tactic when they could not muster the necessary majority support in the legislature.

Finally, defenders of direct democracy contend that the critics underestimate the commonsense of the electorate. Many ballot issues are fairly straightforward and well within the comprehension of the average voter. As noted previously, voters have resisted numerous high-profile campaigns despite the millions in advertising spent by proponents. They have also managed to see through ballot measures that were deceptively worded or misleadingly advertised.[44] Some political scientists theorize that although individual voters may be uninformed, collectively they make coherent choices. They do this by taking cues from elites, or by relying on shortcuts such as the identity of the proponents and opponents of a measure.[45]

Recall

How the recall process works Recall permits Arizona voters to remove state and local officials from office before the end of their terms. Like other direct democracy processes, it has both a petition stage and an election stage. Any registered voter can begin the process by circulating a petition for the recall of a specified state or local official. The petition must set forth the grounds for removal in two hundred words or less.[46] The only constraint is that no recall can be started until after the official has served six months in office. (An exception exists for legislators, who can be targeted a mere five days after the first regular session begins.)

The signature requirement for recall petitions is the steepest of all of Arizona's direct democracy procedures. It requires 25 percent of the total number of votes cast in the last election for the targeted office. (For example, more than 380,000 signatures currently would be needed to launch a recall effort against the governor.) If sufficient petition signatures are obtained, the official has five days to resign. If he or she refuses, a special recall election is called by the secretary of state. Any qualified person can run against the incumbent in this election. Whoever gets the most votes wins the office. If the incumbent wins, the recall effort has failed. The official cannot be recalled again during the term unless the new recall petitioners pay the expenses of the preceding election.

It is instructive to compare recall to impeachment, the more traditional means of removal from office in this country (see table 4.2). Most obviously, recall is a people's process, whereas impeachment is left to the legislature. With recall, an election campaign, rather than an evidentiary trial, determines whether the official is ousted from office. If the governor is the target, there are two other important differences. First, the governor remains in office throughout the recall process. (In contrast, with impeachment the governor temporarily loses power at the moment the house votes to impeach.) Second, in a successful recall, the office passes to the winner of the recall election. This permits an outsider to take over. In contrast, when the governor is convicted of impeachment charges the office passes to the constitutionally designated successor. This is ordinarily the secretary of state, assuming that the officeholder was elected to the office rather than appointed.[47]

Table 4.2. Impeachment and recall contrasted

Differences	Impeachment	Recall

Who starts the process	The house of representatives by a simple majority vote	The citizens with a petition signed by 25% of the voters [a]
Who decides the outcome	The senate by a two-thirds majority vote following an evidentiary trial	The voters, voting in a special recall election
Who gets the office	If the governor is the target, the office passes to the constitutional successor (usually the secretary of state); if another official is the target, a successor is appointed (usually by the governor for state officials)	The winner of the recall election gets the office. If the incumbent wins, he or she retains the office and the recall fails

[a] Percentage refers to the total number of votes cast for the targeted office in the most recent election.

Because the signature requirement is so steep, serious recall efforts are a rarity on the state level. In fact, only two governors in the nation have ever been removed from office through this means.[48] No statewide official in Arizona has ever been removed from office by recall.[49] And despite President Taft's concerns, only one superior court judge has been recalled from office (for erratic behavior). Instead, most recalls occur at the local level and involve city council or school board members (see chap. 7). There is a reason for this: although the same 25 percent signature requirement applies, it is more easily achieved because the electorate is smaller and voter turnout is much lower.

Arizona's recall procedures garnered national attention in 1988 when Governor Evan Mecham was simultaneously subjected to separate recall, impeachment, and criminal proceedings. Six months to the day after the governor assumed office in 1987, citizens began circulating recall petitions for his removal. Meanwhile, in early 1988, the house of representatives voted to impeach the governor (see chap. 3). While the impeachment trial was still pending in the senate, recall supporters defied the odds and collected more than 300,000 petition signatures within four months. This was far more than needed to trigger a recall election. After Governor Mecham refused to resign, the secretary of state scheduled a recall election for May. Several prominent

candidates began campaigning against the governor. In April, however, Mecham was convicted of impeachment charges in the senate and removed from office. Secretary of State Rose Mofford thereupon became governor under the Arizona Constitution's succession provision. (Mecham was later **acquitted** of all criminal charges by a superior court jury.)

The controversy, however, did not end with Governor Mecham's removal. Some voters wanted the recall election to go forward regardless. Mofford was a Democrat, and many Republicans were unhappy with their party's unexpected, midterm loss of the governor's office. Others simply wanted to choose Mecham's successor from among the candidates who were already campaigning. When the attorney general issued a legal opinion that the recall election could not be stopped, the matter went to court. In the end, the Arizona Supreme Court cancelled the recall election. The court acknowledged that it was forced to improvise because there was no precedent for the triple constitutional threat faced by the governor.[50] As a result of the ruling, Governor Mofford remained in office for the balance of Mecham's term, and gubernatorial control abruptly switched from the Republican Party to the Democrats.

Evaluating the recall process Although initiative and referendum procedures have slowly spread throughout the country over the last century, recall (at least on the state level) remains fairly rare and controversial. Critics of recall contend that it undermines representative government by making elected officials too timid to make principled and tough decisions. The process can be abused by political rivals and disgruntled factions who refuse to accept the majority's electoral choice. Special interests can also exploit the process for their own ends. Even when recall is not successful or fully completed, it creates divisiveness and distracts elected officials from their duties. This, in turn, may deter capable individuals from running for office. Critics also contend that recall is inferior to impeachment because (1) it permits the public to react too quickly to a single unpopular decision; and (2) it does not afford the officeholder a forum for a reasonable hearing. Finally, recall can be costly to both the taxpayers (who pay for the extra election) and the officeholder (who may be forced to campaign twice for the same office).

In rebuttal, supporters argue that recall enables the electorate to remove incompetent, corrupt, or unresponsive officials without excessive delay. It provides for continuous accountability, making elected officials more

sensitive to the public interest on every decision. Recall allows the citizens to act when the legislature may be too corrupt to impeach. It serves as a safety valve for disaffected voters. Finally, defenders argue that the high petition signature requirement and restriction on multiple recall elections prevent the process from being abused.

Online resources

Arizona Secretary of State (home page):
www.azsos.gov

Arizona Secretary of State Elections Information:
www.azsos.gov/election

5 The Executive Branch

The job of the executive branch is to carry out ("execute") the laws and judicial decrees of the state. It is a huge responsibility. In addition to multiple elected officials, more than 65,000 people work for this branch of government.[1] This makes the executive not only the largest of the three branches of state government, but also Arizona's biggest employer by a wide margin.

Most people don't realize the range of services that the executive branch provides. Nor do they think of university professors (or football coaches) as executive-branch employees. However, these individuals get their paychecks from the state, as do highway engineers, park rangers, correctional officers and prosecutors. Arizona's executive branch operates prisons, medical facilities, and three universities. It oversees the K–12 public school system, certifies its teachers, and monitors the schools' academic performance. It constructs, maintains, and polices state highways. It manages vast natural resources, public lands, and state parks. It provides assistance to the needy and unemployed. It licenses accountants, barbers, chiropractors, contractors, dentists, nurses, pharmacists, physicians, psychologists, real estate brokers, veterinarians, and many other occupations. It regulates corporations, day-care centers, hospitals, insurance companies, liquor sellers, nursing homes, and other private businesses. It issues hunting, fishing, and drivers' licenses. It operates a lottery. It maintains the vital records of the state's residents. It handles the state's legal affairs. It oversees elections. It promotes tourism and economic development. And this list is incomplete.

Executive-Branch Structure

A "Plural" Executive Branch

Coordinating such a range of responsibilities is no easy task. Yet, like many of its sister states, Arizona has a structurally weak executive branch. That is, neither the governor nor any other official has overarching management authority. There is no office comparable to that of the president. Instead,

power in the Arizona executive branch is fragmented among many elected officials and quasi-independent boards. This is called a **plural executive branch.** The design reflects the Progressive framers' deep mistrust of government. They were especially uneasy about executive power for several reasons. First, the executive branch has considerable discretion in enforcing the law. The framers worried that such discretion could be abused. Second, the Progressives feared all concentrations of power. They knew that when power is consolidated in a few hands, it is more easily corrupted. Finally, Arizona's territorial officials did not give executive power a particularly good name. Accordingly, the state constitution is riddled with limitations on executive power designed to prevent the worst abuses of that era from happening again.

A weak executive branch, however, has downsides. Most large organizations—public or private—benefit from strong leadership. Effective leadership entails clear focus, firmness, consistency, and the ability to respond quickly to changed circumstances. These are traits that committees and collective bodies (like a legislature) typically lack. For this reason, large organizations usually adopt the pyramid organizational structure that Arizona's framers rejected. Essentially, the framers deliberately sacrificed efficiency for greater safety. Although some of their efforts have been modified by subsequent constitutional changes, Arizona's executive branch still remains weak by intentional design.

Multiple elected officials Arizona voters separately elect a governor, secretary of state, attorney general, state treasurer, superintendent of public instruction, state mine inspector, and five corporation commissioners.[2] No official is the boss of any other. Having so many elected officials increases the level of conflict and disunity within the executive branch. Because the officials are elected independently, they can be of different political parties. As shown in table 5.1, it is rare when a single party sweeps the top three executive-branch positions. High-level officials from different parties have ample reason not to cooperate since they have devoted their careers to different political philosophies, policies, and priorities.

Executive-branch conflict is fairly common, even when officials are of the same party. This is especially true when policy responsibilities overlap. For example, most modern governors regard education as a top priority of their administrations.[3] Arizona voters however separately elect a

superintendent of public instruction to oversee the state's public schools. Not surprisingly, this arrangement can lead to friction when the two have different policy views. In the mid-1990s, Governor Fife Symington (R) and school superintendent Lisa Graham Keegan (R) advocated diametrically opposing approaches to school reform. The result was stalemate. The governor could not "fire" the superintendent nor insist that she promote his policies. As an independently elected official, the superintendent could rightly claim that *she* had been chosen by the voters to direct the state's education policies. The conflict continued when Symington's successor, Jane Hull (R) became governor. In fact, the governor and Superintendent Keegan took opposite sides in a groundbreaking lawsuit over school funding.[4] (The taxpayers wound up paying the legal expenses of both officials.) Hull's successor, Janet Napolitano (D) and school superintendent Tom Horne (R) also had different educational priorities. Horne, backed by new governor Jan Brewer (R), later formally opposed Attorney General Goddard (D) in high-profile federal litigation over Arizona's funding of English-language-learner programs. Once again the taxpayers underwrote the legal fees for the two opposing sides. Apart from expense, recurring intra-branch conflict over school policy deprives the state of effective, unified leadership. It also undermines accountability. Who should the voters blame for education shortcomings?

Table 5.1. Party affiliations of top Arizona executive-branch officials

Year	Governor	Secretary of state	Attorney general
1978	D	D	R
1982	D	D	R
1986	R	D	R
1990	R	D	R
1994	R	R	R
1998	R	R	D
2002	D	R	D
2006	D	R	D

Clashes between governors and attorneys general have a long history

too. These are potentially more disruptive because the attorney general's legal support is needed to implement a wide range of executive-branch policies. There are several explanations for this recurring conflict. First, attorneys general often harbor ambitions of becoming governor themselves. This makes them potential political rivals of their governor-clients even when the two are of the same party.[5] Second, litigation has become an increasingly important way of establishing public policy in areas such as civil rights, consumer protection, environmentalism, education, and federal-state relations. Because the attorney general is the state's chief lawyer, he or she can take policy stances in these cases that conflict with the governor's own agenda. For example, in the 1990s, Governor Symington repeatedly clashed with Attorney General Grant Woods, a fellow Republican.[6] At one point, the governor even tried to terminate the attorney general's high-profile tobacco litigation by ordering a state health agency to withdraw from the lawsuit. (The attorney general managed to persist with the litigation, and ultimately won a large monetary settlement for the state.[7]) Similarly, Governor Brewer and Attorney General Goddard publicly clashed over the English-language-learner litigation mentioned previously. Brewer sent a strongly worded letter to the attorney general, ordering him to withdraw from the lawsuit and "abide" by her policy positions.[8] Goddard politely declined, noting his own independent obligations as the state's lawyer. All of these battles pale however next to Attorney General Robert Corbin's criminal indictment of Governor Evan Mecham in 1988. Not surprisingly, the ensuing turmoil within the executive branch reached record levels of mistrust and dysfunction. While this was undeniably an extreme situation, the plural design of Arizona's executive branch promotes internal conflicts and rivalries.

Many quasi-independent boards and agencies The structure of the state's bureaucracy further limits the governor's authority. The executive branch is divided into more than one hundred separate departments and agencies. Many of these are headed by a single gubernatorial appointee who remains subject to the governor's control. In such situations the governor wields executive power comparable to that of the president. Other agencies however are headed by multi-person boards that are highly independent. Board members are typically part-time citizen-administrators drawn from the professions that they regulate. Illustratively, the Arizona Medical Board, which oversees the

state's physicians, is required to have eight doctors, one nurse, and three members of the general public.[9] Although the governor appoints the members of most boards,[10] they generally serve for fixed terms and cannot be removed by the governor.[11] The governor, accordingly, has limited ability to control decision making by these agencies. Moreover, as the following (partial) list indicates, these quasi-independent boards regulate many important activities:

Arizona Board of Regents (the governor and superintendent of public instruction are ex-officio members)
Arizona Corporation Commission (members are elected)
Arizona Medical Board
Arizona State Board of Accountancy
Arizona State Board of Nursing
Arizona State Board of Pharmacy
Arizona State Parks Board
Arizona State Retirement System
Arizona State Veterinary Medical Examining Board
Board of Barbers
Board of Cosmetology
Board of Executive Clemency
Industrial Commission of Arizona
State Board of Chiropractic Examiners
State Board of Dental Examiners
State Board of Dispensing Opticians
State Board of Education (the superintendent of public instruction is a member)
State Board of Funeral Directors and Embalmers
School Facilities Board (the superintendent of public instruction is a nonvoting member)

Evaluating the plural executive branch The design of Arizona's executive branch is not unique. Nearly all states elect multiple officials instead of copying the unitary structure of the national government. With eleven elected offices and a large number of quasi-independent boards, Arizona is however classified as a "weak governor" state. Public administration experts criticize this design for many of the reasons previously noted. They argue that a plural executive branch deprives the state of strong, unified leadership, and that it is prone to too many internal conflicts. Accountability is also reduced because elected officials can blame one another for inaction and failures. The state would be better off, the critics contend, with a single official who could be held responsible. Finally, a plural executive branch puts elected politicians, as opposed to expert professionals, at the helm of major state departments. This serves to politicize these units. Although it gives citizens a greater say, critics argue that the voters don't always exercise this power wisely.

In contrast, most Arizonans continue to share the Progressives' enthusiasm for a weak executive design. Over the years, the voters have largely rebuffed proposals to consolidate or strengthen the governor's powers. Defenders of the plural structure counter that it provides needed checks against the abuse of executive power. Without it, it is doubtful that an attorney general would have the independence to investigate and prosecute wrongdoing on the part of a governor or other high-level officials. The design also encourages a wider range of policy viewpoints and promotes bipartisanship. It insulates sensitive regulatory agencies from excessive gubernatorial pressure. (For example, without relative independence, parole board decisions could be politicized by governors seeking to score easy points with the voters.) A plural executive branch is more democratic because it enables the citizens to choose the heads of major departments (such as education) instead of letting the governor appoint cronies who may or may not be well qualified. Finally, Arizona's many boards and commissions give citizens the opportunity to participate in overseeing the state's bureaucracy.

Elected Officials

Length of terms The constitution originally gave the governor and other executive officers two-year terms like state legislators. This was intended to further reduce executive power by putting such officials on a short leash. At the constitutional convention, short terms were touted as "one of the guarantees of democratic government."[12] In 1968, however, the voters concluded that two-year terms were simply too short. (This is one of the few times when they heeded the advice of public administration experts.) Accordingly, the constitution was amended to give the five major officers—governor, secretary of state, attorney general, treasurer and superintendent of public instruction—four-year terms.[13]

When the executive terms were lengthened, the state had to decide whether the four-year electoral cycle should coincide with the U.S. presidential term. In the end, Arizona decided to follow the practice of most states and have its executive officers elected in even-numbered, *off*-presidential years (2010, 2014, 2018, etc.; see table 5.2). This arrangement has advantages as well as disadvantages. On the plus side, it focuses voters' attention on state issues and prevents national presidential politics from unduly influencing state election outcomes. On the minus side, as shown in

figure 5.1, voter turnout is significantly lower in off-presidential years. In fact, when turnout is viewed as a percentage of the voting eligible population, as opposed to the percentage of registered voters, the picture is even worse: since 1980, the turnout for off-presidential general elections has averaged 38 percent.[14] In other words, nearly two-thirds skip the election that chooses the state's top officials.

Term limits Prior to 1992, most Arizona executive officials could hold office for an unlimited number of terms. Arizona's first governor, George Hunt, remains the gubernatorial record holder, having won seven (two-year) terms. In 1992, Arizona voters imposed term limits. (The state treasurer had always been subject to term limits—reflecting the framers' heightened concerns over the management of public money.) Currently, the five major executive-branch officers, as well as Corporation Commission members, can serve no more than two consecutive terms in the same office, or eight years.[15]

Table 5.2. Arizona and U.S. election cycles

Year	Arizona offices	U.S. offices
2010, 2014, 2018, etc.	• Governor • Secretary of state • Attorney general • Treasurer • Superintendent of public instruction • State mine inspector • Corporation commissioners (2) • State senators (all) • State representatives (all)	• U.S. representatives (all) • U.S. senator (1, elected to a 6-year term)[a]
2012, 2016, 2020, etc.	• Corporation commissioners (3) • State senators (all)	• President • U.S. representatives (all)

	• State representatives (all)	• U.S. senator (1, elected to a 6-year term)[a]

[a] Arizona's two senators have staggered, six-year terms. This means that unless there is a midterm vacancy, there will be no U.S. senate elections in Arizona in 2014, 2020, 2026, etc.

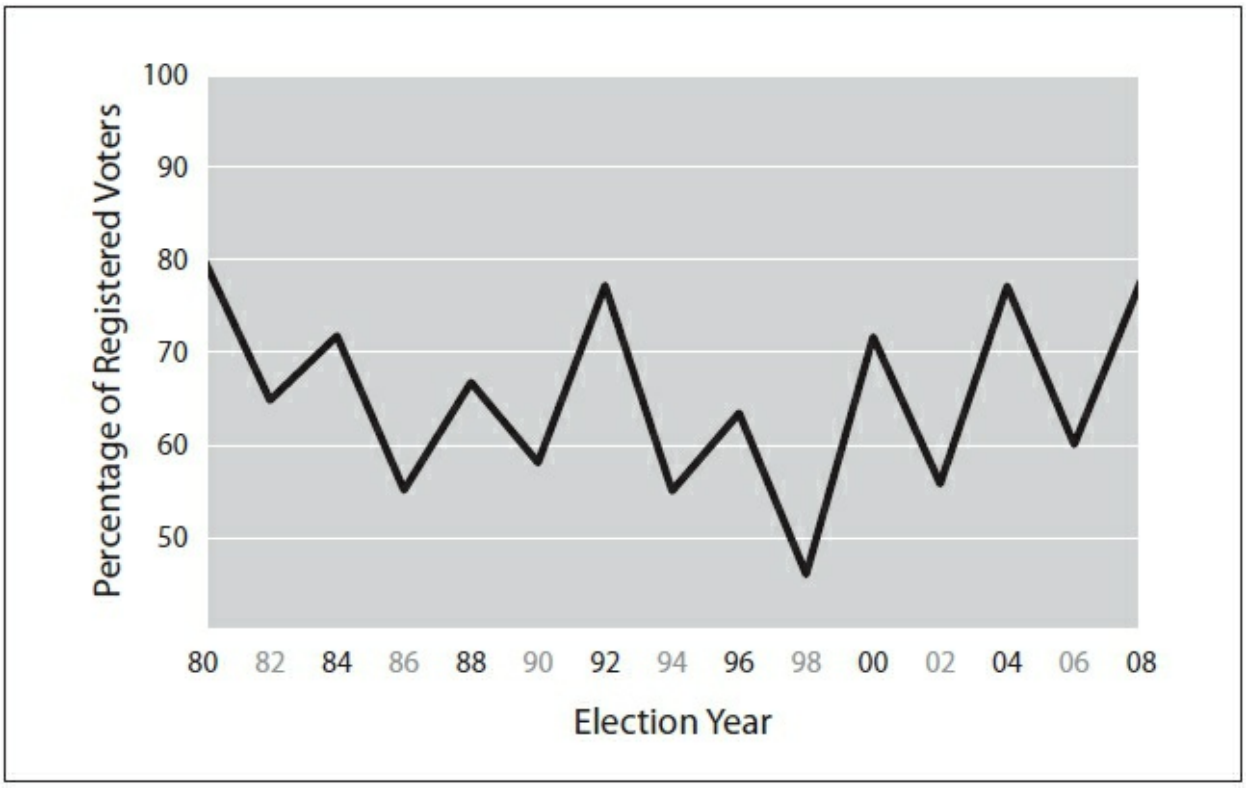


Figure 5.1. Voter turnout in Arizona general elections. (Presidential election years are bolded.)

Qualifications In keeping with their Populist sympathies, the Progressive drafters of Arizona's constitution intentionally kept the qualifications for executive office relatively low. The governor and the state's four other major officers need only be twenty-five years old, U.S. citizens (for ten years), Arizona residents (for five years), registered voters, and English proficient.[16] This contrasts with thirty-five states that require their governors to be at least thirty years old.[17]

Until 1988, the state constitution also stated that the top five executive

officers had to be male. This was actually an oversight that had no legal force. When women were given the right to vote in 1912, the amendment expressly included the right to hold all public offices.[18] The drafters simply forgot to remove the male qualification from Article 5. The gender qualification was belatedly deleted in 1988 after Rose Mofford became the state's first female governor. (She succeeded to the office after Evan Mecham was impeached and ousted.) Actually, Mofford was not the first to break the gender barrier in the executive branch. Elsie Toles was elected superintendent of public instruction in 1920, and Ana Frohmiller served as the elected state auditor for twenty-four years. Frohmiller, who crusaded against government waste, was the first female state auditor in the country. She was narrowly defeated in her bid for governor in 1950.These historic firsts were trumped in 1998 when Jane D. Hull became the first woman to be *elected* governor in the state. At the same time, Arizona voters set national precedent by electing women to the remaining four top executive offices (see fig. 5.2). The women became collectively known as the "Fab Five," and a bumper sticker boasted: "Arizona—Where Chicks Rule!" There have only been thirty-two female governors in the United States since 1920 (i.e., when the Nineteenth Amendment guaranteed women the right to vote.) Four of those have been Arizonans—a national record.[19]

Figure 5.2. Women at the top: Arizona made national history in 1998 when it elected women to *all* of the top executive-branch offices. The new officeholders were sworn in by Justice Sandra Day O'Connor (the first woman to serve on the U.S. Supreme Court and a fellow Arizonan). Also joining them was former state representative Polly Rosenbaum, who served in the Arizona legislature for a record forty-six years, until she lost her first election at age ninety-five. From left to right: Superintendent of Public Instruction Lisa Graham Keegan, Attorney General Janet Napolitano (who later became the second woman elected governor), Governor Jane D. Hull (the first woman elected to the office), Polly Rosenbaum, Justice Sandra Day O'Connor, State Treasurer Carol Springer, and Secretary of State Betsey Bayless.

THE POLITICAL CURE THAT BACKFIRED

How do you determine who wins an election when more than two candidates run? For seventy-six years, Arizona's constitution provided a

straightforward answer: whoever gets the most votes. This is known as a *plurality rule.* In 1988, Arizonans had second thoughts about this simple rule. They were reacting to the political trauma caused by the impeachment and attempted recall of Governor Evan Mecham (see chaps. 3 and 4). Some blamed the state's plurality rule. It was observed that Governor Mecham had won the office in an unusual three-way race where the votes were distributed as follows:

Evan Mecham (R) = 40 percent
Carolyn Warner (D) = 34 percent
Bill Shulz (I) = 26 percent

In other words, although Mecham won, he didn't have the support of a majority of the voters casting ballots. In fact, it could be argued that 60 percent of the electorate wanted anybody but Mecham. Mecham wouldn't have become governor if a *majority* of the vote—not a plurality—were needed to win the election. Accordingly, in 1988, the voters amended the constitution to require a runoff election between the top two vote-getters if no candidate got a majority. This would ensure that the winner would always have the support of at least half of the state's voters. It seemed like a good idea—at least to the 56 percent of the electorate who supported the constitutional change. Unfortunately, disaster struck at the very next gubernatorial election. There shouldn't have been any need for a runoff, because this was only a two-candidate race. (In a two-candidate race, unless there is a tie, the winner will always have a majority.) The election was extremely close, however, and seven write-in candidates (including a prominent Mecham supporter) siphoned off a scant 11,731 votes in an election where more than one million votes were cast. The final breakdown was as follows:

Fife Symington (R) = 49.7 percent
Terry Goddard (D) = 49.3 percent
All write-ins combined = 1.0 percent

Even though Symington got the most votes, he did not win the election under the constitution's brand-new majority rule. The state was required to conduct a runoff election that was a virtual replay of the original election. Symington won the runoff and became governor, but the duplicate election cost the taxpayers several million dollars. It also

financially burdened the candidates with double campaign expenses, subjected the voters to a campaign that never seemed to end, raised fairness concerns that the two elections might come out differently, and delayed the gubernatorial transition for several months—disrupting state government. At the next general election in 1992, chagrined Arizonans quietly amended the constitution back to the original plurality rule! The lone runoff election remains an anomaly in Arizona history—and an interesting lesson in unintended political consequences.

Compensation The same independent salary commission that makes recommendations for legislative salaries (see chap. 3) also makes recommendations for elected executive officials and judges. The follow-up process is however quite different. The recommendations for these officials do not go to the voters for approval. Rather, they are sent to the governor, who has the power to raise, lower, or completely reject the proposed increases. The governor's recommendations are then transmitted to the legislature. If the legislature does nothing, the salary recommendations automatically take effect.[20] This arrangement conspicuously reverses normal legislative practice: ordinarily the legislature must take action in order to make a change. Clearly, the process was designed to give the legislature political "cover." (Every legislator can tell constituents, "I didn't vote for a pay raise.") The process also puts the governor in the awkward position of reviewing the salary for his or her own office. However, the raises cannot take effect until the next term,[21] and recent governors, with acute sensitivity to public opinion, have typically rejected raises for themselves and most other top offices.[22]

As table 5.3 shows, executive salaries are currently well above legislative salaries. This is because the executive positions are full-time, and the voters are not involved in the salary-setting process. Interestingly, members of the governor's own staff, and more than eight hundred other state employees, receive higher salaries than the governor. (Top university coaches —who are also executive-branch employees—receive compensation in excess of $1 million.)[23] In fact, Arizona's gubernatorial compensation ranks in the bottom six, and Arizona is one of only five states that does not provide an official residence for the governor.[24]

Table 5.3. Salaries of Arizona's elected executives, 2008

Office	Annual salary
Governor	$95,000
Secretary of state	$70,000
Attorney general	$90,000
State treasurer	$70,000
Superintendent of public instruction	$85,000
State mine inspector	$50,000
Corporation commissioner	$73,000

Removal The state constitution provides two alternative ways to remove executive-branch officials from office before the end of their terms: impeachment (by the legislature) and recall (by the people). These processes are described in chapters 3 and 4, respectively.

Succession When an executive office becomes vacant, the governor appoints a replacement to serve until the next general election. If the governor becomes incapacitated, the constitution's succession rules apply. The constitution distinguishes between temporary incapacity (e.g., a short-term disability, temporary absence from state, or impeachment) and permanent incapacity (death, resignation, conviction on impeachment charges, or a permanent disability). In either situation, the secretary of state ordinarily assumes the powers of the office, either temporarily or permanently. If the governor is permanently incapacitated, the secretary of state officially becomes the governor for the balance of the term and appoints someone to fill the vacated office of secretary of state.[25] As table 5.4 indicates, the succession clause has come into play six times in Arizona's brief history as a state. More strikingly, *five* of the last eight governors did not initially acquire the office by election. The most recent occasion was in January 2009, when Secretary of State Jan Brewer (R) took over after Governor Napolitano (D) resigned to become U.S. Secretary of Homeland Security. On one occasion the attorney general became governor because the secretary of state was ineligible.[26] The high number of non-elected governors has prompted some

to argue that the state needs a lieutenant governor (an office found in forty-three other states). A constitutional referendum to create such an office was resoundingly rejected by the voters in 1994. Presumably, they concluded that it would be a tax-supported position with insufficient responsibilities. Others have proposed simply changing the title "secretary of state" to "lieutenant governor," to cue voters to the potential for promotion. Opponents counter that unless the duties of the office also were altered, a name change wouldn't solve the problem. In any event, this too would require a constitutional amendment approved by the voters.

Table 5.4. Arizona's governors since statehood

Term	Governor	Term	Governor
1912	George W. P. Hunt (D)	1956	Ernest W. McFarland (D)
1914	George W. P. Hunt (D)	1958	Paul J. Fannin (R)
1916	George W. P. Hunt (D)[a]	1960	Paul J. Fannin (R)
1918	Thomas E. Campbell (R)	1962	Paul J. Fannin (R)
1920	Thomas E. Campbell (R)	1964	Samuel P. Goddard (D)
1922	George W. P. Hunt (D)	1966	Jack Williams (R)
1924	George W. P. Hunt (D)	1968	Jack Williams (R)
1926	George W. P. Hunt (D)	1970	Jack Williams (R)[c]
1928	John C. Phillips (D)	1974	Raul H. Castro (D)
1930	George W. P. Hunt (D)		Wesley Bolin (D) (1977)[d]
1932	Benjamin B. Moeur (D)		Bruce Babbitt (D) (1978)[e]
1934	Benjamin B. Moeur (D)	1978	Bruce Babbitt (D)
1936	Rawglie C. Stanford (D)	1982	Bruce Babbitt (D)
1938	Robert T. Jones (D)	1986	Evan Mecham (R)
1940	Sidney P. Osborn (D)		Rose Mofford (D) (1988)[f]
1942	Sidney P. Osborn (D)	1990	Fife Symington (R)
1944	Sidney P. Osborn (D)	1994	Fife Symington (R)

1946	Sidney P. Osborn (D)		Jane D. Hull (R) (1997)[g]
	Daniel E. Garvey (D) (1948)[b]	1998	Jane D. Hull (R)
1948	Daniel E. Garvey (D)	2002	Janet Napolitano (D)
1950	J. Howard Pyle (R)	2006	Janet Napolitano (D)
1952	J. Howard Pyle (R)		Jan Brewer (R) (2009)[h]
1954	Ernest W. McFarland (D)		

[a] Thomas E. Campbell served one year before the court declared Hunt the election winner.

[b] Technically Garvey (secretary of state) only became "acting governor" upon the death of Osborn, and he was denied the governor's compensation. The constitution was amended five months later to make it clear that the constitutional successor becomes governor in all respects, including salary.

[c] Terms were lengthened to four years as a result of a 1968 constitutional amendment.

[d] Bolin (secretary of state) became governor when Raul Castro resigned to become U.S. ambassador to Argentina.

[e] Babbitt (attorney general) became governor upon the death of Bolin.

[f] Mofford (secretary of state) became governor upon the impeachment and ouster of Mecham.

[g] Hull (secretary of state) became governor when Symington resigned following a criminal conviction.

[h] Brewer (secretary of state) became governor when Napolitano resigned to become U.S. Secretary of Homeland Security.

The Governor's Powers

The public expects the governor to provide strong leadership. He or she is supposed to offer creative solutions to the state's problems, efficiently manage the state's bureaucracy, forcefully take charge in times of crisis, and represent the state on important ceremonial occasions. In short, the governor is viewed as the state's presidential equivalent. Unfortunately, the

constitution and statutes do not give the Arizona governor the powers to fully realize these expectations. Although the office does possess significant administrative, legislative, and judicial powers, these formal powers are limited in multiple ways. In addition, the plural structure of the executive branch prevents the governor from having a monopoly on leadership. Nonetheless, if a governor is politically astute—and lucky—he or she can be the most powerful person in state government.

Administrative Powers

The governor's primary job is to manage the state's bureaucracy and coordinate the many executive-branch responsibilities listed at the start of this chapter. The constitution and statutes give the governor various means to do this.

Appointment powers One way that the governor exerts influence over the state bureaucracy is through the power to appoint. The governor selects the heads of most state agencies and fills vacancies on boards and commissions. This enables the governor to install persons who share the same political philosophy and policy views. For example, if the governor wants the state's prisons to emphasize tough punishment over rehabilitation, he or she will pick a corrections head of similar mind.

There are, however, various limits to the governor's appointment powers. First, most appointments must be approved by the senate, although this is largely a formality. The senate rarely rejects a governor's choice. Second, the governor cannot "clean house" by filling every top position in the state at once. Although the governor can usually replace the heads of top departments at will, independent board members typically serve for staggered, fixed terms that do not necessarily coincide with the governor's term. This means that a governor inherits appointees from predecessors and must wait until a board member's term expires before a replacement can be appointed. Third, constitutional and statutory provisions may limit the governor's freedom of choice by requiring that the appointee possess specific qualifications, or be chosen from a panel nominated by others. Finally, appointees do not always remain loyal to the governor's agenda once they get the job. Without commensurate removal powers, the governor cannot maintain effective control.

Removal powers The governor's removal powers are also limited. Some appointees can be fired by the governor for any reason whatsoever. These include the heads of most large agencies such as the Department of Corrections. They serve at the pleasure of the governor. This permits the governor to control how their agencies operate. If the agency refuses to follow the governor's directives, the head can be summarily replaced with a more obedient director. In contrast, most state personnel are not removable by the governor except for cause—which means provable incompetence or wrongdoing, not disagreements over policy. Individuals in this category include the heads of a few sensitive agencies (e.g., the Financial Institutions Department), the members of virtually all boards and commissions, and the majority of the 65,000 civil service workers who make up the state's bureaucracy. A striking example of a governor's powerlessness to control state boards occurred in 1999 when the Arizona Medical Board licensed an admitted sex offender over Governor Hull's strong objections. Although the governor attended the board meeting in person, the board refused to back down.[27] Clashes between governors and the parole board are even more commonplace. In fact, Governor Symington unsuccessfully pushed for the power to fire appointees following his own high-profile clashes with this and other boards.

Finally, the governor cannot fire the other ten independently elected members of the executive branch. As discussed more fully below, these officials head agencies with significant public policy and budgetary implications. For example, public schools—which account for more than half of the state's annual budget—are regulated by the state school superintendent along with the state and county boards of education.[28] Similarly, the state's energy policies fall under the purview of the corporation commission, which regulates power companies and public utilities. (California's recall of its governor over the state's electricity crisis amply illustrates the sensitivity of this area.) Unfortunately, the general public tends to conflate governors with far more powerful presidents, holding the former responsible for policy matters beyond the governor's formal control.

Fiscal powers As detailed in chapter 3, the governor is a major participant in the state's appropriations process. By statute, the governor is required to submit a proposed operating budget to the legislature, requesting specific dollar amounts for all state agencies, boards, and programs. The legislature

has the final say on appropriations, and agencies can independently lobby the legislature for more funds. Nonetheless, the governor's backing is often critical to their success. This reality gives the governor some leverage over independent agencies; that is, the governor can use this fiscal power to pressure such agencies to toe the line.

Most importantly, the powerful line-item veto, discussed in greater detail below, enables the governor to strike individual items from appropriation bills. Although the legislature can override any veto, an override requires a supermajority vote that is extremely difficult to muster. Accordingly, even a threatened veto can become a powerful bargaining chip in the budget negotiations that routinely take place between the legislature and the governor. Governor Brewer's epic battle with the legislature during her first year in office is illustrative. As the 2010 fiscal year rapidly approached, the legislature intentionally stalled. It delayed transmitting a budget to Brewer to force the governor to accept massive budget cuts. Brewer retaliated by suing the legislature and establishing the principle that bills must be transmitted in a timely fashion.[29] In the end, the new governor (who wanted more funding for schools and other programs) wound up vetoing sixteen budget bills, including the entire appropriation for the state's K–12 schools. This hardball tactic forced the legislature into special sessions and further negotiations with the governor.[30]

Military powers The governor is the commander-in-chief of the state's military forces (the National Guard). Ordinarily, this authority would warrant little more than a footnote. Unless a natural disaster requires deployment, most governors simply appoint the adjutant general (military head) and have little further contact with the guard. Arizona's governors have however exercised their military authority in more unorthodox ways.

Arizona's first governor, George W. P. Hunt (fig. 5.3), took his commander-in-chief title quite literally by camping out with the guard on some training maneuvers.[31] Other governors deployed the national guard for controversial purposes. For example, in 1934, Governor Benjamin Moeur ordered the state's guard to block construction of the Parker Dam because it would divert Colorado River water to California. Moeur sent one hundred armed personnel to the dam site and managed to delay construction of the federal project for nearly a year.[32] Although the deployment was plainly illegal—and the federal government could have nationalized the guard at any

time—Moeur's attention-getting stunt won concessions from the federal government on water issues.

Figure 5.3. Governor George W. P. Hunt, Arizona's first governor, served a record seven terms in office. Here Hunt demonstrates his common touch by mowing the state capitol lawn.

In 1953, Governor Howard Pyle sent more than one hundred armed highway patrol officers and national guardsmen into Colorado City (then known as Short Creek) to end polygamy in the remote, fundamentalist religious community. Arriving in the middle of the night, they arrested ninety-six men. Community leaders protested on grounds of religious persecution, the media criticized the governor's use of force, and a backlash from the raid contributed to Pyle's defeat in the next gubernatorial election.[33]

Governor Bruce Babbitt sent the national guard along with state police into Morenci in 1983 to restore order in the strike-torn mining community. Although Babbitt's deployment rested on firmer legal grounds than Governor

Moeur's, it remains controversial to this day. Labor sympathizers, who supported Babbitt's 1982 election, felt betrayed. They still contend that Babbitt unfairly sided with mine owners and caused a lawful strike for improved working conditions to end prematurely.

Finally, in November 1995, Governor Fife Symington copied Moeur's strategy when he used the national guard to protest the federal government's attempted closure of Grand Canyon National Park. (The shutdown was ordered because of a budget standoff between Congress and the president.) While Symington was publicly threatening to use force to keep the park open,[34] federal officials were quietly preparing to nationalize the guard. In the end, the governor's deployment of fifty unarmed guardsmen to the gates of the national park was little more than a media event. As with Moeur's ploy, it accomplished the desired political result: the federal government negotiated an arrangement with the state that allowed the Grand Canyon to remain open.

Lawmaking Powers

The governor is not a member of the legislature. The state constitution does however give the governor three legislative powers that, if used shrewdly, can make the governor a significant player in the lawmaking process.

The power to propose new legislation The constitution specifically directs the governor to recommend new legislation at the start of every regular session.[35] A governor is particularly well suited to do so for several reasons. First, unlike individual legislators, who come from small districts, the governor represents all the people in the state. Second, the governor also possesses superior information about the state's particular needs, because department heads regularly report to the governor.[36] Third, the governor typically has more national and international contacts than other public officials in the state. Finally, the governor is usually a leader in his or her own party. All of these factors give the governor an ideal perspective for developing broad policy initiatives.

Arizona governors make their annual recommendations in a speech to the legislature known as the State of the State Address. Effective governors do not rely on this speech alone. Rather, publicly and behind the scenes, they propose new legislation all the time. The governor must find a sympathetic

legislator to formally introduce a bill, but ordinarily this is not a problem. Although the governor's support does not guarantee that a particular bill will pass, it usually carries considerable weight when the legislature is controlled by the governor's own party.

The power to call the legislature into special session As noted in chapter 3, the constitution also gives the governor the authority to call the legislature into special session. This power enables the governor to force lawmakers to meet and consider the particular issue specified in the governor's call. If the legislature is already in regular session, a special session serves to interrupt the legislature's regular business and divert its attention. Again, this does not guarantee that the legislature will take the action desired by the governor—or for that matter, any action. The legislature can adjourn itself any time after it formally meets. To avoid such a political embarrassment, or a costly session that drags on too long, governors usually closely consult with legislative leaders before calling a special session. Nonetheless, this power gives the governor the ability to influence the legislature's agenda. In politically adept hands, it can accomplish far more.

The veto power The governor's most powerful legislative tool is the veto. Unless the legislature diverts a bill to the people using the statutory referendum (see chap. 4), all bills must go to the governor before they can become law. The governor ordinarily has five days either to accept a bill or to veto it.[37] The time frame expands to ten days if the legislature has adjourned. Actually, a substantial number of bills do arrive on the governor's desk after adjournment. Short sessions make this situation somewhat unavoidable. Nonetheless, there can be serious consequences to this bill pileup. For example, in 2000, Governor Jane Hull accepted blame for failing to veto the disastrously flawed alt-fuels bill (see chap. 3). The bill—which materialized in the final hours of the legislative session—was ninety-two pages long, exceedingly technical, and part of a mass of end-of-session bills all competing for the governor's attention.

The veto process itself is fairly straightforward. The constitution requires the governor to draft a short written message to the legislature setting forth the objection to the bill.[38] Theoretically, the governor's veto does not completely kill the measure. Rather, it goes back to the legislature for a possible override vote. In actuality, however, vetoes are seldom overridden in

Arizona for several reasons. First, an override requires a supermajority vote (see table 3.4), which is extremely hard to muster. Second, the legislature often adjourns before an override vote can be taken. Finally, the legislature sometimes passes a bill with the expectation that it will be vetoed. It might do this to placate a demanding constituent by shifting the blame to the governor. Or, it might be simply seeking to call attention to the governor's position in an election year. Whether or not the legislature is strongly committed to the bill, the governor's veto almost always sticks.

The veto power, however, has limitations. Unless the bill involves appropriations (a special case discussed below), the governor has only two options: to accept the bill *exactly as written* or to veto the entire bill. That is, the governor cannot use the veto power to add new provisions, to rewrite objectionable language, or to strike parts of a bill while approving the remainder. The veto is all or nothing. Because the legislature knows this, it can force the governor's hand. For example, it might **piggyback** (combine) two bills, compelling the governor to accept something objectionable in order to obtain something that the governor badly wants. Conversely, opponents of a bill can engineer a veto by including a "poison pill" (objectionable language in a bill). Similar political strategies are widely used on the federal level where riders (unrelated pieces of legislation) are commonly tacked onto bills. As noted in chapter 3, however, the Arizona Constitution requires all bills to embrace a single subject.[39] This serves to reduce, but not entirely eliminate, such legislative tactics in Arizona.

The governor's veto power is much greater with respect to appropriation (spending) bills. Here, the governor possesses a true line-item veto. That is, the governor can strike one or more items in a spending bill while approving the remainder. This is one of the few areas where the governor's power exceeds that of the president, who lacks a line-item veto. Even here, however, there are ways in which the legislature can outmaneuver the governor. For example, it can appropriate funds in a **lump-sum** (non-itemized) fashion that deprives the governor of individual items to selectively veto. The downside of this tactic is that it gives the governor greater discretion to determine how the funds are allocated—something that the legislature may not wish to do. Finally, line-item vetoes can be overridden by a supermajority vote. As with regular vetoes, such a vote is hard to muster, and therefore rarely occurs.

Technically, the veto is only a negative, blocking tool. Nonetheless, a

governor with political savvy can use it to achieve affirmative ends. For example, by threatening to veto legislation well in advance, the governor can pressure the legislature into rewriting the bill to the governor's liking. No member of the legislature has equivalent clout.[40] Alternatively, the governor can threaten to veto other bills if the legislature does not pass the governor's legislation. Much like a game of poker, this tactic won't work if the legislature believes the governor is bluffing. Accordingly, veto threats from governors who rarely veto are not likely to be taken seriously.

Governor Bruce Babbitt (D) was the first modern governor to fully exploit the veto power (see fig. 5.4). He vetoed 114 bills, which at the time was a record. Babbitt's aggressive use of the veto power enabled him to become a major player in the lawmaking process even though the legislature was controlled by a powerful speaker of the opposite party. Unlike many of his predecessors, Babbitt got involved in the lawmaking process early on; he didn't wait for the bills to arrive on his desk. When Babbitt didn't like the language of a particular bill, he would threaten to veto it unless the bill were modified. Initially, the legislature ignored his threats, regarding them as mere bluffs. But after Babbitt followed through with a record number of vetoes, the legislature was forced to take the threats seriously. Babbitt was also able to win passage of some of his own party's bills by threatening to veto legislation favored by the Republican leadership.

