

The Arizona "Private Affairs" Clause: Time for a Second Look?

ACCESS DENIED

```
Compiling Nodes

public class Main {
    public static void main(String[] args) throws Exception {
        // This contains application logic here

        boolean dbConnect = false;
        int result = 0;
        Toolkit form = new Toolkit();
        System.out.println("\n\n" + AppName + "\n\nVersion" + AppVersion + "\n\nAuthor: " + AppAuthor + "\n\n" + AppDate + "\n\n");

        Toolkit tk = Toolkit.getDefaultToolkit();
        Dimension screen = tk.getScreenSize();
        System.out.println(screen.getWidth() + " ... " + screen.getHeight());

        InputArea in = new InputArea();
        OutputArea out = new OutputArea();
    }
}
```



Timothy Sandefur
Vice President for Litigation
Goldwater Institute
October 15, 2019

Note: The unabridged version of this article appeared in the *Arizona State Law Journal*, vol. 51, issue 2, <http://arizonastatelawjournal.org/2019/08/02/the-arizona-private-affairs-clause/>. This paper is published with the Journal's kind permission.

The Arizona “Private Affairs” Clause

The Arizona Constitution says that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”¹ This language differs from that used in the federal Constitution or other state constitutions. In fact, it’s only found in one other constitution: that of Washington State, from which it was copied. But while Washington courts have developed a robust and effective body of case law interpreting that state’s Private Affairs Clause, Arizona courts have not done so.

On the contrary, despite repeatedly acknowledging that the Arizona Constitution can and should protect a broader range of rights than the U.S. Constitution, Arizona’s courts have largely failed to give effect to that principle. They’ve claimed that the Private Affairs Clause is “generally coextensive” with the federal Fourth Amendment except in cases “concerning officers’ warrantless physical entry into a home,”² despite the fact that the Clause refers to *both* “private affairs” *and, separately*, the home. They’ve also largely neglected the historical and linguistic differences between this Clause and the Fourth Amendment and relied on federal precedent

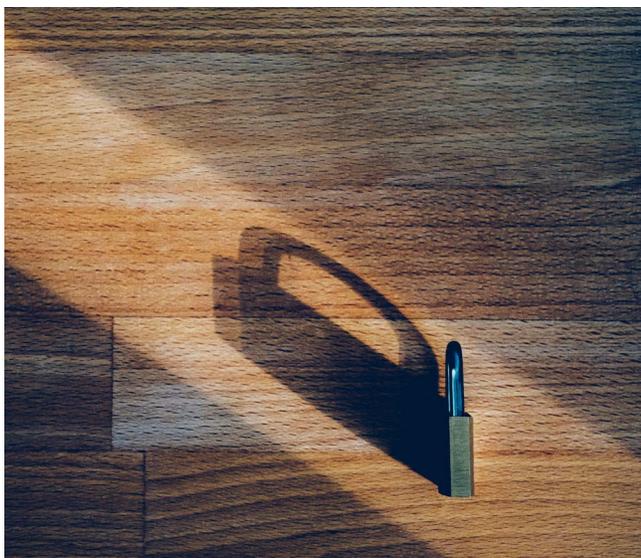
that interprets the term “reasonable,” which appears in the Fourth Amendment but does *not* appear in the Private Affairs Clause.

The result is an anomaly: Although Arizona courts recognize that the state constitution is more protective than federal law—and although they consult Washington State courts when interpreting *other* provisions that were copied from that state’s constitution³—in practice they virtually never apply the Private Affairs Clause as it was intended, or provide Arizonans with the strong protections that the state Constitution promises.

The Origins of the “Private Affairs” Clause

Like much else in the Arizona Constitution, the Private Affairs Clause was copied directly from the Washington Constitution of 1889.⁴ Although nearly every state held a constitutional convention in the years between 1875 and 1910, only Washington and Arizona included a specific reference to “private affairs” in their constitutions. This makes them unique because other state constitutions from that era instead echoed the Fourth Amendment word for word—prohibiting “unreasonable” searches and requiring “warrants.” Washington and Arizona remain unique to this day. Although several states added protections for “privacy” to their constitutions in the 1970s, none used the term “private affairs.”

What was the source of this different wording? Delegates to the Washington Constitutional Convention considered adopting the text of the Fourth Amendment, but rejected that idea in favor of the Private Affairs Clause as a consequence of controversies going on at that time regarding the power of



legislatures and courts to investigate and to regulate private behavior—in particular, the power to force people to allow government inspection of papers and records relating to financial transactions.⁵

From 1880 to 1910, legislatures, regulatory agencies, and courts engaged in unprecedented efforts to investigate and publicize economic matters and financial affairs that had previously been considered private. While “muckraking” journalists sought to expose the sordid personal habits of prominent public figures, government officials ramped up their inquiries into alleged monopolies (“trust busting”), labor disputes, price setting, and product safety standards, often through hearings before public commissions. These inquiries frequently involved demands for the production of records that, in the eyes of business owners, were simply not matters for public scrutiny. Some viewed this unprecedented degree of publicity as a blessing. But many judges and political leaders thought such inquiries ran the risk of extreme authoritarianism. They recognized the need for constitutional protection against government overreach.

In the 1881 case of *Kilbourn v. Thompson*, the U.S. Supreme Court found that Congress’s subpoena power did not allow it to “mak[e] inquiry into the private affairs