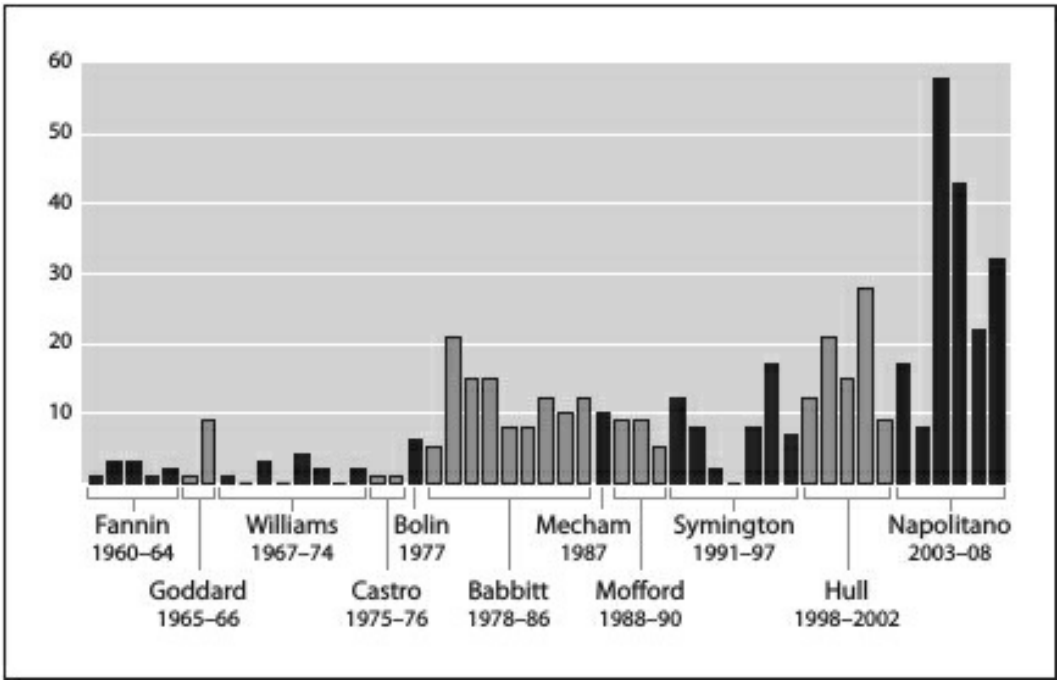


Figure 5.4. Vetoes by modern Arizona governors, 1960–2008 (excludes special sessions and line-item vetoes).

Babbitt's successors, Governors Symington (R) and Hull (R), were surprisingly aggressive with the veto pen as well. Unlike Babbitt, they were exercising the power against legislatures controlled by their own party. Vetoes are normally rare in such instances since members of the same party usually support a common agenda. The vetoes made Symington a serious player in the lawmaking process, just as they enhanced Babbitt's clout. Governor Hull (R), however, encountered some push-back: four of her vetoes were even overridden by the legislature—a rarity in Arizona.

To date no governor has exercised the veto power as aggressively and effectively as Governor Janet Napolitano (D). Like Babbitt, Napolitano was confronted with an antagonistic legislature controlled by the opposite party. Nonetheless, using her veto power, Napolitano repeatedly blocked conservative social legislation and achieved some of her own policy goals (e.g., all-day kindergarten). Napolitano's bold vetoes angered lawmakers, who twice took the governor to court. The litigation failed however to resolve the legality of a controversial line-item veto tactic that enabled the governor to *increase* spending beyond the legislature's clear intent.[41] Strikingly, Napolitano's successor, Governor Jan Brewer (R), used the same controversial tactic to veto the budget submitted by her own party. In all, the new governor vetoed 22 bills (out of 213) in her first six months in office.[42]

As figure 5.4 reveals, recent governors of both parties appear quite willing to wield the veto pen aggressively. However, playing hardball with the legislature has undeniable risks. If the governor pushes too hard, he or she can jeopardize the delicate relationships that are needed for legislative success. In the end, the governor's influence over the lawmaking process depends upon a combination of factors, including the governor's own political skills, the ideological composition of the legislature, the caliber of legislative leadership, and the governor's overall popularity. If these factors are all favorably aligned, it is possible for a governor to dominate the lawmaking process.

Judicial Powers

The constitution also gives the governor limited judicial powers. They do not allow the governor to intrude significantly into the operation of the courts, which is a notoriously independent branch. They do however contribute to the system of checks and balances found in virtually all American governments.

The power to appoint judges Since 1974, governors have appointed all of the state's appellate judges and most of its major trial court judges. As explained in chapter 6, this power is constrained by the fact that the governor must choose from a short list of names compiled by a special nominating commission. On the other hand, the governor's choice is final—that is, unlike most other gubernatorial appointments, it does not require senate approval. Of course, appointing someone to the bench does not guarantee that the judge will be faithful to the governor's philosophy. Moreover, Arizona judges do not serve for life, but must survive a **retention election** if they want additional terms. This makes the governor's appointment power less significant than the president's comparable power over federal judicial appointments. Nonetheless, it does allow the governor to exert some influence over the political orientation and temperament of the state's judiciary.

Clemency powers The constitution gives the governor three **clemency** powers.[43] Clemency actually has a long history in Anglo-American jurisprudence. Punishments are supposed to be imposed in a uniform way. While most people regard this system as fair, there may be special circumstances that make a particular sentence unjust. Clemency is intended to address this problem and prevent criminal laws from being applied too rigidly. It allows one person—the governor—to set aside or modify a punishment for any reason whatsoever. Basically, the applicant appeals to the governor's conscience. The president of the United States has comparable powers. However, because the president's clemency powers extend only to violations of federal law, and most criminals are convicted under state law, governors actually possess the more significant authority. Arizona governors can grant three different types of relief:

1. *Reprieve:* A **reprieve** simply delays the carrying out of a criminal sentence. For example, a governor could grant a reprieve to postpone a

scheduled execution. Alternately, a reprieve might delay the start of a prison term for various humanitarian reasons.

2. *Commutation:* A **commutation** permits the governor to reduce the court's sentence. For example, a death sentence could be commuted to life imprisonment, a prison sentence could be shortened from ten years to five, or an offender could be released on probation, in lieu of imprisonment.
3. *Pardon:* A **pardon** completely releases the convicted person from all criminal penalties. It signifies official forgiveness by the state and is therefore sometimes granted for symbolic reasons even after a person has served the full original sentence.

Although only the governor can grant clemency, there are some significant limitations on the governor's powers. First, the constitution specifies that clemency can be granted only after a person is convicted of a crime,[44] and it does not extend to treason or impeachment cases. Above all, the governor cannot act at all unless the **Board of Executive Clemency** recommends clemency first.[45] The board's approval is not actually a constitutional requirement but rather a statutory limitation that the constitution permits. This particular restriction was added in 1914 as a backlash to Governor Hunt's leniency in death penalty and other cases. The five-person clemency board is intended to function as an independent check on the governor. Its full-time members serve for staggered five-year terms and cannot be removed by the governor except for cause.[46] This arrangement enables the clemency board to function in a highly independent manner, fairly immune from gubernatorial and other pressures. Whenever executions are scheduled, the board remains in close contact with the governor, ready to pass on any last-minute clemency recommendations. If however a majority of the board does not approve clemency, the governor is powerless to act.

Clemency board members actually devote most of their attention to **parole** determinations, not clemency matters. (Paroles allow eligible inmates to be released from prison before the end of their sentences. Unlike commutations and pardons, a parole does not reduce the sentence itself. The inmate remains under state supervision, and can be returned to prison if the terms of the parole are violated.) Paroles generate public controversy too, but the governor has no formal say in their determination. Nonetheless, this has

not stopped governors from periodically trying to influence board decisions.[47]

Finally, the granting of clemency typically unleashes a backlash, making public opinion a potent check on the governor's clemency powers. In 1989, Governor Mofford (D) commuted the life sentences of two murderers. Following a public outcry, the governor attempted to rescind the commutations, but the court ruled that it was too late. Shortly thereafter, the legislature pointedly added a new limitation on the governor's clemency powers. Now, whenever executive clemency is granted, the governor is required to publish the reasons in the newspaper in "bold type."[48] Clemency is usually a hot-button issue with the general public, but few cases have provoked as much enduring controversy as that of James Hamm. Hamm was one of the two murderers involved in Governor Mofford's infamous commutation. At the time of his release in 1992, he had served seventeen years of a life sentence for an execution-style murder committed during a drug-related robbery. Hamm earned a college degree from Northern Arizona University while still in prison, and a law degree from ASU upon his release. His subsequent attempts to teach and practice law in Arizona have been thwarted by official and public opposition.[49] The intense controversy that the Hamm case continues to generate reveals deep societal divisions over the boundaries of clemency, rehabilitation, and punishment.

Informal Powers

All of the powers outlined above derive from the state constitution and statutes. The governor also possesses informal powers that can reinforce (or if exercised ineptly, dilute) the governor's formal authority. For example, the governor is the ceremonial head of state for Arizona. He or she delivers speeches on important public occasions, entertains visiting dignitaries, issues proclamations and awards, and is usually the best known representative of the government. Indeed, a considerable portion of the governor's daily schedule is devoted to such public relations activity. Additionally, governors usually play a major leadership role within their respective political parties, although they often have competition from U.S. senators and other influential officials. Party leadership and ceremonial leadership can translate into real political power. Simply put, a popular governor is likely to have more clout with the legislature, the bureaucracy, and local officials.

Other Elected Officials

Four other officials make up the "executive department" along with the governor and can potentially inherit the top office. These are (in succession order): the secretary of state, attorney general, treasurer, and superintendent of public instruction. All are elected in the same election cycle as the governor (see table 5.2), and must meet the same minimum qualifications described above. In addition, Arizona voters elect six other statewide officials: a mine inspector and five corporation commissioners. (The latter have staggered terms, so that only two commissioners are elected in the same cycle as the governor.)

The Secretary of State

The secretary of state stands first in line of succession to the governor. As table 5.4 indicates, this position has become a fast track to the top office. Four out of the last six elected secretaries of state acquired the governorship through this means. Those favorable odds have encouraged politically ambitious persons to trade more powerful positions for this office. For example, rumors of Governor Symington's impending legal troubles prompted both the speaker of the house and the senate minority leader to run for secretary of state in 1994. The gamble paid off when Symington was forced to resign following a federal criminal conviction.

Some worry that most voters don't realize that Arizona lacks a lieutenant governor and that the secretary of state is the heir apparent. In fact, only Oregon and Wyoming have a similar arrangement.[50] Others argue that being secretary of state doesn't adequately prepare the officeholder to assume the governor's duties. Finally, the real possibility that the secretary of state and governor will belong to different parties (see table 5.1) contributes to the disruption of midterm transitions. As noted previously, however, the public appears resistant to a constitutional change.

The secretary of state's responsibilities lie in two main areas: (1) elections and (2) recordkeeping. Overseeing all statewide elections entails many important responsibilities beyond tabulating and certifying the official vote counts. It also includes maintaining accurate voter registration records, certifying that all citizen initiatives and referenda meet constitutional signature and other requirements, certifying that candidate nominating

petitions meet formal legal requirements, preparing the official ballot, preparing voter information pamphlets, training and supervising the personnel who staff local polling places, ensuring the integrity of voting equipment, and maintaining the financial disclosure reports required of candidates, elected officials, political action committees (PACs), and large contributors to ballot campaigns.

On the recordkeeping side, the secretary of state's office is the official repository of the state's laws: that is, it maintains up-to-date editions of the constitution, the statutes, and administrative rules. The office also maintains other important official documents, including election records, trademark registries, lobbyist registration files, registered charities lists, notary public certifications, commercial lien filings, and more.

The Attorney General

The attorney general—colloquially known as the "AG"—is the state's top legal adviser. Although second in line of succession, the attorney general actually wields more real power than the secretary of state does. The attorney general provides legal advice to other elected officials, the state's many agencies and boards, the courts, and occasionally to school districts and local governments. Because the line between legal advice and policy advice is murky, the attorney general can influence public policy through this means. Most of the attorney general's legal advice is rendered on an informal, ongoing basis by the more than three hundred lawyers who work for the attorney general in the state's Department of Law. Occasionally, however, the attorney general is asked to formally opine on an important issue affecting the state. The office will then issue an official Attorney General Opinion.[51] These formal, published legal opinions interpret ambiguous constitutional and statutory provisions. They are binding on state officials until a court rules to the contrary.

In addition to providing general legal advice, the attorney general's office serves as the state's lawyer in most noncriminal litigation. It is also the primary enforcer of Arizona's antitrust, consumer fraud, organized crime, and civil rights laws. As noted previously, this gives the AG significant ability to shape public policy—sometimes in opposition to the governor's policy preferences. The office prosecutes administrative disciplinary actions against doctors, dentists, real estate agents, licensed contractors, and others who hold

occupational licenses.

The attorney general also plays an important, but not exclusive, role in criminal law enforcement. In Arizona, most crimes are initially tried at the county level by elected county attorneys and their staffs (see chap. 7). Appeals of criminal convictions are however typically handled by the attorney general's office to ensure consistency on important legal issues. In addition, the attorney general has supervisory powers over county attorneys and can take over local criminal prosecutions at the request of the governor or county.[52] (This usually occurs when a county attorney has a conflict of interest.)

A statutory requirement that the AG must possess five years of legal experience—in addition to the minimum qualifications that apply to all executive department officials—was declared unconstitutional.[53] It remains uncertain whether being an attorney is a prerequisite for the office, although Arizona's AGs have all been lawyers.

The State Treasurer

The state treasurer is the state's chief financial officer. The treasurer's office safeguards, invests, audits, and disburses the billions of dollars that belong to the state. Essentially, the office functions as the state's banker, processing huge sums each day. The treasurer also serves on numerous official boards involved with financial issues.[54] The treasurer does not have to possess any specialized training, such as an accounting or financial background. Essentially, it is left to the voters to ensure that the treasurer has the necessary fiscal qualifications.[55] Nonetheless, the Arizona Constitution has always singled out this office for special oversight. As noted previously, the treasurer can't leave the state without first giving notice, and the office has always been subject to term limits.

The Superintendent of Public Instruction

The superintendent of public instruction is the state's highest-ranking education official. At the same time, the superintendent's authority is undercut by the astonishing number of other officials and boards that share power in this critical area.[56] The superintendent directs the Arizona Department of Education. This large state agency certifies K–12 teachers,

oversees statewide testing, approves textbooks, sets minimum pupil competencies, and apportions operating funds to public school districts and **charter schools** in accordance with legislative directives. The department's major policies are actually set by the State Board of Education. The superintendent is a member of this board, but the remaining eight members are appointed by the governor. This arrangement obviously dilutes the superintendent's power. Indeed, it is somewhat unusual to subject a high-ranking elected official to the authority of an appointed board.

The superintendent's authority is further undercut by four other state boards that control various aspects of public education.[57] Additionally, the state legislature, the governor, the attorney general, and the courts also play active roles in shaping the state's education policies through their power to enact, enforce, and interpret education laws. Moreover, this is only a listing of the participants at the *state* level. Other powerful individuals and boards operate at the local level (see chap. 7). In short, school governance in Arizona is exceedingly fragmented, and the superintendent of public instruction is just one of many players. The office does however provide a high-profile "bully pulpit" that allows the superintendent to direct public debate on education issues.

Controversially, the state's top school chief does not have to possess any prior teaching or school administration experience. Finally, the superintendent is last in line for gubernatorial succession. Despite this low ranking, in 1996 School Superintendent Keegan briefly became the acting governor when the governor, secretary of state, attorney general, and treasurer all traveled to Pasadena to watch ASU take on Ohio State in the Rose Bowl.

The State Mine Inspector

In addition to the five major offices already described, Arizona also elects a state mine inspector every four years. It is not unusual for a state with substantial mining interests to have such an inspector; mining is a dangerous activity. Having the position as an elected, constitutional office is however singular and anachronistic. (The state's many other health and safety inspectors are all appointed.) Arizona's unusual arrangement was a reaction to the mining industry's powerful—and often corrupt—influence over government during the territorial period. The constitution's Progressive

drafters reasoned that mineworkers would be better protected by an independently elected inspector than by one appointed by the governor with "help" from the regulated industry.

Arizona Corporation Commissioners

The five-member Arizona Corporation Commission is one of the state's most powerful regulatory bodies. As its name indicates, the commission regulates corporations. That is, it certifies businesses that wish to incorporate under Arizona law and regulates the securities that they sell. It also registers out-of-state corporations that conduct business in Arizona. The real power of the commission, however, centers on its authority over one particular type of corporation, namely **public service corporations.** These are private[58] utility companies that provide gas, electricity, water, sewage treatment, telephone, and similar types of services.[59] Because most of these businesses are legalized monopolies, the Arizona Corporation Commission determines the maximum rates they can charge. It also has sweeping control over what services these utilities offer and how the services are delivered. (In essence, government regulation serves as a substitute for the missing market competition.)

Accordingly, when a public service corporation requests a rate hike or wants to alter its services, the commission schedules a public evidentiary hearing. The outcomes of these hearings, however, have not always been as pro-consumer as the Progressives intended. In part, this is because uninformed voters sometimes elect commissioners who have stronger ties to the regulated utilities (or their shareholders) than to consumers. In addition, the hearings have not always been evenly balanced. The superior expertise and resources of the utilities have enabled them to present stronger cases to the commission than the disorganized consumers who objected. To rectify this problem, the legislature created the Residential Utility Consumer Office (RUCO) in 1983.[60] This office's mandate is to level the playing field. It intervenes in Arizona Corporation Commission hearings on behalf of residential consumers and presents evidence and legal arguments to counter the utilities.

California's 2003 energy crisis—which eventually led to the recall of the governor—illustrates how politically important utility regulation can be. In contrast to California, however, Arizona's governor has little say in this

area. This is because corporation commissioners are independently elected. The state's Progressive forefathers chose this design over an appointed body of utility experts because they believed that the latter would be too industry-friendly. Today, only a handful of states have elected commissions,[61] and modern scholarship is divided over whether such bodies are really more pro-consumer. There are several reasons why they might not be. First, the races are low profile and the candidates relatively unknown to the general public. As a result most Arizona voters skip this part of the ballot altogether, or base their commissioner choices upon party labels rather than utility policies.[62] This leaves industry insiders as the most engaged voters. There is also some evidence that utilities more heavily pad their rate requests when they appear before elective (as opposed to appointed) bodies to compensate for an anticipated pro-consumer bias.[63] Finally, comparisons are difficult to make because some consumer issues—for example, quality of service, environmental impact, commitment to new energy technologies—are hard to quantify. In any event, Arizona voters have twice rejected legislative proposals to switch to the more common, appointive model.[64] In 2000, the voters did however approve one major change: the commission was expanded from three to five members. (The original, smaller size produced protracted interpersonal conflicts that seriously impeded the commission's functioning.) Commissioners currently serve for staggered four-year terms, with a limit of two consecutive terms.[65]

Online resources

Arizona Governor:
www.azgovernor.gov

Arizona Secretary of State:
www.azsos.gov

Arizona Attorney General:
www.azag.gov

Arizona Treasurer:
www.aztreasury.gov

Arizona Department of Education (including Superintendent of Public Instruction):
www.azed.gov

Arizona State Mine Inspector:
www.asmi.az.gov

Arizona Corporation Commission:
www.azcc.gov

Complete Listing of Arizona State Departments and Agencies:
http://az.gov/webapp/portal

Arizona Executive Orders:
http://azmemory.lib.az.us/cdm4/index.php?CISOROOT=/execorders

Arizona Attorney General Opinions:
http://azmemory.lib.az.us/cdm4/index.php?CISOROOT=/agopinions

6 The Judicial Branch

The judicial branch is the least visible of Arizona's three branches of government. Judges actively promote anonymity by striving to remain "above politics." Nonetheless, the courts wield considerable power over public policy as well as the lives of private citizens. The Progressive drafters of Arizona's constitution were quite attuned to this fact. When they designed the state's judiciary they consciously deviated from the federal model. Once again, their main objective was to prevent the abuse of power by giving the citizens an enlarged role. Constitutional amendments have altered the structure of the court system since statehood,[1] but the citizens still retain significant oversight powers over the judiciary.

The Power of the Judicial Branch

Courts resolve legal disputes. The dispute may involve purely private matters, such as a contract dispute, or matters of wide social significance, such as how Arizona's public schools are funded. The cases may be criminal—that is, brought by government prosecutors to enforce penal statutes against accused wrongdoers—or they may be **civil** (everything else). The opposing parties can be private individuals and organizations, businesses, governments, public bodies, elected officials, or any combination of these. Essentially, the courts provide a formal setting where disagreements can be resolved with fairness and finality. When the courts function properly, they prevent vigilante justice and social breakdown—things that Arizona did experience sporadically during its territorial period.

The full role of the judge is not well understood. Most people envision judges as courtroom referees. We picture them ruling on evidentiary objections, maintaining order, and instructing the jury as to how it should proceed. It is an undeniably important function. Judicial power extends well beyond the disposition of individual cases. As explained in this chapter, judges actually make law. Judge-made law is called the *common law,* and it is just as authoritative as the statutes enacted by the legislature or the people. In addition, judges have an important oversight power known as **judicial**

review. It enables them to declare the acts of other public officials, and even the voters, *unconstitutional* and therefore void. Both of these additional powers can profoundly alter the public policies of the state.

How Judges Make Law and Public Policy

In the American legal system, the judge's job is to apply the appropriate law to each case. This is usually a fairly straightforward process, with the judge simply identifying the relevant statutes or constitutional provisions. Some disputes, however, do not have controlling statutes or constitutional provisions. Most tort cases fall within this category. In these circumstances, the trial judge looks to prior court rulings instead. More specifically, the judge turns to the published opinions of the state's appellate courts. When appellate courts review individual cases they do not merely determine who should win or lose. Rather, they explain their reasoning in published written opinions. These opinions set forth legal principles that lower courts must follow in future cases. Arizona's common law currently fills more than two hundred volumes and is as detailed as any statutory scheme.

The common law changes over time, but it evolves slowly. Appellate judges generally adhere to the principle of *stare decisis,* which literally means "let the decision stand." In plain English, courts strive to follow precedents, or prior rulings. This provides important stability and predictability in the law. Only on rare occasions will an appellate court completely abandon a common-law principle in favor of an entirely new legal rule. The decision that does this is often described as a *landmark* decision. A striking example occurred in 1985, when the Arizona Supreme Court altered the state's employment law. Up to that time, private employers could fire most workers for almost any reason not involving a civil rights violation. This is because most workers are regarded as "at-will" employees. An at-will employee can quit at any time. The flip side however is that the employer can summarily dismiss the worker as well. The landmark case *Wagenseller v. Scottsdale Memorial Hospital*[2] modified this principle. The lawsuit was brought by a nurse who claimed that she had been wrongfully fired for refusing to participate in a "mooning" skit that took place on a river-rafting trip and was later reenacted at a hospital party. (The nurse's supervisor and coworkers had all participated.) Under the existing common law, it didn't matter why the nurse was fired; the hospital had a right to terminate an employee even for a

bad reason. The supreme court, however, decided that a new rule was needed. It announced that employers could no longer fire workers for refusing to engage in immoral conduct or acts contrary to "public policy." In this narrow but significant way, the case changed employment law in the state. Of course, the legislature could have mandated the same—or even greater—protections for workers through the normal lawmaking process. But it had not done so. *Wagenseller* therefore stands as an example of important public policy being made by judges.

More subtly, appellate courts also make law when they interpret vague statutes and constitutional provisions. The judges must fill in the gaps to resolve the ambiguities. When an appellate court does so, its interpretation essentially becomes part of the law, as authoritative as the original text itself. For example, in another landmark case, the supreme court interpreted ambiguous statutory language to require the state to provide increased care to the chronically mentally ill.[3] Once again, the court issued this order after a cost-conscious legislature had declined to act.

The courts' interpretative role is especially significant when constitutional provisions are called into question. Constitutional provisions tend to be written in broad language. This gives the courts substantial interpretive leeway. Additionally, a constitutional ruling is hard to reverse. Unless the court itself decides to undo the ruling down the road, any change requires a brand-new, voter-approved amendment. A good example of the court's power to "make law" through constitutional interpretation involves Arizona's so-called right to privacy. Article 2, section 8 reads in its entirety:

> Sec. 8. Right to privacy
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Notably, the constitution does not define "private affairs," leaving this provision wide open to many different interpretations. In 1987, the state supreme court used section 8 to recognize a qualified right to die. The decision grew out of a case in which a guardian went to court to disconnect life support on a sixty-four-year-old woman in a chronic vegetative state. At the time, Arizona had no statute that permitted the termination of life support under these circumstances. The supreme court, however, decided that section 8 covered the situation. More precisely, the court ruled that the right to privacy "encompass[es] an individual's right to refuse medical treatment."[4]

The judges candidly acknowledged that the termination of life support raised complex philosophical, legal, religious, and scientific issues "to which no single person or profession has all the answers." Nonetheless, the supreme court preempted the legislature in a classic exercise of judicial policymaking. In essence, the court created a new—and significant—right through the process of constitutional interpretation. The decision predated a similar ruling from the U.S. Supreme Court by three years.[5]

During the past sixty years judicial lawmaking has become more prevalent throughout the nation. This is because reformers have increasingly turned to the courts in the face of legislative inaction. Despite the examples cited here, Arizona's appellate courts have not been especially activist. For example, the courts declined to recognize a right of same-sex marriage when courts in several other states did.[6] Until late in the game, Arizona's appellate courts did not stop the widespread racial discrimination that flourished since territorial days. And many significant criminal precedents, such as *Miranda v. Arizona* and *In re Gault*, were actually federal decisions that *reversed* Arizona rulings.[7] Critics of activist judges would applaud the state's judicial restraint. They view judicial lawmaking as undemocratic in that it usurps the authority that properly belongs to the legislature and voters. On the other hand, former Arizona Supreme Court Justice Stanley Feldman vigorously defends the practice, arguing that it gives Arizonans a "double security" in the protection of their rights.[8] And Arizona judges—unlike their federal counterparts—remain directly accountable to the voters through periodic retention elections and the possibility of recall.

Judicial Review

Judges not only have the power to make new laws and policies, they also can strike down laws and policies made by other branches of government or the voters. They do this by exercising the power of judicial review. This oversight power, which was established by a landmark U.S. Supreme Court case in 1803,[9] gives the courts the last word on all questions of constitutional interpretation. Accordingly, whenever a statute, rule, ordinance, or governmental action is challenged on the ground that it conflicts with the state or federal constitution, the courts have the authority to declare the offending law or act unconstitutional—and therefore unenforceable. In theory, judges cannot void laws simply because they personally dislike them

—that *would* usurp the power of the other branches. As previously noted however, constitutional interpretation can be a fairly loose business.

Over the years, Arizona's appellate courts have used the power of judicial review to strike down some significant laws and public policies. For example, in 1994, the supreme court ruled that the state's method of funding school facilities was unconstitutional.[10] Specifically, it concluded that Arizona's heavy reliance on local property taxes discriminated against low-income school districts. The resulting funding disparity was deemed to violate the constitution's mandate of "general and uniform" public schools.[11] Although the governor and the legislature strongly disagreed, the court's ruling forced them to abolish a system that had been used since territorial days. And when the legislature initially failed to adopt a new funding approach that satisfied the judges, the court threatened to close the state's public schools until it complied! In the past six years alone, Arizona's appellate courts have voided a school voucher program that had strong gubernatorial and legislative support, a worker's compensation law that barred recovery by impaired claimants, a jail policy that restricted the abortion rights of inmates, and a city's random drug testing of firefighters. Each was deemed unconstitutional.[12]

The state supreme court has also used its power of judicial review to settle disputes between public officials. For example, in 2009, Governor Brewer took her high-profile budget fight with the state legislature to court.[13] In fact, inter-branch disputes over vetoes and appropriations are becoming increasingly common.[14] Over the years, the courts have settled many other turf wars between elected officials[15] and have resolved numerous disputes between local governments and the state.[16]

Citizen actions are not immune from judicial review either. For example, in 1998, the court struck down an Official English constitutional initiative that had been approved by the voters a decade earlier.[17] (A revised version was reenacted in 2006.) The supreme court also overturned all or part of three voter decisions in the 1998 election.[18] And it has frequently tossed initiatives from the ballot for violating the constitution's single-subject or other technical requirements.[19]

This is not to suggest that it is easy to overturn a statute, governmental policy, or election outcome through litigation. Arizona judges tend to exercise restraint in these situations. For example, after almost a decade's

worth of litigation, the supreme court declined to second-guess the judgment of the Independent Redistricting Commission.[20] And in a case challenging university tuition increases it similarly deferred to the Board of Regents.[21] Nonetheless, the courts' watchdog role, exercised through the power of judicial review, should not be underestimated.

The Court System

Arizona's Major Courts

As indicated in figure 6.1, five major courts make up Arizona's judicial system.[22] Three handle the state's most serious cases and are known as *courts of record.* The remaining two courts handle the less serious cases and are known as *limited jurisdiction,* or *inferior,* courts. Despite these designations, no court in Arizona is unimportant. As outlined below, each performs a critical role in the overall administration of justice.

Justice of the peace (JP or Justice) courts Justice of the peace courts are located in every county. In the larger counties, they are situated in neighborhood precincts that bring them closer to the people they serve. JP courts mostly handle traffic cases that do not result in serious injury. They also have jurisdiction over minor criminal cases (i.e., **misdemeanors** and **petty offenses**), as well as some landlord-tenant disputes. The courts conduct the **preliminary hearings** that precede **felony** trials, and issue search warrants and injunctions in domestic violence and harassment cases.

Small private lawsuits can also be tried in JP courts as long as the amount claimed is less than $10,000.[23] These cases are processed in a streamlined manner that helps keep the litigation costs low. Finally, JP courts have a small-claims division to handle the most minor private disputes (i.e., those less than $2,500). The proceedings in this division are conducted in an expedited, informal, fashion much like the disputes that come before TV judges. The parties must present their case to a hearing officer without the aid of lawyers, and there are no juries. The hearing rarely lasts more than an hour, and a decision is rendered at the end. The tradeoff for such quick justice is that there is no right to appeal the ruling. (Non-small-claims cases can be appealed from JP court to the superior court.)

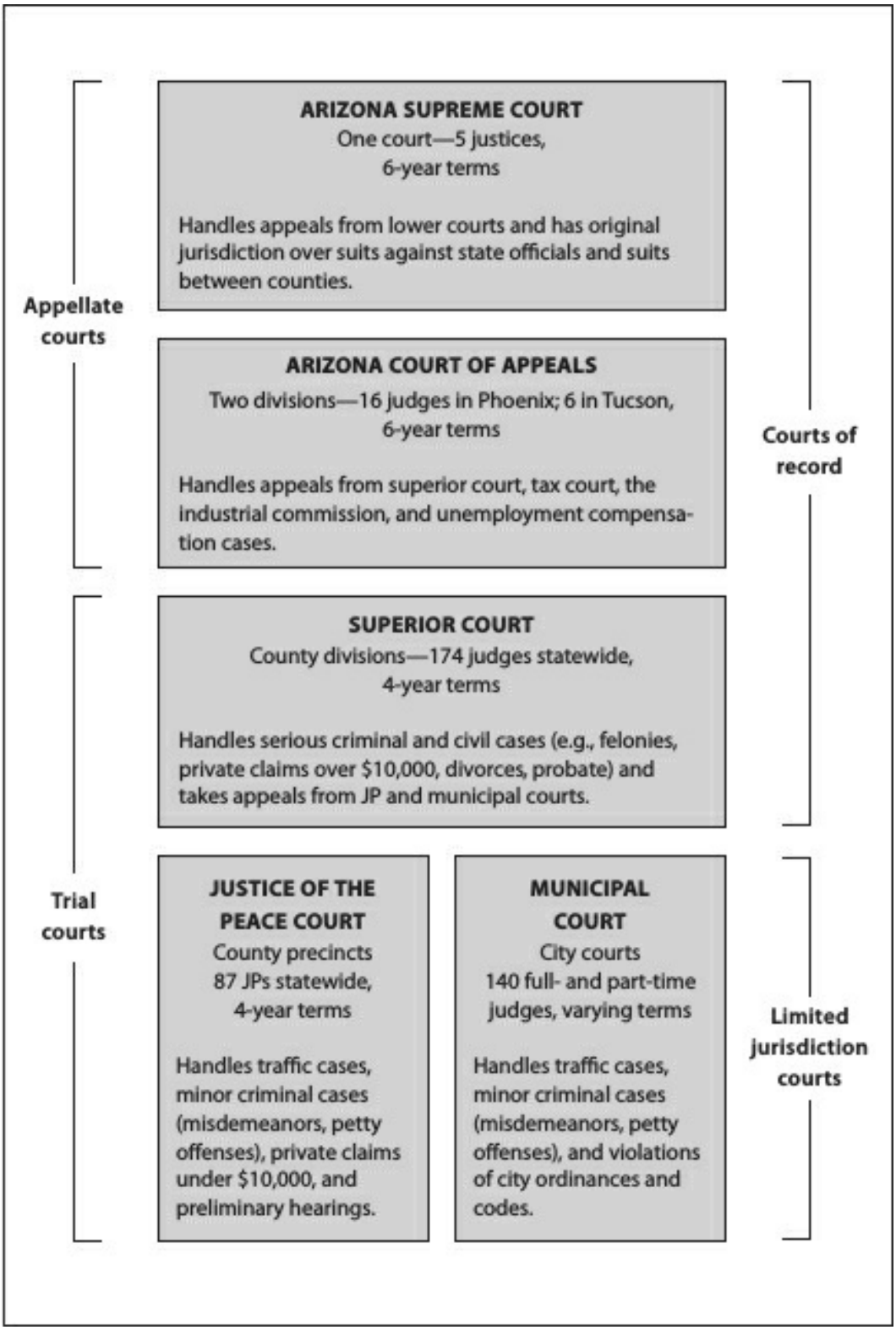


Figure 6.1. The Arizona court system, 2008. (Superior courts and justice of the peace courts have concurrent jurisdiction over some landlord-tenant disputes.)

Justice of the peace courts are actually remnants of Arizona's frontier past. Unlike the judges in the state's other courts, JPs are not required to have law degrees—or even high school diplomas. Essentially, they need only be registered voters over the age of eighteen. JPs serve for four-year terms and are elected in contested elections that are often quite colorful and heated. Some argue that the qualifications are too low and that JP courts should be "professionalized." They cite the increased complexity of the cases, and note that JPs have been subject to a disproportionate number of disciplinary actions.[24] In fact, only a handful of states currently allow non-lawyers to serve as judges in limited jurisdiction courts.[25] JPs are however an entrenched political institution in Arizona and have strong support in Arizona's citizen legislature.[26] To date, proposals to amend the constitution and upgrade the qualifications for JPs have repeatedly failed.

Municipal courts Most cities and towns operate their own courts, which are variously called *municipal*, *city*, or *magistrate* courts. These courts chiefly handle traffic violations and minor crimes that occur within city limits. (Their jurisdiction in this respect overlaps with JP courts.) Municipal courts also try violations of city ordinances and codes. For example, a curfew violation, barking dog, or city nuisance would fall within this category. Finally, municipal courts authorize search warrants, and issue injunctions in domestic violence and harassment cases. Unlike JP courts, city courts do not handle private lawsuits between citizens. Although the jurisdiction of these courts is therefore fairly limited and mostly penal, as figure 6.2 indicates, municipal courts currently process more cases than any other court.

City charters determine the terms,[27] qualifications, and selection methods for municipal court judges. Currently, every city except Yuma appoints these judges for a fixed term; Yuma holds elections. Finally, in contrast to JPs, most city judges are licensed attorneys.

Arizona Superior Court Superior court is the state's major trial court. A division of superior court is located in every county, with the number of judges dependent upon the county's population. Although the county divisions function somewhat independently, they technically make up a single judicial entity.[28]

Superior court handles the state's most serious criminal and civil cases. On the criminal side, all felony trials—for example, murder, rape, armed

robbery—take place in this court. Death penalty sentences are imposed here as well. As figure 6.3 shows, superior court also handles a broad range of civil cases. These include major personal-injury lawsuits, contract disputes, domestic relations matters (e.g., marriage dissolution, adoption, child custody), evictions, disputes over real property and wills, and more. Finally, superior court judges also perform a limited appellate function by reviewing cases from JP and municipal courts.

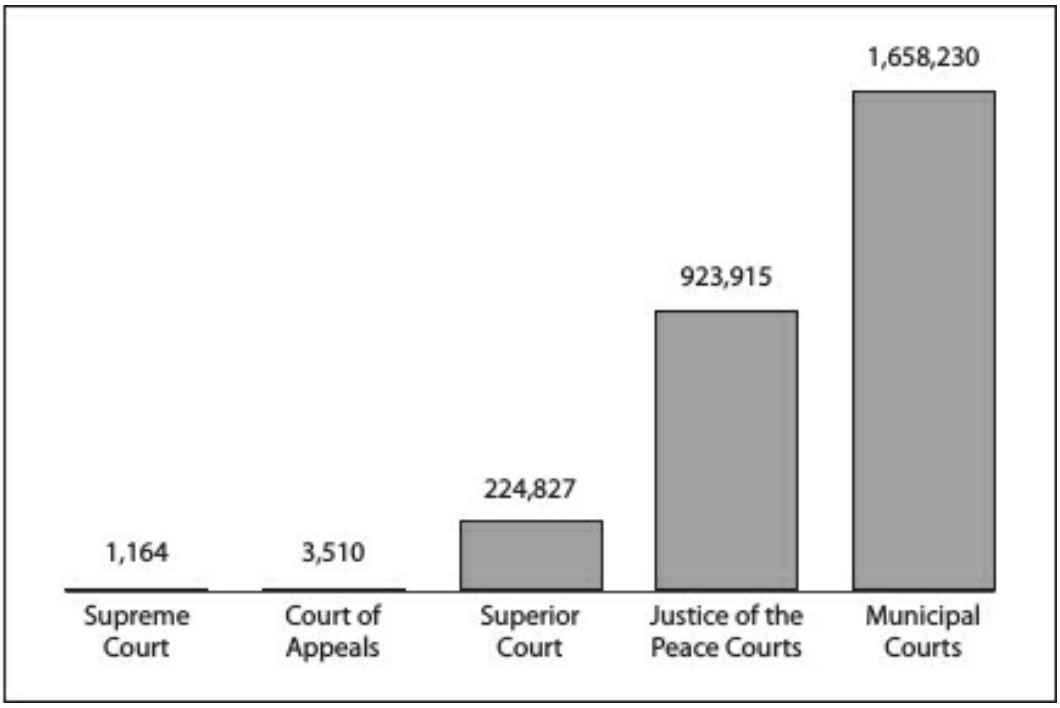


Figure 6.2. Arizona court caseloads, FY 2008.

In contrast to JP court, the proceedings in superior court are quite formal. Twelve-person juries are likely to be employed in the more serious criminal cases. And it can take a year or more before a final judgment is rendered in a major civil case. Because the proceedings are complex, a person without a lawyer is usually at a significant disadvantage in this court.

Superior court judges have unlimited four-year terms. The method of selection and retention varies by county: the smaller counties still hold **nonpartisan** contested elections as the constitution originally prescribed. Maricopa and Pima counties now use merit selection, which is discussed below. Superior court judges must be at least thirty years old, of good moral character, and licensed attorneys for at least five years.[29]

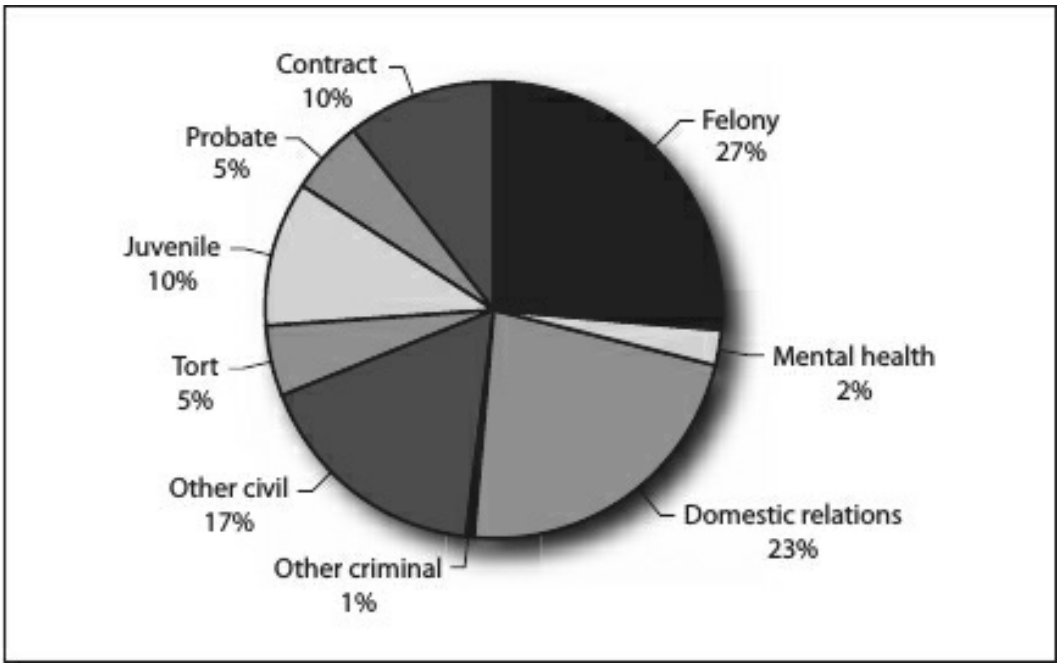


Figure 6.3. Types of cases filed in superior court, FY 2008. (Excludes appeals from limited jurisdiction courts, arbitration cases, post-conviction relief, and harassment and protection orders.)

Arizona Court of Appeals The court of appeals is an intermediate appellate court that came into existence in 1965. As its name indicates, it handles appeals from cases that that were originally tried elsewhere.[30] The court's narrow task is to determine whether any serious legal errors occurred in the lower court proceedings.[31] It does not conduct trials or consider new evidence. If the court concludes that an evidentiary retrial is necessary, it will return the case to the lower court for further proceedings.

Unlike the lower trial courts, the appellate court assigns three judges to each appeal. They will review the record of the lower court proceedings, study written legal briefs submitted by the opposing parties, and conduct a short hearing where the parties present oral arguments. (Normally, such hearings last less than an hour.) The three judges will then privately confer and reach a decision. They do not all have to agree; majority rule determines the official outcome (i.e., agreement of two judges). When the court of appeals renders its decision—which can be several months after the hearing—it normally issues a formal written opinion that becomes part of the common law of the state. Parties who are dissatisfied with the court's ruling

can try to appeal to the state's supreme court. In reality, however, most Arizona appeals terminate with the court of appeals. As figure 6.2 indicates, the supreme court accepts relatively few cases each year.

The court of appeals has two separate divisions: Division 1 (the larger) is located in Phoenix, and Division 2 is located in Tucson. The judges on this court have unlimited six-year terms. They are chosen and retained through merit selection and must meet the same qualifications as superior court judges.[32]

Arizona Supreme Court The supreme court is the state's court of last resort. It is required to review all death penalty cases from the superior court. In fact, these appeals go straight to the supreme court, bypassing the court of appeals altogether. Otherwise, it chooses which appeals it accepts, and it is highly selective.[33] Typically, the supreme court only takes cases with the greatest statewide importance, or to resolve inconsistent lower court rulings. Even though the supreme court is primarily an appellate court, two categories of lawsuits can begin there: cases between counties, and cases against the governor or other state officials in their official capacity.[34] Unless the U.S. Supreme Court accepts jurisdiction—which is exceedingly rare—the decision of the state's supreme court is final.

Five judges, called *justices*, serve on this powerful court, and normally all five participate in every case. The court's appellate procedures are similar to those of the court of appeals. Like the latter court, unanimity among the justices is not required; majority rule determines the outcome (i.e., agreement of three judges).

The supreme court also performs important administrative functions. It oversees all of the lower courts in the state and approves the formal rules under which they operate. It has the authority to discipline and remove judges from office, and to disbar the state's licensed attorneys. Additionally, the chief justice (who is chosen by the other justices for a five-year term) presides over impeachment trials.

Supreme court justices have unlimited six-year terms. They are now chosen and retained through merit selection and must be licensed attorneys for at least ten years.[35]

The Relationship between State and Federal Courts

State courts handle roughly 97 percent of all cases in the United States. However, federal courts also have jurisdiction over Arizona and operate within the state's borders. Moreover, the federal appellate courts have similar-sounding names to Arizona's appellate courts, which can cause confusion. For example, there is a U.S. Court of Appeals as well as a U.S. Supreme Court. Thus, when a reporter simply announces, "The court of appeals ruled today . . ." it isn't always obvious whether the reporter is referring to state or federal ruling.

The jurisdictional boundary between the two court systems is also a source of confusion. As a general rule, federal courts handle cases involving federal law, while state courts handle cases involving state law. There is some overlap, however, and some cases can be brought in either court system at the option of the parties. For example, a case might raise both federal and state issues. The controversy over Arizona's Official English amendment provides a good illustration. Opponents of the Arizona constitutional initiative argued that it violated the federal Constitution's free speech clause. Lawsuits were filed in both state and federal court by different parties, because both courts had jurisdiction. Ten years of litigation followed. In the end, the U.S. Supreme Court deferred to the state courts and, as noted previously, the Arizona Supreme Court struck down the state provision.[36]

Second, a losing party in state court can attempt to appeal the case to the U.S. Supreme Court if the proceedings raise federal issues. *Attempt* is the operative word because this is a long shot—there is only one Supreme Court for the entire country, and its justices are even more selective than the state's in accepting jurisdiction. Nonetheless, many landmark cases such as the *Miranda* ruling (see box) have resulted from appeals of Arizona decisions.

Third, the federal courts will entertain purely state law disputes if one of the opposing parties is a resident of another state or a foreign country. This is called *diversity jurisdiction.* Federal statutes, however, currently impose a $75,000 jurisdictional minimum for these types of cases.[37]

Finally, and perhaps most controversially, criminal cases often bounce back and forth between state and federal courts long after direct appeals have been exhausted. The U.S. Constitution gives state prisoners the right to challenge their imprisonment in federal court by filing **habeas corpus petitions.**[38] Post-conviction habeas proceedings are chiefly responsible for the long delays that occur in death penalty cases.

How Judges Are Chosen, retained, and removed

Judges wield considerable power. For this reason, the method of choosing them not only matters but remains controversial to this day.

MIRANDA

Decisions of the Arizona Supreme Court are usually the end of the line for criminal **defendants.** The *Miranda* case was a striking exception. It went all the way to the U.S. Supreme Court and changed police practices throughout the entire nation. Ernesto Miranda was arrested for kidnapping and rape by Phoenix police. He was twenty-three years old, had only a ninth-grade education, was poor, and was possibly mentally ill. The eighteen-year-old victim had picked Miranda out of a police lineup. During the two-hour interrogation that followed, Miranda gave the police a handwritten confession. There was no evidence that he had been physically coerced or subjected to any psychological tricks to elicit this confession. Miranda was convicted by a superior court jury and sentenced to prison. He appealed to the Arizona Supreme Court, contending that his confession should not have been admitted into evidence. The state's top court disagreed. It concluded that the confession was entirely voluntary and upheld the conviction. Miranda then appealed to the U.S. Supreme Court. Defying the odds, the Court accepted the case. By a narrow five-to-four margin, it sided with Miranda. The Court reasoned that even if the confession was technically voluntary, custodial police interrogations of suspects are inherently psychologically coercive. It concluded that the police should first have informed Miranda (1) that he had a right to remain silent, (2) that his statements could be used against him, and (3) that he had a right to the assistance of counsel, even at government expense. The U.S. Supreme Court voided the state conviction and barred Arizona from using the confession in any subsequent retrial. Miranda did not particularly benefit from his own landmark ruling. He was convicted in the second trial because the state had ample evidence even without the tainted confession. Miranda was paroled from prison in 1973. Three years later, at age thirty-six, he was fatally stabbed during a poker game at a Phoenix bar. His case did however give rise to the well-known Miranda

warnings that have become standard operating procedure for police and "part of our national culture."[39]

Judicial Selection and Retention before Merit Selection

Arizona's Progressive drafters deliberately rejected the federal approach where judges are nominated by the president, confirmed by the U.S. Senate, and serve for life. This model promotes judicial independence and professional expertise. However, Arizona's Progressives were populists who mistrusted all elites, including judges. They believed that judges were partisan and ideological, that the common law favored the rich and powerful, and that judges were corruptible. The Progressive solution was to make judges fully accountable to the voters. Instead of being appointed, judges were to be elected in contested elections like other public officials.[40] Instead of lifetime tenure, judges were to have fixed, renewable terms (six years for appellate judges; four years for all others). And instead of independence, judges could be removed from office at any time—and for any reason—by a majority of the voters using the recall process. This is the way the system operated in Arizona for more than sixty years. It is still the way that superior court judges in the smaller counties, and all justices of the peace, are chosen and retained.

Arizona significantly changed its system in 1974 as a result of growing unease with contested judicial elections. Such elections were problematic for several reasons. First, most voters had limited contact with judges and lacked a sound basis for assessing the qualifications of competing candidates. Second, candidates who lacked campaigning skills were disadvantaged under the election system. Many qualified persons wouldn't consider judicial careers for this reason. Third, although incumbents usually won, they were subjected to increasingly unfair media attacks. Judicial ethics rules prohibit a sitting judge from defending or even publicly commenting on rulings. This allowed challengers to run ads that distorted the judge's record. (A common tactic was to depict the judge as "soft on crime" by taking a single sentencing decision out of context.) Fourth, the escalating mudslinging tended to erode respect for the courts in general.[41] Finally, rising campaign costs forced most judicial candidates to solicit funds. Not surprisingly, the major contributors tended to be big businesses, unions, law firms, and other frequent litigators.[42]

The judges' growing dependence on this money raised serious concerns about the impartiality of their rulings. (What litigant wouldn't feel uneasy if the judge's election was heavily funded by the opposing party?)[43] Ultimately, an alliance of Arizona lawyers, judges, and reformers persuaded the voters to adopt a new system, pioneered by Missouri and known as merit selection.[44] Some variant of this hybrid appointment/election system is now used by twenty-six other states. In Arizona, merit selection applies to roughly 75 percent of the state's general jurisdiction judges—that is, all appellate judges, plus the superior court judges in Maricopa and Pima counties. It works as follows:

Choosing judges under merit selection Whenever there is a judicial vacancy, qualified attorneys apply to one of three judicial nominating commissions.[45] The commission reviews the applicants' lengthy written applications, conducts interviews, and sends the names of its top choices to the governor. Usually it recommends only three (the constitutional minimum), but it can recommend more. The governor then appoints a judge from the commission's short list—no senate approval is required. Once appointed, the judge serves for either a two- or four-year term, depending upon the timing of the vacancy in the state's election cycle.

When merit selection was first adopted, the nominating commissions were directed to make their selections solely on the basis of merit. Although merit remains the "primary" consideration, a 1992 constitutional amendment requires the commission and governor to consider diversity as well.[46] Notwithstanding this mandate, Arizona's judiciary remains overwhelmingly white and male, although the courts have become more diverse since the adoption of merit selection.[47] This issue attracted attention in early 1998 when there was a vacancy on the all-male Arizona Supreme Court. (The state's sole female justice, Lorna Lockwood, had retired decades earlier.) The nominating commission pointedly sent the governor five nominees, four of whom were female. In the end, Governor Hull appointed one of the four women, Ruth V. McGregor, to the supreme court.

The McGregor appointment was noteworthy for a second reason: the governor crossed party lines. Partisanship is not supposed to influence the selection process under merit selection. In fact, the constitution specifically states that the nominees cannot all come from the same party.[48] Nonetheless,

governors overwhelmingly appoint members of their own party. All of Governor Symington's seventeen appellate appointments were Republicans like himself; only two of Governor Hull's twelve appellate appointments crossed party lines.[49] Tellingly, in 2009 only two Democrats out of seventeen total candidates even bothered to apply for a supreme court vacancy to be filled by a new Republican governor.[50] Clearly, party affiliation matters.

Retaining judges under merit selection In order to remain in office, a merit selection judge must survive a retention election at the end of each term. In a retention election, the judge's name appears on the ballot, and the voters are simply asked to vote "yes" or "no" as to whether the judge should be given an additional term. This is quite different from a contested election; in a retention election the judge runs against his or her own record, not against an opponent (see fig. 6.4). If, however, a majority of those voting reject the judge at the polls, a judicial vacancy is created. This starts the merit selection process over, and the governor appoints a new judge from the nominating commission's short list. Because there are no term limits for judges, a judge can remain in office as long as he or she survives these periodic elections (up to a mandatory retirement age of seventy).[51]

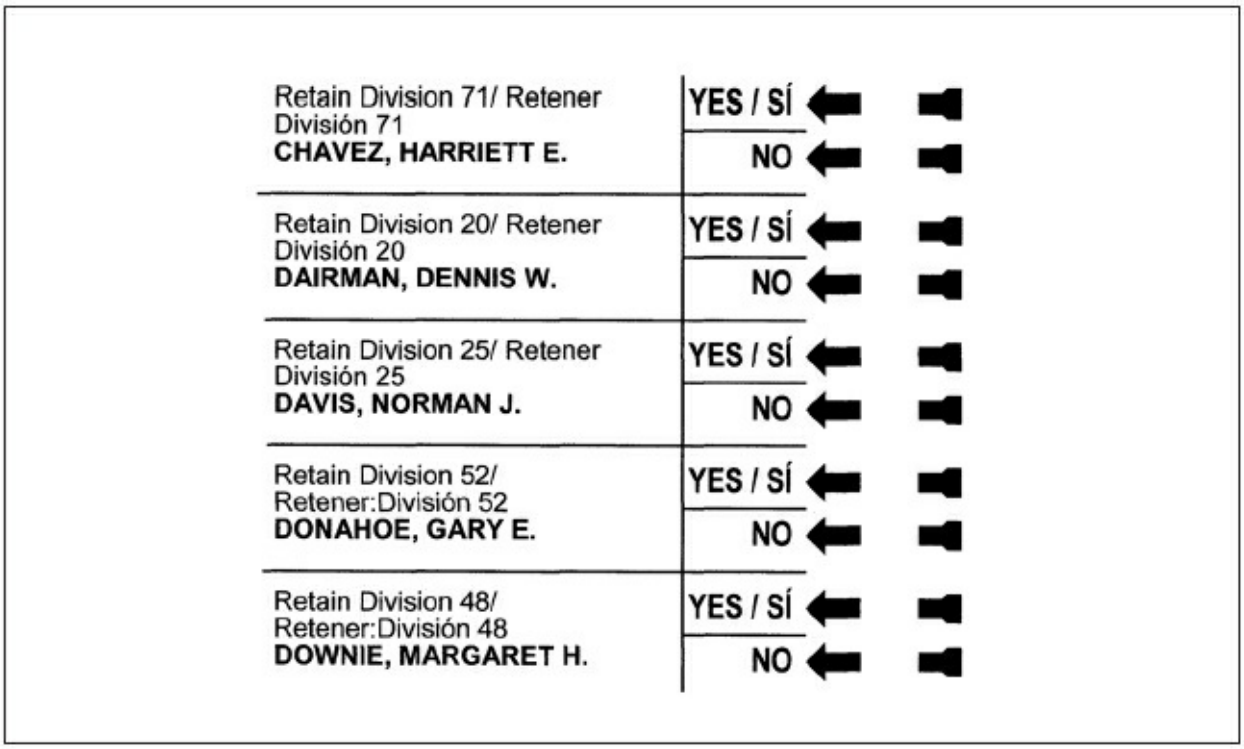


Figure 6.4. A judicial retention ballot. In Maricopa County there may be more than forty-five judges up for retention in the same election.

In the thirty-five-plus years that merit selection has been in effect, only two judges have been voted out of office. This fact has led some to argue that the system doesn't work, while others counter that it is simply proof that good judges are being initially appointed. The truth probably lies somewhere in between. Undeniably, there have been some judges who shouldn't have been retained. For example, in 1988 a Maricopa County Superior Court judge was convicted of marijuana possession in a Texas court. The judge happened to be up for retention a few months later. Although the judge's farfetched testimony attracted considerable media attention, he still mustered enough retention votes for another term. The judge resigned three years later after he was convicted of a second, more serious drug offense and perjury. However, the failure to remove him promptly had consequences: two death row inmates subsequently challenged their sentences, citing the judge's drug addiction.[52]

Part of the problem lies in the sheer number of judges who are simultaneously up for retention. For example, in the 2008 general election, Maricopa County voters were asked to weigh in on forty-six judges—a daunting task for even the most conscientious voter! Apart from ballot fatigue, there is also a problem of voter education. A 1992 constitutional amendment attempted to address this issue by creating the Judicial Performance Review Commission to evaluate the judges up for retention.[53] The commission extensively surveys persons who have had contact with the judge (e.g., litigants, attorneys, witnesses, jurors, staff) and reviews other information. It then votes on the judge's fitness for office and publishes detailed findings in the voter information guide (see fig. 6.5). Unfortunately, it is not evident that this information actually influences voter decisions. For example, in 2008 one superior court judge was identified as being unfit. Nonetheless, he was retained with 57 percent of the vote. The raw election returns suggest that many voters simply skip this portion of the ballot or arbitrarily vote "yes" or "no" across the board.[54] Even if retention elections remain a weak link in the merit selection process, there are other ways to remove unfit judges (discussed below).

Evaluating merit selection After more than three decades of operation, merit

selection still remains controversial. Supporters[55] argue that it has significantly improved the overall quality of the bench,[56] and has allowed younger, less affluent, more diverse individuals to serve. They contend that the system provides ample accountability through retention elections, judicial performance reviews, and administrative removal procedures.[57] And if retention elections challenge voters, it is unclear how a return to contested elections would be an improvement. Above all, defenders stress that merit selection eliminates the troubling dependence upon fund-raising, and insulates judicial candidates from the inflammatory, ideological campaigns that now characterize contested elections in other states. Without merit selection, supporters argue, judges would be reluctant to make tough, unpopular decisions, and public confidence in the courts would be eroded.

Assignment During Survey Period: Criminal
Appointed to Maricopa County Superior Court: 2001

25 Commissioners Voted "Meets"
4 Commissioners Voted "Does Not Meet"

Judicial Performance Standards Evaluation Categories	Attorney Responses *Surveys Distributed: 292 Surveys Returned: 64*	Litigant, Witness, ProPer Responses *Surveys Distributed: 21 Surveys Returned: 17*	Juror Responses *Surveys Distributed: 124 Surveys Returned: 89*
	Score (See Footnote)	Score (See Footnote)	Score (See Footnote)
Legal Ability	90%	N/A	N/A
Integrity	93%	100%	100%
Communication Skills	83%	100%	100%
Judicial Temperament	71%	100%	98%
Administrative Performance	96%	100%	99%
Settlement Activities	94%	N/A	N/A
Administrative Skills	N/A	N/A	N/A

Figure 6.5. A judicial "report card" for a merit selection judge up for retention as it appeared in the 2008 Voter Publicity Pamphlet.

Detractors counter that merit selection has simply substituted the open politics of elections for political manipulations by narrower, less visible groups. They point to the fact that the nominating commissions consist of gubernatorial appointees, that lawyers and political insiders heavily lobby these bodies behind the scenes, and that partisanship plays an undeniable role in the final pick. Furthermore, they contend that the judges have the equivalent of life tenure since retention elections don't work. Some complain that merit selection has failed to produce a sufficiently diverse bench despite the constitutional mandate to do so. Above all, critics challenge the

fundamental underpinning of merit selection: they contend that judges have ideological biases and therefore should be subjected to the same political processes that apply to other officials. In recent years, Arizona legislators have introduced more than a dozen bills to eliminate or significantly alter merit selection, and citizens have circulated initiative petitions to restore contested elections. To date, none of these efforts has gained traction, but the opposition persists.

Removing Judges

The constitution currently provides three ways to remove judges before the end of their terms. First, the legislature can impeach and remove a judge like any other state officer (see chap. 3). Given the legislature's severe time constraints and other responsibilities, however, this is not a realistic option. Second, the voters have the power to remove a judge through the recall process (see chaps. 2 and 4). Despite the strong concerns of President Taft, only one superior court judge has ever been removed through recall—and that was back in 1925.[58] The 25 percent signature requirement, along with the relative invisibility of judges, remain formidable obstacles. This leaves the third method, administrative removal, as the only viable method for removing unfit judges. The eleven-member Arizona Commission on Judicial Conduct has the authority to investigate any type of behavior that "brings the judicial office into disrepute."[59] (This includes incompetence, willful misconduct, or criminal activity.) If the commission determines that a complaint against a judge has merit, it can impose private sanctions. More serious matters are referred to the state supreme court for possible censure, suspension, or immediate removal.[60]

Judicial Procedures

Court procedures vary with the nature of the case. It should come as no surprise that child custody proceedings are not conducted in the same manner as murder trials. There are however three major stages in the typical criminal or civil case: (1) pretrial, (2) trial, and (3) appeal. The appellate process (described previously) is essentially the same for both criminal and civil cases. Significant procedural differences, however, affect how felony and tort cases are initiated and tried. These differences can give rise to opposite

outcomes even when the two types of cases arise from the same set of facts. For example, a person can be acquitted in a criminal case but still found liable for **damages** in a subsequent tort case. This is what happened to O. J. Simpson, who was acquitted of murder in an infamous California trial but ordered to pay more than $33 million to his victim's families in a later, private civil case. The apparent inconsistency is partially explained by the procedural differences between criminal and civil cases, outlined here.

A Typical Felony Case

A felony is a serious crime. In Arizona, it is punishable by incarceration in a state prison or even death. The purpose of a felony case is to establish the accused's guilt and impose the appropriate punishment. It is an important governmental responsibility, and only the government has the power to bring a felony case. This is why such cases are always styled *State of Arizona vs. [named defendant]*. The state, of course, can't appear in court. It is represented by prosecutors, who are government lawyers. In Arizona, prosecutors in the county attorney's office[61] usually handle the case through trial; however, prosecutors in the state attorney general's office take over on appeal.

Pretrial proceedings in felony cases One of the biggest differences between felony and tort cases involves how they are initiated. Felony cases are not easily commenced. The law recognizes that serious harm can result from simply being accused of a felony. For example, the defendant—although presumptively innocent—can be jailed until the trial is over. And even if the defendant is ultimately acquitted, a stigma attaches from having been formally accused. Accordingly, the state constitution does not permit prosecutors to begin felony trials whenever they or the police wish. Rather, the trial can commence only if it has first been authorized by (1) a **grand jury** or (2) a justice of the peace following a preliminary hearing.[62]

The grand jury is the older, more traditional way of initiating criminal cases in the United States. (It is still the only way that federal criminal cases can be begun.) Grand juries are made up of ordinary citizens who have been randomly summoned to serve. Unlike regular trial juries, grand juries can be impaneled for up to six months, and they typically review evidence in more than one case.[63] The prosecutor presents evidence to the grand jury in

strictest secrecy. (The accused may not even know that he or she is under investigation.) The grand jurors can ask questions and require additional evidence to be produced. If the grand jury concludes that there is sufficient evidence to justify a criminal trial, it will sign an **indictment** (written charges) submitted by the prosecutor. The indictment formally initiates the criminal process, and an arrest warrant or summons is normally issued at this point (see fig. 6.6).

The alternative, and more common, way of initiating felony trials in Arizona is through a preliminary hearing before a justice of the peace.[64] The JP performs a reviewing function similar to the grand jury's. At the preliminary hearing the prosecutor presents a small portion of the case to the JP. This often consists of the testimony of a single witness, such as the investigating police officer. Unlike a grand jury proceeding, however, the preliminary hearing is conducted in public, and the accused's attorney has a limited right to participate. If the JP concludes that the state has sufficient grounds to proceed, the prosecutor files an **information** in superior court. This is a written document that accuses the defendant of specific criminal acts. It is equivalent to a grand jury indictment.

Preliminary hearings and grand jury proceedings have their respective advantages and disadvantages.[65] Prosecutors choose which route to take, and their choice is usually based upon strategic considerations that apply to the particular case.[66] What is important is that either way, *a neutral third party*—citizen grand jurors or a JP—serves as a check against the abuse of power by the executive branch (e.g., police or prosecutors).

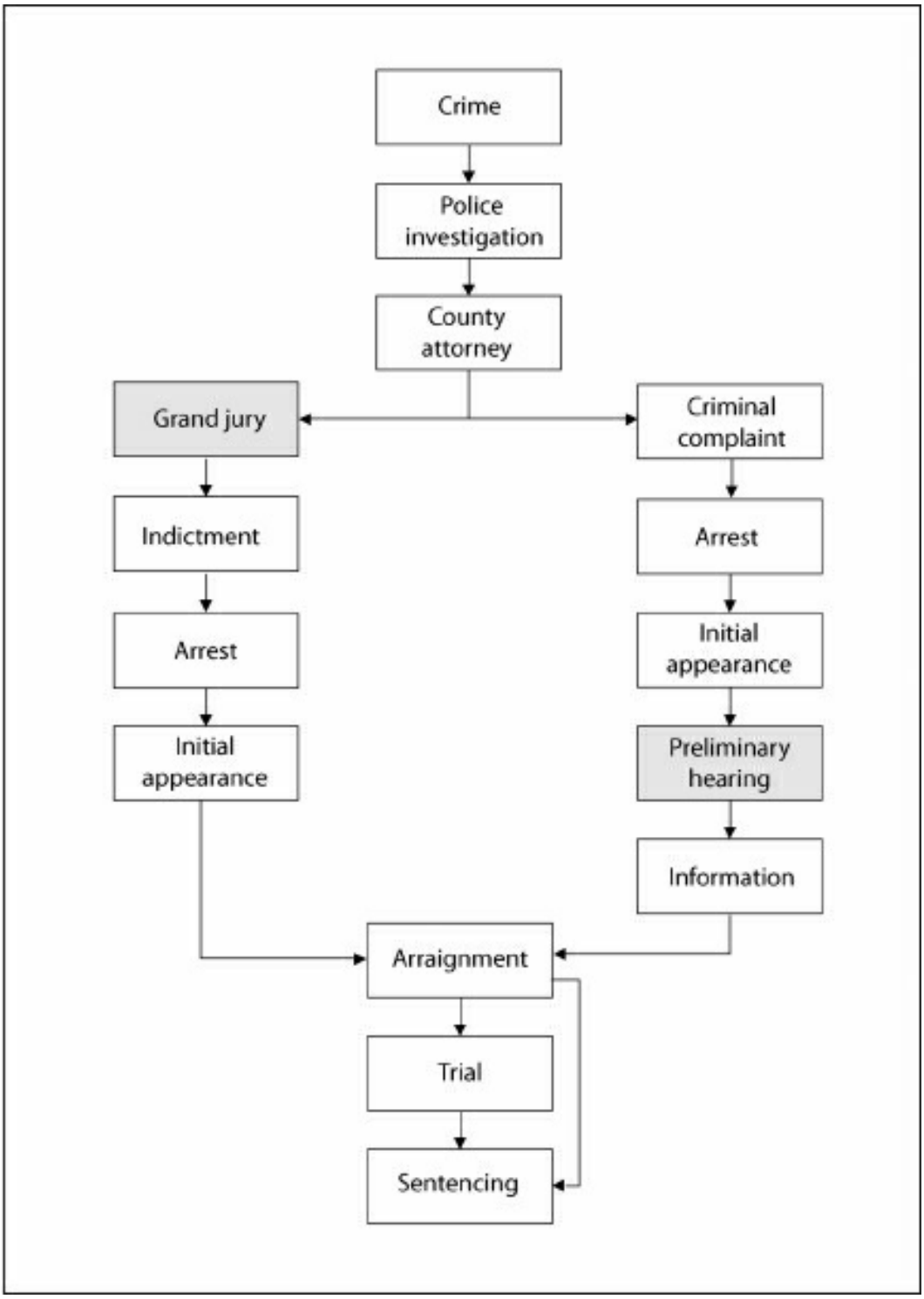


Figure 6.6. Alternative paths to criminal conviction. A preliminary hearing or grand jury proceeding must always precede the trial. However, the arrest and initial appearance can take place before the case is referred to the county attorney.

Finally, regardless of how the case formally commences, in a felony case two other short hearings precede the actual trial: First there is an **initial appearance** before a magistrate where the defendant is informed of the charges and his or her constitutional rights.[67] Bail will be considered if the defendant is in custody and otherwise eligible.[68] Second, an **arraignment** takes place (where the defendant enters a formal plea of "guilty," "not guilty," or "no contest"). If the defendant pleads not guilty, a trial date is set; otherwise the matter proceeds directly to sentencing, as shown in figure 6.6.

Felony trials All felony trials take place in superior court. There are usually three major participants: the parties, the judge, and the jury. Each performs a different function:

In the American system of justice, the opposing parties have the job of presenting evidence and proving the facts of the case. (This contrasts with many European systems in which the judge plays a more active, investigative role.) In felony cases the **burden of proof** always rests with the government. This means that prosecutors have the responsibility of bringing evidence of guilt into the courtroom. They do this by summoning witnesses to testify under oath, and by presenting physical evidence such as documents, photographs, weapons, or articles of clothing. The prosecutor, however, cannot force the defendant to take the witness stand, nor can the prosecutor comment on a defendant's refusal to testify. This is because the U.S. and state constitutions give criminal defendants a **privilege against self-incrimination.**[69] (*No such privilege applies in civil cases.*) The burden of proof in a criminal case is exceedingly high. The prosecution must introduce enough evidence to convince the jury that the defendant is guilty beyond a reasonable doubt. The defendant is not obligated to present any evidence whatsoever; a defendant can simply sit back and argue that the government did not prove the case.[70] This is however a somewhat risky strategy. Most defendants do present evidence to establish their innocence or rebut the prosecutor's case.

The trial judge performs three major functions in a felony case. First, the judge ensures that the proceedings are conducted in a way that is fair to both sides. Ordinarily, this entails ruling on evidentiary objections that are raised by the parties. Second, the judge makes sure that the proper law is applied to the facts of the case. For example, the judge gives the jury detailed instructions regarding the applicable law before the jury retires to decide the

verdict. Finally, if it is a non-capital case and the defendant is found guilty, the judge conducts a sentencing hearing and imposes the actual sentence. (Death penalty cases have special procedures and are discussed below.) Prior to sentencing, the judge will order the court's probation department to prepare a detailed presentence report.[71] There will also be a hearing where the victims have a constitutional right to testify.[72] In the past, judges had considerable discretion in determining the appropriate punishment. Today, however, statutes set highly specific punishment ranges for each offense, sharply reducing the judge's power.[73]

The jury is the third major participant in felony trials. Arizona is deeply committed to the right to trial by jury. The Progressive framers of the state constitution viewed the jury as an important citizen check on abuse of governmental power. The constitution sweepingly declares that "the right of trial by jury shall remain inviolate."[74] This provision has been interpreted to guarantee jury trials in all criminal cases except for those involving the most petty offenses. A defendant can always waive the right to a jury trial; in this circumstance the judge assumes the jury's role. Otherwise, it is the jury's job to resolve factual issues that are in dispute (e.g., whether a witness is telling the truth). The judge instructs the jury as to the relevant law to be applied to the facts of the case. The Arizona Constitution jealously guards the jury's role and warns judges not to encroach upon it: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."[74]

Juries are made up of ordinary citizens over the age of eighteen who are randomly summoned to appear in court.[76] (Names of potential jurors are obtained from driver's license, voter registration, and other lists.) As shown in table 6.1, the size of the jury varies depending on the type of case. The state constitution requires a twelve-member jury for the most serious felony cases (crimes punishable by death or by more than thirty years' imprisonment).[77] Other felony cases use eight-member juries.[78] Irrespective of the jury's size, the verdict must always be unanimous in criminal cases.[79] If all the members on the jury cannot agree, the jury is said to be *hung* and the trial has no legal effect. Prosecutors will normally retry the case before a new jury. (Obviously, this is an undesirable outcome. It delays the administration of justice; subjects the witnesses, victims, and defendants to a second ordeal; ties up the courts; and is quite costly.)

In felony cases the jury must choose between two verdicts: “guilty” or “not guilty.” Contrary to popular perception, a “not guilty” verdict does not mean that the defendant is innocent. Rather, it simply signifies that the state did not present enough evidence to establish the defendant’s guilt to the high level of certainty required by the constitution. If the jury finds the defendant not guilty, the proceedings are completely over. Government prosecutors cannot appeal the acquittal because the state and federal constitutions protect criminal defendants from **double jeopardy.**[80] Alternatively, if the defendant is found guilty, the judge dismisses the jury and sets a date for sentencing. A defendant can appeal both the conviction and the sentence.

Table 6.1. Arizona jury requirements by case type

Court and type of case	Number of jurors	Agreement required
Superior court: felonies punishable by death or 30+ years’ imprisonment	12	Unanimous
Superior court: all other felonies	8	Unanimous
Superior court: civil cases	8	6
JP and municipal courts: criminal cases	6	Unanimous
JP: civil cases	6	5

Death penalty cases Special rules apply to capital cases. Except for a brief interlude between 1916 and 1918 when the voters repealed the death penalty,[81] Arizona has always had a death penalty law on the books. It has however been forced to halt executions and change its sentencing procedures multiple times because of federal decisions that declared aspects of the process unconstitutional.[82] Most recently, the U.S. Supreme Court struck down Arizona’s longstanding practice of having judges impose death sentences.[83] As a result, *juries* must now make a threshold factual determination of whether mitigating factors outweigh the statutorily defined aggravating factors that justify a death sentence.[84] Jurors do this in a separate penalty trial that follows the determination of guilt. Judges must still review death sentences for proportionality, and all death sentences are automatically appealed to the state supreme court.

A Typical Tort Case

In contrast to criminal cases, tort cases are usually brought by private parties to recover damages (money) for injuries. The injury can be of a personal nature (physical or emotional harm); it can involve an injury to the plaintiff ’s reputation; or it can involve financial or property loss. The wrongful conduct giving rise to the tort case may be intentional, negligent, or neither. When the defendant intentionally inflicts harm, the conduct usually constitutes a crime as well as a tort. Thus, the crimes of murder, assault, theft, and fraud all give rise to parallel torts. There is a need for separate criminal and civil cases because they serve different purposes. The criminal prosecution is brought by the government to protect society as a whole. Although it may give the victim some emotional satisfaction, punishing the defendant does not pay the victim’s bills. This is the purpose of the private tort action.

Most tort cases, however, do not involve intentional misconduct by the defendant. Rather, they fall into the category of negligence. In these cases the plaintiff argues that the defendant failed to exercise “reasonable care” under the circumstances. Simple negligence cases rarely have parallel criminal actions. For example, when a grocery store fails to warn patrons of a wet floor it is not committing a crime. Nonetheless, an injured shopper can sue the store and may recover damages for the injuries incurred. Automobile accident, malpractice, and “slip and fall” cases make up the bulk of negligence cases.

Finally, a defendant can be held liable under tort law even when there is no real moral culpability. For example, manufacturers of defective products are sometimes held responsible on **strict liability** theories even when they exercised all possible care. The rationale of these cases is that it is better to shift the burden of unforeseeable harms to the manufacturer (who can distribute the burden by raising prices) than to leave the unlucky consumer without legal redress.

In Arizona, minor tort cases—those in which the claimed damages are less than $10,000—are handled by JP courts in a fairly streamlined fashion. Serious tort cases (above the $10,000 cutoff) are handled exclusively by superior courts. As with felony cases, the proceedings are quite formal. There are however some important differences, as explained below.

Pretrial proceedings in tort cases In sharp contrast to the procedure in

criminal cases, there are no screening processes like grand juries or preliminary hearings to determine whether a tort case has sufficient merit to proceed. The plaintiff unilaterally commences the case by paying a court fee and filing a written complaint with the clerk of the superior court. Once a copy of the complaint is served on the defendant, the defendant has a short period of time (usually twenty days) to file a formal answer that either admits to or denies the allegations in the complaint.

After the complaint and answer have been filed, the case enters an investigative stage known as pretrial **discovery.** Court rules compel the parties to exchange information with each other. Sometimes the litigants demand information through formal written questionnaires known as **interrogatories.** They also orally question each other, as well as potential witnesses, in proceedings known as **depositions.** Depositions normally take place in private settings such as lawyers' offices. The persons being questioned are under oath, a court reporter transcribes the deposition word for word, and the transcript can potentially be used at trial. Judges supervise but do not directly participate in pretrial discovery.

Fortunately, the majority of tort cases do not go to trial; Arizona's court system could not sustain such a burden. Instead, after the discovery phase is over, most cases either are settled by mutual agreement of the parties or are resolved by the judge on legal grounds. For example, if a case is frivolous on its face, the defendant can file a motion with the court to have the case dismissed. Alternatively, either side can file a motion for **summary judgment.** This motion argues that there is no need for a trial because the relevant facts are not in dispute. The judge is asked to enter judgment by applying the law to the undisputed facts. If the court grants either of these two motions, the case terminates at this juncture and the losing party can appeal.

Tort trials Tort trials resemble felony trials in most respects. Indeed, an observer who walked into the courtroom would be hard-pressed to know which type of proceeding was underway. The same three participants—the parties, the judge, and the jury—are usually present. The parties play the same role as they do in a felony trial. That is, it is their job to present the facts of the case through live testimony and physical evidence. Similarly, the plaintiff (the injured party) has the burden of proof. That burden is, however, much lower than in a felony case. In order to prevail, the plaintiff must

merely prove the case by a preponderance of the evidence. In plain English, this means that the jury must simply believe that it is “more likely than not” that the defendant is responsible for the injury; the jury does not have to be convinced to a virtual certainty (beyond a reasonable doubt), as in a felony case.

There are other important procedural differences between civil and criminal trials. Tort defendants have fewer constitutional rights than do their criminal counterparts. For example, a tort defendant can be called to the witness stand and interrogated by the plaintiff. If the defendant refuses to answer questions on Fifth Amendment grounds,[85] the refusal will be in front of the jury and is likely to be prejudicial. That is, the jury is likely to view the refusal to testify as an acknowledgment of liability. Additionally, tort defendants are not entitled to have a lawyer provided at public expense—a constitutional right that belongs to criminal defendants.

As in felony cases, the judge maintains order in the courtroom and rules on procedural objections to ensure the fairness of the proceedings. Because few statutes apply to tort cases, the judge has an expanded role. As explained previously, the judge will apply the common law to the facts of the case. This is an interpretative activity that allows the judge some latitude. In fact, much of the action in tort cases takes place behind the scenes. Significant issues are often resolved in legal motions argued by the lawyers in the judge’s chambers, outside the presence of the jury.

The parties in tort cases also have a right to trial by jury. The size of the jury is however smaller than in serious felony cases, and unanimity is not necessary. Agreement of six out of eight jurors is all that is required to render a verdict (see table 6.1).[86] Two judgments are possible in tort cases: the defendant can be found *liable* or *not liable*. (The term *guilty* applies only to criminal proceedings.) If the defendant is found liable, the jury determines the appropriate level of compensation, called *damages*. Some damages—such as medical expenses, lost wages, and property damage—can be easily quantified. Arizona common law also allows the plaintiff to recover money for more speculative losses, such as pain and suffering, loss of enjoyment, and loss of companionship. All of these types of damages, whether speculative or not, are called *actual damages.*

When the defendant’s conduct is particularly egregious (intentional, reckless, or grossly negligent) the plaintiff may be able to recover **punitive**

damages as well. This additional windfall amount is awarded to punish the defendant and deter a repetition of the wrongful conduct. Although juries do not always award punitive damages, such awards can be sizable—exceeding the actual damages by a substantial amount. Large punitive damage awards have become quite controversial; some critics contend that juries are too easily swayed by emotional arguments and that such awards raise insurance and other costs for everyone.

Arizona's constitution jealously guards the jury's role in determining the amount of damages. For example, Article 2, section 31 states in unambiguous language:

> Section 31. Damages for death or personal injuries
> No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person.[87]

A related constitutional provision prohibits a case from being dismissed by the judge in advance of trial even when the plaintiff is mostly at fault. For example, automobile accidents often have more than one cause. Should a driver be allowed to sue the state for a poorly lit roadway if the driver's own impairment was 90 percent responsible for the accident? Alternatively, should an injured passenger be allowed to sue the state if the passenger voluntarily got in the car knowing the driver was drunk? The Arizona Constitution answers yes to both of these questions.[88] Although the jury is not obligated to award damages to plaintiffs under either circumstance, the constitution requires this decision to be left to the jury.[89]

As explained in chapter 2, organized labor pushed for the adoption of these provisions when the Arizona Constitution was being written. It feared the state's most powerful industries—the mines and railroads—would procure legislation that limited their liability to injured workers. In recent years these constitutional provisions have been part of a national debate over tort reform. Critics of the present system argue that frivolous cases and excessive jury verdicts raise costs for everyone, clog the court system, subject defendants to unpredictable liability, and unfairly burden defendants with legal costs even when they are ultimately exonerated. In some states, these arguments have carried the day. That is, legislatures have passed laws that cap jury awards or require the early dismissal of frivolous cases. Arizona's constitutional provisions, however, prevent similar laws from being enacted.

The Progressive drafters put the provisions in the state constitution because they did not trust the legislature or judges to set fair limits. Instead, they chose to trust the commonsense of ordinary citizens "to render individualized justice under the facts of each case."[90] The insurance industry has vigorously lobbied for the removal of these constitutional barriers to tort reform. Proposed amendments to eliminate them appeared on the ballot in 1986, 1990, and 1994. Each time, the voters said no, remaining true to their Progressive heritage. It is doubtful, however, that the tort reform debate is over.

Online resources

Arizona Judicial Branch:
www.supreme.state.az.us

Arizona Supreme Court (home page):
www.supreme.state.az.us/azsupreme

Arizona Supreme Court, recent decisions:
www.supreme.state.az.us/opin

Arizona Court of Appeals, Division 1 (home page):
www.cofad1.state.az.us

Arizona Court of Appeals, Division 2 (home page):
www.apltwo.ct.state.az.us

Maricopa County Superior Court:
www.superiorcourt.maricopa.gov

Pima County Superior Court:
www.sc.pima.gov

Locator for other Arizona Courts:
www.supreme.state.az.us/location

Arizona Commission on Judicial Conduct:
www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct.htm

Arizona Commission on Judicial Performance Review:
www.azjudges.info/home/index.cfm

7 Local Government

Up to now the focus has been on state government. However, roughly 1,700 local governments also operate within Arizona's borders. These include 15 county governments, 90 municipal governments (cities and towns), and more than 1,600 district governments (school districts, community college districts, fire districts, hospital districts, and other special taxing districts). It is difficult to give a precise count, because special taxing districts come and go. Moreover, this list omits Arizona's twenty-one tribal governments, which are not under state jurisdiction. Tribal governments derive their authority from the national government. Although Arizona's native communities interact with state and local governments, they are largely outside the state's control.[1]

Local governments have their own officials, and they can levy taxes, borrow money, and make enforceable regulations. However, they differ from the state government in an important legal respect. They are not sovereign governments. Rather, they are called "creatures of the state" because their very right to exist, as well as their powers, derive from the state constitution and statutes.[2] Despite this subordinate status, local governments perform critical public functions. For example, they provide police and fire protection, run public schools and community colleges, operate the trial courts and jails, protect public health, and directly or indirectly furnish residents with water, sanitation, and other vital services. More than 230,000 people are currently employed by local Arizona governments to provide the services that have become essential to everyday living.

Why We Have Local Governments

Few countries have as many local governments as are found in the United States. Certainly, there are downsides to this system. It complicates matters when there is a need for a coordinated response to problems like pollution, crime, and transportation which cross jurisdictional lines. Official accountability is also reduced when separate governments can point the finger of blame at each other. Uneven conditions and levels of service are perpetuated with multiple jurisdictions. Local governments are periodically

associated with scandals such as bid-rigging, kickbacks, nepotism, and misuse of public property. Small governments can be inefficient. Finally, having multiple governments increases the burden on voters. A typical general election ballot may have candidates for six or more separate governments competing for the voters' limited attention.[3]

Despite these downsides, most Americans strongly favor the concept of local government. There are numerous reasons why. From ancient times onward, citizens have resented being governed by distant public officials who are unfamiliar with local circumstances. Arizona's diverse geographic, demographic, economic, and other conditions make a "one size fits all" governing approach especially problematic. It is also doubtful that a single, central government could efficiently deliver all the services demanded by today's citizens. Local governments foster participatory democracy. They enable citizens to directly influence public decisions that affect their own communities. They also provide more opportunities for holding public office —and therefore serve as a valuable training ground for those seeking political careers. Having local governments permits greater policy experimentation by allowing individual communities to pioneer their own solutions to social problems. Effective solutions can be copied by others; conversely, the impact of mistakes is reduced. Local governments tend to be more responsive to citizens. Officials know that dissatisfied residents and businesses can "vote with their feet"—that is, relocate to a community that better serves their needs. In short, for practical, historical, and even emotional reasons, local governments are deeply entrenched in the Arizona political landscape.

Counties

Arizona's fifteen counties are shown in figure 7.1. They are products of Arizona's past. Except for La Paz (which was created when Yuma County was split in 1982), all of the state's counties were established during the territorial period, when towns were relatively small and far-flung. It would have been impractical back then for every small community to operate its own courthouse and jails, collect taxes, build and maintain roads, and the like. Accordingly, counties were established to provide these services on a more efficient regional basis. Until recently, county governments were the most important units of local government, and the **county seat** was the center of both political and cultural life. This still holds true in many of Arizona's

rural counties. In urban Maricopa and Pima counties, however, large city governments now compete for power and influence. In fact, some argue that counties have become obsolete and should be eliminated. Although forty-eight states still have them, some have been consolidated with city governments into a single political entity. On the other hand, defenders argue that counties can more efficiently address the many regional problems that spill beyond city boundaries, and can better facilitate relations with the national government.

Figure 7.1. Arizona's fifteen counties.

In a technical sense, Arizona's county governments are all alike. Because counties do not enjoy **home rule** as some cities do (see discussion below), county governments are structured in very similar ways. Essentially, they must follow the generic design prescribed by the state constitution and statutes. The actual conditions in each county vary enormously, however. For

example, Maricopa County is home to more than 60 percent of the state's residents (fig. 7.2). Within its boundaries are twenty-five separate municipalities and three tribal communities. With more than 3.9 million people, it is the fourth largest county in the entire nation, and its population is larger than those of twenty-six states. At the opposite end of the scale is Greenlee County, with a mere 8,000 people.[4] Obviously, these demographic differences present the counties with profoundly different governing challenges.

There are other striking differences that affect county governance. In Gila County only 2 percent of the land is privately owned (see fig. 7.3).[5] This makes raising revenues difficult, because public and reservation lands cannot be taxed. The presence of tribal reservations within counties is another differentiating factor. Seventy-seven percent of the residents in Apache County are Native Americans, and the county is home to large portions of both the Navajo and Apache reservations. These circumstances produced a political crisis in the early 1980s when Native Americans won a majority of seats on the county **board of supervisors.** They then approved bond sales that raised taxes on nontribal property, since reservation land could not be taxed.[6] The landowners vigorously protested. The legislature's solution—to isolate the reservation by splitting the county in two—was vetoed by Governor Bruce Babbitt. Tensions remain to this day in Apache and other counties with high reservation populations. In short, as we generalize about Arizona's county governments, it is important to keep in mind that these governments confront very different problems and are necessarily shaped by the unique contexts in which they operate.

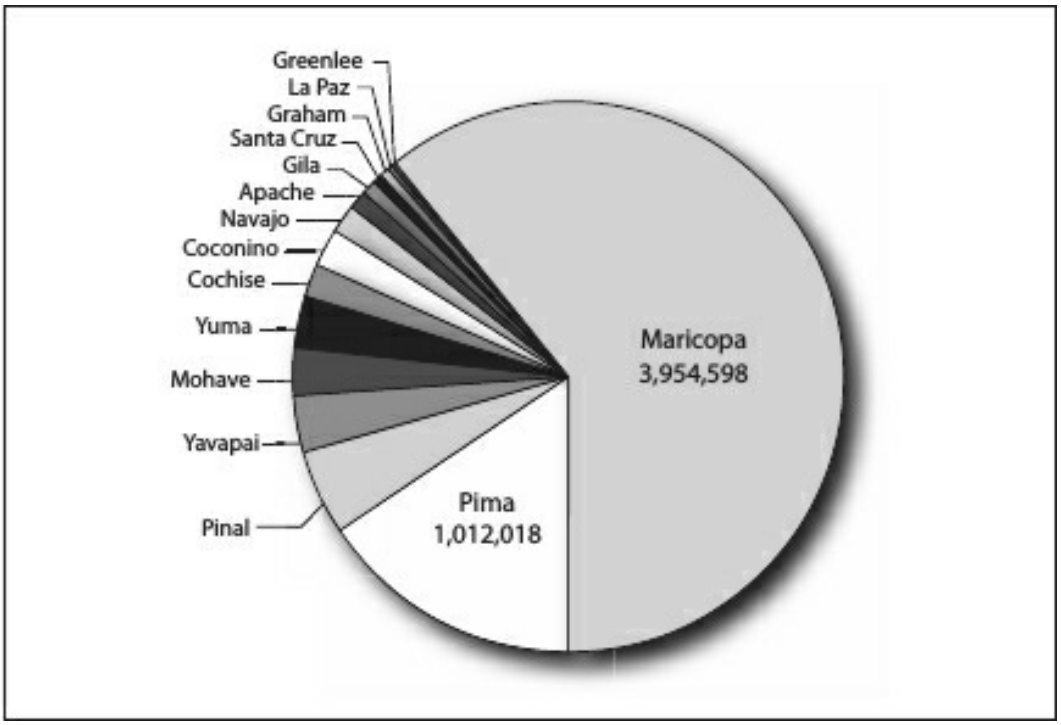


Figure 7.2. Relative populations of Arizona counties, 2008 estimate.

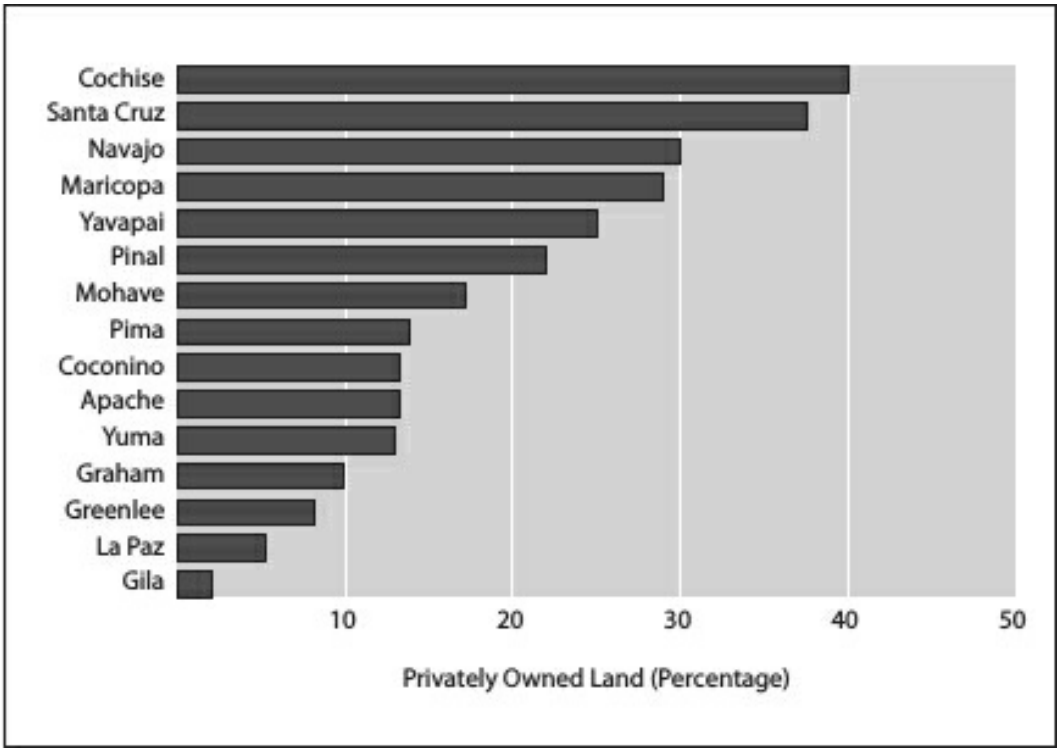


Figure 7.3. Privately owned land by county.

What Counties Do

County governments perform services that fall within two broad categories. First, they function as administrative arms of the state. That means that they carry out state responsibilities on a more efficient, regional basis. Counties have little discretion when performing these state-mandated functions; typically, the legislature calls the shots. And the services falling within this category (see table 7.1) are generally available to all the residents of the county, including those who reside within cities and towns. Second, counties provide city-type services for those who do not live within municipal boundaries. For example, persons living in unincorporated areas look to the county sheriff for basic police protection. Other functions in this increasingly important category are summarized in table 7.1.

Table 7.1. Major functions of county government

State-delegated functions (furnished to all country residents)	**City-type functions** (furnished to residents in unincorporated areas)[a]
• Assesses and collects property taxes	• Furnishes utilities (water, sewage, garbage collection, electricity, gas, irrigation, landfill services, etc.)
• Conducts elections and maintains voter registration records	• Provides law enforcement [b]
• Operates jails	• Provides fire protection
• Prosecutes state crimes	• Provides public housing
• Operates superior and JP courts	• Makes and enforces zoning, subdivision, and other land-use regulations
• Administers welfare and social service programs	
• Operates county hospitals and provides indigent health care	• Regulates traffic, public nuisances, and building safety
• Administers air pollution and environmental programs	

	• Records deeds and mortgages • Builds and maintains bridges and roads • Operates county fairs, parks, libraries, and agricultural extension services

[a] Counties may contract to have all or some of these services provided by private companies. Alternatively, they may be provided by special taxing districts.

[b] The sheriff ’s office provides basic law enforcement to some cities and towns by contract.

How Counties Are Governed

Arizona’s counties follow the traditional county commission form of government. This is the oldest organizational design, still used by a majority of the nation’s counties.[7] Power is divided between an elected governing body (called the board of supervisors in Arizona) and numerous separately elected officials (see fig. 7.4). The size of the board of supervisors varies. Counties with large populations are required to have five-member boards, small counties have three-member boards; medium-sized counties can choose either model.[8] The supervisors are elected from individual districts within the county. The remaining officials are elected on a countywide basis. These include a sheriff, a county attorney, a recorder, a treasurer, a tax assessor, a superintendent of schools, and a superior court clerk. The primary responsibilities of each office are summarized in table 7.2. Except for the county attorney (who must be a lawyer) and the school superintendent (who must have a teaching certificate), the qualifications for holding an elective county office are minimal. Officials must be eighteen years old, English proficient, registered voters, and residents of the county.[9] County officials are elected in partisan elections that coincide with the presidential election cycle. Other important county officials are appointed by the board of supervisors.[10] Finally, each county employs a workforce that ranges in size from more than 12,000 full-time employees in Maricopa County to fewer than 200 employees in Greenlee County.

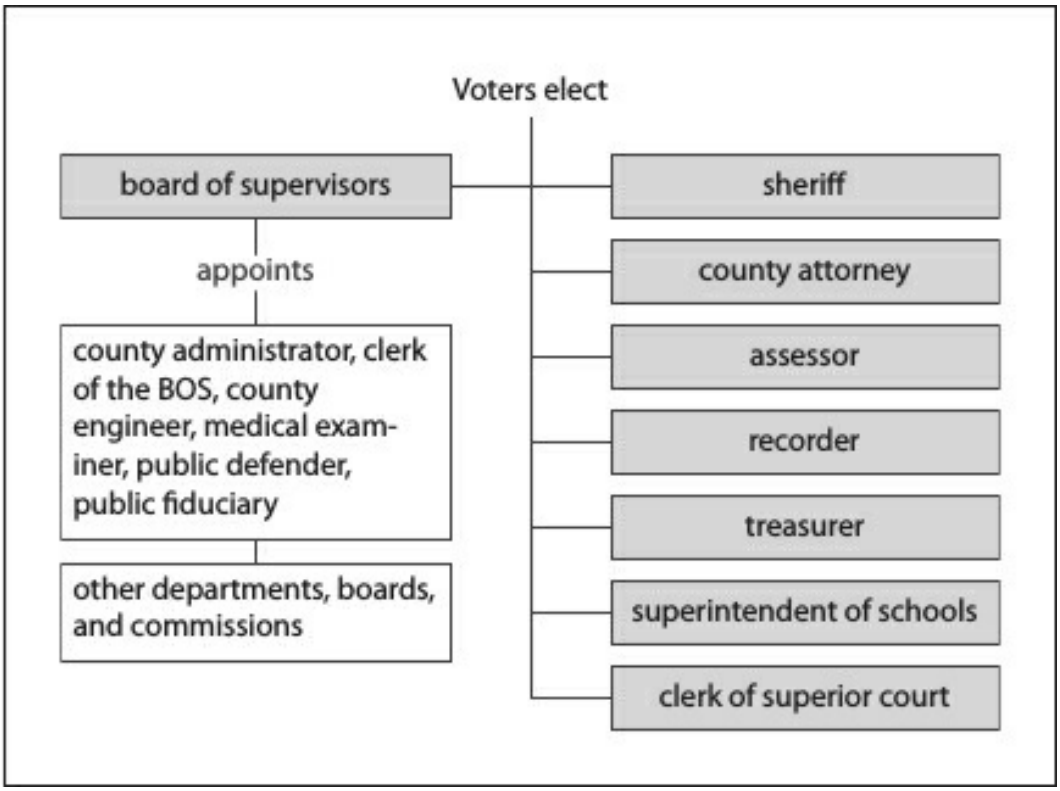


Figure 7.4. Structure of Arizona county governments.

Table 7.2. Primary responsibilities of elected county officials

Office	Responsibilities
Board of supervisors	Determines the county's annual budget, sets the county's tax rates, enacts ordinances and codes, hires and oversees other county employees, and adjudicates zoning matters and other appeals.
Sheriff	Operates the jails; serves process for superior court; and provides primary law enforcement services for all unincorporated areas and for contracting cities and towns.
County attorney	Prosecutes major state crimes and provides legal advice for the county and school districts.
County recorder	Conducts state and local elections; maintains voting, real estate, and other local records.
County	Manages the county's financial assets, collects property

treasurer	taxes, and disburses funds to other jurisdictions (e.g., special taxing districts) within the county.
County assessor	Determines the current value of all taxable property within the county.
Clerk of the superior court	Maintains all court records, collects court fees, manages court finances, and disburses child support payments.
County superintendent of schools	Serves as an administrative liaison between the state and local school districts, disburses funds to individual school districts, and fills school board vacancies.

The Problem of County Governance

In the early 1990s, Maricopa County was branded one of the worst governments in the entire nation.[11] The county teetered on the brink of bankruptcy. Its elected officials had overspent their budgets for years, ignoring a rising county deficit and the pleas of the board of supervisors. The county assessor was so far behind in appraising properties that the county was estimated to have lost as much as $100 million in uncollected taxes. The sheriff was suing the board, demanding more funds. Wall Street was losing confidence in the county's bonds. Ultimately, Maricopa County required massive layoffs and a $9 million bailout from the state in order to stay afloat. The county appointed a skilled manager in 1994 and experienced a period of relative calm.[12]

The harmony was short-lived. By 2008 Maricopa County had returned to its old, dysfunctional ways with a vengeance. An astonishing number of high-profile feuds erupted among the supervisors, the sheriff, the county attorney, the treasurer, the superior court, and the county school superintendent. These resulted in more than a dozen separate lawsuits—all financed by the taxpayers.[13] Most were initiated by the sheriff and county attorney, who used their formidable criminal investigative powers to allege massive conspiracies throughout the county. They procured lengthy criminal indictments against two of the county's five supervisors. They also brought felony charges against the presiding criminal judge of superior court—a judge who had previously ruled against them in other cases. And they filed a racketeering suit in federal court against all five supervisors, the county

manager, several judges, and others. During this period, the presiding superior court judge publicly accused the sheriff ’s office of spying on her at home, and the board of supervisors spent more than $14,000 sweeping for eavesdropping devices purportedly planted by the sheriff ’s office. The sheriff ’s office, responsible for delivering inmates to court, repeatedly failed to deliver them on time, and the officer in charge was held in contempt of court. That triggered a rash of purported illnesses on the part of sheriff ’s deputies, more missed court appearances, and new contempt proceedings. The county refused to license a costly, customized bus that the sheriff purchased without proper authorization, and the bus sat unused on a lot for nearly a year. The sheriff ’s office, concerned about the security of sensitive criminal background files, raided the county’s IT office, unilaterally changed the password on the shared county computer system, and refused to yield control until threatened with contempt of court. The county attorney tried to disqualify all Maricopa County Superior Court judges from his office’s cases. The board of supervisors “fired” the county attorney and hired its own lawyers for civil matters; the county attorney sued to preserve his legal role. And in August 2009, all seven of the county-wide elected officials called for the dismissal of the county manager who had rescued the county back in the 1990s. Echoing the past, they asserted that his budget cuts and austerity measures were encroaching upon their independent policymaking prerogatives. In an understatement, the county attorney proclaimed, “There is a real rebellion, and it’s not going away.”[14]

The county’s latest implosion was not caused by partisanship; virtually all of the feuding officials were Republicans. Rather, there are more systemic explanations, including the county’s very governing structure. As figure 7.4 indicates, the county government is “headless.” That is, there is no single county leader comparable to a president, governor, mayor, or strong city manager. Elected county officials have little incentive to function as team players. They tend to run their departments as independent fiefdoms, banking on their personal popularity with the voters. For example, at the height of Maricopa County’s first meltdown, the sheriff reflected the attitude of most elected officials when he declared, “I don’t report to the Board of Supervisors. I serve the people only.”[15]

A second problem is that the counties lack sufficient independent governing authority. In contrast to the state, they are not sovereign

governments. Instead, they are bound by **Dillon's Rule.**[16] This legal principle holds that they possess only those powers expressly delegated to them by the state legislature and constitution. Unfortunately, the delegated powers are largely based upon nineteenth-century realities and have not kept pace with the challenges counties face today. The state legislature could rectify this problem by giving the counties more autonomy. State governments tend, however, to be jealous of such delegations and some residents oppose expanded county power, fearing more bureaucracy and taxes.

Third, Arizona counties face chronic fiscal problems. It is no accident that Maricopa County's most intense intra-governmental conflicts have occurred during periods of profound economic crisis. In fact, competition for scarce resources is arguably the root cause of the latest battles among the sheriff, county attorney, courts, and board of supervisors. Historically, property taxes have been the primary source of county revenues. Since the voters put strict limits on these taxes in 1980 (see chap. 3), counties have struggled to find alternative funding sources.[17] Compounding the problem, they have been burdened with some of the most costly—and least popular—governmental responsibilities, such as running the jails and providing indigent health care. Unfortunately, the county has little control over the escalating costs associated with these thankless tasks. Although the state provides more supplemental funding to counties than most states do, Arizona's counties are always struggling to make ends meet.

Finally, reformers criticize county government for having elected sheriffs, assessors, recorders, and other department heads instead of appointed professionals with the requisite training and experience. They argue that the counties' modern responsibilities are too complex to be left to officials whose tenure in office may rest upon personal popularity and campaigning skills, rather than professional competence. And, as Maricopa's experience amply demonstrates, this arrangement provides little incentive for cooperation and team playing.

The home rule debate A remedy was proposed in 1992, during Maricopa County's first breakdown. The state constitution was amended to allow Maricopa and Pima counties to adopt home rule.[18] This meant that the state's two largest counties could have their own, individualized form of government by adopting a county charter tailored to their needs. Such a charter would allow them to replace the dysfunctional headless governing structure with a

model providing stronger, centralized leadership. Home rule also would also permit the counties to manage their affairs with greater independence from the state legislature. In fact, roughly three-quarters of the nation's counties currently enjoy home rule.

Maricopa and Pima counties immediately embarked on the lengthy process of converting to home rule. New governments were proposed for each county that emphasized management principles over electoral politics. Somewhat predictably, the proposed charters were vigorously opposed by most of the counties' existing elected officials. They argued that the citizens' role would be reduced, and that professional managers would be less accountable than elected officials. Finally, charter opponents feared that greater county autonomy would lead to bloated governments, more bureaucracy, unnecessary services, and higher taxes and fees.[19] The timing for the home rule debate was especially poor. Maricopa County voters were still upset over a controversial stadium tax that had been levied by county supervisors to build the Chase Field ballpark.[20] In the end, the opposition prevailed. Maricopa County voters rejected the proposed charter in 1996; Pima County voters followed suit in a low-turnout election the following year. Home rule at the county level was politically dead. It remains to be seen whether Maricopa County's latest crises will trigger renewed interest in structural reform.

Cities and Towns

The vast majority of Arizona residents live in cities or towns. Contrary to popular perception, the state has always been predominately urban. From the beginning, scarce water, clashes with native peoples, and frontier hazards necessitated close group living for survival. Currently, only eight states are more urban.[21] Until fairly recently, however, Arizona's towns were relatively small and slow-growing. Indeed, the state's many ghost towns provide striking reminders of the precarious existence of early settlements. As described in chapter 2, chronically low population was one of the key reasons for Arizona's delayed admission as a state.

Today, the story could not be more different. Arizona's growth first began to take off after World War II (see fig. 7.5). The establishment of military bases was a major catalyst. New businesses were also attracted to the

state's mild winter climate, nonunion labor market, and pro-growth public policies.[22] Since 1980, Arizona's population has skyrocketed. Phoenix—a relatively young city founded in 1870—is now the fifth largest city in the United States, and seven Arizona cities are among the nation's one hundred largest.[23] Smaller communities such as Gilbert and Chandler have been growing at even faster rates than Phoenix (see fig. 7.6). For example, between 2000 and 2008, Gilbert had the second fastest growth rate in the entire nation, nearly doubling its population during that period (and posting a 600 percent increase since 1990).[24] And while existing municipalities have been rapidly expanding, brand-new Arizona communities have been incorporating. Strikingly, one-third of Arizona's present-day municipalities didn't legally exist prior to 1960.[25] An *Arizona Republic* series reported that the state's open spaces were disappearing at the rate of "an acre an hour."[26] Urban sprawl became a hot issue as municipalities wrestled with building moratoriums, developers' impact fees, and various antigrowth initiatives (discussed below).

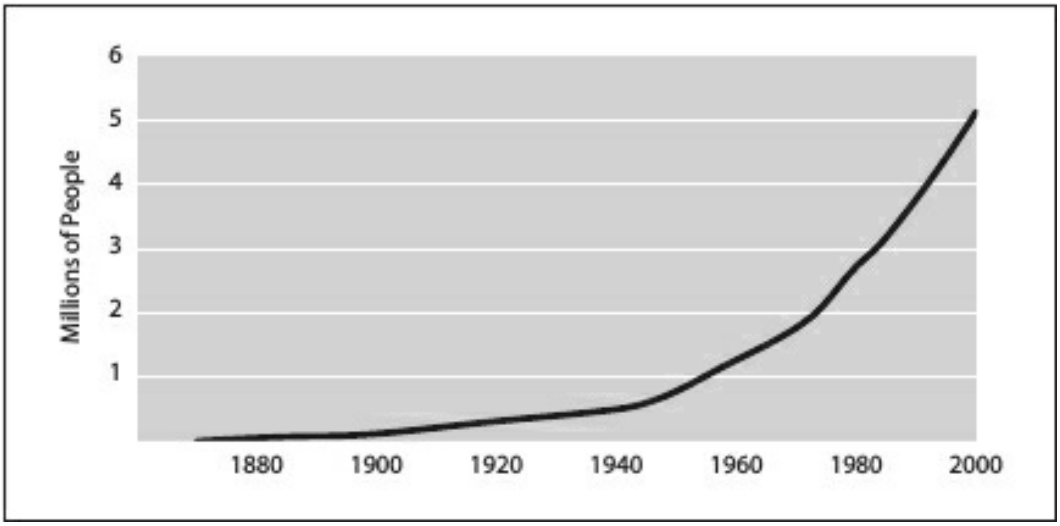


Figure 7.5. Arizona's population growth.

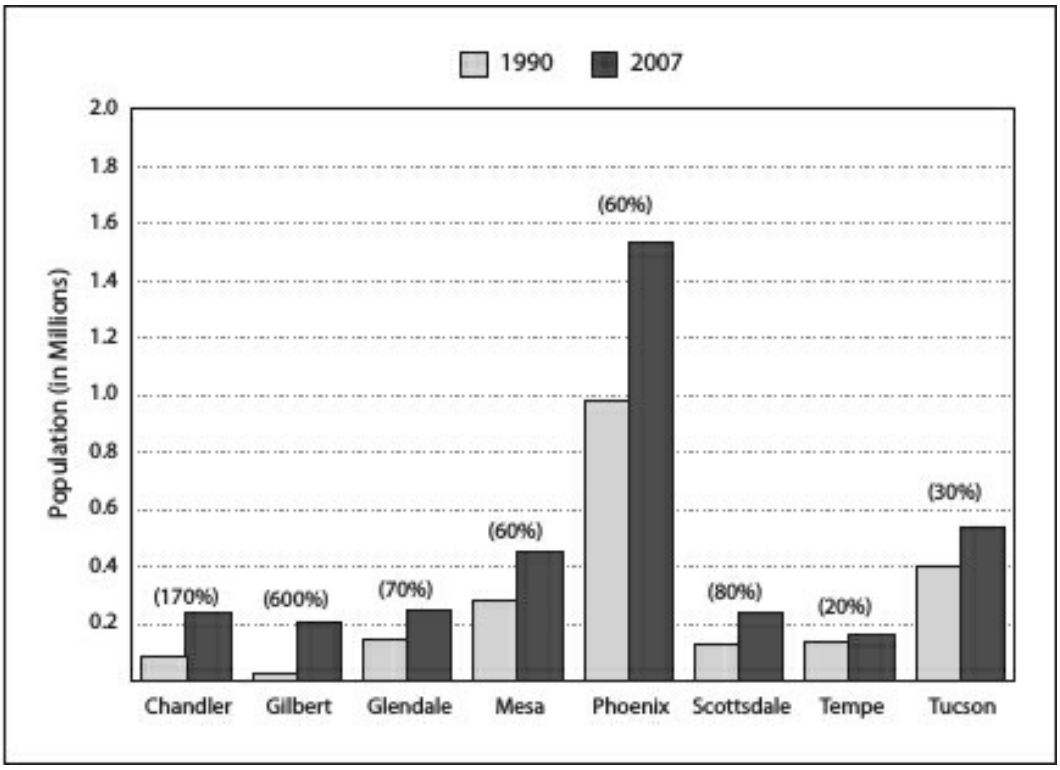


Figure 7. 6. Population growth in Arizona's largest cities, 1990–2007.

What Cities and Towns Do

Cities and towns are Arizona's true "bread and butter" governments because they furnish a wide range of services that are indispensable to everyday living. For example, larger cities:

1. Provide police and fire protection
2. Furnish water, sewage treatment, garbage collection, irrigation, and landfill services
3. Build and maintain streets, parking facilities, airports, and cemeteries
4. Provide public transportation
5. Operate city courts
6. Build and maintain parks, golf courses, libraries, museums, civic centers, and other public facilities
7. Provide public housing
8. Regulate traffic, public nuisances, building safety, and other local health and safety matters

9. Make and enforce zoning, subdivision, and other land-use planning regulations
10. Promote tourism and economic development

In smaller cities and towns, some of these services may be provided by special districts (discussed below), by private corporations regulated by the Arizona Corporation Commission, or by other governmental entities on a contract basis. And a few municipalities furnish services to their residents that are not on this list, such as providing gas and electricity.

Although the list of municipal services is a long one, it is important to emphasize what Arizona cities and towns do *not* do. Notably, they do not have authority over public schools. Elementary and secondary schools in Arizona are operated by school districts, which are independent governments (discussed below). This arrangement has caused real difficulties for communities that have experienced sudden population growth. For example, between 1990 and 1998, school enrollment in the town of Gilbert nearly doubled. New school construction simply could not keep pace with new home construction. Existing schools were being strained to the breaking point. Ultimately, frantic school officials persuaded city officials to impose a controversial one-year moratorium on new residential development. On the other hand, Apache Junction's attempt to impose an impact fee for new school construction was voided by the court.[27] Cities and school districts in other communities continue to struggle to coordinate their responses to the challenge of rapid population growth.

How Cities and Towns Are Governed

Cities and towns are **municipal corporations.** Like private business corporations, they derive their right to exist from state law. The principal difference between a city and a town lies in the size and complexity of the government. Towns are smaller and have simpler governing structures. To incorporate (become an officially recognized, self-governing municipality) a community must have a minimum population of 3,000 for city status but only 1,500 for town status.[28] Currently, Arizona has forty-five cities and forty-five towns. Many well-known Arizona communities, such as Sun City, are in fact neither cities nor towns. Despite their names, these are simply unincorporated places. They do not have the authority to govern themselves; instead, the

county serves as their local government.

Arizona's Progressive founders valued local autonomy, so they put constitutional limits on the legislature's ability to interfere with cities and towns. For example, the legislature is expressly prohibited from enacting "local or special" laws that treat communities individually.[29] Even more importantly, the Progressives encouraged municipal home rule. In contrast to the counties, from the very beginning, any city with a population of at least 3,500 could design its own form of government by drafting and adopting a charter (i.e., local constitution.)[30] Today, Arizona has nineteen **charter cities** that enjoy their own, individualized forms of government.[31] The remaining seventy-one municipalities are called **general law cities** (or **towns**) because they must follow the governing structure laid down by state statutes (which permit only minor variation). In short, there is no single governing structure for Arizona cities and towns as there is for counties. There are, however, some common patterns.

Arizona's council-manager governments As explained previously, Arizona counties follow a traditional governing structure that emphasizes electoral politics over professional management. The situation is the exact opposite with the state's cities and towns. With one exception (Nogales), Arizona's municipalities use the **council-manager form of government.** This is the design favored by most urban experts. It originated in the early twentieth century as a Progressive reform, and the city of Phoenix (see box) was one of the first cities in the nation to embrace it.

The council-manager structure was intended to replace the traditional, mayor-centered government that is still used by the nation's oldest and largest cities. The Progressives associated elected mayors with **patronage,** corruption, conflict, and inefficiency. They reasoned that problems at the local level are primarily technical in nature: for example, how to deliver utilities in the most efficient manner and how to engineer good roads. The reformers concluded that residents would be better served by city governments that emphasized technical expertise over electoral politics. The council-manager innovation was essentially an attempt to take the politics out of urban governance.

Arizona's council-manager governments vary slightly from city to city. In general, power is divided between an elected city council (usually

consisting of seven members)[32] and a powerful, professional city manager appointed by the council. The council's responsibility is to set broad policies, while the city manager actually runs the city. That is, the manager hires and supervises the other city personnel (e.g., the police and fire chiefs), prepares the budget, and recommends actions to the council.

Today, most city managers have degrees in public administration or political science. They typically work their way up through the ranks of city government. Once they become city managers, however, their tenure can be as precarious as that of major league baseball managers. The average city manager lasts no more than five years on the job. They must walk a fine line between management and political issues, taking care not to step on the toes of their elected bosses (the members of the city council). Unless a charter specifies otherwise, the city manager can be summarily dismissed upon a simple majority vote of the council.[33] (Phoenix, Tucson, and a few other charter cities require a supermajority vote for removal.) Not surprisingly, the most successful city managers maintain a *very* low profile. For example, few Phoenix residents could name their longtime city manager, even though he ran a city that is larger than most major business corporations. In fact, Frank Fairbanks smoothly managed Phoenix for nearly two decades, winning national awards in the process.

Although Arizona's council-manager governments have mayors, their role is greatly reduced. Apart from ceremonial functions, the mayor is typically a member of the city council with no greater voting power than any other council member. In some cities, the mayor is chosen by the members of the council themselves. Increasingly, however, Arizona's cities have chosen to have mayors directly elected by the voters.[34] (In these cities the mayor's higher public profile can translate into greater political power, even though the mayor still has only a single council vote.)

Nonpartisan elections Nearly all city council and mayoral elections in Arizona are nonpartisan. Only Tucson and South Tucson deviate from this pattern. This is another way in which Arizona's municipalities differ from its counties. Nonpartisan elections are part of the Progressive reform agenda. As with the council-manager design, the rationale was to eliminate politics from local governance. Reformers believed that having nonpartisan elections would focus attention on local issues; put emphasis on the qualifications of the candidates; lessen the influence of irrelevant, national politics; diminish

community conflict; and reduce corruption and graft.

To some degree, nonpartisan elections have fulfilled these expectations. Like most political choices, however, they have downsides as well. Voter turnout is markedly reduced in nonpartisan elections—indeed, less than 20 percent of registered voters typically bother to vote in Arizona city elections. Low-income, less-educated voters tend to skip these elections altogether. Lack of party labels deprives voters of information about the ideological orientation of the candidates—a problem compounded when candidates run bland, low-content campaigns designed to avoid giving offense. Nonpartisan elections also give incumbents an advantage because a familiar name may be the only information that some voters possess. As a result, city council members are rarely voted out of office. Finally, nonpartisan elections may be nonpartisan in name only. Political parties often operate behind the scenes, sending mailers to members to alert them to the party affiliations of candidates.

At-large versus district elections In most Arizona cities, the mayor and council members are elected on an **at-large** (citywide) basis. Again, this represents a Progressive reform. At the turn of the century, reformers criticized the traditional ward system in which council members were elected from separate districts. They believed that it led to infighting on city councils, facilitated corruption, and fostered **NIMBY** (not-in-my-backyard) attitudes, which sacrificed the city's overall needs to narrow, neighborhood interests. In recent years, Phoenix and other larger cities have however abandoned the Progressives' thinking and returned to the traditional ward system. Proponents of district elections claim that at-large elections unfairly favor candidates from more affluent parts of the city (where turnout is higher) and lead to the neglect of minority and lower-income neighborhoods. They also contend that at-large elections excite less interest, reduce turnout, and exaggerate the influence of special interests. Phoenix made the switch to district elections in 1982 (see box). Today, Mesa, Glendale, and several other charter cities have converted as well.

Recall on the local level Arizona mayors and council members are subject to recall by the voters under the same constitutional procedures that apply to state officials (see chap. 4). Recall is however much more common on the city than the state level. Because voter turnout is low in local elections, the 25

percent petition threshold is much easier to achieve. For example, in a small town, it may translate to as few as three hundred petition signatures. In recent years, city officials in Apache Junction, Buckeye, Carefree, Chandler, Gilbert, Laveen, Litchfield Park, Mesa, Peoria, Phoenix, and Tombstone have been targeted. Sometimes the provocation is fairly trivial—a single, unpopular council vote can trigger a recall petition. A recall campaign can also be a way for supporters of a losing candidate to get a second chance at winning the office. Most recall efforts fail, at either the petition or ballot stage. Even so, critics charge that recalls are distracting, divisive, and costly; that they put unreasonable pressure on public officials; and that they discourage competent people from running for office. Defenders, echoing the Progressive view, contend that recalls keep elected officials in line; provide a way to counter too much special-interest influence and the incumbency advantage; permit citizens to participate in local governance; and offer an important safety valve for dissidents.

PHOENIX: THE CITY OF URBAN REFORM

Like its mythological namesake, Phoenix has risen from the ashes of scandal to successful urban government.[35] Accomplishing this took some time. Actually, Phoenix never experienced the truly big-time corruption associated with the nation's older cities. Nonetheless, in 1913, it became one of the first cities to enthusiastically embrace urban reform. The city did away with ward elections and hired a manager who was expected to run the city in a professional (i.e., nonpolitical) manner.[36] Unfortunately, the experiment didn't work. The manager got into continual conflicts with city council members and was fired within a year. In fact, this set a precedent. In the next thirty-five years, Phoenix had *thirty-one* city managers!

By the 1940s, the city government was widely perceived as inept. Phoenix developed a reputation for tolerating gambling, prostitution, venereal disease, cronyism, and corruption. At the low point, Luke Field's commander declared the city off-limits to military personnel. Fearing that the city's unsavory reputation was hindering growth, a business elite calling itself the Charter Government Committee (CGC) took over. In 1948, it succeeded in converting the city to a true council-

manager form of government.[37] The CGC also decided to run its own, handpicked candidates for every office. Barry Goldwater was one of its first picks. He and the other CGC candidates swept the 1949 election. The CGC maintained an iron grip on the city's government for the next twenty-five years, losing only two out of ninety races. Its reign brought undeniable stability. For the first time, a city manager enjoyed an eleven-year run, the government was largely free of scandal, and the city grew and prospered. However, there was a price. City elections became hollow formalities. Few opposition candidates were willing to take on the powerful CGC or the major media outlets that supported it. Eventually, Phoenicians resented the CGC's elitist control. The election of a non-CGC mayor and loss of four other council seats in 1975 ended the CGC's long grip on city government.

In the early 1980s, Phoenix lawyer Terry Goddard advocated a partial return to the traditional form of city government. He argued that the council-manager system gave too much power to developers and neglected the needs of minority and low-income neighborhoods. Goddard led a successful grassroots campaign to restore district (or ward) elections, and was elected mayor under the new system. He strengthened the mayor's office but also came to respect the city manager's role. In the end, he and the city manager developed a successful governing partnership. In fact, while mayors came and went from 1980 to 2000, two successive city managers, Marvin Andrews (1976–1990) and Frank Fairbanks (1990–2009), quietly and effectively ran the city—defying the high turnover that characterized the city's past.

Today, Phoenix is widely cited as a model city government, winning national and international awards.[38] For nearly fifty years, the city has stressed professional management over electoral politics. Whether it can maintain its successful governing formula as it grows is an interesting question. Big cities tend to develop social cleavages that city managers are ill suited to resolve. Regardless, Phoenix's history is a story of continual adaptation and commitment to reform.

Coping with urban growth Rapid population growth creates opportunities as well as challenges for Arizona's local governments. On the one hand, growth brings needed tax revenues, bolsters business and economic development,

generates new jobs, creates a market for existing homes, and adds vibrancy to a community's cultural life. In fact, local governments vigorously compete with each other to attract major employers, shopping malls, residential projects, stadiums, and other large-scale development. This competition becomes controversial, however, when tax rebates and other financial incentives are offered to sweeten the pot. Escalating bidding wars can wind up benefiting developers more than the competing municipalities or the taxpayers who subsidize these incentives. Critics question both the wisdom and the legality of government subsidies, citing the constitution's Gift Clause. This provision was put in the state constitution to prevent the widespread abuses that occurred during Arizona's territorial period. Basically, it bars local governments from giving gifts, loans, or other subsidies to private individuals or businesses. Its enforcement, however, has been somewhat uneven over the years. The issue recently came to a head when Phoenix gave the developer of CityNorth a $97.4 million tax subsidy to complete the upscale shopping center. The Goldwater Institute, a libertarian think tank, challenged the subsidy in court. In a landmark ruling, the Arizona Supreme Court concluded that the city's deal "quite likely violate[d]" the Gift Clause. Although the court declined to void the arrangement due to the city's reliance on prior court rulings, it laid down strict new guidelines to prevent future violations.[39] In the same vein, the state legislature has also attempted to put the brakes on the tax-incentive competition with a new law prohibiting the practice in Maricopa County.[40]

While some growth is clearly desirable, explosive growth—like that experienced by the town of Gilbert (see fig. 7.6)—is problematic. Rapid growth strains infrastructure and overburdens municipal services. Unfortunately, the various stakeholders rarely agree on the appropriate response. There is an inevitable tension among (1) newcomers who want affordable housing; (2) businesses, builders, and real estate agents who want more customers; and (3) existing residents who wish to preserve the look and feel of the original community, and who don't want to foot a sizable tax bill for the new infrastructure that growth requires. The various strategies local governments use to mediate these competing interests trigger controversy and litigation. For example, as noted previously, Gilbert was forced to adopt one of the more extreme solutions: a temporary building moratorium. The town stopped new home construction by simply refusing to issue new building permits. Although such moratoriums give local governments time to catch

up, they alienate landowners who wish to sell, real estate agents, and builders.

Impact fees are another controversial growth-management tool. Basically, this is a fee imposed on new development to offset the cost of providing and expanding the infrastructure it requires: roads, water and sewer lines, parks, fire and police protection, libraries, and sanitation services. Notably, such fees cannot include the costs of constructing new schools, since school construction is not a municipal responsibility.[41] Impact fees are passed on to the buyers of new homes, adding to the total cost of the home. Since each local government sets its own fees (or chooses to forgo them), impact fees vary. But they can add a significant surcharge.[42] Longtime residents generally applaud impact fees on fairness grounds, but they are often opposed by real estate and business interests, and of course, by buyers of new homes.

Zoning ordinances provide another important tool for the management of growth. They allow local governments to regulate property use by creating zoning maps that segregate different land uses—for example, residential from commercial—and control such additional factors as density, building size, and setbacks.[43] As the community grows and changes, property owners often petition local governments for rezoning or for **variances** (one-time exceptions from existing ordinances). Such petitions may trigger opposition from adjoining property owners. In fact, few routine proceedings generate as much conflict on the local level as zoning hearings. Proposition 207 (the Private Property Protection Act), approved by the voters in 2006, addressed another controversial aspect of zoning: State law now mandates compensation for any zoning change that reduces the fair market value of the property.[44]

Developers' agreements permit local governments to enter into individualized contracts with the developers of large-scale projects and planned communities. Typically, these agreements waive rigid zoning restrictions (e.g., density, setback, and single-use) in exchange for the developer's commitment to provide greenbelts, parks, or other amenities. They become controversial when neighbors disapprove of the zoning deviations, or when citizens believe that the municipality failed to negotiate the best deal.

Finally, the power of **eminent domain**—which dates back to the

country's very inception—continues to generate controversy on both national and local levels. In Arizona, eminent domain allows governments to acquire private property for public use if fair compensation is paid.[45] This is how land for roads, parks, jails, fire stations, and other public buildings is typically obtained. Recent controversies have revolved around acquisitions for economic redevelopment. In 1999, for example, the city of Mesa attempted to condemn a family-owned auto brake business that had been located in the heart of the city for years. Mesa wanted to transfer the property to new *private* owners who planned to build a large retail center with shops, offices, and restaurants. The proposed center would generate more tax revenue for the city and presumably enhance the ambiance of the downtown area. The brake shop challenged the city's use of eminent domain and won. The court concluded that the attempted condemnation didn't sufficiently satisfy the constitution's "public use" requirement.[46] In fact, this is another instance in which the Arizona Constitution provides greater rights than those guaranteed under the U.S. Constitution.[47] Proposition 207 (2006), mentioned above, also mandated more stringent limitations on eminent domain in response to the brake shop episode and other recent condemnation actions.[48]

District Governments

Arizona's 1,600-plus governmental districts constitute a third form of local government. Unlike counties and municipalities, which have multiple responsibilities, they exist to perform a single or limited function for the residents and businesses within their jurisdictional boundaries. These boundaries can be large or small, and they can cross city and county lines. District governments have their own elected or appointed officials. They typically have the power to tax, spend money, and borrow funds through the sale of bonds. Like all local governments within Arizona, they must however operate within the limitations imposed by the state constitution and state statutes.

School Districts

Arizona currently has 227 public school districts. These include primary school districts, secondary school districts, and unified districts that combine both types of schools. Each district is independently governed by a three- or

five-member board consisting of unpaid citizen volunteers. The board members are chosen in nonpartisan elections and do not have to possess any special qualifications. They serve for staggered, four-year terms and can be recalled like all other elected officials. The actual day-to-day management of a school district rests with a full-time superintendent. The superintendent is appointed by the school board and serves at its pleasure. The superintendent hires principals, teachers, and other school personnel subject to board approval. Finally, each school within the district also has a site council consisting of parents, teachers, school administrators, and community representatives. It studies curriculum and other issues assigned by the board. With input from the superintendent and site councils, the elected school board sets school policies, manages school property, establishes a budget, levies taxes, and borrows money.

In public opinion polls, Arizonans invariably identify education as one of their top concerns. Unfortunately, that is where the consensus ends; persistent controversies surround the governance of the state's public schools.

State versus local control The most fundamental debate centers on who should regulate Arizona's schools. We have already seen that on the state level, the legislature, multiple separately elected officials, and numerous boards, all compete to set education policy (chap. 5). Added to this mix are equally large numbers of local officials, along with parents and teachers. Having so many persons involved in educational policy inevitably leads to conflict, inefficiency, and reduced accountability. Unfortunately, Arizona remains deeply divided over the appropriate governance model. Some—like former governor Fife Symington—champion local control. During the 1990s the governor called for the total elimination of the Arizona Department of Education, state teacher certification, and most other state-mandated requirements.[49] Although his proposals were not implemented, the legislature's creation of site councils in 1994 was intended to advance the decentralization cause.[50] On the opposite side, most school superintendents, teachers, and education professionals favor uniform state standards and professional school management. For example, former school superintendent Lisa Graham Keegan publicly criticized site-based councils[51] and argued that decentralization accentuates the economic and academic disparities that plague the state's public schools. In 2008, her elected successor, Tom Horne, successfully lobbied for a law allowing state officials to take over the

management of school districts where student performance failed to meet state standards. Opponents, such as the Arizona School Boards Association, argued that such takeovers offend the principle of local control. The school superintendent countered that providing quality education to all children was a "moral issue," and that it was the state's responsibility to help students in these districts.[52] The debate is not likely to end any time soon.

School board conflicts School board members are frequent recall targets. A recall effort can be trigged by a single unpopular vote, such as a disagreement over school uniforms, closed campus policies, sex education classes, budget cuts, or the firing of a popular teacher or administrator. Recalls also result from longstanding cleavages within the district itself. For example, a losing school board slate may use the recall process as a second chance to gain control. Whatever the catalyst, the low voter turnout in school elections makes it relatively easy to achieve the 25 percent petition signature threshold. Although not all recall efforts are successful, the mere threat of recall can be disruptive to school governance. It also contributes to the difficulty many districts face in attracting school board candidates.[53]

The Dysart School District's turmoil in the mid-1990s provides a dramatic illustration of the conflicts that can arise. At the time, 75 percent of the district's student population consisted of low-income minorities. The district boundaries also included some retirees from Sun City West extension areas. In 1995, the retirees formed a group called Citizens for Tax Equity that successfully defeated school bond and budget override efforts over the next few years. In the aftermath of the budget defeats, the district eliminated physical education, art, music, and other programs deemed nonessential. By 1998, the retirees had taken over the school board itself by winning all five seats in successive regular, special, and recall elections. (Although the retirees were a minority in the district, they were better organized and turned out to vote at higher rates than the parents who made up the majority.) Once in charge, their initial objective was to have the retirement areas removed from the school district altogether. When that failed, they focused on implementing more efficient, cost-effective school management. The superintendent was forced to resign, and several Hispanic principals, teachers, and staff voluntarily left the district.[54] Today, Dysart has new governance and the demographics have changed. The turmoil has however left a lingering scar.[55] And while the cleavages in Dysart were admittedly

extreme, ideological and policy clashes continually roil school districts throughout Arizona, making local school governance a dicey business.

School funding Operating the state's public schools is the most costly routine activity that the state undertakes (see fig. 3.12). Not surprisingly, school funding is a pervasive source of controversy. Historically, costly capital improvements (new schools, remodeling, and expensive equipment) were primarily funded by each local school district through the sale of bonds. Bonds are financed by local property taxes. This system produced glaring inequities because property values vary from district to district. Low-income districts often had higher tax rates than their wealthier neighbors but still couldn't raise sufficient funds to maintain their schools adequately. Residential districts that lacked businesses and industries (which pay high taxes) were also disadvantaged. Low-income school districts eventually sued, and in 1994 the Arizona Supreme Court voided the funding system used since statehood.[56] The court's landmark ruling ordered the legislature to come up with a new way to finance capital improvements. After rejecting two of the legislature's subsequent proposals, the court finally approved a sweeping new approach in 1998, known as Students First.[57] A nine-member state board was created to set minimum standards for public schools and disburse the needed funding to bring all schools up to this level. Individual school districts were allowed to exceed the minimum standards through local bond and override elections; and the new system did not apply to the sizable operational costs of running schools.[58] Over the past decade, Students First has disbursed millions to bring schools up to minimum standards, to refurbish existing buildings, and to finance brand-new schools. There has however been continuing controversy—and litigation—over the level of funding. Moreover, this isn't the only funding dispute; high-profile battles also have erupted over federally mandated English-learning programs,[59] and over the management of school trust lands (see chapter 2).

School consolidation In 2005, the legislature established the School District Redistricting Commission to study whether some of Arizona's 227 separate school districts should be consolidated. The move was prompted by a state auditor general study which found that large districts had reduced per-pupil costs.[60] The commission conducted extensive hearings over the next two years and ultimately recommended the elimination of forty-nine elementary

and high school districts. For example, it recommended that the Phoenix Union High School District be combined with thirteen separate feeder elementary districts to create a single, unified district with roughly 112,000 students. The final proposals were put on the 2008 ballot in the affected districts. Supporters argued that the mergers would eliminate duplicative administrative overhead, free up more money for classrooms, facilitate a smoother transition between elementary and secondary schools, equalize salaries for elementary and high school teachers, and raise professional standards within the district. Opponents disputed the alleged savings, argued that more—not less—competition would improve schools, feared that quality schools would be degraded, that high school teachers' pay would be lowered, and that local control would be reduced.[61] In the end, the voters rejected nearly all of the consolidation recommendations, and two of the four that passed were voided on technical grounds by courts. The state school superintendent and other unification supporters vowed to renew efforts with scaled-down proposals in the future.

Parental choice: the debate over charter schools, tax credits, and vouchers

Some argue that the key to school improvement lies in giving parents affordable alternatives to traditional public schools. Such "choice" advocates contend that one size doesn't fit all, that the public school system discourages innovation, and that all schools benefit from having competition. Such thinking led to the establishment of the first charter schools in 1994.[62] Charter schools are public schools that receive taxpayer funds on a per-pupil basis like other state schools, but they are run by private entities. Those entities enter into fifteen-year contracts with state boards or local school districts.[63] Notably, charter schools are exempt from most of the state's education laws, including teacher certification requirements. This frees charter schools to be more innovative and to provide specialized curricula, such as focusing on the arts, science, or basics. Charter schools are however bound by the constitution's prohibitions on religious instruction, and must comply with general health and civil rights laws.

Arizona currently has more than 450 charter schools that enroll roughly 8 percent of the state's students.[64] In fact, Arizona leads the nation—no state has more charter schools. Nonetheless, these schools remain controversial. Critics charge there is insufficient financial and academic oversight.[65] They point to scandals involving inflated attendance records, criminal theft, fund

diversion, and fraud. Academic performance comparisons are somewhat inconclusive because charter schools serve different student populations. For example, in 2008, some of the top-performing schools were charters. Overall however a significantly smaller percentage of charter schools met the state's highest performance categories (excelling, highly performing, performing plus).[66] It is equally difficult to assess the impact that charter schools have on traditional school districts. All schools must now worry about enrollment, which determines state funding levels. It is unclear whether this competition translates into improved programs or simply diverts limited district resources to marketing efforts. Moreover, the closure of a charter school in the middle of a school year—and several have failed—can put an unexpected burden on the school districts that must suddenly absorb these students. The State Board for Charter Schools promises more rigorous review when the first charters come up for renewal in 2009. The board's limited staff and resources make such a review somewhat problematic.[67]

Finally, private schools have always provided an educational alternative for those who could afford them. In the past decade, the legislature has enacted controversial tax credit and voucher legislation to provide financial assistance to parents who choose this option. Apart from the issue of whether such programs divert needed revenues from public schools, special considerations arise when religious schools are the ultimate beneficiaries. As noted previously, Arizona's constitution contains multiple provisions mandating the separation of church and state, several of which apply specifically to school contexts.[68] Accordingly, in 2009, the Arizona Supreme Court unanimously struck down two voucher plans designed to help disabled children attend private religious schools. The court concluded that the vouchers violated the constitution's Religious Aid Clause.[69] A decade earlier, however, it sustained a tax credit for private contributions to school tuition organizations that provided tuition aid for private schools, including religious schools.[70] The court concluded that the tax credits, in contrast to the vouchers, did not involve appropriations of public money and therefore did not implicate the Religious Aid Clause. Recent investigations into the actual operation of the tax-credit program reveal, however, that most of the benefit has gone to wealthy families, not the low-income children that the legislation was supposed to aid.[71] Additionally, 93 percent of the money has gone to religious schools, and some families have "swapped" scholarships to ensure

that their own children benefit.[72] These findings have prompted calls for new legislation, and federal litigation challenging the religious neutrality of the program is pending.[73]

Community College Districts

Arizona's community college districts represent yet another form of district government. The state's community college system was created by legislative enactment in 1960. Today, there are ten separate community college districts. The boundaries of each district generally coincide with county lines; exceptions are Yuma and La Paz counties, which have a combined district, and four smaller counties that are served by the other districts. The Maricopa County Community College District—with ten individual colleges and a student enrollment in excess of 250,000—is one of the largest in the nation.

Each local community college district is governed by a five-person board.[74] Board members are elected in nonpartisan elections from individual precincts within the district. They have staggered six-year terms and are subject to recall elections like other Arizona officials. Each district board appoints a chancellor to manage the district, and a president for each separate college. The board sets the district's annual budget, determines tuition levels, levies property taxes, authorizes bond elections, manages district property, approves new courses and curriculum changes, hires and fires college and district personnel, and awards degrees.

Special Taxing Districts

Special taxing districts are the most numerous local governments in Arizona, and their numbers are steadily increasing. These districts are organized for a variety of different—but always limited—purposes. For example, there are fire districts, irrigation districts, water conservation districts, sanitary districts, flood-control districts, electrical districts, pest-control districts, hospital districts, road-improvement districts, regional transportation districts, lighting districts, special road districts, jail districts, library districts, and—most controversially—stadium districts.

The boundaries of these districts vary. Some districts encompass only a small neighborhood within a city or town; other districts coincide with county boundaries; and there are regional districts that cross county lines. It is

equally difficult to generalize about the governing structures of special districts. Many of the state's special taxing districts have small, elected boards made up of unpaid citizen volunteers. This is the structure used by fire districts, for example. While it is democratic in theory, in actual practice few citizens know much about the candidates who run for these relatively obscure boards, and the elections contribute to ballot bloat. Other districts, however, are governed by the county board of supervisors, wearing a second hat. (This is how the Maricopa County Stadium District, owner of Chase Field ballpark, is governed.)[75] Most special districts set their own budgets and raise revenues through property tax levies, bond sales, and user fees. Some however get their revenues from sales taxes instead.[76] Legally, special taxing districts are "subdivisions of the state" with privileges and immunities comparable to those enjoyed by cities and towns.[77]

There are several reasons why special districts have mushroomed in recent years. Population growth in unincorporated areas is one explanation. When there is no city government to supply water, fire protection, and other essential services, residents often turn to special districts. Many property owners believe that these districts provide basic services more cheaply than cities can and therefore reject the option of incorporating. Second, even in urban areas, special districts can efficiently address a localized need. For example, one neighborhood may be located in a floodplain, or another may require street lighting. The special district structure allows the affected homeowners and businesses to tax themselves for the necessary improvements, without burdening other taxpayers. Third, district residents have a greater measure of control over the expenditures and services, since they typically elect the district's governing board. Fourth, because special districts can cross city and county lines, they permit regional problems to be more effectively addressed. Finally, special districts are exempt from the constitutional debt limitations that apply to counties and municipalities.[78] A cash-starved county, therefore, can circumvent the limitations by reconstituting itself as a special district.

Special districts are not immune from political conflict. The very creation of a district can arouse controversy. For example, many Maricopa County residents were upset when the board of supervisors created a special district in 1991 to build a major league baseball stadium. The stadium district then levied a countywide quarter-cent sales tax to pay for the project.

(Although the tax has long expired, the public funding of the stadium still generates controversy.) Even well-established districts have disputes over major capital expenditures. For example, citizens are often divided over whether a fire district needs a new fire station or truck, because such costly capital expenditures will usually result in increased property taxes. Recall attempts can emanate from such controversies. Governance on the local level tends to be more personal and intense. Like all governments, special districts must make difficult policy choices and weather the political conflict that often accompanies them.

Online resources

Arizona Department of Commerce, Community and Regional Profiles:
www.azcommerce.com/CommAsst/Profiles

Maricopa County:
www.maricopa.gov

Pima County:
www.pima.gov

League of Arizona Cities and Towns:
www.azleague.org

Arizona State Department of Education:
www.azed.gov

Arizona State Board for Charter Schools:
http://www.asbcs.az.gov

Appendix

Taft's Veto of Arizona Statehood

To the House of Representatives: I return herewith, without my approval, House joint resolution No. 14, "To admit the territories of New Mexico and Arizona as States into the Union on an equal footing with the original States."

Congress, by an enabling act approved June 20, 1910, provided for the calling of a constitutional convention in each of these Territories, the submission of the constitution proposed by the convention to the electors of the Territory, the approval of the constitution by the President and Congress, the proclamation of the fact by the President, and the election of State officers. Both in Arizona and New Mexico conventions have been held, constitutions adopted and ratified by the people and submitted to the President and Congress. I have approved the constitution of New Mexico, and so did the House of Representatives of the Sixty-first Congress. The Senate, however, failed to take action upon it. I have not approved the Arizona constitution, nor have the two Houses of Congress, except as they have done so by the joint resolution under consideration. The resolution admits both Territories to statehood with their constitutions, on condition that at the time of the election of State officers New Mexico shall submit to its electors an amendment to its new constitution altering and modifying its provision for future amendments, and on the further condition that Arizona shall submit to its electors, at the time of the election of its State officers, a proposed amendment to its constitution by which judicial officers shall be excepted from the section permitting a recall of all elective officers.

If I sign this joint resolution, I do not see how I can escape responsibility for the judicial recall of the Arizona constitution. The joint resolution admits Arizona with the judicial recall, but requires the submission of the question of its wisdom to the voters. In other words, the resolution approves the admission of Arizona with the judicial recall, unless the voters themselves repudiate it. Under the Arizona constitution all elective officers, and this includes county and State judges, six months after their election, are subject

to the recall. It is initiated by a petition signed by electors equal to 25 per cent of the total number of votes cast for all the candidates for the office at the previous general election. Within five days after the petition is filed the officer may resign. Whether he does or not, an election ensues in which his name, if he does not resign, is placed on the ballot with that of all other candidates. The petitioners may print on the official ballot 200 words showing their reasons for recalling the officer, and he is permitted to make defense in the same place in 200 words. If the incumbent receives the highest number of the votes, he continues in his office; if not, he is removed from office and is succeeded by the candidate who does receive the highest number.

This provision of the Arizona constitution, in its application to county and State judges, seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government, that I must disapprove a constitution containing it. I am not now engaged in performing the office given me in the enabling act already referred to, approved June 20, 1910, which was that of approving the constitutions ratified by the peoples of the Territories. It may be argued from the text of that act that in giving or withholding the approval under the act my only duty is to examine the proposed constitution, and if I find nothing in it inconsistent with the Federal Constitution, the principles of the Declaration of Independence, or the enabling act, to register my approval. But now I am discharging my constitutional function in respect to the enactment of laws, and my discretion is equal to that of the Houses of Congress. I must therefore withhold my approval from this resolution if in fact I do not approve it as a matter of governmental policy. Of course, a mere difference of opinion as to the wisdom of details in a State constitution ought not to lead me to set up my opinion against that of the people of the Territory. It is to be their government, and while the power of Congress to withhold or grant statehood is absolute, the people about to constitute a State should generally know better the kind of government and constitution suited to their needs than Congress or the Executive. But when such a constitution contains something so destructive of free government as the judicial recall, it should be disapproved.

A government is for the benefit of all the people. We believe that this

benefit is best accomplished by popular government, because in the long run each class of individuals is apt to secure better provision for themselves through their own voice in government than through the altruistic interest of others, however intelligent or philanthropic. The wisdom of ages has taught that no government can exist except in accordance with laws and unless the people under it either obey the laws voluntarily or are made to obey them. In a popular government the laws are made by the people—not by all the people—but by those supposed and declared to be competent for the purpose, as males over twenty-one years of age, and not by all of these—but by a majority of them only. Now, as the government is for all the people, and is not solely for a majority of them, the majority in exercising control either directly or through its agents is bound to exercise the power for the benefit of the minority as well as the majority. But all have recognized that the majority of a people, unrestrained by law, when aroused and without the sobering effect of deliberation and discussion, may do injustice to the minority or to the individual when the selfish interest of the majority prompts. Hence arises the necessity for a constitution by which the will of the majority shall be permitted to guide the course of the government only under the controlling checks that experience has shown to be necessary to secure for the minority its share of the benefit to the whole people that a popular government is established to bestow. A popular government is not a government of a majority, by a majority, for a majority of the people. It is a government of the whole people by a majority of the whole people under such rules and checks as will secure a wise, just, and beneficent government for all the people. It is said you can always trust the people to do justice. If that means all the people and they all agree, you can. But ordinarily they do not all agree, and the maxim is interpreted to mean that you can always trust a majority of the people. This is not invariably true; and every limitation imposed by the people upon the power of the majority in their constitutions is an admission that it is not always true. No honest, clear-headed man, however great a lover of popular government, can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a government tyrannical and cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority, and of the individual in his relation to other individuals, and in his relation to the whole people in their character as a state

or government.

The Constitution distributes the functions of government into three branches —the legislative, to make the laws; the executive, to execute them; and the judicial, to decide in cases arising before it, the rights of the individual as between him and others and as between him and the Government. This division of government into three separate branches has always been regarded as a great security for the maintenance of free institutions, and the security is only firm and assured when the judicial branch is independent and impartial. The executive and legislative branches are representative of the majority of the people which elected them in guiding the course of the Government within the limits of the Constitution. They must act for the whole people, of course; but they may properly follow, and usually ought to follow, the views of the majority which elected them in respect to the governmental policy best adapted to secure the welfare of the whole people. But the judicial branch of the Government is not representative of a majority of the people in any such sense, even if the mode of selecting judges is by popular election. In a proper sense, judges are servants of the people; that is, they are doing work which must be done for the Government and in the interest of all the people, but it is not work in the doing of which they are to follow the will of the majority except as that is embodied in statutes lawfully enacted according to constitutional limitations. They are not popular representatives. On the contrary, to fill their office properly they must be independent. They must decide every question which comes before them according to the law and justice. If this question is between individuals, they will follow the statute, or the unwritten law if no statute applies, and they take the unwritten law growing out of tradition and custom from previous judicial decisions. If a statute or ordinance affecting a cause before them is not lawfully enacted, because it violates the constitution adopted by the people, then they must ignore the statute and decide the question as if the statute had never been passed. This power is a judicial power imposed by the people on the judges by the written constitution. In early days some argued that the obligations of the Constitution operated directly on the conscience of the legislature, and only in that manner, and that it was to be conclusively presumed that whatever was done by the legislature was constitutional. But such a view did not obtain with our hard-headed, courageous, and far-sighted statesmen and judges, and it was soon settled that it was the duty of judges in

cases properly arising before them to apply the law and so to declare what was the law, and that if what purported to be statutory law was at variance with the fundamental law, that is, the Constitution, the seeming statute was not law at all, was not binding on the courts, the individuals, or any branch of the Government, and that it was the duty of the judges so to decide. This power conferred on the judiciary in our form of government is unique in the history of governments, and its operation has attracted and deserved the admiration and commendation of the world. It gives to our judiciary a position higher, stronger, and more responsible than that of the judiciary of any other country, and more effectively secures the adherence to the fundamental will of the people.

What I have said has been to little purpose if it has not shown that judges to fulfill their functions properly in our popular Government must be more independent than in any other form of government, and that need of independence is greatest where the individual is one litigant and the state, guided by the successful and governing majority, is the other. In order to maintain the rights of the minority and the individual and to preserve our constitutional balance, we must have judges with courage to decide against the majority when justice and law require.

By the recall in the Arizona constitution, it is proposed to give to the majority power to remove arbitrarily, and without delay, any judge who may have the courage to render an unpopular decision. By the recall it is proposed to enable a minority of 25 per cent of the voters of the district or State, for no prescribed cause, after the judge has been in office six months, to submit the question of his retention to the electorate. The petitioning minority must say on the ballot what they can against him in 200 words, and he must defend as best he can in the same space. Other candidates are permitted to present themselves and have their names printed on the ballot so that the recall is not based solely on the record or the acts of the judge, but also on the question whether some other and more popular candidate has been found to unseat him. Could there be a system more ingeniously devised to subject judges to momentary gusts of popular passion than this? We can not be blind to the fact that often an intelligent and respectable electorate may be so roused upon an issue that it will visit with condemnation the decision of a just judge, though exactly in accord with the law governing the case, merely because it affects unfavorably their contest. Controversies over elections, labor troubles, racial

or religious issues, issues as to the construction or constitutionality of liquor laws, criminal trials of popular or unpopular defendants, the removal of county seats, suits by individuals to maintain their constitutional rights in obstruction of some popular improvement—these and many other cases could be cited in which a majority of a district electorate would be tempted by hasty anger to recall a conscientious judge if the opportunity were open all the time. No period of delay is interposed for the abatement of popular feeling. The recall is devised to encourage quick action and to lead the people to strike while the iron is hot. The judge is treated as the instrument and servant of a majority of the people and subject to their momentary will, not after a long term in which his qualities as a judge and his character as a man have been subjected to a test of all the varieties of judicial work and duty so as to furnish a proper means of measuring his fitness for continuance in another term. On the instant of an unpopular ruling, while the spirit of protest has not had time to cool, and even while an appeal may be pending from his ruling, in which he may be sustained, he is to be haled before the electorate as a tribunal, with no judicial hearing, evidence, or defense, and thrown out of office and disgraced for life because he has failed, in a single decision, it may be, to satisfy the popular demand. Think of the opportunity such a system would give to unscrupulous political bosses in control, as they have been in control not only of conventions but elections! Think of the enormous power for evil given to the sensational, muckraking portion of the press in rousing prejudice against a just judge by false charges and insinuations, the effect of which in the short period of an election by recall it would be impossible for him to meet and offset! Supporters of such a system seem to think that it will work only in the interest of the poor, the humble, the weak and the oppressed; that it will strike down only the judge who is supposed to favor corporations and be affected by the corrupting influence of the rich. Nothing could be further from the ultimate result. The motive it would offer to unscrupulous combinations to seek to control politics in order to control the judges is clear. Those would profit by the recall who have the best opportunity of rousing the majority of the people to action on a sudden impulse. Are they likely to be the wisest or the best people in a community? Do they not include those who have money enough to employ the firebrands and slanderers in a community and the stirrers-up of social hate? Would not self-respecting men well hesitate to accept judicial office with such a sword of Damocles hanging over them? What kind of judgments might those on the unpopular side expect from

courts whose judges must make their decisions under such legalized terrorism? The character of the judges would deteriorate to that of trimmers and timeservers, and independent judicial action would be a thing of the past. As the possibilities of such a system pass in review, is it too much to characterize it as one which will destroy the judiciary, its standing, and its usefulness?

The argument has been made to justify the judicial recall that it is only carrying out the principle of the election of the judges by the people. The appointment by the executive is by the representative of the majority, and so far as future bias is concerned there is no great difference between the appointment and election of judges. The independence of the judiciary is secured rather by a fixed term and fixed and irreducible salary. It is true that when the term of judges is for a limited number of years and reelection is necessary, it has been thought and charged sometimes that shortly before election, in cases in which popular interest is excited, judges have leaned in their decisions toward the popular side.

As already pointed out, however, in the election of judges for a long and fixed term of years, the fear of popular prejudice as a motive for unjust decisions is minimized by the tenure on the one hand, while the opportunity which the people have calmly to consider the work of a judge for a full term of years in deciding as to his reelection generally insures from them a fair and reasonable consideration of his qualities as a judge. While, therefore, there have been elected judges who have bowed before unjust popular prejudice, or who have yielded to the power of political bosses in their decisions, I am convinced that these are exceptional, and that, on the whole, elected judges have made a great American judiciary. But the success of an elective judiciary certainly furnishes no reason for so changing the system as to take away the very safeguards which have made it successful.

Attempt is made to defend the principle of judicial recall by reference to States in which judges are said to have shown themselves to be under corrupt corporate influence and in which it is claimed that nothing but a desperate remedy will suffice. If the political control in such States is sufficiently wrested from corrupting corporations to permit the enactment of a radical constitutional amendment like that of judicial recall, it would seem possible to make provision in its stead for an effective remedy by impeachment in which the cumbrous features of the present remedy might be avoided, but the

opportunity for judicial hearing and defense before an impartial tribunal might be retained. Real reforms are not to be effected by patent shortcuts or by abolishing those requirements which the experience of ages has shown to be essential in dealing justly with everyone. Such innovations are certain in the long run to plague the inventor or first user and will come readily to the hand of the enemies and corrupters of society after the passing of the just popular indignation that prompted their adoption.

Again, judicial recall is advocated on the ground that it will bring the judges more into sympathy with the popular will and the progress of ideas among the people. It is said that now judges are out of touch with the movement toward a wider democracy and a greater control of governmental agencies in the interest and for the benefit of the people. The righteous and just course for a judge to pursue is ordinarily fixed by statute or clear principles of law, and the cases in which his judgment may be affected by his political, economic, or social views are infrequent. But even in such cases judges are not removed from the people's influence. Surround the judiciary with all the safeguards possible, create judges by appointment, make their tenure for life, forbid diminution of salary during their term, and still it is impossible to prevent the influence of popular opinion from coloring judgments in the long run. Judges are men, intelligent, sympathetic men, patriotic men, and in those fields of the law in which the personal equation unavoidably plays a part, there will be found a response to sober popular opinion as it changes to meet the exigency of social, political, and economic changes. Indeed, this should be so. Individual instances of a hidebound and retrograde conservatism on the part of courts in decisions which turn on the individual economic or sociological views of the judges may be pointed out; but they are not many, and do not call for radical action. In treating of courts we are dealing with a human machine, liable, like all the inventions of man, to err, but we are dealing with a human institution that likens itself to a divine institution, because it seeks and preserves justice. It has been the corner stone of our gloriously free Government, in which the rights of the individual and of the minority have been preserved, while governmental action of the majority has lost nothing of beneficent progress, efficacy, and directness. This balance was planned in the Constitution by its framers, and has been maintained by our independent judiciary.

Precedents are cited from State constitutions said to be equivalent to a popular recall. In some, judges are removable by a vote of both houses of the

legislature. This is a mere adoption of the English address of Parliament to the Crown for the removal of judges. It is similar to impeachment in that a form of hearing is always granted. Such a provision forms no precedent for a popular recall without adequate hearing and defense, and with new candidates to contest the election.

It is said the recall will be rarely used. If so, it will be rarely needed. Then why adopt a system so full of danger? But it is a mistake to suppose that such a powerful lever for influencing judicial decisions and such an opportunity for vengeance because of adverse ones will be allowed to remain unused.

But it is said that the people of Arizona are to become an independent State when created, and even if we strike out judicial recall now, they can reincorporate it in their constitution after statehood.

To this I would answer that in dealing with the courts, which are the corner stone of good government, and in which not only the voters, but the nonvoters and nonresidents, have a deep interest as a security for their rights of life, liberty, and property, no matter what the future action of the State may be, it is necessary for the authority which is primarily responsible for its creation to assert in no doubtful tones the necessity for an independent and untrammeled judiciary.

WM. H. TAFT

THE WHITE HOUSE, *August 15, 1911*

Glossary

Acquitted: Found not guilty by a jury or judge in a **criminal case.**

Administrative rules: Detailed rules adopted by executive-branch officials and bodies to make the implementation of the laws more uniform, fair, and efficient. (Also called *regulations.*)

Appellate courts: Courts that review the decisions of lower courts for legal mistakes. The two major appellate courts in Arizona are the Arizona Supreme Court and the Arizona Court of Appeals.

Appropriation: A formal legislative authorization for the spending of public money.

Arizona Corporation Commission: The elected body that regulates Arizona's public utilities.

Arraignment: A pretrial hearing where the defendant appears in court and enters a formal plea of guilty, not guilty, or no contest to criminal charges.

At-large elections: A system in which the members of a multimember body (e.g., a city council) are elected by the entire community rather than by the residents of individual districts or wards within the community.

Bicameral: A body made up of two separate chambers, such as the Arizona legislature and the U.S. Congress.

Bill: A proposed law or appropriation measure that has been introduced in either house of the legislature.

Bipartisan: Involving cooperation between Republicans and Democrats.

Board of Executive Clemency: A five-member board that grants paroles and

screens **clemency** applications (i.e., for **reprieves, pardons,** and **commutations**) for the governor.

Board of supervisors: Elected body that serves as the general governing authority for an Arizona county.

Burden of proof: The responsibility to prove the facts in a case. The **plaintiff** (the side initiating the case) usually bears the burden of proof, but plaintiffs have a higher burden in **criminal cases** than in **civil cases.**

Bureaucracy: The employees of the executive branch who carry out the state's laws and policies.

Carpetbagger: An opportunistic politician who moves to a new state or district to run for office.

Caucus: An informal meeting, typically confined to members of the same political party, to consider legislation, policies, or other group actions.

Charter: A document that functions as a constitution for a city or county; it establishes the basic structure and powers of the particular government.

Charter cities: Cities that have their own **charters** and greater autonomy than **general law cities** have. Also known as **home rule** cities.

Charter schools: Public schools that are operated by private persons and entities, and that are subject to limited government regulation.

Citizen legislature: A part-time legislature, such as Arizona's, composed of members who typically have private employment on the side.

Civil case: A noncriminal case.

Clemency: The governor's discretionary power to grant **pardons, reprieves,** and **commutations** to convicted offenders.

Codes: Rules enacted by local governments for the protection of public health and safety (e.g., city building codes). The term is also sometimes applied to a compilation of statutes (e.g., the *criminal code* and the

administrative code).

Committee of the Whole (COW): A meeting of the entire membership of the house or senate, sitting as a committee, to debate legislation and adopt amendments. This meeting typically precedes the official vote on a bill.

Common law: Judge-made law principally derived from appellate court opinions, as distinguished from statutory law.

Community property: Joint ownership of property by a husband and wife.

Commutation: A reduction in a criminal sentence granted by the governor as an act of **clemency.**

Conference committee: A one-time legislative committee composed of members from both chambers, appointed to resolve differences between house and senate versions of the same measure.

Conflict of interest: A situation in which a public official's position on an issue would benefit or harm the official's private financial interests.

Constituent: A citizen who resides in the district of a legislator or other elected representative.

Constitutionalism: The idea that lawful governmental power must be defined and limited by a constitution.

Council-manager form of government: A city government in which power is divided between an elected city council and a powerful, appointed city manager.

County seat: The city that serves as the administrative headquarters of the county.

Criminal case: A case brought by government prosecutors on behalf of the state, county, or city to enforce a penal law against an accused wrongdoer.

Damages: A monetary award in a **tort** case to compensate the **plaintiff** for personal injuries or other losses.

Declaration of Rights: Portion of the Arizona Constitution that sets forth fundamental rights and liberties (art. 2).

Defendant: The party sued in a **civil case** or accused of a crime in a **criminal case.**

Deposition: Oral interrogation of potential witnesses or opposing parties. Depositions are a typical part of the pretrial **discovery** process in a **civil case.**

Developers' agreements: Contracts between local governments and the developers of planned communities or other major projects that waive compliance with certain **zoning** and building codes in exchange for greenbelts or other amenities provided by the developer.

Dillon's Rule: Principle that local governments have only the power that is delegated to them by the state government or constitution.

Direct democracy: A system of government in which the people directly govern themselves, as opposed to electing officials to govern in their behalf. In Arizona, direct democracy also refers to the **initiative, referendum,** and **recall** processes (also called *participatory democracy* or *pure democracy*).

Direct primary: A popular election to choose the candidate of a political party who will run in the general election. Primary elections are required by the state constitution.

Discovery: A process that enables a party in a criminal or civil case to examine the evidence that the other side possesses in advance of trial.

Double jeopardy: A second criminal trial or punishment of an individual who has been previously acquitted or punished for the same offense; double jeopardy is prohibited under both the U.S. and Arizona constitutions.

Dracula Clause: A potential penalty in impeachment trials that prohibits the convicted official from holding future public office.

Emergency clause: A provision in a bill declaring that public health or safety requires the immediate enactment of the measure. An emergency

clause can be attached to any bill by a two-thirds majority vote of the legislature and prevents citizens from starting a referendum against the measure.

Eminent domain: The power of governments to take private property for a public use even if the owner objects. This power is authorized by both the U.S. and state constitutions. The power is subject to various restrictions, such as the requirement of fair compensation.

Enabling Act (1910): Federal law that established the terms under which Arizona and New Mexico could become states.

Federal system: A system of government, such as that in the United States, in which power is shared by the national government and the states. Both levels of government exercise direct authority over citizens and operate with substantial independence.

Felony: A serious crime punishable by imprisonment in a state prison or by death.

Fracturing: Gerrymandering practice in which districts are broken up to dilute the voting strength of the opposing political party. (Also called *splintering.*)

Gadsden Purchase: Purchase of a narrow strip of land from Mexico in 1853 that established Arizona's present-day southern border.

General appropriation bill: A comprehensive spending bill that allots money to all of the state's major departments and institutions.

General election: A statewide election that is held on the first Tuesday after the first Monday in November of every even-numbered year.

General fund: The fund where most state revenues are deposited and that is used to pay for the ordinary operations of state government.

General law cities and towns: Cities and towns that do not have **home rule,** and must therefore use the governing model prescribed by state statutes.

Gerrymandering: The creative drawing of district boundaries to give an electoral advantage to a particular party, group, or individual.

Grand jury: A group of citizens that is impaneled to investigate criminal activity and issue an indictment when there is sufficient evidence to justify a criminal trial.

Gubernatorial: Pertaining to the governor.

Habeas corpus petition: A petition filed in federal court by a prisoner to review the legality of his or her imprisonment. The U.S. Constitution guarantees the right to file such petitions.

Home rule: A local government that has its own **charter** and greater autonomy than other cities that must operate in accordance with general statutes. (In Arizona, cities that have home rule are called **charter cities**, to distinguish them from **general law cities.**)

Impact fee: A fee imposed on the developers of new projects or homes to offset the government's cost of providing streets, sanitation, and other services and utilities.

Impeachment: The formal process of bringing charges of misconduct against a public official by the house of representatives. (The official is removed from office if convicted by the senate following an evidentiary trial.)

Incumbent: A person who currently holds office.

Indictment: Formal written charges issued by a **grand jury,** accusing a person of specific criminal acts.

Information: Formal criminal charges against a **defendant** filed by a prosecutor following a **preliminary hearing.** It serves a function similar to a grand jury **indictment.**

Initial appearance: The first appearance by a criminal defendant before a judicial officer, during which the accused is formally advised of important

constitutional rights.

Initiative: A direct democracy process that allows citizens to draft changes to the state's constitution or statutes.

Interest group: An organized group that tries to influence government policy. Interest groups may be based upon economic, professional, ideological, demographic, or other shared interests.

Interim committee: A legislative committee that meets when the legislature is not in regular session to study the need for new legislation.

Interrogatories: Written questions directed to an opposing party prior to the start of a civil trial. Interrogatories are a typical part of the **discovery** process in **civil cases.**

Joint Legislative Budget Committee (JLBC): A permanent legislative committee established by statute, responsible for fiscal oversight and the preparation of the state budget. This committee includes both house and senate members.

Judicial review: The power of the courts to authoritatively interpret the constitution. This power enables judges to nullify laws, executive actions, and citizen measures on the ground that they are unconstitutional.

Line-item veto: The power of the governor to veto one or more items in an appropriation (spending) bill while approving the remainder. (Sometimes called an *item veto.*)

Lobbyist: A person who represents a corporation, interest group, or other organization and attempts to influence government policy by communicating with public officials.

Logrolling: Vote-trading among legislators, where they agree to support each other's legislation.

Lump sum: A consolidated appropriation or budget cut that does not contain itemized breakdowns for specific programs.

Majority party: The party in each chamber of the legislature that has the most seats.

Majority-minority district: A district where a racial or ethnic minority makes up the majority of voters, often as a result of **gerrymandering.**

Manifest Destiny: The belief, held by many Americans in the nineteenth century, that the United States was destined to occupy the continent from the Atlantic to the Pacific.

Merit selection: System for selecting and retaining judges that combines gubernatorial appointments with retention elections (also called the *Missouri Plan*).

Minority party: The political party in each chamber of the legislature that has the second most seats and is subordinate in power to the **majority party.**

Misdemeanor: A crime that is less serious than a **felony,** but more serious than a **petty offense.** Misdemeanors are punishable by fines, probation, or imprisonment in jail for up to a year.

Municipal corporations: Legally incorporated cities or towns.

Negligence: A category of **tort** cases that accuses the defendant of failing to exercise "reasonable care" (e.g., in an automobile accident, malpractice, or slip and fall case).

NIMBY: Literally "not-in-my-backyard." A common objection to the siting of prisons, sanitation facilities, homeless shelters, or other projects believed to have an adverse affect on the neighborhood or local community.

Nonpartisan: Not ascribing a party label to a candidate or position.

Ordinance: A local law enacted and enforced by a county, city, or town.

Organic Act (1863): Federal law that established Arizona as a separate territory from New Mexico.

Override: The power of the legislature to nullify a governor's **veto** of a bill

by repassing the legislation by a **supermajority** (two-thirds or three-fourths) vote.

Packing: Gerrymandering practice in which opponents are consolidated into a few, super-strong districts. This removes them from surrounding districts, "wastes" their votes, and thereby gives an overall advantage to the gerrymanderer.

Pardon: The power of the governor to set aside all criminal penalties imposed on a convicted offender as an act of **clemency.**

Parole: Conditional release of a convicted offender from prison before the sentence is completed. In contrast to a **commutation,** the sentence is not reduced, and if the offender violates the terms of the parole, he or she can be returned to prison.

Partisan: Identifying with a political party.

Patronage: The practice of giving jobs, contracts, or other favors to those who support the winning candidate or party.

Per diem: A daily allowance of money to reimburse officials for housing, meals, and transportation costs while they are performing government business away from home.

Petty offense: A minor infraction of the law, usually punishable by a fine.

Piggyback: The practice of attaching a measure to a more popular bill in order to get it passed.

Plaintiff: The party that brings the lawsuit or legal action to court. In a **criminal case,** the plaintiff is always the government.

Plural executive branch: An executive branch, like Arizona's, that is composed of many separately elected offices and independent boards.

Populist: A national political movement of the 1880s and 1890s that attacked the banks, railroads, and other established powers, and influenced the Progressive movement that followed.

Popular referendum: Statutory **referendum** that is initiated by citizen petition. It permits the voters to prevent the targeted bill from taking effect.

Preliminary hearing: A proceeding that typically takes place before a justice of the peace to determine whether there is enough evidence against an accused person to justify a **felony** trial.

President (Arizona legislature): The presiding officer of the senate; formally elected by the entire chamber but actually chosen by the majority party.

Privilege against self-incrimination: A constitutional privilege that prevents the government from compelling criminal defendants to testify against themselves. The privilege is guaranteed by both the U.S. and Arizona constitutions.

Progressive: A **bipartisan** reform movement of the early 1900s that advocated direct democracy and other political reforms to combat corruption and the influence of monopolies and big business.

Proposition: An issue that appears on the ballot for voter approval or rejection.

Public service corporation: A public utility, such as a power company, that lacks private competition and is subject to extensive regulation by the **Arizona Corporation Commission.**

Punitive damages: An extra sum of money, in addition to actual damages, that a tort defendant can be ordered to pay the injured party as punishment for gross **negligence** or intentional misconduct.

Recall: A direct democracy process that enables the voters to remove elected officials from office before the end of their terms.

Redistricting: The redrawing of district boundaries to ensure that an equal number of persons live in each voting district. U.S. Supreme Court cases require the states to redistrict after every decennial census. (Also called

reapportionment.)

Referendum: A direct democracy process that enables the voters to accept or reject changes to the constitution or statutes that are proposed by the legislature. A statutory referendum can be triggered by citizen petition (a **popular referendum**) or by the legislature on its own volition.

Regular session: The annual meeting of the legislature when lawmaking and other official legislative business is conducted. Regular sessions in Arizona begin on the second Monday in January of each year and typically last between 100 and 150 days. (There is no fixed ending date.)

Representative democracy: A political system, such as that in the United States, in which citizens directly or indirectly choose representatives to govern on their behalf. (Also called a *republican form of government.*)

Reprieve: A delay in the carrying out of a criminal sentence that is granted by the governor as an act of **clemency.**

Retention election: An uncontested election in which the voters, by voting "yes" or "no," decide whether an officeholder should be allowed an additional term. In Arizona, retention elections are part of the **merit selection** process for judges.

Rider: A measure, unlikely to pass on its own, that is tacked on to a more popular bill to secure passage.

Right to work: A provision that prohibits workers from being forced to join unions as a condition of employment. (Found in Article 25 of the Arizona Constitution.)

Rules Committee: A **standing committee** in each legislative chamber that studies bills to determine whether they are constitutional and in proper form.

Secret ballot: The citizens' right, guaranteed by the Arizona Constitution, to have their votes remain secret.

Simple majority: One more than half.

Speaker (Arizona legislature): Presiding officer of the house of representatives; formally elected by the entire chamber but actually chosen by the majority party.

Special session: Extra session of the legislature, in addition to the annual **regular session,** that can be initiated by the governor or the legislature whenever needed.

Sponsor: A legislator who formally introduces a **bill** or measure. It is common for bills to have multiple sponsors.

Standing committee: A semipermanent legislative committee that studies bills prior to consideration by the entire chamber. It has the power to kill bills or propose amendments.

Statute: A state law enacted by the legislature or the people.

Strict liability: A category of **tort** cases that holds the **defendant** liable irrespective of fault. Such liability is sometimes imposed on manufacturers and sellers of products that cause injuries.

Suffrage: The right to vote.

Summary judgment: A legal ruling by a judge that ends a **civil case** without a trial. A summary judgment can be granted only when the relevant facts are not in dispute.

Sunset review: The automatic termination of a state agency or program after a fixed period of time unless the legislature votes to renew it.

Supermajority: More than a simple **majority;** usually a vote that requires the concurrence of two-thirds or three-fourths of a body.

Supremacy Clause: Provision in the U.S. Constitution (Article 6) that makes the federal constitution, duly enacted federal laws, and treaties superior to any conflicting state and local laws.

Term limits: A constitutional limitation on the number of terms that an officeholder can serve. (In Arizona the limitations apply only to consecutive

terms.)

Tort: A wrongful act (other than breach of contract) that causes injury to another and gives rise to a **civil** lawsuit for damages.

Treaty of Guadalupe Hidalgo: 1848 treaty between the United States and Mexico that ended the Mexican War and transferred most of Arizona and the Southwest to the United States.

Variance: Permission granted by a **zoning** authority that allows the property owner to violate a specific zoning requirement.

Veto: The rejection of a bill by a president or governor. A veto kills the bill unless both houses of the legislature **override** the veto by a supermajority vote. See also **line-item veto.**

Voter Protection Act: An Arizona constitutional provision that prevents the legislature and governor from vetoing or repealing any measure approved by the voters, and which sharply limits their ability to change citizen-approved measures.

Voter turnout: Alternatively refers to the proportion of registered voters that actually votes, or to the proportion of the voting-age population (VAP) or voting-eligible (VEP) population that actually votes.

Zoning: Laws or **ordinances** that regulate a property owner's use of the land (e.g., restricting the usage to residential, commercial, or more specific breakdowns). Modern zoning laws also typically regulate density, setback, and other usage factors.

Notes

Chapter 1. The Arizona Constitution

1. The U.S. Constitution was written in 1787. Massachusetts' constitution was adopted in 1780 and New Hampshire's in 1784.
2. Arizona Constitution, art. 2, sec. 8. *Rasmussen ex rel. Mitchell v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987), held that life support could be terminated for a patient in a chronic, vegetative state. The U.S. Supreme Court's parallel ruling was based upon the Due Process Clause of the Fourteenth Amendment. See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).
3. Arizona Constitution, art. 2, sec. 2.1.
4. For example, the religion clauses in the two constitutions are quite different. The state provisions are more numerous and detailed: The Arizona Constitution specifically prohibits public expenditures for religious purposes (art. 2, sec. 12); prohibits taxation or appropriation in aid of any church or sectarian school (art. 9, sec. 10); prohibits sectarian instruction in public education (art. 11, sec. 7, and art. 20, sec. 7); prohibits religious qualifications for jury service (art. 2, sec. 12), for public employment (art. 2, sec. 12), and for teaching (art. 11, sec. 7); and expressly protects non-belief (art. 20, first ordinance). This contrasts with the U.S. Constitution's brief prohibition on religious tests (art. 6), and the sixteen words that compose the Establishment and Free Exercise clauses of the First Amendment. Similarly, the state's right to bear arms specifically refers to a *personal* right of self-defense—language not found in the U.S. Constitution (cf. Arizona Constitution, art. 2, sec. 26 with U.S. Constitution, amend. 2). The U.S. Supreme Court didn't protect personal gun rights under the Second Amendment until 2008, and the extent of those rights has yet to be determined. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The free speech clauses of the two constitutions also differ. Arizona's Article 2, section 6 declares: "Every person may freely

speak, write, and publish on all subjects, being responsible for the abuse of that right." This contrasts with the terse, negative phrasing of the U.S. Constitution's Free Speech Clause (amend. 1). The two constitutions also have different provisions dealing with eminent domain (cf. Arizona Constitution, art. 2, sec. 17 with U.S. Constitution, amend. 5; also see chapter 7, notes 45–47).

5. The court has declared that it will not "blindly" follow federal precedent. *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984). In *State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986), the court excluded key evidence against an accused child molester on the grounds that the police had violated the defendant's search and seizure rights. It dismissed federal precedent, holding that Arizona's constitution provided greater privacy protections. See also *Mountain States Telephone & Telegraph Co. v. Arizona Corporation Commission*, 160 Ariz. 350, 773 P.2d 455 (1989) (government regulation of "900" telephone numbers violated the more liberal free speech protections in the state's constitution); *Simat Corp. v. Arizona Health Care Cost Containment System*, 203 Ariz. 454, 56 P.3d 28 (2002) (voiding funding restrictions on medically necessary abortions and noting "regardless of the [U.S.] Supreme Court's interpretation of the federal constitution, we are bound by oath and obligation to examine our own state constitution"); *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ct. App. 2003) (refusing to follow federal precedent in interpreting the state's eminent domain provisions); and *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009) (voiding two school voucher plans for violating the state constitution's specific prohibition on religious aid). But see *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 288 (1999)(applying federal precedents to uphold tax credits for religious school tuition organizations). See generally, William J. Brennan Jr., "State Constitutionalism and the Protections of Individual Rights," *Harvard Law Review* 90 (January 1977): 489–504; John Kincaid, "State Constitutions in a Federal System," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 12–22; Stanley G. Feldman and David L. Abney, "The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution," *Arizona State Law Journal* 20 (Spring 1988): 115–50; Jodi A. Jerich, "Considerations of the Arizona Legislature: The Effects of State Constitutionalism," *Arizona Attorney* (December 1998): 30–35; and Robert K. Fitzpatrick, "Neither Icarus Nor Ostrich: State Constitutions as an

Independent Source of Individual Rights," *New York University Law Review* 79 (November 2004): 1833. For criticism of this state power, see Steven J. Twist and Len L. Munsil, "The Double Threat of Judicial Activism: Inventing New 'Rights' in State Constitutions," *Arizona State Law Journal* 21 (Winter 1989): 1005–65.

6. See chapter 6 for a discussion of this issue.

7. *Arizona Revised Statutes,* sec. 41-171. The provision was in effect when Arizona became a separate territory in 1863 (*Howell Code,* ch. 17, sec. 1). In a similar vein, the constitution originally imposed term limits only for the state treasurer. Arizona Constitution, art. 5, sec. 10 (1910). Term limits for other officials weren't added until 1992.

8. See *Arizona Revised Statutes,* secs. 41-853 to 41-860.

9. *Arizona Session Laws 1982,* ch. 1. For the adoption of the original song, see *Arizona Session Laws 1919,* ch. 28.

10. The U.S. Supreme Court upheld the federal government's right to do this in *South Dakota v. Dole,* 483 U.S. 203 (1987).

11. U.S. Constitution, art. 6.

12. *Ruiz v. Hull,* 191 Ariz. 441, 957 P.2d 984 (1998).

13. Arizona Constitution, art. 9, sec. 13(2).

14. The Arizona Constitution itself contributes to this state of affairs because Article 9, section 2(13) prohibits the legislature from granting tax exemptions that are not constitutionally authorized.

15. U.S. constitutional amendments in theory can also be proposed through a constitutional convention called by two-thirds of the states, although this method has never been used. See U.S. Constitution, art. 5.

Chapter 2. Origins of the Arizona Constitution

1. Modern-day Hopis and other Pueblo peoples are likely descendants of the Ancestral Pueblo (formerly called Anasazi) and Mogollon cultures, which lasted into the 1500s. There is however debate as to whether the Hohokam culture left any modern-day descendants. Several native communities (e.g., the Gila River, Salt River Pima–Maricopa, Tohono O'odham, and Ak-Chin) claim Hohokam lineage. This has become more than an academic

question since passage of the Native American Graves Protection and Repatriation Act, *U.S. Code* 25 (2008), sec. 3001. The federal law allows descendant tribes to claim remains and other sacred burial objects found on federal land.

2. He was accompanied by Esteban, a slave of likely Moorish descent, who is generally credited with being the first non–Native American to enter Arizona. Esteban was a survivor of a previous expedition led by Alvar Cabeza de Vaca. It is uncertain whether the slave crossed into the southeastern corner of Arizona on that earlier expedition in 1536. See generally Jay J. Wagoner, *Early Arizona: Prehistory to Civil War* (Tucson: University of Arizona Press, 1989), 47–49.

3. Neither expedition apparently encountered any Athabaskan-speaking peoples (Navajos or Apaches), leading to speculation that these tribes may have entered Arizona after the Spanish.

4. The formal governing structure of the region underwent multiple changes from 1776 to 1821, prompted in part by the longstanding neglect of the region by Mexico City. In 1776, the six northern provinces of New Spain (which included southern Arizona) were united in a single jurisdiction known as the Interior Provinces. These provinces reported to a representative of the king rather than to Mexico City. In 1787, however, the northern provinces were split and made subject to Mexico City once again. Finally, in 1792, King Carlos IV reconsolidated the northern provinces and restored their former autonomy from New Spain. See generally James E. Officer, *Hispanic Arizona, 1536–1856* (Tucson: University of Arizona Press, 1987), 53–70; and Wagoner, *Early Arizona,* 133–34.

5. Officer, *Hispanic Arizona,* 214–15.

6. Although the Apaches were a significant barrier to Hispanic and Anglo settlement, they were not the only obstacles. Pima and Hopi uprisings took place in the early years; Yuman-speaking tribes controlled the lower Colorado River area until the 1850s; and the Navajos engaged in sporadic raids that led to warfare and their defeat in 1865. See generally Thomas E. Sheridan, *Arizona: A History* (Tucson: University of Arizona Press, 1995); Wagoner, *Early Arizona;* and Officer, *Hispanic Arizona.*

7. Joseph F. Park, “Spanish Indian Policy in Northern Mexico, 1765–1810,” in *New Spain’s Far Northern Frontier: Essays on Spain in the American*

West, 1540–1821, ed. David J. Weber (Dallas: Southern Methodist University Press, 1979), 219–34; Wagoner, *Early Arizona*, 149–51.

8. Constitution of Occidente, sec. 2, arts. 7–8. Reprinted in Odie B. Faulk, ed., *The Constitution of Occidente* (Tucson: Arizona Pioneers' Historical Society, 1967).

9. Constitution of Occidente, sec 2, art. 6.

10. Provisions of the Occidente Constitution were incorporated into the Sonoran constitutions of 1831 and 1848. See Faulk, *Constitution of Occidente*, 1–4.

11. Officer, *Hispanic Arizona*, 2.

12. Ibid., 17.

13. The most costly proposal, at $50 million, would have given the United States the Baja California Peninsula as well as a large swath of Mexican territory reaching all the way to the Gulf of Mexico. See Henry P. Walker and Don Bufkin, *Historical Atlas of Arizona*, 2d ed. (Norman: University of Oklahoma Press, 1986); and Wagoner, *Early Arizona*, 281–97.

14. Quoted in Wagoner, *Early Arizona*, 294. The treaty signed in Mexico on December 30, 1853, had authorized $15 million for 45,000 square miles of Mexican territory. However, the U.S. Senate ratified the smaller land area and reduced price on April 25, 1854. (President Antonio López de Santa Anna approved the revised Gadsden Purchase agreement on June 8, 1854.) See also Odie B. Faulk, *Too Far North . . . Too Far South* (Los Angeles: Westernlore Press, 1967) for a lengthier treatment of the events surrounding the Gadsden Purchase.

15. A final major change in Arizona's boundaries occurred in 1866 when the north-western corner of the territory—which includes the present site of Las Vegas—was transferred to the state of Nevada. See Arizona Geographic Alliance, "Historical Development of Arizona and New Mexico Boundaries," http://alliance.la.asu.edu/maps/AZ_hist_bdries.PDF.

16. See Thomas E. Sheridan, *Los Tucsonenses: The Mexican Community in Tucson, 1854–1941* (Tucson: University of Arizona Press, 1997), 26–31. U.S. troops promised superior military protection against the Indians, the country had better economic prospects, and Tucson was experiencing internal political strife.

17. Annual Message to Congress (December 19, 1859), *A Compilation of the*

Messages and Papers of the Presidents (New York: Bureau of National Literature, 1897–1917), 7:3099–3100.

18. See generally B. Sacks, *Be It Enacted: The Creation of the Territory of Arizona* (Phoenix: Arizona Historical Foundation, 1964), 35–42. (The self-proclaimed territory included portions of southern New Mexico, as well as Arizona.)

19. Proclamation of August 1, 1861, reproduced in Sacks, *Be It Enacted,* 64.

20. See Wagoner, *Early Arizona*, 443–79, for a discussion of the military maneuvers in Arizona during the Civil War period.

21. U.S. Senate, *Federal Census–Territory of New Mexico and Territory of Arizona,* 89th Cong., 1st sess., 1965. S. Doc. No. 13, 1. (This special reprint extracted the Arizona portion of the territorial census.) By 1870, the territory's non–Native American population had grown to 9,627 with 907 dwellings in Tucson and 151 in Prescott. Ibid., 162, 207.

22. Arizona Constitution, art. 20, ninth ordinance. A similar provision in the Oklahoma Enabling Act was struck down by the U.S. Supreme Court as an unconstitutional interference in state affairs. *Coyle v. Smith*, 221 U.S. 449 (1911).

23. Lincoln initially appointed Goodwin to be chief justice of Arizona. Goodwin was promoted to governor when Lincoln's first choice, former Ohio congressman John Addison Gurley, died. For general background on Arizona's territorial governors see John Jay Wagoner, *Arizona Territory, 1863–1912: A Political History* (Tucson: University of Arizona Press, 1970); and John S. Goff, *Arizona Territorial Officials: The Governors* (Cave Creek, Ariz.: Black Mountain Press, 1978).

24. Actually, Goodwin initially went east as Arizona's nonvoting delegate to Congress. When his term ended on March 4, 1867, he terminated his official connection with Arizona.

25. Howard Roberts Lamar observes, "The roster of Arizona governors from 1869 to 1900 demonstrates . . . that the real function of government on the frontier was business development." *The Far Southwest, 1846–1912: A Territorial History* (New Haven: Yale University Press, 1966), 476.

26. Safford's wife had published flyers alleging that the governor had been unfaithful and had contracted venereal disease. Goff (*Arizona Territorial Officials,* 51) suggests that the governor's self-granted divorce may be unique in gubernatorial annals. On the other hand, Wagoner (*Arizona*

Territory, 58) notes that the legislature had previously annulled a legislator's marriage. In fact, six years later, the Tenth Legislature passed an "Omnibus Divorce Bill" that terminated the marriages of fifteen couples, including the territory's secretary and acting governor. Ibid., 60.

27. Wagoner, *Arizona Territory*, 224–26; Goff, *Arizona Territorial Officials*, 96–97. Goff views these governors somewhat more sympathetically, observing that as a whole, they "were no better and no worse than those subsequently elected by the voters of the state." Ibid., 12.

28. Wagoner, *Arizona Territory*, 219–20.

29. Amazingly, a successor, Governor Franklin, similarly returned the excess portion of a bribe to a mining company. Both episodes are recounted in Wagoner, *Arizona Territory*, 256–67, 330.

30. Angelo Patane, "Old-Fashioned Justice: Law and (Dis)Order on the Arizona Frontier," *Arizona Attorney* 34, no. 6 (February 1998): 28–29. For a more sympathetic account see Fred Veil, "19th-Century 'Old West' Law Surprisingly Sophisticated," Sharlot Hall Museum Days Past, September 17, 2006, www.sharlot.org/archives/history/dayspast/text/2006_09_17.shtml.

31. See generally Charles S. Peterson, *Take Up Your Mission: Mormon Colonizing along the Little Colorado River, 1870–1900* (Tucson: University of Arizona Press, 1973), 170–71.

32. U.S. Constitution, art. 4, sec. 3.

33. Senate Committee on Territories, *New Statehood Bill*, 57th Cong., 2d sess., 1902, S. Rept. 2206, pt. 1, 15.

34. Ibid., 16–20.

35. In 1870, 60.1 percent of Arizona's population was foreign born. By 1910, the number had declined to 23.9 percent. (The national average for these two periods was 14 percent.) U.S. Bureau of the Census, "Historical Statistics on the Foreign-Born Population of the United States: 1850–2000," prepared by Campbell J. Gibson and Kay Jung, February 2006, table 14, www.census.gov/population/www/documentation/twps0081.

36. *New Statehood Bill*, 16.

37. John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20 (Spring 1988): 11.

38. *New Statehood Bill*, 15–16.

39. Beveridge exclaimed:

> And what a glorious State this new Arizona would be. . . . Arizona, second in size and eminent in wealth among the States of the greatest nation; Arizona, standing midway between California and Texas, three giant Commonwealths guarding the Republic's southwestern border. . . . not Arizona the little, but Arizona the great; not Arizona the provincial, but Arizona the national; not Arizona the creature of a politician's device, but Arizona the child of the nation's wisdom! How its people and the people of the Republic will glory in such an Arizona! *(Congressional Record,* 58th Cong., 3d sess. [February 6, 1905], 39, pt. 2: 1931).

40. Wagoner, *Arizona Territory*, 412.

41. Ethnic bigotry was also part of Arizona's intense opposition to jointure. Hispanics composed a larger proportion of New Mexico's population and held political power. During the Senate debate over jointure, pejorative comparisons were often made between the makeup of the two territories' populations. Senator Beveridge attempted to downplay the differences, declaring at one point that it was "not true you are loading upon a pure American strain of Arizona the Spanish stock of New Mexico." *Congressional Record,* 59th Cong., 1st sess. (March 8, 1906), 40, pt. 4: 3522. Previously he had argued that Arizona's "American" population would combine with the American minority in New Mexico, "Americanizing within a few brief years every drop of the blood of Spain." *Congressional Record,* 58th Cong., 3d sess. (February 6, 1905), 39, pt. 2: 1929. See also David R. Berman, *Reformers, Corporations, and the Electorate: An Analysis of Arizona's Age of Reform* (Niwot: University Press of Colorado, 1992), 50–52.

42. U.S. Bureau of the Census, "The Population of States and Counties of the United States: 1790–1990," July 21, 1999, www.census.gov/population/censusdata/table-16.pdf.

43. Such land grants—typically earmarked for public education—were actually a legacy of the Northwest Ordinance, enacted in 1787 before the U.S. Constitution was even adopted.

44. Senator Beveridge, the prime mover behind the land restrictions, was particularly upset that Arizona's sister territory, New Mexico, had sold land granted in 1898 for unreasonably low prices. See *Lassen v. Arizona Highway Department,* 385 U.S. 458 (1967).

45. Arizona Constitution, Article 20, ordinance 12 requires the state to abide by the federal land restrictions "in every respect and particular." Many of the specific Enabling Act land mandates are found in Article 10 of the state constitution.

46. Other beneficiaries with smaller land grants include the state universities, state hospitals, penal institutions, public buildings, and other lesser designees.

47. Even though the federal government has relaxed the Enabling Act's ban, the state constitution, which incorporates much of the original Enabling Act, still bars swaps. See art. 10, sec. 3, and *Fain Land & Cattle Company v. Hassell*, 163 Ariz. 587, 790 P.2d 242 (1990). Ballot propositions authorizing land exchanges in one form or another were rejected in 1990, 1992, 1994, 2000, 2002, and 2004.

48. Since 1990, eleven proposed trust land reforms have been on the ballot; all but three were rejected. In 1998, the voters authorized the investment of trust fund monies (Prop 102), and authorized the purchase of some trust land for preservation (Prop 303). In 2000 the voters approved a measure to divert some trust revenues to a new Classroom Site Fund (Prop 301). (They approved the latter measure again in 2002, when a second vote was needed to correct a drafting error.)

49. How the schools actually benefit from the trust lands is complex and also controversial. Basically, the state maintains two separate accounts: a *permanent fund* and an *expendable fund.* When the State Land Department sells school trust land, the proceeds go into the permanent fund. That fund now has more than two billion dollars invested in stocks, bonds, and annuities. In contrast, lease payments on the remaining land, as well as the annual income earned by the permanent fund, go into the expendable fund. It is this latter money which is annually distributed to the schools. In the past, the availability of expendable fund money simply allowed the state legislature to free up general tax revenues for other public needs (e.g., highways, prisons, hospitals). In other words, the schools didn't particularly benefit from the additional revenue derived from trust lands. Voter-approved measures in 2000 and 2002 established a special Classroom Site Fund and mandated that more trust revenues be earmarked for teacher salaries, class-size reduction, and other education programs. For example, in fiscal year 2008, the Classroom Site Fund received roughly

$100 million from state land trust revenues. (Although this may seem like a large sum, it is divided among more than two thousand public schools, and it pales next to the more than $5 billion required annually to run the schools.)

50. Analogously, when the Highway Department needed some trust land for a right-of-way, the U.S. Supreme Court ruled that the state had to pay for it like any other purchaser. *Lassen v. Arizona Highway Department*, 385 U.S. 458 (1967). Although this ruling required payment to the school trust fund prospectively, it did not address the more than nine hundred uncompensated easements that had been awarded between 1929 and the date of the *Lassen* ruling in 1967. That issue was resolved against the schools in 2009 when the Arizona Supreme Court ruled that their compensation demands were time-barred. *Mayer Unified School District v. Winkleman,* 219 Ariz. 562, 201 P.3d 523 (2009).

51. On the national level, the Progressives also successfully campaigned for the adoption of the Seventeenth Amendment to the U.S. Constitution, which provided for the direct election of U.S. senators. (Prior to the adoption of this amendment in 1913, senators were chosen by state legislatures.)

52. For example, in 1910, the average wage for mineworkers was $2.00 a day. This did not buy much because most workers lived in company towns where the goods were sold at inflated prices. Moreover, many workers were paid in company scrip, rather than in cash. See generally Sheridan, *Arizona: A History*, 168–73.

53. On July 12, 1917, Bisbee's sheriff rounded up 2,000 striking mineworkers from their homes at gunpoint and imprisoned them overnight in a ballpark. The 1,186 who refused to abandon the strike were jammed into railroad boxcars guarded by armed vigilantes, transported to a remote location in the New Mexico desert, and abandoned without food or water. The episode shocked the country, and the federal government ultimately came to the workers' rescue. Although the sheriff and twenty prominent Bisbee residents were subsequently indicted for their roles in the kidnapping, they were acquitted in state trials. See generally Sheridan, *Arizona: A History,* 181–86 and Berman, *Reformers, Corporations, and the Electorate*, 146–48.

54. Arizona Constitution, art. 25 (this provision outlaws union shops).

55. John S. Goff, ed. *The Records of the Arizona Constitutional Convention of 1910* (Phoenix: Supreme Court of Arizona, 1991), November 28, 1910: 714.

56. For this reason, Arizona courts pay extra attention to the rulings from that state when interpreting Arizona provisions. See, for example, *Solana Land Co. v. Murphey*, 69 Ariz. 117, 210 P.2d 593 (1949); *Cienega Cattle Co. v. Atkins*, 59 Ariz. 28, 292, 126 P.2d 481, 483 (1942); and *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ct. App. 2003).

57. Arizona's constitution called for a popular, "advisory" vote for U.S. senators, slightly predating the Seventeenth Amendment to the U.S. Constitution (which became effective in 1913). Arizona Constitution, art. 7, sec. 9 (1910).

58. Ibid., art. 14, sec. 15.

59. John S. Goff, *George W. P. Hunt* (Cave Creek, Ariz.: Black Mountain Press, 1987), 13.

60. See, for example, Arizona Constitution, art. 2, sec. 31 and art. 18, secs. 4–6. These provisions, which are discussed more fully in chapter 6, have become controversial in recent years, as proponents of tort reform have sought to modify or eliminate them.

61. Ibid., art. 20, seventh and eighth ordinances. It should be noted however that the delegates to the constitutional convention refused to add an English literacy voter qualification that would have disenfranchised Hispanic pioneers. Several of the delegates passionately defended the contributions of Arizona's Hispanic settlers and their qualification to vote. See Goff, *Records of the Arizona ConstitutionalConvention*, 865, 872–75, and 930–31. Admittedly, there were political considerations at work as well: Fred Ingraham, a Democrat from Yuma County, candidly noted that one-third of the voters in his county were Spanish American, and if they were disenfranchised "the Democratic party [would] receive a hard blow." Ibid., 872. There were also concerns that a literacy test might jeopardize congressional approval of the constitution. (Senator Beveridge opposed such a test not because of the impact on Hispanic voters, but because he feared it could be corruptly administered for political advantage.)

62. Arizona Constitution, art. 17, sec. 1.

63. See, for example, *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Company*, 39 Ariz. 65, 4 P.2d 369

(1931), which discusses the Spanish legal legacy. Water law in Arizona is quite complex, and it evolved flexibly and pragmatically even under Spanish/Mexican control. See Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History,* 1550–1850 (Tucson: University of Arizona Press, 1984).

64. Louisiana, which was originally part of France, also recognized the Roman community property law.

65. Goff, *Records of the Arizona Constitutional Convention*, 537–38. A law passed over the territorial governor's veto in 1909 permitted individual school districts to establish racially segregated schools. Arizona Laws 1909, ch. 67, sec. 1. The law was upheld by the Arizona Supreme Court in *Dameron v. Bayless,* 14 Ariz. 180, 126 P. 273 (1912).

66. Although antimiscegenation laws are associated with the South, they were also quite common in the western states. See Peggy Pasco, "Race, Gender and the Privileges of Property: On the Significance of Miscegenation Laws in the U.S. West," in *Over the Edge: Remapping the American West,* ed. Valerie J. Matsumoto and Blake Allmendinger (Berkeley: University of California Press, 1999), 215–30. Arizona's ban on interracial marriage was first enacted by the territorial legislature in 1865 (Howell Code ch. 30, sec. 3), and the ban remained in effect until 1962. Arizona Session Laws 1962, ch. 14, sec. 1. At various times, the law prohibited whites from marrying "negroes," "mulattoes," "Indians," "Mongolians," "Malays," and "Hindus." In 1922, the state's supreme court upheld an annulment on the ground that a marriage between a Hispanic male and a (presumptively) African American female was illegal. *Kirby v. Kirby,* 24 Ariz. 9, 206 P. 405 (1922). By obtaining an annulment rather than a divorce, the husband was able to avoid all support obligations. (The case subsequently gained some notoriety for the dubious fashion in which the races of the parties were determined.)

67. Arizona Constitution, art. 18, sec. 10. One provision rejected by the delegates was enacted by the voters using the statutory initiative in 1914. It barred employers from hiring noncitizens in excess of 20 percent of their workforce. The U.S. Supreme Court declared the Arizona law unconstitutional the following year. *Truax v. Raich,* 239 U.S. 33 (1915).

68. Arizona Constitution, art. 20, fourth and fifth ordinances establish federal control over Indian lands and prohibit state taxation of reservation

property. Theseprovisions were mandated by the Enabling Act and cannot be repealed without the permission of Congress.

69. See generally *American Indian Relationships in a Modern Arizona Economy: Sixty-fifth Arizona Town Hall* (Phoenix: Arizona Town Hall, 1994). Not all the tension is between the state government and the tribes; federal land management decisions are also the source of continuing controversy. For example, some Arizona officials were miffed when President Clinton established two new national monuments in Arizona without prior consultation. The legislature and governor enacted a formal resolution "denouncing" the federal action. See House Joint Resolution 2001, 44th Leg., 2d reg. sess. (2000).

70. Arizona Constitution, art. 4, part 2, sec. 23.

71. Ibid., art. 5, sec. 6. This includes the power to appoint, veto, or even pardon. A minor tiff developed in 2005 when Governor Janet Napolitano went to Russia for a two-week trip. Secretary of State Jan Brewer disputed the governor's claim that she was still in charge, pointing to the state constitution. Chip Scutari, "Napolitano Says She's in Charge While Away; Secretary of State Disagrees, Cites Law," *Arizona Republic*, July 8, 2005.

72. Arizona Constitution, art. 4, pt. 2, sec. 19.

73. Ibid., art. 4, pt. 2, sec. 19(13).

74. Ibid., art 9, sec. 7. Over the years, the Gift Clause has generated numerous lawsuits with inconsistent outcomes. In a recent landmark case, the Arizona Supreme Court candidly acknowledged the confusion and attempted to lay down definitive guidelines for the future interpretation of this clause. See *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010) and chapter 7, note 39.

75. Arizona Constitution, art. 22, sec. 20.

76. The territory had more than one seal. One became known as the "baking powder seal" because it bore a suspicious resemblance to the label of a popular commercial product. Goff, *Records of the Arizona Constitutional Convention*, 650–51.

77. Ibid., 994–98, 1002.

78. Actually, these fears weren't entirely unfounded. In 1914, the Arizona Constitution was amended to make alcohol illegal. Although this was the first general election in which women were allowed to vote, women were

not the only supporters of prohibition. Mormon voters also favored the ban on alcohol. See Berman, *Reformers, Corporations, and the Electorate*, 119–21.

79. The vote, which took place on February 9, 1911, was 12,187 to 3,302. David R. Berman, *Arizona Politics and Government: The Quest for Autonomy, Democracy, and Development* (Lincoln: University of Nebraska Press, 1998), 35.

80. Taft served as a judge on the Ohio Superior Court from 1887 to 1890, and on the U.S. Court of Appeals for the Sixth Circuit from 1890 to 1900. He was appointed chief justice of the U.S. Supreme Court in 1921, and served on the Court until his death in 1930. He is the only person to have served as the head of both the executive and judicial branches.

81. See "House on Statehood Accepts Taft View; Resolution Compelling Arizona to Repeal the Judiciary Recall Provision is Adopted," *New York Times*, August 20, 1911.

82. That is, judges were expressly exempted from the general recall provision found in Arizona Constitution art. 8, pt. 1, sec. 1. Desperate for statehood, Arizonans approved the change by a vote of 14,963 to 1,980. Berman, *Arizona Politics and Government*, 35.

83. See *Arizona Highways Album: The Road to Statehood*, ed. Dean Smith (Phoenix: Arizona Department of Transportation, 1987), 138–43.

84. See Arizona Constitution, art. 8, pt. 1, sec. 1. The amendment restored the original language that was vetoed by Taft. Accordingly, the constitution now states: "*Every* public officer in the state of Arizona, holding elective office . . . is subject to recall from such office" (emphasis added).

85. "Arizona's Recall: Neither Mr. Taft nor Mr. Wilson Would Sanction Last Week's Act," *New York Times*, November 10, 1912.

Chapter 3. The Legislative Branch

1. A constitutional initiative to abolish the senate and make the legislature unicameral was decisively rejected by Arizona voters in 1916.

2. U.S. Constitution, art. 4, sec. 4.

3. Since its enactment in 1998, Arizona's Clean Elections Act has provided

public funding for candidates who choose to participate. To be eligible, candidates must collect at least two hundred $5.00 contributions. See *Arizona Revised Statutes* sec. 16-950 et seq. Interest groups help candidates reach this threshold and also independently campaign. Political contributions from lobbyists have actually risen over the past decade notwithstanding the Clean Elections Act, see note 44. Moreover, as of this writing, the long-term future of the act is somewhat clouded. Although the Ninth Circuit rejected the latest challenge to the law's constitutionality, see *McComish v. Bennett*, —F.3d—, (9th Cir. 2010), 2010 U.S. App. LEXIS 10442, the litigation is still pending. Moreover, legislative attempts to repeal the law through the referendum process have been gaining support. See, for example, S.C.R. 1043, 49th Leg. 2d Reg. Sess. (2010).

4. The Arizona Constitution has always had term limits for the state treasurer. See Arizona Constitution, art. 5, sec. 10 (1910). The 1992 amendment also added term limits for the governor, secretary of state, attorney general, and superintendent of public instruction. Ibid., art. 5, sec. 1.

5. The 1992 term limits initiative was approved by a convincing 74.2 percent of the voters.

6. For some early assessments see David R. Berman, "Effects of Legislative Term Limits in Arizona," Joint Project on Term Limits 2004 report, National Conference of State Legislatures (2005), http://ecom.ncsl.org/jptl/casestudies/Arizonav2.pdf; Ken Bennett, "Effects of Term Limits in Arizona: New Legislative Leadership," *Spectrum: The Journal of State Government*, January 1, 2005; and Jake Flake: "Effects of Term Limits in Arizona: Irreparable Damages," *Spectrum: The Journal of State Government*, January 1, 2005.

7. From 1968 through 2008, Arizona house incumbents won 91 percent of the time, and senate incumbents 89 percent of the time. (These figures exclude those running for the other chamber.) See "Legislative Incumbent Re-Election Success," *Arizona Capitol Times*, January 9, 2009, 28. See generally, Scott Jordan, "Advantage Incumbent: Investigating the Power of Money and Incumbency in the 2006 State Legislative Elections," National Institute on Money in State Politics, May 7, 2008, www.followthemoney.org/press/Reports/MoneyIncumbency2006_Final.pd

8. Originally, the five most populous counties got two senators, while the remaining nine counties got one apiece. After 1953, all counties were

given two senators each. The house always had some system of apportionment by population. Initially, the constitution prescribed the number of representatives that each county would receive, ranging from one to seven. However, a 1918 amendment apportioned representatives to each county on the basis of votes cast for governor in the prior election. Counties entitled to more than one representative were required to create legislative districts of equal population that were "compact" and "contiguous." Subsequent amendments in 1932 and 1953 altered the apportionment formula but retained this basic approach.

9. See, for example, *Baker v. Carr*, 369 U.S. 186 (1962) (requiring the reapportionment of Tennessee's lower house) and *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring both houses of the Alabama legislature to be apportioned on the basis of population).

10. The history of Arizona's "long and fitful attempt to devise a constitutionally valid reapportionment scheme" is partially chronicled by the U.S. Supreme Court in *Ely v. Klahr*, 403 U.S. 108 (1971). The three-judge district court case that actually designed Arizona's historic reapportionment is *Klahr v. Goddard*, 250 F. Supp. 537 (D. Ariz. 1966).

11. Arizona Constitution, art. 4, pt. 2, sec. 1.

12. Democrats briefly regained control of the senate on three subsequent occasions and tied 15 to 15 in 2000; however, the party has not controlled the house of representatives since reapportionment in 1966.

13. According to the cartoonist, the odd-shaped districts favored by Governor Gerry resembled a salamander, hence he christened it a "gerrymander."

14. Originally, the board of supervisors in each county drew the house districts. From 1966 until 2000, the Arizona legislature took over the decennial redistricting task. Legislators had an obvious conflict of interest because the maps affected their own reelection prospects. Some of the maps they adopted had misshapen or bifurcated districts designed to protect incumbents. The 2000 Fair Districts, Fair Elections initiative (Proposition 106) took the power of redistricting away from the legislature and gave it to a five-person independent redistricting commission. It also set forth detailed guidelines as to how the maps were to be drawn. See Arizona Constitution, art. 4, pt. 2, sec. 1(2)–(23).

15. In 1922 (the first year that voter registration data are available), Arizona Democrats outnumbered Republicans 64.5 percent to 31.9 percent,

reaching a high of 87.8 percent in 1938. Republican registrations first exceeded Democrats in 1986 and have dominated ever since, although only 3.2 percentage points separated the parties in 2008. "Arizona Voter Registration since Statehood," *Arizona Capitol Times*, January 9, 2009, 31.

16. *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972).

17. *Goddard v. Babbitt*, 536 F. Supp. 538 (D. Ariz. 1982).

18. U.S. Justice Department policy encourages this practice. The federal Voting Rights Act of 1965 as amended requires Arizona (and other states with a history of racial discrimination) to "pre-clear" all election changes with the department. Arizona's initial legislative map for the 2000–2010 decade was denied pre-clearance by the Department of Justice on May 20, 2002, because the number of majority-minority districts was less than in the prior decade. The department described the map as "retrogressive." See *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 220 Ariz. 587, 208 P.3d 676 (2009); and 42 U.S.C. sec. 1973c (2000).

19. To get on the ballot a legislative candidate needs signatures equaling 1 percent of the candidate's party registration in the district. *Arizona Revised Statutes*, sec. 16-322. For example, in 2008, a senator from District 13 who ran unopposed in both the primary and general elections could have obtained office with a mere 211 signatures.

20. Two house members are elected from each district. From 1990 through 2008, 29 percent had no opposition from the other major party, and an additional 40 percent faced reduced opposition (three candidates running for two seats).

21. No more than two commission members can be of the same party. The house speaker, house minority leader, senate president, and senate minority leader each appoint a member from a twenty-five-person nominee pool consisting of ten Democrats, ten Republicans, and five unaffiliated voters. The newly appointed commissioners then choose a fifth, nonpartisan member to chair the commission. Arizona Constitution, art. 4, pt. 2, sec. 1(3)–(6).

22. Subsection 14 spells out six specific goals: (1) complying with the U.S. Constitution and Voting Rights Act; (2) equalizing population; (3) making the districts geographically compact; (4) keeping "communities of interest" together; (5) respecting geographic features and local government

boundaries; and (6) making the districts as politically competitive as possible. Ibid., art. 4, pt. 2, sec. 1(14).

23. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission.*

24. The proposed constitutional amendment would have also expanded the size of the redistricting commission and mandated more speedy judicial review of district maps. Proposition C-05-2008 (2008).

25. Citizen legislatures are fairly common on the state level. Other than California, New York, and a few other large states, most have low-paid, part-time legislatorslike Arizona's. *The Book of the States* (Lexington: Council of State Governments, 2009), 99–107.

26. Arizona's age requirement for the house of representatives is among the nation's highest. Only five other states require representatives to be more than twenty-one years old. Ibid., 91–92.

27. Arizona Constitution, art. 4, pt. 2, sec. 2; art. 7, sec. 15; and art. 20, eighth ordinance. The English requirement was imposed by the federal government in the Enabling Act as a condition of statehood (see chap. 2).

28. In 2009, 30 percent of the Arizona legislature was female, putting it in eleventh place among the fifty states. Council of State Governments, Trends, Facts, and Figures, "Women in State Government," www.csg.org/pubs/Documents/TIA_FF_gender.pdf. Moreover, women candidates typically have a higher election success rate than men in Arizona. See "Candidates for Legislature by Gender," *Arizona Capitol Times,* January 9, 2009, 29; and Luige del Puerto, "Women Lead the Way in Arizona Politics," *Arizona Capitol Times,* November 2, 2007.

29. Hispanics made up 16 percent of the 47th Legislature (2007–2008), as compared to 28 percent of the general population. Mary Jo Pitzl, "Average Lawmaker No Average Arizonan," *Arizona Republic,* January 12, 2007.

30. The era of Arizona's "cowboy legislature" reached its peak in the 1960s, when roughly twelve legislators were ranchers. The redistricting decision of 1966, which dramatically reduced the number of rural districts, put an end to this era. In recent years only one or two ranchers have served in the legislature. See Robbie Sherwood, "As Ranchers Leave the Legislature, Arizona Loses Ties to Its Rural Roots," *Arizona Republic*, December 26, 2006.

31. Longstanding house and senate rules require adjournment on the Saturday

of the week in which the one hundredth day falls. The speaker or president can unilaterally authorize a seven-day extension; thereafter, extensions require a majority vote of the chamber. See, for example, Arizona Senate, Rules, 48th Leg. (2007–2008), rule 27; and Arizona House of Representatives, Rules, 48th Leg. (2007–2008), rule 2. Additionally, the lawmakers' per-diem allowance dramatically shrinks after the 120th day, providing added incentive for short sessions. See *Arizona Revised Statutes,* sec. 41-1104.

32. Arizona Constitution, art. 4, pt. 2, secs. 1 and 3. (The legislature calls itself into session through a petition supported by two-thirds of the members.)

33. For example, in fall 2003 Governor Napolitano (D) called a special session to deal with two thorny, neglected issues: prison overcrowding and Child Protective Services reforms. The session dragged on for nearly two months and cost taxpayers in excess of $300,000. Eventually, a deal was reached between the Democratic governor and the Republican-controlled legislature. See, Chip Scutari and Robbie Sherwood, "Special Session Reaches Day 50," *Arizona Republic,* December 8, 2003. In mid-2009 and early 2010, Governor Brewer (R) called five special sessions to deal with the worst fiscal crisis in the state's history. The governor favored a temporary sales tax increase to offset projected budget shortfalls of several billion dollars. Staunchly anti-tax Republicans balked, and Democrats initially rejected the tax proposal as well. After a year's worth of pressure and several unproductive sessions, a narrow, bipartisan legislative majority reluctantly agreed to send the sales tax proposal to the voters. Sixty-four percent of the voters at the May 18, 2010, special election approved the sales tax increase, silencing those who had been critical of the governor's leadership skills during the budget crisis.

34. Another reason for calling a special session during the regular session is that it advances the date on which the legislation becomes effective. (An emergency clause does this too, but it requires a two-thirds vote.)

35. "What Happened to the 'Citizen' in the 'Citizen Legislature?'" *State Legislatures,* July–August 2003, http://ecom.ncsl.org/programs/pubs/slmag/2003/03SLJulAugOFR.pdf.

36. Arizona Constitution, art. 4, sec. 22 (1910).

37. The history of legislative compensation in Arizona is rather complex,

with salary and per-diem issues intermingled. As originally worded, the constitution expressly permitted the legislature to enact an overriding salary law. Ibid. In fact, the Eighth Legislature did so in 1928, increasing its salary to $15 per day. Arizona Session Laws, ch. 2 (1928). From 1932 onward, however, constitutional amendments have eliminated the legislature's discretion to set its own salary. Instead, the constitution set specific dollar amounts. Arizona Constitution, art. 4, pt. 2, sec. 1 (1932) and amendments in 1958 and 1968. The legislature began awarding itself a per diem (in addition to its annual salary) beginning in 1947. See Arizona Session Laws, ch. 16, sec. 1 (1947). The 1958 and 1968 constitutional amendments to art. 4, pt. 2, sec. 1 expressly authorized a per diem, and the latter amendment gave the legislature complete discretion as to its rate and terms. The current constitutional provision controlling legislative salaries —art. 5, sec. 12—makes no reference to a per diem, and the Arizona Supreme Court has left per-diem rates in the hands of the legislature. *Randolph v. Groscost,* 195 Ariz. 423, 989 P.2d 751 (1999).

38. See Arizona Constitution, art. 5, sec. 12.

39. Although the commission makes recommendations for all elected state officials, only legislative salaries go to the voters. The salary commission's recommendations for other elected officials go to the governor and legislature for approval. Ibid., art. 5, sec. 12 and *Arizona Revised Statutes,* sec. 41-1904. See also chapter 5, text accompanying notes 22–23.

40. Twenty-one states have higher annual salaries than Arizona does. *Book of the States,* 2009 ed., 99–101. Straight salary comparisons are misleading, however, because per diem and other benefits vary significantly from state to state.

41. *Arizona Revised Statutes,* sec. 41-1104. (The per diem drops to $10 for Maricopa County lawmakers and $20 for non–Maricopa County legislators when the session runs more than 120 days.)

42. In 1998, two senators received in excess of $23,000 as per-diem and mileage reimbursements. The senate president and house speaker—who both resided in Maricopa County—received $8,635 and $10,643, respectively. See Chris Moeser, "Legislators' Stealth Pay: Special Deal Let Ex-Speaker Cash In," *Arizona Republic,* January 24, 1999; and Moeser, "Per Diems Can Double a Paycheck," *Arizona Republic,* January 24, 1999.

43. *Randolph v. Groscost,* 195 Ariz. 423, 989 P.2d 751 (1999). The salary

commission had coupled its 1998 salary recommendation with the requirement that legislators be subject to the same statutory per diem that applied to all other state workers. (This would have eliminated the per diem for Maricopa County residents who don't need a second residence when the legislature is in session. But it would have significantly increased the per diem for non–Maricopa County residents.) The combined recommendation was approved by the voters. The Arizona Supreme Court ruled that the commission lacked the authority to address matters other than annual salary. More controversially, the court concluded that the two provisions were "severable" and therefore allowed legislators to keep the raise without the per-diem reform. (Arizona voters do have the power to restrict or even eliminate legislative per diem, but this would have to be done through the regular initiative process, not through a salary commission recommendation.)

44. As previously mentioned (see n. 3), the Arizona Clean Elections Act recently survived another major legal challenge, although litigation is still pending. Since the public financing law was adopted by the voters in 1998, an increasing number of Arizona lawmakers have accepted public funding for their campaigns. See the Citizens Clean Elections Commission, www.azcleanelections.gov/home.aspx; and Megan Moore, "Clean Elections, Arizona 2006," National Institute on Money in State Politics report, December 11, 2008, http://followthemoney.org/press/Reports/Clean_Elections_Arizona_2006.pd Even so, in 2008 the average senator received $52,735 in private campaign contributions and the average house member $40,920. "Arizona, 2008," National Institute on Money in State Politics, www.followthemoney.org/database/state_overview.phtml?s=AZ&y=2008. Former senator Randall Gnant (who later served as senate president) was once startlingly candid about the influence of special-interest money: Gnant told a group of school board members and school administrators that if they wanted to influence legislative policy they'd have to make campaign donations. When a school board member protested, Gnant purportedly replied, "This is not Civics 101. This is real life. Welcome to hardball politics." Quoted in Michael Murphy, "Sen. Gnant Lays Awful Truth on Line," *Arizona Republic,* November 10, 1999. Finally, over the past decade lobbyist spending in Arizona has risen to more than $3.6 million a year. Jeremy Duda, "Arizona Spending Doubles in 10 Years,"

Arizona Capitol Times, March 27, 2009. State law prohibits lobbyists from giving gifts worth more than $10. Lobbyists can however buy meals for lawmakers, pay for travel, and cover entertainment expenses (e.g., sporting events) for legislative groups. See Arizona Secretary of State, "Arizona Lobbyist Handbook," www.azsos.gov/election/lobbyist/lobbyisthandbook.pdf.

45. This puts Arizona in a three-way tie for fifth place among the fifty states. Council of State Governments, "State Lobbying," Trends in America Policy Report, www.csg.org/knowledgecenter/docs/TIA_FF_StateLobbying.pdf. This argument is undercut however by the fact that states with *higher* lobbyist ratios have professional, full-time legislators (e.g., California and New York).

46. See, for example, Dennis Wagner and Kathleen Ingley, "Disregard of Voters in Vogue: Elected Officials Go Their Own Way," *Arizona Republic,* February 23, 1997. Moreover, public-spiritedness is not always the sole motive for legislative service: the private businesses of legislators can profit from important contacts made through legislative service. One study found that the average Florida legislator tripled his or her net worth over ten years. Cited in Thomas R. Dye, *Politics in States and Communities,* 10th ed. (Englewood Cliffs, N.J.: Prentice Hall, 2000), 158–59.

47. Arizona Constitution, art. 4, pt. 2, sec. 8 and *Arizona Revised Statutes,* sec. 41-1102.

48. Kris Mayes, "Speaker Tosses Reporter," *Arizona Republic,* February 14, 1997; and Hal Mattern and Chris Moeser, "Locked-In Legislators Still Fail on Budget," *Arizona Republic,* April 2, 1999.

49. *Arizona Revised Statutes,* sec. 41-1271.

50. In 2001–02 there was no majority party in the Arizona Senate because the thirty-member body was split evenly between Democrats and Republicans. Some worried that the chamber would be dysfunctional without a majority party to organize the legislative agenda. However, a deal was struck between moderate Republicans and Democrats. Randall Gnant (R) became the senate president, and committee chairs and assignments were divided between the two parties. The power-sharing arrangement worked and led to a fairly productive Forty-Fifth Legislature. See Alan Greenblatt,

"Randall Gnant: Mushroom Power," *Governing*, January 2001.

51. In 1990, House Speaker Jane Hull stripped two fellow Republican lawmakers of their chairmanships for opposing her property tax bill. In 2004, House Speaker Jake Flake similarly demoted two moderate Republicans who supported more expensive Child Protective Services reform legislation. Robbie Sherwood, "Flake Punishes Representatives," *Arizona Republic*, February 6, 2004. And in 2009, Speaker Kirk Adams stripped a senator of his chairmanship over budget disagreements, although he reversed the punishment within forty-eight hours. Mary Jo Pitzl, "Crump Back as House Panel Chair," *Arizona Republic*, February 5, 2009.

52. This was one of the ways that House Speaker Jeff Groscost won eleventh-hour passage of his infamous alt-fuels bill in 2000. It is difficult to assess how common these pressure tactics are, since the participants rarely go public. In 2004 however several moderate Republicans openly complained of the strong-arm tactics used by the house leadership to force loyalty to a more conservative agenda. See, for example, Robbie Sherwood, "Legislative Retribution Riles Senator," *Arizona Republic*, April 1, 2003; and Sherwood, "Disenchanted with Power Games," *Arizona Republic*, April 3, 2003.

53. Most of the state's education laws can be found in Title 15 of the *Arizona Revised Statutes.*

54. For example, in 2001 the state repealed three laws, deemed outdated, that criminalized certain sexual acts between consenting adults. See HB 2016, 45th Legislature, 1st Reg. Sess. (2001) repealing *Arizona Revised Statutes*, secs. 13-409 (open cohabitation by unmarried persons), 13-1411 (sodomy and oral sex), and 13-1412 ("lewd and lascivious" sex acts).

55. Arizona Constitution, art. 4, pt. 2, sec. 15. Most measures require only a simple majority (50 percent plus 1) to pass. There are some important exceptions, however. See table 3.4, and notes 62, 64–68.

56. Arizona Constitution, art. 4, pt. 2, sec. 19 lists twenty categories of prohibited special laws. The legislature sometimes evades this requirement by passing laws that appear to be of general application but in fact have limited applicability. For example, a statute that applies to "any city with a population over 500,000" is actually a law targeted at Tucson and Phoenix.

57. Ibid., art. 4, pt. 2, sec. 13. Not surprisingly, the single-subject and proper-title requirements have generated a fair amount of litigation. See generally

John D. Leshy, *The Arizona Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), 113–14.

58. Arizona Constitution, art. 4, pt. 2, sec. 20.

59. It may be more accurate to describe the bill as "severely wounded," borrowing Senator Gnant's phrase. This is because there are various procedural tricks that can be used to resurrect bills, including discharge petitions and "strike all" amendments. See Randall Gnant, "From Idea to Bill to Law: The Legislative Process in Arizona," www.azleg.gov/alisPDFs/BillToLaw.pdf.

60. Arizona Legislative Council, "Arizona Legislative Manual," 2003 ed., www.azleg.gov/alispdfs/Council/legman2003.pdf. (This is sometimes called *pigeonholing*.)

61. Alternatively, the legislature has the option of sending a measure to the voters instead of the governor, using the statutory referendum process (see chap. 4).

62. Although the legislature can function as long as a quorum is present, the constitution makes it plain that passage of bills requires "a majority of *all members elected to each house*" (emphasis added). Arizona Constitution, art. 4, pt. 2, sec. 15.

63. In contrast, when the voters enact laws or constitutional changes through the initiative and referendum processes, only a simple majority is required for passage. Ibid., art. 4, pt. 1, sec. 1(5). Interestingly, the voters have rejected attempts to raise the passage requirement for citizen votes. See chapter 4, note 14.

64. Outside of lawmaking, there are other situations in which supermajority votes are required. For example, it takes a two-thirds vote to expel a legislator or to remove another public official from office through the impeachment process. Arizona Constitution, art. 4, pt. 2, sec. 11, and art. 8, pt. 2, sec. 2.

65. Ibid., art. 4, pt. 1, sec. 1(3).

66. Ibid., art. 9, sec. 22.

67. Ibid., art. 4, pt. 1, sec. 6(c). The state's severe fiscal crisis in 2009–2010 has prompted calls for the modification or elimination of this provision.

68. Ibid., art. 5, sec. 7, and art. 4, pt. 1, sec. 1(3).

69. More in-depth accounts of the lawmaking process are available at the

Arizona Legislative Council Web site: www.azleg.gov/az_leg_council/documentation.htm.

70. "Bill Naming Arizona Dinosaurs Gets Stomped into History," *Arizona Republic*, August 24, 1998.

71. See Robbie Sherwood, "'Strike-all' Tool Puts Dead Bills Back on Table," *Arizona Republic*, April 7, 2000.

72. Alan Greenblatt, "Arizona's $483 Million Headache," *Governing*, December 2000; Robbie Sherwood, "Alt-Fuel Warnings Given Early," *Arizona Republic*, November 6, 2000; Judd Slivka, "The Making of a Quagmire: Alt-fuel Flap Threatens to Drown State," *Arizona Republic*, November 3, 2000; Ross E. Milloy, "Costly Plan to Promote Alternative Fuels Jolts Arizona," *New York Times*, November 2, 2000; Robbie Sherwood, "Hull Voices Anger at Groscost," *Arizona Republic*, November 2, 2000; Jim Carlton, "If You Paid Half Price for That New SUV, You Must Be in Arizona," *Wall Street Journal*, October 26, 2000; Pat Flannery, "Alt-Fuels Cost Ends Up Lower," *Arizona Republic*, October 19, 2003; see also, Betty Beard and Robbie Sherwood, "Former Legislator Snags Job in Alternative-Fuels Industry," *Arizona Republic*, July 14, 2005.

73. Carlton, "If You Paid Half Price for That New SUV."

74. Arizona Constitution, art. 9, sec. 3.

75. *Book of the States*, 2009 ed., 366–67. (This includes all state funds, federal funds, and bonds.)

76. U.S. Senate, Senator Albert Beveridge speaking on the jointure proposal, 59th Cong., 1st sess., *Congressional Record* (March 8, 1906), 40, pt. 4:3535.

77. See also Arizona Constitution, art. 9, sec. 2, prohibiting the legislature from granting exemptions not authorized by the constitution itself; and art. 4, pt. 2, sec. 19(9), prohibiting "special" tax and valuation laws for the benefit of particular taxpayers.

78. Ibid, art. 9, secs. 18 and 19. In California, the tax revolt was accomplished by the people through the initiative process. In Arizona, it was the legislature that sent this tax limitation to the voters, although it passed by a margin of more than 5 to 1. Essentially, the constitutional amendment limits residential property taxes to 1 percent of the full cash value of the property; it also caps the rate at which the valuation of the property can increase in any given year. Because there are some

exceptions, Arizona has developed a complex system that recognizes primary taxes (which are subject to the limits) and secondary taxes (which are not).

79. See generally Dan A. Cothran, "The Arizona Budget in an Age of Taxpayer Revolt," in *Politics and Public Policy in Arizona,* 2d ed., ed. Zachary A. Smith (Westport, Conn.: Praeger, 1996), 173–90.

80. Arizona Constitution, art. 9, sec. 22.

81. Arizona is one of sixteen states with such a supermajority requirement. See Bert Waisanen, "State Tax and Expenditure Limits—2008," National Conference of State Legislatures, www.ncsl.org/programs/fiscal/telsabout.htm. One workaround is to send a proposed tax increase to the voters. (It takes only a simple majority vote to do this, as opposed to the two-thirds majority vote required to pass the increase directly.) Governor Hull (R) used this strategy to obtain an education sales tax in 2000, although it took more than one special session to convince the legislature to make the referral to the voters. Governor Brewer (R) had even greater difficulty getting a tax increase but was subsequently vindicated by the voters, see note 33.

82. Arizona typically ranks among the top 10 states most dependent upon sales tax. See, for example, Kail Padgitt, "Fiscal Fact No. 196: Updated State and Local Option Sales Tax," The Tax Foundation, October 16, 2009, www.taxfoundation.org/publications/show/25395.html (ranking Arizona ninth); and National Conference of State Legislatures, "State Sales Tax Collections per Capita and per $100 of Personal Income, 2005," www.ncsl.org/programs/fiscal/rankstsales.htm.

83. For this reason, some experts advocate greater reliance on income taxes, which are typically graduated and therefore progressive. See, for example, Cothran, "Arizona Budget in an Age of Taxpayer Revolt," 182. (The Arizona Constitution, art. 9, sec. 12 expressly authorizes graduated income and inheritance taxes, to avoid arguments that such taxes violate the uniformity requirement in sec. 1, quoted in the text.)

84. JLBC'S study of the state's "big three" taxes (sales, individual income, and corporate income) reveals that sales tax revenues closely track personal income. Corporate income tax is the most volatile; and individual income tax is the most "elastic" (i.e., it grows more quickly in good times and more slowly in bad times). See Joint Legislative Budget Committee,

"Volatility of Major Revenue Sources," November 18, 2009, www.azleg.gov/jlbc/volatility-'09.pdf.

85. Arizona Constitution, art. 9, sec. 5.

86. The principal and interest owed on a revenue bond are secured through the future revenues of the project being financed. In contrast, a general obligation bond is secured by the government's full taxing power.

87. The first lease-purchase sale involved more than a dozen buildings and raised $735 million from private and institutional investors. Additional sales are contemplated. See Chris Kline, "Arizona's Capitol Building Sold!" ABC15.Com, January 17, 2010; "Arizona Puts State Buildings on Sale to Plug Deficit," *USA Today*, January 12, 2010; Jennifer Steinhauer, "In Need of Cash, Arizona Puts Offices on Sale, *New York Times*, September 24, 2009. For general background on lease-purchase agreements see Donald W. Jansen, "Arizona's Constitutional Restraints on the Legislative Powers to Tax and Spend," *Arizona State Law Journal* 20 (Spring 1988): 181–208; Diane Kittower, "Guide to the Municipal Bond Market: Deals of the Year," *Governing*, April 2004 (describing how lease-purchase agreements were used to fund new school construction in Arizona); and Leshy, *Arizona Constitution*, 209–11.

88. Arizona Constitution, art. 9, sec. 5. This restriction applies only to money "paid out of the state treasury." Federal money is usually not subject to the legislative appropriation process, although this depends upon the terms of the federal grant.

89. K–12 schools and universities also receive significant funding from sources other than the general fund, including school trust land proceeds, tuition, and federal money.

90. This is an oversimplification of a complex process. In addition to the general appropriation bill, the legislature typically enacts a capital outlay bill (for the purchase of land and buildings), various budget reconciliation bills (BRBs) for statutory adjustments, and named claimants bills to pay past claims against the state. See generally, "Arizona Legislative Manual," 50–52.

91. As with other types of legislation, supplemental appropriation bills can embrace "but one subject." Arizona Constitution, art. 4, pt. 2, sec. 20.

92. The top fifteen to twenty-five agencies now get funded annually. In fact, the state's six largest agencies (K–12 schools, Arizona Health Care Cost

Containment System [AHCCCS], the universities, Department of Corrections, Department of Economic Security, and DHS) account for more than 90 percent of general fund outlays. Joint Legislative Budget Committee, "New Legislator Orientation," December 10, 2008, 23, www.azleg.gov/jlbc/newlegislatororientation.pdf.

93. *Arizona Revised Statutes,* sec. 35-111. The budget process actually begins much earlier. State agencies begin working on their next budget a year prior to the start of the fiscal year. Their individual budget requests are submitted to the governor's Office of Strategic Planning and Budgeting (OSPB) by September. OSPB analyzes the agency funding requests against anticipated revenue projections. Ultimately, an itemized budget, reflecting the governor's spending priorities, is submitted to the legislature at the start of the regular session. See "Arizona Legislative Manual," 50–53.

94. JLBC staffers have access to the same data as the governor's budget office. JLBC then conducts its own, independent analysis. It can accept or reject the governor's projections and spending priorities, and make funding recommendations of its own.

95. Former Senator Gnant defends this practice, observing:

> Because the subcommittees are small, it is possible for as few as one or two members philosophically out of tune with the rest of the body, to make major budget adjustments supporting their individual goals. And . . . because some relatively inexperienced legislators invariably end up on the Appropriations Committee, they could make honest mistakes in a number of areas. Finally, leadership in both houses have to present a budget to their membership that will earn enough votes to pass muster with a majority of the members. (Gnant, "From Idea to Bill to Law," 69)

96. Arizona Constitution, art. 9, sec. 3.

97. Ibid., art. 9, sec. 17.

98. For a general discussion of the effectiveness and pros and cons of such spending limits see Waisanen, "State Tax and Expenditure Limits—2008."

99. Arizona Constitution, art. 9, sec. 14.

100. Ibid., art. 4, pt. 1, sec. 1(6)(D) states:

> The legislature shall not have the power to appropriate or divert funds created or allocated to a specific purpose by an initiative measure approved by a majority of the votes cast thereon, or by a referendum measure

decided by a majority of the votes cast thereon, unless the appropriation or diversion of funds furthers the purposes of such measure and at least three fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to appropriate or divert such funds.

101. JLBC, “New Legislator Orientation,” 35.

102. See, for example, Proposition 203 (1996)(lottery funds earmarked for antismoking and low-income health programs); Proposition 200 (2000) (tobacco litigation settlement funds earmarked for Healthy Children, Healthy Families Fund); Proposition 204 (2000) (tobacco settlement funds earmarked for expanded AHCCCS coverage); Proposition 301 (2000) (sales tax increase earmarked for increased education spending and Classroom Site Fund); Proposition 300 (2002) (correcting a drafting oversight in Proposition 301 to clarify that certain trust land proceeds go to the Classroom Site Fund); and Proposition 203 (2006) (cigarette and tobacco products tax increase earmarked for the Early Childhood Development and Health Fund).

103. Proposition 101 (2004), narrowly approved by the voters, added article 9, sec. 23 to the constitution.

104. Arizona Constitution, art. 8, pt. 2, sec. 1.

105. Ibid., sec. 2.

106. U.S. Constitution, art. 2, sec. 4.

107. *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 782 P.2d 1160 (1989).

108. Arizona Constitution, art. 5, sec. 6.

109. Ibid., art. 8, pt. 2, sec. 2.

110. Ibid.

111. Mecham was convicted of obstruction of justice and misuse of public funds. The senate decided not to address the allegation relating to campaign finance violations, because that charge was the subject of a pending criminal proceeding. (Mecham was acquitted by a jury in the criminal case subsequent to his removal from office.)

112. Arizona Constitution, art. 5, sec. 6.

113. Some voters went to court to challenge Mecham’s right to run again. They argued that the senate had wrongly interpreted the constitution and that Mecham was *automatically* disqualified from holding future office by

virtue of the conviction vote. The Arizona Supreme Court acknowledged that the passage could be interpreted either way. It opted however to defer to the senate's judgment, and allowed Mecham to run. *Ingram v. Shumway,* 164 Ariz. 514, 794 P.2d 147 (1990).

114. At the time, Governor Mecham was only the seventh governor in American history removed through an impeachment process (one resigned before the conviction was formally announced). *Book of the States,* 2009 ed., 178. The procedure remains rare to this day. In 2009, Illinois Governor Rod Blagojevich became the only governor since Mecham to be removed from office through the impeachment process.

115. In 1933, two members of the Arizona Corporation Commission were impeached but not convicted. (One resigned before the proceedings began.) And in 1964, two corporation commissioners were impeached but ultimately acquitted by the senate. "Arizona Legislative Manual," 57.

116. Arizona Constitution, art. 4, pt. 2, sec. 11.

117. *Arizona Revised Statutes,* sec. 41-1279.01. (Until the voters eliminated the position in 1968, Arizona had an elected state auditor.)

118. See Proposition 304 (1998).

119. The U.S. Court of Appeals for the Ninth Circuit ruled against the commission and in favor of the "Choose Life" license plate. *Arizona Life Coalition v. Stanton,* 515 F.3d 956 (9th Cir. 2008).

120. *Arizona Revised Statutes,* sec. 41-1155.

121. U.S. Constitution, art. 5. (The U.S. Constitution also provides for ratification through people's conventions in each state, but this alternative method has been used on only a single occasion in U.S. history.)

Chapter 4. Direct Democracy

1. Most states refer constitutional amendments to the voters. However, only three other states (Montana, North Dakota, and Oregon) have Arizona's full range of initiatives, referenda, and recall. *Book of the States,* 2008 ed., 336, 354–55.

2. Not all the adults living in Athens were citizens. Although the definition was quite liberal for the times, far more than half the people—including

women, slaves, and those of foreign ancestry—were excluded.

3. Madison writes in Federalist Paper No. 10:

> [A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. . . . Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

Similar criticisms of democracy can be found throughout the Federalist Papers. See especially Nos. 6, 9, 14, 49, and 58.

4. This is the term that the U.S. Constitution uses (see art. 4, sec. 4); the term *democracy* does not appear anywhere in the document.

5. Federalist Paper No. 10. See also Nos. 9 (Hamilton), 14 (Madison), and 51 (Madison).

6. Direct democracy actually has earlier roots in American political life than this brief history suggests. Village government in New England was highly participatory from the 1640s; some states required constitutional changes or select issues to be referred to the people; and recall was even debated at the Constitutional Convention of 1787. For a fuller history see Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge, Mass.: Harvard University Press, 1989).

7. New Mexico became a state pursuant to the same Enabling Act as Arizona, but its constitution was more conservative and contained only the less controversial referendum provision.

8. *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U.S. 118 (1912). A delegate at Arizona's constitutional convention referred to the pending case and urged his fellow delegates not to include the direct democracy procedures because of their likely unconstitutionality. Goff, *Records of the Arizona Constitutional Convention*, 740.

9. *Book of the States,* 2009 ed., 16.

10. See *Arizona Revised Statutes*, Title 19, for the details of Arizona's direct democracy procedures.

11. The single amendment requirement is found in Arizona Constitution, art. 21, sec. 1. It is similar to the single-subject rule that applies to legislative

lawmaking (see art. 4, pt. 2, sec. 13 and chap. 3, n. 57). However, the Arizona Supreme Court imposes a stricter test for constitutional amendments. *Clean Elections Inst., Inc. v. Brewer*, 209 Ariz. 241, 99 P.3d 570 (2004). Unfortunately, the court has not come up with consistent guidelines for determining compliance, and its decisions in this area continue to provoke controversy. See, for example, *Arizona Together v. Brewer*, 214 Ariz. 118, 149 P.3d 742 (2007); *Clean Elections Inst., Inc. v. Brewer*; *Taxpayer Protection Alliance v. Arizonans Against Unfair Tax Schemes*, 199 Ariz. 180, 16 P.3d 207 (2001); *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (Ariz. 1934). See generally, Matthew O. Gray, "*Clean Elections Institute, Inc. v. Brewer:* The Separate Amendment Rule of the Arizona Constitution," *Arizona Law Review*, 47 (2005): 237–43.

12. A record number of high-profile initiatives were disqualified from the 2008 ballot for invalid signatures. One petition purportedly had an error rate of 42 percent, prompting the secretary of state to comment that the backers "spent $1 million for bad signatures." Arizona Secretary of State Press Release, August 27, 2008. Some blame the growing interstate "initiative industry," and argue that circulators should not be paid on a per-name basis. See Jennie Drage Bowser, "The Battle for the Ballot," *State Legislatures Magazine*, January 2009.

13. The secretary of state delegates much of the task to county recorders, who check individual signatures against their voter registration lists. Ordinarily, they check only a random sample. *Arizona Revised Statutes*, sec. 19-121.01. If the number of signatures is between 95 and 105 percent of the constitutional minimum, however, every signature must be checked. Ibid., sec. 19-121.03.

14. In recent years, the voters have rejected attempts to impose a higher passage requirement for certain types of initiatives. For example, in 2000 they defeated Proposition 102, which would have required a two-thirds majority for anti-hunting measures. And in 2008, they defeated Proposition 105, which would have required a majority of *all registered voters* to pass new spending or tax measures. (This would have made it virtually impossible to pass such measures, since a majority of registered voters do not always turn out to vote.)

15. Arizona Constitution, art. 22, sec. 14 states: "Any law which may be enacted by the legislature under this constitution may be enacted by the

people under the initiative. Any law which may not be enacted by the legislature under this constitution shall not be enacted by the people."

16. *Book of the States*, 2009 ed., 336.

17. This was subsequently declared unconstitutional by the U.S. Supreme Court. See chapter 2, n. 67.

18. For a full account of this episode, see Bob Jacobsen, "An ASU Victory Like No Other," *ASU Vision*, Fall 1998, 9.

19. The 1914 amendment stated that "the power of the Legislature, to repeal or amend, shall not extend to initiative or referendum measures *approved by a majority vote of the qualified electors.*" Arizona Constitution, art. 4, pt. 1, sec. 1(6) (1914) (emphasis added). The court ruled that this language barred legislative alteration of voter-approved measures only when the measures had been approved by a majority *of all registered voters*—a situation that has never occurred due to low voter turnout. See *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952).

20. Arizona Constitution, art. 4, pt. 1, sec. 1(6)(a)–(d). California and Michigan have comparable barriers. In fact, California prohibits legislative alteration under all circumstances. Seven other states have time restrictions or two-thirds vote requirements which are more attainable. National Conference of State Legislatures, *Initiative and Referendum in the 21st Century: Final Report of the NCSL I & R Task Force*, March 23, 2009, table 2.

21. Proposition 301 was initially put on the ballot through a legislative referendum, not a citizen initiative. The Voter Protection Act applies however to all measures approved by the voters—that is, to referenda as well as initiatives.

22. See note 14.

23. Proposition 104 (2004) would have reduced the time frame for submitting petition signatures by three months.

24. Arizona Constitution, art. 9, sec. 23.

25. Several states have additional barriers not found in Arizona, such as requiring the proposed amendment to be approved by the legislature over two successive sessions. *Book of the States*, 2009 ed., 14.

26. Arizona Constitution, art. 4, pt. 1, sec. 1(6)(A).

27. Between 1912 and 2008 the voters sided with the legislature 65 percent of

the time.

28. Some were constitutional referenda, not statutory referenda, but the principle is the same. In 1998, the legislature attempted to counter three propositions with mixed results: it unsuccessfully countered the Voter Protection Act and a Salary Commission proposal to regulate legislative per diem. (The latter was subsequently struck down by the court). On the other hand, it successfully countered an open primary initiative, although ironically the rival citizen measure belatedly failed to make the ballot (1998). In 2000, the legislature put a land preservation proposal on the ballot, arguably to detract from a more sweeping Sierra Club antigrowth initiative. Both measures failed. In 2002, the legislature successfully countered a drug liberalization initiative with its own measure, which eliminated probation for certain drug offenses. And in 2006, the legislature countered a sweeping trust land reform measure backed by a coalition of environmental and education groups. Both it and the legislature's countermeasure (which had the support of farm, ranching, and other groups) failed.

29. The effect appears to be the greatest among less engaged voters who might ordinarily bypass off–presidential-year elections. See, for example, Todd Donovan, Caroline J. Tolbert, and Daniel Smith, "Political Engagement, Mobilization, and Direct Democracy," *Public Opinion Quarterly* 73 (Spring 2009): 98–118; Jeffrey R. Makin, "Are Ballot Propositions Spilling Over onto Candidate Elections?" IRI Report 2006-2, October 2006, www.iandrinstitute.org/REPORT%202006-2%20Spillovers.pdf; Todd Donovan and Daniel A. Smith, "Turning On and Turning Out: Assessing the Individual-Level Effects of Ballot Measures," 2004, www.ballot.org/page/-/ballot.org/Research/Turning%20On%20and%20Turning%20Out.pdf.

30. Arizona Constitution, art. 4, pt. 1, sec. 1(3).

31. Ibid.

32. Arizona Constitution, art. 9, sec. 22(A).

33. Mecham claimed that he was relying upon a legal opinion issued by the Arizona attorney general. That opinion concluded that governors lacked the power to create a paid holiday for state workers. See Executive Order No. 87-3, Rescission of Executive Order 86-5 (January 12, 1987); State of the State Address of Governor Evan Mecham to the Thirty-Eighth

Legislature, January 12, 1987, and *Arizona Attorney General Opinion,* No. I86-062 (1986). See also Governor Babbitt's Executive Order 86-5 (May 18, 1986) establishing the paid holiday.

34. The Arizona Constitution anticipates this situation. Article 4, pt. 1, sec. 1(12) states that when two conflicting measures are both passed by the voters, the one that receives the most votes prevails.

35. The group was successful in the following election with a more narrowly drawn initiative banning the traps.

36. Phoenix businessman John Sperling was joined by New York financier George Soros and Ohio businessman Peter B. Lewis. The trio targeted multiple states, pumping more than $3 million into Arizona alone. See David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (New York: Harcourt, 2000), 191–97, for an account of their undertaking.

37. A narrower same-sex marriage ban, without the domestic partnership provision, did pass in 2008. See Arizona Constitution, art. 30.

38. See *Meyers v. Bayless,* 192 Ariz. 376, 965 P.2d 768 (1998); *Citizens Clean Elections Comm. v. Myers,* 196 Ariz. 516, 1 P.3d 706 (2000); *Lavis v. Bayless,* 233 F. Supp.2d 1217 (D. Ariz. 2001); *May v. McNally,* 203 Ariz. 425, 55 P.3d 768 (2002); *Smith v. Clean Elections Comm.*, 212 Ariz. 407, 132 P.2d 1187 (2006); *Assoc. of Am. Physicians & Surgeons v. Brewer,* 494 F.3d 1145, 1146 (9th Cir. 2007), amended by 497 F.3d 1056 (9th Cir. 2007); *McComish v. Bennett,* —F.3d—, (9th Cir. 2010), 2010 U.S. App. LEXIS 10442 (as of this writing, the litigation is still pending); and see generally, "Clean Elections Timeline," *Arizona Capitol Times,* July 14, 2006.

39. A summary of the litigation can be found in *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission,* 220 Ariz. 587, 208 P.3d 676 (2009).

40. Arizona Constitution, art. 9, sec. 23.

41. Research into the influence of money on ballot propositions is still in the early stages. See generally, Thomas Stratmann, "The Effectiveness of Money in Ballot Measure Campaigns," *Southern California Law Review* 78 (May 2005): 1041; Arthur Lupia and John G. Matsusaka, "Direct Democracy: New Approaches to Old Questions," *Annual Review of Political Science* 7 (2004): 470–72; Ballot Initiative Strategy Center,

"Money Talks: Ballot Initiative Spending in 2004," May 2006, www.ballot.org/page/-/ballot.org/Research/Ballot%20Initiative%20Spending%20in%202004.pdf; Megan Moore, "The Money behind the 2006 Marriage Amendments," Institute on Money in State Politics Report, July 23, 2007, www.ballot.org/page/-/ballot.org/Research/The%20Money%20Behind%20the%202004%20Marri "A Buyer's Guide to Ballot Measures: The Role of Money in 2002 Initiative Campaigns," March 2003, www.docstoc.com/docs/7255131/A-Buyers-Guide-to-Ballot-Measures; Cronin, *Direct Democracy*, 99–116; and Broder, *Democracy Derailed*, 163–97.

42. To date, 59 percent of all Arizona initiatives, constitutional and statutory, have failed.

43. While these claims are intuitive, they are difficult to prove. See note 29 for research on ballot propositions and voter turnout.

44. For example, a 1998 proposition to make it harder to pass animal rights measures was prominently advertised as a vote "for wildlife." The 1996 Arizona NonSmoker Protection Act was a proposition designed to protect smoking rights. The 2008 Payday Loan Reform Act was actually an industry measure designed to stave off meaningful reform by the legislature. And, if enacted, the Majority Rule—Let the People Decide Act (2008) would have prevented a simple majority of the voters from enacting spending measures in the future. All of these propositions were rejected by the voters despite their misleading titles and advertising campaigns.

45. See, for example, Lupia and Matsusaka, "Direct Democracy," 467–70; and see generally, Benjamin I. Page and Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans' Public Policy Preferences* (Chicago: University of Chicago Press, 1992).

46. Arizona Constitution, art. 8, pt. 1, sec. 2.

47. Ibid., art. 5, sec. 6 lists the normal succession order as follows: secretary of state, attorney general, state treasurer, and superintendent of public instruction. In order to assume the office, however, the official must have been elected to his or her post.

48. Governor Lynn J. Frazier (North Dakota) was recalled during a third term in 1921, and Governor Gray Davis (California) was recalled during his second term and replaced by Arnold Schwarzenegger. *Book of the States*,

2009 ed., 178.

49. Three gubernatorial recall efforts did clear the signature threshold, however. In 1955, a recall petition was certified against Governor J. Howard Pyle but his term ended before the date set for the recall election. In 1972, César Chávez and the United Farm Workers led a recall effort against Governor Jack Williams. Although they collected sufficient signatures to trigger an election, the secretary of state voided many of the collected signatures on technical grounds. By the time this ruling was overturned by a court, the governor's term had expired, rendering the recall effort moot. Finally, a recall election against Governor Evan Mecham was cancelled by a court ruling after the governor was impeached and removed from office.

50. *Green v. Osborne,* 157 Ariz. 363, 758 P.2d 138 (1988).

Chapter 5. The Executive Branch

1. This figure does not include part-time employees. *Book of the States,* 2009 ed., 439. It also does not include the more than 230,000 full-time employees who work for Arizona's local governments–counties, cities, and school districts.

2. In 2000, the voters approved the expansion of the Arizona Corporation Commission from three members to five. Originally, there was also an elected state auditor, but this position was eliminated by the voters in 1968. (While the legislature currently appoints a state auditor, the bulk of the former state auditor's duties are performed by the State Department of Administration.)

3. This isn't unique to Arizona; nationally, education is the most frequently addressed issue in governors' state of the state addresses. See *Book of the States,* 2009 ed., 163.

4. *Hull v. Albrecht,* 192 Ariz. 34, 960 P.2d 634 (1998).

5. In 2002, the attorney general, secretary of state, and state treasurer were *all* contemplating a run for governor. See also Josh Goodman, "The Second Best Job in the State," *Governing,* April 1, 2004, www.governing.com/article/second-best-job-state (discussing the rising political ambitions of attorneys general).

6. One conflict involved the governor's desire to prosecute state's rights cases against the federal government. When Woods declined, Symington attempted an end run. He persuaded the legislature to create the Constitutional Defense Council and appropriate $1 million for the hiring of private lawyers. The attorney general challenged the council in court and won. The Arizona Supreme Court concluded, "The Legislature's actions . . . show its intent to take over an executive function by eliminating the Attorney General from the litigation process." This was deemed to violate Arizona's separation of powers clause (Article 3). See *State ex rel. Woods v. Block*, 189 Ariz. 269, 942 P.2d 428 (1997).

7. Woods asserted that he—not the governor—was responsible for the state's consumer protection policy. At one point in the ensuing war of words, the attorney general indicated that he might be willing to sign a recall petition against the governor. See Kris Mayes and Martin Van Der Werf, "Tobacco Suit Pits Governor Against Woods," *Arizona Republic*, October 18, 1996; and "Woods Hints He May Help Recall Effort; He, Symington Clash over Tobacco Suit," *Arizona Republic*, November 16, 1996. Symington resigned midterm following a criminal conviction, and his successor, Governor Jane Hull, reinstated the agency in the ultimately successful litigation.

8. Brewer's letter asserted that under the state constitution, "the governor is in charge of the executive branch and sets the policy and positions of the state of Arizona." Goddard countered that she was "mistaken," citing the attorney general'sresponsibility to represent the state in matters of litigation. Howard Fischer, "Goddard, Brewer at Odds over AG's Power: Governor Threatens Action after Differing Lawsuit Stands," *Arizona Daily Star*, April 7, 2009.

9. *Arizona Revised Statutes*, sec. 32-1402.

10. A major exception is the powerful Arizona Corporation Commission; its five members are elected.

11. As noted in chapter 4, a controversial law that would have given the governor the power to fire appointed board members triggered a popular referendum effort in 1996. The law was repealed by the legislature before the people could vote.

12. Goff, *Records of the Arizona Constitutional Convention*, 370.

13. In 1992, the state mine inspector's term was lengthened to four years, with a limit of four consecutive terms. Arizona Constitution, art. 19. The

members of the Arizona Corporation Commission had staggered six-year terms until 2000, when the Commission was expanded and the terms were reduced to four years. Arizona Constitution, art. 15, sec. 1.

14. Instead of measuring electoral participation as a percentage of the *registered* voters, it can be measured as a percentage of the voting-age population (VAP). The VAP is defined by the U.S. Census Bureau as everyone over age eighteen—that is, the minimum age for voting. This number, however, includes noncitizens and felons who are not legally eligible to vote in Arizona. Because they make up a significant portion of the state's population, Michael McDonald's VEP (voting eligible population) removes these groups. This provides a more meaningful indicator of actual electoral participation. Under this measure, Arizona turnout for off-presidential year elections becomes:

    1982 36.8 percent
    1986 38.4 percent
    1990 43.4 percent
    1994 39.9 percent
    1998 32.1 percent
    2002 36.7 percent
    2006 39.6 percent

    In contrast, the average turnout for presidential-year elections between 1980 and 2008 was 50.8 percent. (This puts Arizona at the low end of the fifty states, but not at the very bottom.) See Michael McDonald's, United States Elections Project Web site, http://elections.gmu.edu/index.html.

15. Arizona Constitution, art. 5, sec. 1, and art. 15, sec. 1. The state mine inspector can serve four consecutive four-year terms. Ibid., art. 19.

16. Ibid., art. 5, sec. 2; art. 7, sec. 15; art. 20, eighth ordinance.

17. *Book of the States*, 2009 ed., 187.

18. Arizona Constitution, art. 7, sec. 2 (1912).

19. *Book of the States*, 2009 ed., 176. Arizona is also the first state to have three consecutive female governors (Hull, Napolitano, and Brewer).

20. Arizona Constitution, art. 5, sec. 12.

21. Arizona Constitution, ibid., and art. 4, pt. 2, sec. 17.

22. Governors Symington, Hull, and Napolitano all rejected proposed gubernatorial raises.

23. See, for example, Anne Ryman, "Coaching Salaries Reviewed," *Arizona Republic*, September 20, 2009. (University coaching salaries are funded out of ticket revenues and private donations, not taxpayer money.) Other state employees at the high end of the salary scale include university presidents and top administrators, and doctors at the state's medical schools.

24. *Book of the States*, 2009 ed., 188.

25. Arizona Constitution, art. 5, sec. 6. If the secretary of state acquired the office through appointment, the succession passes to the next elected official, normally the attorney general. See also *Arizona Revised Statutes*, sec. 16-230, regarding vacancies in other offices.

26. When Governor Wesley Bolin died in office in 1978, Attorney General Bruce Babbitt became governor because the secretary of state, Rose Mofford, had not been elected to her office. (Mofford had been appointed to fill the vacancy created when Secretary of State Bolin became governor upon Raul Castro's resignation.)

27. Jodie Snyder and Mike McCloy, "BOMEX defies Gov. Hull," *Arizona Republic*, February 6, 1999.

28. Arizona Constitution, art. 15, sec. 2.

29. *Brewer v. Burns*, 222 Ariz. 234, 213 P.3d 671 (2009).

30. See Jeremy Duda, "Brewer Praises Budget Deal, Credits Vetoes," *Arizona Capitol Times*, July 6, 2009. See also text accompanying note 42.

31. Goff, *George W. P. Hunt*, 21–22.

32. The troops took over a ferryboat, which was dubbed Arizona's "navy" in bemused news accounts. See Sheridan, *Arizona: A History*, 224.

33. See Berman, *Arizona Politics and Government*, 119–20. The community quickly returned to its polygamist ways, changing its name to Colorado City to reduce the stigma. Subsequent Arizona officials—mindful of the Pyle backlash—largely looked the other way. In the late 1990s, reports of forced underage marriages began to surface. This prompted the attorneys general in both Arizona and Utah to prosecute select individuals. Warren Jeffs, the community's religious leader, fled and was placed on the FBI's Most Wanted List before his capture and eventual conviction in 2007. A striking replay of the 1953 Short Creek raid—down to the same mixed public reaction—occurred in 2008 when Texas officials raided a Texas

complex founded by Jeffs and other FLDS church members. For general background on these events, see "Fundamentalist Church of Jesus Christ of Latter-day Saints," *New York Times*, http://topics.nytimes.com/top/reference/timestopics/subjects/f/fundamentalis cp=1-spot&sq=fundamentalist%20church%20of%20jesus%20christ%20of%20la day%20saints&st=cse.

34. Pat Flannery, Clint Williams, and Jeff Barker, "U.S. Feared Symington Coup to Keep Grand Canyon Open," *Arizona Republic*, February 12, 1996.

35. Arizona Constitution, art. 5, sec. 4.

36. Like the president, the governor has the power to demand formal written reports from all executive officials. Ibid., art. 5, sec. 4. Most modern governors also hold regular "cabinet" meetings with the heads of major state agencies.

37. The constitution states that if the governor approves the bill, "he shall sign it, and it shall become a law as directed by the constitution." Ibid., art. 5, sec. 7. This is the normal practice. On rare occasions a governor will allow a bill to become law without signature. This is a way of signaling mild opposition not strong enough to warrant a formal veto.

38. Ibid., art. 5, sec. 7.

39. Ibid., art. 4, pt. 2, sec. 13.

40. The senate president and house speaker can accomplish much the same with their power to hold bills. In fact, this strategy was used by Speaker Groscost to enact the alt-fuels bill (see chap. 3). Senate and house rules do provide a means for the rank and file to override the leadership, but this rarely occurs.

41. The line-item veto at issue in *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003) involved "lump sum reductions" for select agencies. The bill directed that some agency appropriations be reduced by a stated percentage. Napolitano vetoed *just the reduction language*, thereby enabling the agencies to wind up with more money than the legislature clearly intended them to have. The Arizona Supreme Court refused to void the governor's vetoes on the technical ground that the lawsuit had not been properly authorized by the legislature. In dismissing the case the court noted that the legislature's drafting was "unusual," and that the legislature could easily prevent such vetoes in the future by simply avoiding lump-

sum reductions. The legislature did win its second veto battle with the governor. In *47th Legislature v. Napolitano*, 213 Ariz. 482, 143 P.3d 1023 (2006), the court voided a line-item veto that was targeted at non-appropriation language in a bill.

42. The legislature apparently failed to learn the lesson of *Bennett v. Napolitano* (n. 41). In 2009, it sent new Governor Brewer appropriation bills that again contained lump-sum reductions (see n. 41). Just as Napolitano had done, Brewer line-item vetoed the reduction language, thereby increasing overall funding for schools. Angry lawmakers defended their lump-sum reductions on the ground that it gave agencies more discretion. And they threatened to take the new governor to court if this veto practice occurred again. See Jim Small, "Lawmakers Could Have Avoided Line-Item Vetoes," *Arizona Capitol Times*, July 23, 2009. Finally, it should be noted that Governor Brewer's high veto rate was largely the result of a protracted battle with the legislature over the state's budget. Sixteen of the twenty-two vetoed bills pertained to funding. In contrast, the governor signed most of the conservative social legislation that Napolitano had previously vetoed. See Jeremy Duda, "Brewer's Bill Signings Overshadowed by Tax Plan?" *Arizona Capitol Times*, August 4, 2009.

43. Arizona Constitution, art. 5, sec. 5.

44. Ibid. This contrasts with the clemency provision in the U.S. Constitution (art. 2, sec. 2). For example, President Ford bestowed a full pardon on former PresidentNixon before the latter had been indicted. A comparable action is not possible in Arizona.

45. *Arizona Revised Statutes*, sec. 31-402.A.

46. Ibid., sec. 31-401.E.

47. For example, Governor Symington pressured the board to reverse a controversial parole decision by demoting its chairperson and refusing to reappoint another board member. Governor Hull also tried to influence some high-profile board decisions. See Mike McCloy, "Parole Board Chairman Resigns; Critic Says Decision Tied to Governor's Interference," *Arizona Republic*, December 14, 1999.

48. *Arizona Revised Statutes*, sec. 31-445.

49. In 2005, the Arizona Supreme Court unanimously concluded that Hamm hadn't demonstrated sufficient moral character for admission to the bar. *In the Matter of James Joseph Hamm*, 211 Ariz. 458 (2005). Although the

court did not completely rule out the possibility that a rehabilitated killer could win the right to practice law, it acknowledged that it was "a near impossibility." More than a decade earlier, Governor Symington and state lawmakers had attempted to block Hamm's admission to ASU Law School, threatening funding cuts and other sanctions. See, for example, Karen McCowan, "Admitting Killer May Imperil Law School's Funding," *Arizona Republic*, August 25, 1993; Paul Davenport, "Arizona State Law School Criticized after Admitting Man Convicted of Murder," *Morning Star*, Sept. 12, 1993. ASU refused to back down on the admission decision. Renewed official and public outrage did however cause ASU to modify a subsequent adjunct teaching offer to Hamm upon graduation. See, for example, Mark Shaffer, "Ex-Con Now ASU Prof," *Arizona Republic*, December 3, 1998; and Martin Van Der Werf, "ASU Reversal on Hamm," *Arizona Republic*, December 4, 1998. Hamm also encountered significant opposition during his subsequent efforts to terminate his parole and practice law. See, for example, Paul Davenport, "Paroled Killer Passes Bar Exam," *News Herald*, October 14, 1999; Paul Davenport, "Ex-Convict Says Lawyer Bill Targets Him," *Arizona Republic*, January 25, 2001; Carol Sowers, "Ex-Con Law Grad Freed from Parole," *Arizona Republic*, December 5, 2001; Andrew Thomas, "Hamm Has No Right to Be a Lawyer," *Arizona Republic*, March 14, 2004; Christopher Johns, "Can't Alter Past but Hamm Shows He Has Changed," ibid; Michael Kiefer, "Murderer Loses Fight to Practice Law," *Arizona Republic*, December 8, 2005.

50. Four other states designate the senate president as successor instead of having a lieutenant governor. *Book of the States*, 2009 ed., 214.

51. *Arizona Revised Statutes*, sec. 41-193.A.7.

52. Ibid., sec. 41-193.A.4-5.

53. See *Arizona Revised Statutes*, sec. 41-191.A. The law is still on the books even though it was ruled unconstitutional in *State ex rel. Sawyer v. LaSota*, 119 Ariz. 253 (1978).

54. Examples include the Debt Oversight Commission, the Greater Arizona Development Authority, and the Water Infrastructure Finance Authority.

55. See *Campbell v. Hunt*, 18 Ariz. 442, 162 P. 882 (1917).

56. The Arizona Constitution gives some hint of this shared authority when it states: The general conduct and supervision of the public school system

shall be vested in a state board of education, a state superintendent of public instruction, county school superintendents, and such governing boards for the state institutions as may be provided by law. (Art. 11, sec. 2)

57. Other state boards with educational oversight powers include the Arizona Board of Regents (which governs the three state universities); the Board for Vocational and Technological Education, the State Board for Charter Schools, and the School Facilities Board (which disburses state funds to bring K–12 facilities up to state standards). The superintendent is a voting member of some, but not all, of these boards.

58. In Arizona, some cities provide water, sewage, garbage, or electrical service to residents. These are not subject to the Arizona Corporation Commission's regulatory jurisdiction.

59. The constitution's definition of a public service corporation is somewhat murky and has spawned numerous court cases as to whether a particular business falls within this classification. For example, to the dismay of some consumers, an appellate court declared in 1983 that cable television companies are not public service corporations. *American Cable Television, Inc. v. Arizona Public Service Company*, 143 Ariz. 273, 693 P.2d 928 (Ct. App. 1983). 60. *Arizona Revised Statutes*, secs. 40-461–40-464.

61. Ten other states beside Arizona currently have an elective utility commission. Center for Public Integrity, "Telecommunications in the States," http://projects.publicintegrity.org/telecom/states.aspx?act=commish.

62. In the 2006 election, only 42 percent voted for a Corporation Commission candidate; in the higher-turnout 2008 election, the figure was only 44 percent.

63. "Public Utility Regulation, Planning for Long-Term Costs, and Transitions to Cleaner Energy Technologies," September 10, 2008, http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1667.

64. Ballot propositions were defeated in 1968 and 1984.

65. Arizona Constitution, art. 15, sec. 1. Prior to the enlargement of the commission in 2000, commission members had six-year terms.

Chapter 6. The Judicial Branch

1. Since 1912, there have been three major structural changes to the judicial branch: (1) In 1960, the Modern Courts Amendment enlarged the Arizona Supreme Court from three to five justices, gave the supreme court administrative powers over all courts, increased the qualifications for judges on courts of record, and authorized the creation of an intermediate appellate court. (The legislature did not actually establish the court of appeals until 1965.) (2) In 1970, the Commission on Judicial Qualifications (later expanded and renamed the Commission on Judicial Conduct) was created to oversee judicial discipline and provide an administrative process for removing unfit judges. (Municipal judges were brought under the commission's purview through a 1988 constitutional amendment.) (3) In 1974, merit selection of judges was added to the constitution. (A 1992 amendment added "diversity" to the selection criteria.)
2. 147 Ariz. 370, 219 P.2d 1025 (1985).
3. *Arnold v. Department of Health Services,* 160 Ariz. 593, 775 P.2d 521 (1989).
4. *Rasmussen ex rel. Mitchell v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987).
5. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). When the U.S. Supreme Court interprets the national constitution, the ruling applies to the entire country, not just a single state.
6. *Standhardt v. Superior Court,* 206 Ariz. 276, 77 P.3d 451 (Ct. App. 2003). This ruling was actually rendered by the intermediate court of appeals. The state's top court declined even to take the case. In contrast, top courts in Massachusetts, Connecticut, California, and Iowa *did* recognize a constitutionally guaranteed right of same-sex marriage in a virtually identical legal context. See, for example, *Goodridge v. Dept. of Public Health,* 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003); *In Re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384 (2008); *Kerrigan v. Commissioner of Public Health*, 289 Ct. 135, 957 A2d. 207 (2008); and *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Arizona's judicial conservatism in the area of marriage actually has a long history. In *Kirby v. Kirby,* 24 Ariz. 9, 206 P. 405 (1922), the court refused to declare the state's antimiscegenation law unconstitutional. A version of the law remained on the books until the early 1960s. (In 1967, the U.S. Supreme Court declared all antimiscegenation laws unconstitutional. *Loving v. Virginia,* 388 U.S. 1

[1967], and see chap. 2, n. 66.)

7. *Miranda v. Arizona,* 384 U.S. 436 (1966) established important procedural rights in connection with police interrogations of suspects in custody. *In re Gault,* 387 U.S. 1 (1967) extended basic due process rights to juvenile delinquency proceedings.

8. For an interesting debate on this issue, compare Stanley G. Feldman and David L. Abney, "The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution," *Arizona State Law Journal* 20 (Spring 1988): 115–50; with Steven J. Twist and Len L. Munsil, "The Double Threat of Judicial Activism: Inventing New 'Rights' in State Constitutions," *Arizona State Law Journal* 21 (Winter 1989): 1005–64. For a nationwide assessment of the practice see Robert K. Fitzpatrick, "Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights," *New York University Law Review* 79 (November 2004). 9. *Marbury v. Madison,* 5 U.S. 137 (1803).

10. *Roosevelt Elementary School District No. 66 v. Bishop,* 179 Ariz. 233, 877 P.2d 806 (1994).

11. Arizona Constitution, art. 11, section 1.

12. See *Cain v. Horne,* 220 Ariz. 77, 202 P.3d 1178 (2009) (voucher program violates Arizona Constitution, art. 9, sec. 10); *Grammatico v. Industrial Commission,* 211 Ariz. 67, 117 P.3d 786 (2005)(worker's compensation exemptions violate the no-faultcompensation system contemplated in the constitution); *Doe v. Arpaio,* 214 Ariz. 237, 150 P.3d 1258 (Ct. App. 2007) (prison transportation policy infringes upon constitutionally protected abortion rights); and *Petersen v. City of Mesa,* 207 Ariz. 35, 83 P.3d 35 (2004) (random drug testing policy violates Fourth Amendment).

13. *Brewer v. Burns,* 222 Ariz. 234, 213 P.3d 671 (2009).

14. See, for example, *47th Legislature v. Napolitano,* 213 Ariz. 482, 143 P.3d 1023 (2006) (striking down a line-item veto that eliminated a non-appropriation provision); *Bennett v. Napolitano,* 206 Ariz. 520, 81 P.3d 311 (2003)(refusing to void the governor's line-item veto of lump-sum cuts); *Rios v. Symington,* 172 Ariz. 3, 833 P.2d 20 (1992) (holding that the governor lacked the power to "impound" funds that he hadn't line-item vetoed).

15. See, for example, *State ex rel. Woods v. Block,* 189 Ariz. 269, 942 P.2d 428 (1997); *Shute v. Frohmiller,* 53 Ariz. 843, 90 P.2d 998 (1939); and

Arizona Board of Regents v. ADOA, 151 Ariz. 450, 728 P.2d 669 (Ct. App. 1986).

16. See, for example, *Arizona League of Cities and Towns v. Martin,* 219 Ariz. 656, 201 P.3d 517 (2009) (voiding a budget demand that cities and towns return money to the state's general fund).

17. *Ruiz v. Hull,* 191 Ariz. 441, 957 P.2d 984 (1998). (The court concluded that the Arizona provision conflicted with the free speech clause of the U.S. Constitution.)

18. It ousted a newly elected corporation commissioner on the ground that he lacked the legal qualifications to run. *Jennings v. Woods*, 194 Ariz. 314, 982 P.2d 274 (1999). It voided a voter-approved measure to change the legislature's per diem, on the ground that the matter was not properly on the ballot. *Randolph v. Groscost,* 195 Ariz. 423, 989 P.2d 751 (1999). And it ruled that the Citizens Clean Elections Act was partially unconstitutional. *Citizens Clean Elections Comm. v. Myers*, 196 Ariz. 516, 1 P.3d 706 (2000).

19. See chapter 4, note 11.

20. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission,* 220 Ariz. 587, 208 P.3d 676 (2009). The court likened the commission to a legislative body and noted, "Courts operate under the assumption that 'the legislature acts constitutionally.'"

21. *Kromko v. Arizona Board of Regents,* 216 Ariz. 190, 165 P.3d 168 (2007). (Students had challenged a tuition increase on the ground that it violated the constitutional mandate that university education be "as nearly free as possible." Arizona Constitution, art. 11, sec. 6.)

22. Other specialty courts, such as juvenile court and tax court, are technically divisions of superior court.

23. Arizona Constitution, art. 6, sec. 32.C.

24. Between 1980 and 2006, 62 percent of the major disciplinary actions involved JPs (who make up only 20 percent of the state's judges). Arizona Commission on Judicial Conduct, "Major Case Summaries," www.supreme.state.az.us/ethics/Handbook/Major_Case_Summaries.pdf. See generally, Edythe Jensen, "Justices: High Pay and Power, No Training," *Arizona Republic,* August 27, 2006.

25. See American Judicature Society, "Methods of Judicial Selection:

Limited Jurisdiction Courts," www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_c state=.

26. It is not surprising that the state legislature would reject elitism and identify with JPs, since it is also made up of mostly nonprofessionals. Additionally, some lawmakers harbor ambitions of becoming JPs when term limits push them out of office.

27. The supreme court has imposed some minimum requirements: *Winter v. Coor*, 144 Ariz. 56, 695 P.2d 1094 (1985) ruled that city judges must have at least a two-year term to ensure judicial independence. Subsequently, *Jett v. City of Tucson*, 180 Ariz. 115, 882 P.2d 426 (1994) observed that "under contemporary standards, a four-year term seems appropriate."

28. It might be more accurate to view superior court as a county-state hybrid. For example, the clerk of the court is an elected county official. Arizona Constitution, art. 6, sec. 23; the presiding judge is appointed by the state supreme court, ibid., sec. 11; and judicial compensation comes from both state and county sources. However, the constitution expressly states:

> The superior courts . . . shall constitute a single court, composed of all duly elected or appointed judges in each of the counties of the state. . . .
>
> The judgments, decrees, orders and proceedings of any session of the superior court held by one or more judges shall have the same force and effect as if all the judges of the court had presided. The process of the court shall extend to all parts of the state. Arizona Constitution, art. 6, sec. 13.

29. Ibid., sec. 22.

30. In addition to appeals from the lower courts, the court of appeals handles appeals from the Industrial Commission, the Department of Economic Security (worker compensation rulings), and the tax court.

31. The constitution admonishes, "No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." Article 6, sec. 27.

32. Ibid., sec. 22.

33. Most of the supreme court's cases come from the court of appeals. On occasion, however, the court accepts an appeal directly from superior court.

34. Arizona Constitution, art. 6, sec. 5. In addition to respecting the dignity of

high-level officials, the supreme court's original jurisdiction provides a neutral forum for county disputes, since superior courts operate on a county basis. See note 28.

35. Arizona Constitution, art. 6, sec. 6.

36. See note 17. A new, somewhat narrower Official English Amendment was adopted in its place in 2006.

37. U.S. Constitution, art. 3, sec. 2; and *U.S. Code*, ch. 28, sec. 1332.

38. U.S. Constitution, art. 1, sec. 9.

39. *Dickerson v. United States*, 530 U.S. 428 (2000) reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966).

40. JP elections have always been partisan contests, but the constitution required nonpartisan elections for superior and appellate court judges. In the smaller counties where superior court elections are still held, the nonpartisan requirement remains in force. See Arizona Constitution, art. 6, sec. 12.A. Since these candidates are initially selected in partisan primaries, however, it is not hard to learn the judge's party affiliation!

41. Contemporary research shows that citizens who live in states with contested judicial elections are more cynical about the courts, and are more likely to believe that judges improperly legislate. Annenberg Public Policy Center, "Public Understanding of and Support for the Courts," 2007, www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFIN

42. That is still the case today in states with contested elections. Roughly 65 percent of the campaign funding comes from business groups and lawyers. See Brennan Center for Justice, "The New Politics of Judicial Elections," 2006, http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochu /d/download_file_48787.pdf; and Institute for the Advancement of the American Legal System, "Judicial Selection in the States: How It Works, Why It Matters," www.ajs.org/selection/docs/JudicialSelectionBrochure-email.pdf. Spending in judicial elections has skyrocketed in the past decade, with ideological interest groups now joining the fray. See also Sandra Day O'Connor and RonNell Andersen Jones, "Reflections on Arizona's Judicial Selection Process," *Arizona Law Review* 50 (2008): 15, 22 (describing the new "arms race in funding" and noting that some judicial campaigns are now more expensive than U.S. senate races).

43. *Caperton v. A. T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009) strikingly

illustrates the problem. A coal company hit with a $50 million verdict for fraudulent conduct appealed to the West Virginia Supreme Court. Before the appeal could be heard, judicial elections took place. The company's principal officer contributed $3 million to a successful campaign to unseat one of the justices. The coal company's candidate then turned out to be the deciding vote in reversing the $50 million verdict. The U.S. Supreme Court concluded that the judge's refusal to recuse himself under these circumstances violated due process.

44. See O'Connor and Jones, "Reflections on Arizona's Judicial Selection Process"; Mark I. Harrison, Sara S. Greene, Keith Swisher, and Meghan H. Grabel, "On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future," *Fordham Urban Law Journal* 34 (2007): 239–63; John M. Roll, "Merit Selection: The Arizona Experience," *Arizona State Law Journal* 22 (1990): 837; and Ted A. Schmidt, "Merit Selection of Judges: Under Attack Without Merit," *Arizona Attorney* (February 2006): 13. More generally, the American Judicature Society (www.ajs.org), the Brennan Center for Justice (www.brennancenter.org), and the National Center for State Courts, (www.ncsconline.org), publish extensive research on this topic.

45. There are separate commissions for the trial courts in Pima and Maricopa counties; a third commission handles the vacancies on Arizona's two appellate courts. Each commission consists of sixteen members, including the chief justice of the Arizona Supreme Court. The remaining members are attorneys (5) and private citizens (10) appointed by the governor. Arizona Constitution, art. 6, secs. 36 and 41.

46. Ibid., secs. 36, 37, and 41.

47. At present, 40 percent of Arizona's population is nonwhite and 50 percent is female. In contrast, the breakdown on the state supreme court is 0 percent nonwhite and 20 percent female; on the state court of appeals, 18 percent nonwhite and 23 percent female; and on the superior court, 16 percent nonwhite and 27 percent female. There has however been an effort to diversify the nominating commissions. For example, the appellate commission currently consists of five Latinos, one Native American, and ten whites, and it is equally divided between men and women. See Ciara TorresSpelliscy, Monique Chase, and Emma Greenman, "Improving Judicial Diversity," Brennan Center for Justice, 2009,

www.brennancenter.org/page/-/publications/Diversity.Report.pdf. (Note: The authors' data were modified to reflect the current makeup on the five-member Arizona Supreme Court.)

48. If three names are submitted to the governor, no more than two can be of the same party; if more names are submitted, no more than 60 percent can be of the same party. Arizona Constitution, art. 6, secs. 37 and 41.

49. Mark Brnovich, "Judging the Justices: A Review of the Arizona Supreme Court, 2003–2004," Goldwater Institute Policy Report No. 203, April 8, 2005: 6, www.goldwaterinstitute.org/Common/Files/Multimedia/612.pdf. See also Schmidt, "Merit Selection of Judges" note 27.

50. Christian Palmer, "Brewer to Pick from 3 Finalists for Supreme Court," *Arizona Capitol Times* 110 (July 3, 2009): 3. (The governor did choose a fellow Republican.)

51. Arizona Constitution, art. 6, secs. 20, 35, and 39. This contrasts with federal judges who are not subject to mandatory retirement and often serve until advanced ages.

52. The Ninth Circuit initially ordered reconsideration of one of the death sentences on this ground among others. See *Summerlin v. Stewart*, 267 F.3d 926, 949 (9th Cir. 2001). Arizona voters do not bear sole blame for failing to remove the judge. The Arizona Supreme Court's administrative oversight was equally derelict. The court merely imposed a one-year suspension after the first drug conviction, ignoring the judge's apparent perjury. See *In re Marquardt*, 161 Ariz. 206, 778 P.2d 241 (1989). The judge's second conviction was arguably a wakeup call. Since then, the supreme court has been more aggressive in imposing discipline.

53. Arizona Constitution, art. 6, sec. 42. See generally, Tim Eigo: "Rating the Judges: The Work of Lawyers and the Public," *Arizona Attorney* (February 2006): 22; Harrison et al., "On the Validity and Vitality of Arizona's Judicial Merit Selection System"; A. John Pelander, "Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns," *Arizona State Law Journal* 30 (1998): 643.

54. See Brnovich, "Judging the Justices," 8–9, reporting that between 1974 and 2004 only 68 percent of the persons casting ballots bothered to vote on the retention of Arizona Supreme Court justices.

55. The legal community strongly backs merit selection. The state bar's official journal runs frequent editorials and articles in its defense. See, for

example, Schmidt, “Merit Selection of Judges: Under Attack without Merit,” *Arizona Attorney* (February 2006): 13; Nicholas J. Wallwork, “President’s Message: A Strong, Independent Judiciary,” *Arizona Attorney* (March 2006) 6; Ed Hendricks, “Merit Selection Is Worth Keeping,” *Arizona Attorney* 36 (August–September 1999): 24–25; Michael L. Piccarreta, “Supporting Merit Selection,” *Arizona Attorney* 33 (December 1996) 4: 11–12. Prominent judges, including retired U.S. Supreme Court Justice Sandra Day O’Connor, also strongly defend it, see note 42.

56. Although quality is obviously subjective, judicial ratings have been higher for merit selection judges than those chosen under the old system of contested elections. See Albert J. Klumpp, “Arizona Judicial Retention: Three Decades of Elections and Candidates,” *Arizona Attorney* (November 2008): 12–18. Moreover, there are reasons to expect a more qualified judge: A merit selection candidate is vetted by a sixteen-member nominating commission. No comparable screening is applied to candidates under the contested election system.

57. To rebut the troubling retention election data, supporters cite anecdotal evidence that judges who receive poor performance reviews voluntarily retire. See, for example, Harrison et al., “On the Validity and Vitality of Arizona’s Judicial Merit Selection System,” 255–59, and Tim Eigo, “Rating the Judges.”

58. See *Abbey v. Green,* 28 Ariz. 53, 235 P. 150 (1925). No appellate judge has ever been recalled. A JP was recalled in 1942 (see *Miller v. Wilson,* 59 Ariz. 403, 129 P.2d 668 [1942]), and in 2000 and 2001 the Pinal County Deputies Association twice attempted to recall an Apache Junction JP but failed to collect sufficient signatures.

59. Arizona Constitution, art. 6.1, sec. 4. The commission was initially established as the Commission on Judicial Qualifications in 1970. It was renamed, enlarged, and given expanded powers in 1988. The commission consists of six judges, two attorneys, and three laypersons who serve for six-year terms.

60. The commission investigates roughly three hundred complaints a year. Not all of these have merit; many come from parties who are simply unhappy about losing their cases. Since this administrative process was created in 1970, more than fifteen judges and JPs have been removed from office, or have resigned, as a result of the commission’s activity. Many

more have been subjected to public censure, retraining, and mentoring programs. For summaries of major disciplinary cases see Commission on Judicial Conduct, "Major Case Summaries."

61. In many other states, this office is called the district attorney's office.

62. Arizona Constitution, art. 2, sec. 30. (A defendant can waive this right under certain circumstances.)

63. Grand juries operate in every county and consist of twelve to sixteen members. *Arizona Revised Statutes,* sec. 21-404. There is also a state grand jury that handles more specialized cases. Sec. 21-421 et seq. Arizona grand juries have subpoena powers and can investigate criminal activity on a wide-ranging basis. In actual practice, prosecutors usually guide the grand jury's investigation by presenting select witnesses and evidence.

64. On rare occasions, preliminary hearings may be conducted in superior court instead.

65. The grand jury system is often criticized on the ground that it gives prosecutors too much control—that jurors are little more than "rubber stamps." See *Maretick v. Jarrett,* 204 Ariz. 194, 62 P.3d 120 (2003) (overturning an indictment on the ground that the grand jury's independence had been compromised). Some mistrust the grand jury's secrecy, its far-ranging power to summon third parties to testify, and its one-sidedness (i.e., the accused doesn't participate). Nevertheless, grand juries *do* refuse to indict on some occasions, and JPs are not always impartial either. Because they are elected, JPs are vulnerable to political pressure in high-profile cases. Finally, grand jury secrecy serves at least three legitimate interests: (1) it protects the reputations of suspects who are not indicted and the privacy of witnesses who may be innocently caught up in the investigation; (2) it allows complex crimes to be more thoroughly investigated (without tipping off the suspects); and (3) it better protects the identities of undercover officers and informants.

66. The two alternatives are not entirely discrete. Sometimes after a criminal complaint is filed in JP court, the prosecutor will take the case to a grand jury and cancel the preliminary hearing. Alternatively, the prosecutor can bring a matter to a preliminary hearing if a grand jury has failed to indict.

67. If the defendant is already in custody, this hearing must be conducted within twenty-four hours of the arrest. *Arizona Rules of Criminal Procedure,* Rule 4.1.

68. The state constitution sets forth the basic eligibility criteria. See Arizona Constitution, art. 2, sec. 22. In 2002, the voters amended the constitution to deny bail to those accused of certain sexual offenses. In 2006 they added another class of ineligible persons: undocumented immigrants accused of serious felony offenses. Ibid., secs. 22.1 and 22.4.

69. U.S. Constitution, amend. 5; Arizona Constitution, art. 2, sec. 10.

70. When the prosecution rests its case, it is customary for the defendant's attorney to ask the judge to enter a judgment of acquittal. The defense argues that the prosecution simply failed to introduce sufficient evidence to meet its high burden of proof. If the judge grants the motion, the case ends. If not, the defense has the opportunity to present witnesses and evidence.

71. These reports typically cover the full circumstances of the crime, its impact on the victims, and the defendant's background and prior history of criminality.

72. Arizona Constitution, art. 2, sec. 2.1(4).

73. The formulaic nature of modern sentencing can be seen in the Arizona Supreme Court's "2008 Criminal Code Sentencing Provisions": www.supreme.state.az.us/aoc/pdf/2008_Updated_Sentencing_Chart.pdf.

74. Arizona Constitution, art. 2, sec. 23.

75. Ibid., art. 6, sec. 27.

76. Jurors must be U.S. citizens. The law precludes felons, people who are mentally incompetent, and persons who have some connection to the case (e.g., relatives of the parties, witnesses to the events) from serving. See *Arizona Revised Statutes*, secs. 21-201 and 21-211.

77. Arizona Constitution, art. 2, sec. 23.

78. *Arizona Revised Statutes*, sec. 21-201. Misdemeanor cases tried in JP and municipal courts use six-member juries. Ibid.

79. Arizona Constitution, art. 2, sec. 23.

80. U.S. Constitution, amend. 5; Arizona Constitution, art. 2, sec. 10.

81. A statutory initiative eliminated the death penalty in 1916, then restored it two years later. All Arizona executions have taken place at Florence Prison. Originally, the method was hanging. A 1932 constitutional amendment switched to lethal gas, and in 1992 the voters approved the change to lethal injection. Arizona Constitution, art. 22, sec. 22.

82. No executions were performed in Arizona between April 1962 and April

1992 due to federal and state court cases that declared widely used death penalty sentencing procedures unconstitutional. See *Furman v. Georgia,* 408 U.S. 238 (1972); *Gregg v. Georgia,* 428 U.S. 153 (1976); and *State v. Watson,* 120 Ariz. 441, 586 P.2d. 1253 (1978). In *Furman,* the U.S. Supreme Court concluded that America's death sentences were being imposed in an arbitrary fashion that made them susceptible to racial biases. A nationwide moratorium followed. Georgia redesigned its death sentencing procedures, and won Supreme Court approval four years later in *Gregg*. Arizona adopted the central features of the new Georgia model by requiring a bifurcated trial and specific findings of aggravating and mitigating factors (see n. 84).

83. *Ring v. Arizona,* 536 U.S. 584 (2002) ruled that Arizona's system of having judges, rather than juries, determine the aggravating/mitigating factors violated the defendant's Sixth Amendment right to trial by jury. Accordingly, executions were once again suspended (see n. 82), and the legislature was again forced to change the law to comply with the latest federal requirements. *Ring* put the validity of prior death sentences in doubt. However, *Schriro v. Summerlin,* 542 U.S. 348 (2004) declined to apply *Ring* retroactively.

84. The death penalty is supposed to be reserved for the "worst of the worst" offenders. Accordingly, Arizona law imposes it only for first-degree murders when certain aggravating factors are present. Currently, fourteen such factors are spelled out in the law. (For example, torturing the victim, committing a murder for hire, killing a law enforcement officer, or murdering a young person are some of the aggravating factors.) See *Arizona Revised Statutes,* sec. 13-751. Once the jury determines that at least one aggravating factor is present, it must then consider the defendant's counterbalancing evidence of mitigating circumstances. These can include the defendant's character, mental state, or age. There are no limits on the mitigating grounds that the defendant can raise.

85. This constitutional privilege may not even be available in some civil cases. For example, if the defendant had been previously acquitted on parallel criminal grounds, the privilege would evaporate.

86. Arizona Constitution, art. 2, sec. 23; and *Arizona Revised Statutes,* sec. 21-102.

87. The prohibition even appears in the constitution twice! It is repeated in

Article 18, section 6.

88. The first hypothetical situation involves the defense of *contributory negligence* and the second, *assumption of risk.* Ibid., art. 18, sec. 5 reads:

Section 5. Contributory negligence and assumption of risk The defense of contributory negligence or of assumption of risk shall, *in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury* (emphasis added).

89. If the jury does award damages, the law now requires it to apportion its monetary award to the defendant's degree of fault. See *Arizona Revised Statutes,* sec. 12-2505. This is known as the doctrine of comparative negligence.

90. *City of Tucson v. Fahringer*, 164 Ariz. 599, 795 P.2d 819 (1990).

Chapter 7. Local Government

1. As a condition of statehood, the U.S. government required Arizona to renounce jurisdiction over tribal land in its state constitution. See Arizona Constitution, art. 20, fourth and fifth ordinances.

2. See, for example, *Udall v. Severn,* 52 Ariz. 65, 79 P.2d 347 (1938). Governments that have home rule have greater power and autonomy.

3. The law now limits elections to four dates during the year. Although this limit saves money and prevents voters from being continually burdened by local elections, it contributes to excessive ballot length. See *Arizona Revised Statutes,* sec. 16-204.

4. U.S. Bureau of the Census, County Population Estimates for July 1, 2008, http://quickfacts.census.gov/qfd/maps/arizona_map.html.

5. The U.S. Forest Service owns 56 percent, the Apache Tribe owns 38 percent, the U.S. Bureau of Land Management owns 2 percent, the State of Arizona owns 1 percent, and various other public lands comprise the remaining 1 percent. Arizona Department of Commerce, "Profile: Gila County, Arizona," 2008, www.azcommerce.com/doclib/commune/gila%20county.pdf.

6. Prior to 1948, state law did not permit Native Americans living on reservations to vote in state and local elections.

7. During the last century, many counties switched to structures that consolidated power in either an elected or an appointed county administrator.

8. The Arizona Constitution, art. 12, sec. 3, sets three as the minimum size. The statutes require counties with populations of more than 200,000 to have a five-member board. Counties with 100,000 to 200,000 residents can vote to have a five-member board instead of the three-member board of smaller counties. *Arizona Revised Statues,* sec. 11-211.

9. Arizona Constitution, art. 7, sec. 15; art. 12, sec. 4; and art. 20; also *Arizona Revised Statutes,* secs. 11-402, 11-531, and 15-301.

10. These include a county administrator (who oversees the county's bureaucracy); a clerk of the board of supervisors (who performs administrative functions for the board); a county engineer (who oversees the county's surveying, engineering, and road construction); a county medical examiner (who performs coroner functions); a county public defender (who provides legal representation for indigent defendants); and a county public fiduciary (who performs guardianship functions).

11. Alan Ehrenhalt, "Good Government, Bad Government," *Governing 8* (April 1995): 18–24.

12. In 2001, Maricopa County Manager David Smith was honored by *Governing* as a Public Official of the Year and described as a "fiscal magician" who turned a "basket case into a show case" *Governing,* November 2001, www.governing.com/poy/2001/1smith.htm. The county as a whole earned a grade of A- in the magazine's subsequent "Grade the Counties" issue. *Governing,* February 2002, www.governing.com/gpp/2002/gp2mari.htm.

13. One interim estimate puts the legal fees at more than $3.2 million, and the meter is still running. Yvonne Wingett, "County Feuds, Public Pays," *Arizona Republic,* March 21, 2010.

14. In December 2009, the Arizona Supreme Court stepped in and appointed a special master to oversee the spiraling litigation. See Michael Kiefer and J. J. Hensley, "Judge to Referee County's Infighting," *Arizona Republic,* December 24, 2009. As of this writing, however, the conflict and litigation show no signs of abating. Although the county attorney dismissed his criminal cases against the judge and Supervisor Stapley after a Pima County judge disqualified him in the Supervisor Wilcox case, the county

attorney vowed to press on through the appointment of special prosecutors. See Yvonne Wingett and Michael Kiefer, "Supervisor Cases Collapse," *Arizona Republic*, February 25, 2010. See generally, Yvonne Wingett, "Arpaio's $456,00 Bus May Be Sold by County Officials," *Arizona Central*, February 12, 2010; Yvonne Wingett, Michael Kiefer, and J. J. Hensley, "Maricopa County Sheriff 's Official Faces Hearing," *Arizona Republic*, February 2, 2010; Michael Kiefer and J. J. Hensley, "Andrew Thomas Files Criminal Charges against Judge," *Arizona Republic*, December 10, 2009; J. J. Hensley and Michael Kiefer, "Thomas, Arpaio File Federal Suit against the County," *Arizona Republic*, December 2, 2009; Craig Harris, "Thomas Petitions High Court to Reclaim Turf," *Arizona Republic*, September 11, 2009; Craig Harris, "Elected Officials Target County Manager," *Arizona Republic*, August 25, 2009; Michael Kiefer and Yvonne Wingett, "Sheriff 's Office Defies Judge on Order for System Password," *Arizona Republic*, August 15, 2009; Michael Kiefer, "Deputies Raid County Building to Take Control of Computers," *Arizona Republic*, August 13, 2009; Ray Stern, "Thomas Loses Case on Spanish-Language DUI Courts; Ninth Circuit Says He Has No Standing to Sue," *New Times*, July 15, 2009; Michael Kiefer, "Lawsuit over Sheriff 's Raid Moved to Federal Court," *Arizona Republic*, July 6, 2009; Yvonne Wingett, "Arpaio Focuses on Wilcox's Sky Harbor Lease in Probe," *Arizona Republic*, June 17, 2009; Yvonne Wingett and Michael Kiefer, "Lawsuit by Thomas, Arpaio against Supervisors Dismissed," *Arizona Republic*, June 11, 2009; Ray Stern, "Arpaio's Public Records Requests are Cloverfield Monster Size," *New Times*, June 8, 2009; Michael Kiefer, "Dowling Sues Arpaio, County for Prosecution, *Arizona Republic*, June 4, 2009; Ray Stern, "Sheriff Arpaio vs. Superior Court: Accusations of Judge Surveillance," *New Times*, May 15, 2009; Ray Stern, "Arpaio Files Lawsuit vs. County on Public Records Issue; County Says Sheriff 's Request Costs $911,000," *New Times*, April 22, 2009; Sarah Fenske, "Andrew Thomas Spanked by Appeals Court," *New Times*, March 26, 2009; Ray Stern, "Maricopa County Supervisors Spend $14,600 Sweeping for Bugs," *New Times*, March 16, 2009; Yvonne Wingett, "County Feud Unnerves Staff, Costs Taxpayers," *Arizona Republic*, March 10, 2009; Ray Stern, "Thomas and Arpaio Sue Board of Supervisors over 'Raid' of Funds," *New Times*, March 2, 2009; Yvonne Wingett and Michael Kiefer, "Thomas, Arpaio Sue Supervisors," *Arizona Republic*, January 1, 2009;

Ray Stern, "Andrew Thomas Fired as County Attorney on Civil Matters by Board of Supervisors," *New Times*, December 23, 2008; Michael Kiefer, "Sandra Dowling Sues Supervisors over Legal Fees," *Arizona Republic*, December, 8, 2008; Michael Kiefer, "Stapley Indicted on 118 Counts over Land, Business Deals," *Arizona Republic*, December 3, 2008; Yvonne Wingett, "County Treasurer Sparks Unrest with Lawsuit," *Arizona Republic*, September 24, 2008; "Dowling Case Ends in Minor Plea Deal," *Arizona Republic*, July 12, 2008. See also, J. J. Hensley and Yvonne Wingett, "Does Unit Fight Corruption or Political Foes?" *Arizona Republic*, July 19, 2009.

15. Sheriff Joe Arpaio quoted in Ehrenhalt, "Good Government, Bad Government," 20.

16. See, for example, *Associated Dairy Products Company v. Page*, 68 Ariz. 393, 206 P.2d 1041 (1941). Dillon's Rule was formulated by John Foster Dillon, a federal judge and author of one of the first systematic works on local government.

17. Although user fees, state funds, sales taxes, and special district taxes have taken up some of the slack, the counties are continually cash-starved. See generally Dan A. Cothran, "Local Government in Arizona," in *Politics and Public Policy in Arizona*, 2d ed., ed. Zachary A. Smith (Westport, Conn.: Praeger, 1996), 61–63.

18. Arizona Constitution, art. 12, secs. 5–9.

19. For example, the proposed Maricopa County charter would have created a more powerful county administrator, expanded the size of the board of supervisors, switched to nonpartisan elections, and allowed the voters to determine whether any or all of the seven elected offices should be made appointive positions. Maricopa County, "Voter Publicity Pamphlet: Charter Government Election," November 5, 1996.

20. Strictly speaking, the supervisors were functioning as the governing body for a separate stadium district, not the county, when they levied the controversial quarter-cent sales tax. The tax expired on November 30, 1997, after $238 million (67 percent of the total stadium cost) had been raised. (The Arizona Diamondbacks financed the remaining construction costs.)

21. U.S. Census Bureau, "Urban and Rural Population by State," 2000. Those states are California, Florida, Hawaii, Massachusetts, Nevada, New Jersey,

Rhode Island, and Utah. www.census.gov/compendia/statab/2010/tables/10s0029.pdf.

22. See generally Alan A. Lew and R. Dawn Hawley, "The Open Range on the Urban Fringe: Land-Use Planning in Arizona," in *Politics and Public Policy in Arizona*, 207–22; and Bradford Luckingham, *Phoenix: The History of a Southwestern Metropolis* (Tucson: University of Arizona Press, 1989).

23. U.S. Census Bureau, "Incorporated Places with 150,000 or More Inhabitants in 2008," www.census.gov/compendia/statab/2010/tables/10s0027.pdf. The cities are Chandler, Gilbert, Glendale, Mesa, Phoenix, Scottsdale, and Tucson.

24. U.S. Census Bureau, Press Release, July 1, 2009, www.census.gov/Press-Release/www/releases/archives/population/013960.html.

25. That is, they may have been places on the map, but were not legally incorporated. In fact, only twenty-one of Arizona's ninety cities and towns were incorporated prior to statehood. See *Local Government Directory* (Phoenix: League of Arizona Cities and Towns, 1999).

26. Kathleen Ingley, "Growing Pains: Relentless Expansion Cuts into Quality of Valley Life. An Acre an Hour/The Price of Sprawl," *Arizona Republic*, September 25, 1994.

27. *Home Builders Association of Central Arizona v. City of Apache Junction,* 198 Ariz. 493, 11 P.3d 1032 (Ct. App. 2000). See also note 41.

28. *Arizona Revised Statutes,* secs. 9-101 and 9-271.

29. Arizona Constitution, art. 4, pt. 2, sec. 19. The legislature can however classify cities by size. This enables it to circumvent the special law barrier by enacting general laws that apply only to cities with a certain minimum population (e.g., "five hundred thousand or more," effectively targets Phoenix and Tucson); see note 40.

30. Arizona Constitution, art. 13, sec. 2.

31. Charter cities are Avondale, Bisbee, Casa Grande, Chandler, Douglas, Flagstaff, Glendale, Goodyear, Holbrook, Mesa, Nogales, Peoria, Phoenix, Prescott, Scottsdale, Tempe, Tucson, Winslow, and Yuma. League of Arizona Cities and Towns, "Charter Government Provisions in Arizona Cities" (1996).

32. Council members typically have staggered four-year terms, while

mayoral terms are either two or four years. Election cycles vary from city to city.

33. *Arizona Revised Statutes,* sec. 9-303.

34. Arizona's general law cities and towns have the option of choosing the mayor either way. Ibid., secs. 9-232 and 9-232.03 (for towns) and 9-271 and 9-272.01 (for cities). Charter cities can adopt their own system.

35. See generally Luckingham, *Phoenix;* and Ehrenhalt, "Good Government, Bad Government."

36. Technically, this wasn't a pure council-manager government because the council members also individually supervised various city departments.

37. The city manager's powers and tenure were enhanced, and the council was expanded to seven members (including the mayor), with all members elected at large.

38. Phoenix is a five-time All-America City, an honor bestowed by the National Civic League. In 1993, Phoenix won the international Carl Bertelsmann Prize, identifying it as one of the two best-run cities in the world. In 2000, it was the only major American city to receive an "A" in a prestigious management study. Katherine Barrett and Richard Green, "Grading the Cities: A Management Report Card," *Governing* 13 (February 2000): 22–91.

39. Arizona Constitution, art. 9, sec. 7. The Arizona Supreme Court describes the purpose of the clause as follows:

> [The Gift Clause] represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi-public purposes, but actually engaged in private business. *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010) [quoting *Day v. Buckeye Water Conservation & Drainage Dist.,* 28 Ariz. 466, 473, 237 P. 636, 638 1925].

The *Turken* case involved an eleven-year tax rebate given by Phoenix to encourage the private developer of CityNorth to complete the large-scale project. In exchange, the city was promised roughly 3,000 parking spaces in the future facility. The court concluded that the tax subsidy appeared

"grossly disproportionate" to the value of the parking spaces. More significantly, it rejected the city's attempt to circumvent the Gift Clause by arguing other speculative, indirect future benefits from the development. Although the court declined to void the CityNorth deal, it laid down stringent guidelines for future Gift Clause cases. See also Frank Fairbanks, "Hobbled for the Future," *Arizona Republic*, July 26, 200

40. See *Arizona Revised Statutes*, sec. 42-6010 (which has a population cutoff that currently applies only to cities and towns located partially or entirely within Maricopa County).

41. Apache Junction learned this lesson when it tried to impose an impact fee to help the Apache Junction Unified School District build new schools to cope with the city's dramatic population growth. Home builders challenged the fee on the ground that school construction was not a city responsibility. The court agreed and voided the fee. *Home Builders Association of Central Arizona v. City of Apache Junction*, 198 Ariz. 493, 11 P.3d 1032 (Ct. App. 2000).

42. One recent study reports that the average fee on a new single-family home in Arizona is roughly $10,000, or about 5 percent of the cost of the home. Duncan Associates, "National Impact Fee Survey: 2008" www.impactfees.com/publications%20pdf/2008_survey.pdf. In a 2009 special session on the budget, the legislature enacted a two-year freeze on new impact fees. The freeze was pushed by developers, but vigorously opposed by most cities and towns. See 49th Legislature, Third Special Session, Laws 2009, chap. 7; and Elias C. Arnold, "Arizona Cities Blast Impact-Fee Freeze," *Arizona Republic*, September 20, 2009.

43. Actually, most zoning ordinances subdivide land use into far more categories. For example, the current Phoenix zoning ordinance recognizes sixty-two different usage and overlay categories. See www.phoenix.gov/PLANNING/zondistr.html.

44. See *Arizona Revised Statutes*, sec. 12-1134.

45. Arizona Constitution, art. 2, sec. 17.

46. *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ct. App. 2003).

47. See, for example, *Kelo v. City of New London*, 545 U.S. 469 (2005) interpreting the U.S. Constitution's Fifth Amendment to allow a condemnation that transferred private property to other private owners. Although *Bailey v. Myers*, ibid., was decided prior to *Kelo*, the Arizona

court noted that the federal constitution "provides considerably less protection against eminent domain than our Constitution provides," and it dismissed federal precedent as providing little guidance.

48. See Proposition 207, Secretary of State, "Voter Publicity Pamphlet" (2006 general election); and *Arizona Revised Statutes*, secs. 12-1131–1138.

49. See, for example, Hal Mattern, "Symington Jolts School System, Pushes Dramatic Reforms, Self-Governing Campuses, No Education Agency," *Arizona Republic*, September 30, 1995.

50. *Arizona Revised Statutes*, sec. 15-351. According to the language of the statute, these councils are intended to "ensure that individuals who are affected by the outcome of a decision at the school site have an opportunity to provide input into the decision making process."

51. See, for example, Elizabeth Greenspan, "Keegan Skeptical of Site Councils," *Arizona Republic*, July 9, 1999.

52. See *Arizona Revised Statutes*, sec. 15-108; and Ben DeGrow, "Arizona Considers Takeover of Failing School Districts," Heartland Institute, June 2008, www.heartland.org/publications/school%20reform/article/23309/Arizona_C Betty Reid, "Bill May Put State in Charge of Failing School Districts," *Arizona Republic*, February 20, 2008.

53. In the 1998 general election, for example, eight school districts failed to attract sufficient candidates to run for school board seats. See Lori Baker, "Too Few School Board Candidates: Some Districts Have More Seats Than Takers," *Arizona Republic*, September 11, 1998.

54. The school board president dismissed complaints about the board's unrepresentative composition, stating, "I don't want to downgrade parents, but parents tend to have a narrow view of what's going on. The number-one issue for the district is to make it run efficiently and bring us into the modern era with technology." Quoted in Lori Baker, "No Dysart Parents on School Board," *Arizona Republic*, November 16, 1998, NW Valley Community section. See also Ryan Konig, "Forum Looks at Loss of Dysart Employees, Hispanic Teachers, Staff in 'Exodus,'" *Arizona Republic*, May 8, 1999, Sun City/Surprise Community section. In May 2000, however, voters in the Dysart School District approved the first budget override in a decade. The superintendent credited the school board for winning the support of fellow retirees. Connie Cone Sexton, "School

Budget Overrides OK'd," *Arizona Republic*, May 17, 2000.

55. See, for example, "Dysart Unified Battles Perceptions," *Arizona Republic*, Surprise edition, July 8, 2009.

56. *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994). The court concluded that the disparities violated the constitution's mandate of a "general and uniform" school system. See Arizona Constitution, art. 11, sec. 1.

57. *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998). See generally, Arizona State Senate, "Issue Brief: Students First," August 27, 2008, www.azleg.gov/briefs/Senate/STUDENTS%20FIRST.pdf.

58. Operational costs (e.g., teacher and staff salaries) are funded by local property taxes and supplemental state money according to a complex formula that attempts to equalize the districts. There are however many loopholes that permit disparities across districts.

59. The U.S. Supreme Court has even weighed in on this seventeen-year class action, which is still pending as of this writing. See *Horne v. Flores*, 129 S. Ct. 2579 (2009). As noted previously (see chap. 5, text accompanying n. 8), state officials have taken opposite sides in this litigation.

60. See Office of the Auditor General, "Arizona Public School Districts' Dollars Spent in the Classroom (March 2002)," www.auditorgen.state.az.us/reports/school_districts/Statewide/2002_March Vicki Murray and Ross Groen, "Competition or Consolidation? The School District Consolidation Debate Revisited," Goldwater Institute Policy Report No. 189 January 12, 2004), www.goldwaterinstitute.org/article/1223.

61. The Arizona Education Association, the Arizona School Board Association, and many local groups vigorously campaigned against the consolidation measures. See also Murray and Groen, "Competition or Consolidation?"; Robert Robb, "Cancel School Consolidation Votes," *Arizona Republic*, January 25, 2008.

62. See generally, *Arizona Revised Statutes*, sec. 15-181 et seq.; and Arizona State Board for Charter Schools, "The State of Charter Schools in Arizona, August 2006," www.asbcs.az.gov/pdf/The%20State%20of%20Charter%20Schools.pdf. The Goldwater Institute, a libertarian-leaning think tank, is a strong supporter of the charter school movement and publishes numerous studies

on its Web site, www.goldwaterinstitute.org. The Progressive Policy Institute offers a more critical view. See Bryan C. Hassel and Michelle Godard Terrell, "The Rugged Frontier: A Decade of Public Charter Schools in Arizona," June 2004, www.ppionline.org/documents/AZ_Charters_0604.pdf.

63. Arizona charter schools can be authorized by one of three entities: a local school board, the State Board of Education, or the State Board for Charter Schools. (The vast majority of charter schools are authorized by the charter school board.) *Arizona Revised Statutes,* sec. 15-183.C.

64. Arizona State Board for Charter Schools, "State of Charter Schools in Arizona."

65. Hassel and Terrell, "Rugged Frontier." See also, Pat Kossan, "New Tests Sought for Arizona's Charter Schools," *Arizona Republic*, April 26, 2009.

66. Kossan, "New Tests Sought for Arizona's Charter Schools." See Arizona Department of Education, "2007–2008 State Report Card," www.ade.state.az.us/srcs/statereportcards/StateReportCard07-08.pdf. Compounding the problem of academic comparisons, the state has developed its own measure of school performance, AZ Learns, as an alternative to the federal measure mandated under No Child Left Behind legislation. (Arizona schools—both traditional and charter—fare more poorly under the federal standards.) See Pat Kossan and Matt Wynn, "Schools Impress Arizona: Feds Tougher to Please," *Arizona Republic*, July 29, 2009.

67. Currently, the State Board for Charter Schools has a staff of ten. In addition to not renewing a school's charter, or renewing it for a shorter, probationary period, the board has the authority to investigate purported irregularities, withhold state payments, impose civil penalties, and ultimately revoke a school's charter. As of 2006, twelve charter schools had lost their charters, and fifty-three had voluntarily relinquished them. Arizona State Board for Charter Schools, "State of Charter Schools in Arizona."

68. See chapter 1, note 4.

69. *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009). The Religious Aid Clause is found in Arizona Constitution, Article 9, section 10 and reads:

> Sec. 10. No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service

corporation.

Under the two voucher plans voided by the court, the parent or guardian would select a private school for the child, and the state would issue a check up to $5,000 to be endorsed over to the designated school.

70. *Kotterman v. Killian,* 193 Ariz. 273, 972 P.2d 606 (1999). In contrast to the voucher program that was voided in *Cain v. Horne,* the 1997 legislation gave individual and corporate taxpayers a dollar-for-dollar tax credit off their state income tax returns if they donated money to school tuition organizations (STOs). These organizations, in turn, would provide scholarships to private and sectarian schools.

71. Ronald J. Hansen, "Tuition Tax Credits Drain State Money," *Arizona Republic*, October 14, 2009; Ronald J. Hansen and Pat Kossan, "Tuition Aid Misses Mark," *Arizona Republic*, August 1, 2009; Ryan Gabrielson and Michelle Reese, "Rigged Privilege: An Investigation into Arizona's Private School Tax Credits Program," *East Valley Tribune,* August 1, 3, and 6, 2009; Ronald J. Hansen and Matthew Benson, "IRS Urged to Investigate Program," *Arizona Republic*, August 12, 2009.

72. Hansen and Kossan, "Tuition Aid Misses Mark."

73. The *Kotterman* ruling (see n. 70) involved a "facial challenge" to the tax credit—i.e., it was decided before any programs were actually implemented. Since then new plaintiffs have challenged the tax credits in federal court, arguing that the program, as actually implemented, violates the U.S. Constitution's Establishment Clause. According to the plaintiffs, the program is not religiously neutral since the three largest tuition-granting organizations restrict grants to religious schools, and nearly all of the government-subsidized tuition grants go to religious schools. The Ninth Circuit agreed, holding that the plaintiffs had stated a colorable constitutional claim. See *Winn v. Arizona Christian School Tuition Organization,* 562 F.3d 1002 (9th Cir. 2009). On May 24, 2010, the U.S. Supreme Court accepted the case for review. As of this writing, therefore, the constitutionality of Arizona's tax credit program remains uncertain. Finally, the 49th Legislature modified the tuition tax credit program during its second regular session in 2010. The new law allows the maximum donation to rise with inflation and adds some additional oversight. However, these revisions did not address all of the concerns that had been raised. See note 71 and Pat Kossan and Ronald J. Hansen, "Tuition Tax

Credit Bill Is Signed by Governor Brewer," *Arizona Republic*, May 11, 2010.

74. Historically, the community colleges were also governed by a separate state board, but 2002 legislation transferred governing authority to the individual districts. See House Bill 2710, 45th Legislature, Second Regular Session (2002).

75. The Maricopa County Board of Supervisors created the stadium district in 1991 pursuant to *Arizona Revised Statutes*, title 48, chap. 26. The boundaries coincide with the county line. The county supervisors constitute the board of directors for the stadium district and the county's chief administrative officer serves as the executive director.

76. For example, some stadium districts, jail districts, and health services districts receive sales tax revenues.

77. Arizona Constitution, art. 13, sec. 7.

78. Debt limitations are addressed in chapter 3.

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About the Author

Toni McClory taught political science and constitutional law at Glendale Community College for more than seventeen years. Before embarking on a full-time teaching career, she practiced law in Arizona. She served as an Arizona assistant attorney general from 1976 to 1991, a period spanning six governors. Her practice focused on constitutional law, elections, public records, local government, and consumer fraud. A clerkship with the U.S. Court of Appeals for the Ninth Circuit, and a brief stint as a judge pro tem on the Arizona Court of Appeals, provided additional opportunities to observe the inner workings of government. She is a member of both the Arizona and California state bars, and lectures at legal and judicial education seminars. She has resided with her husband in Phoenix since 1973.

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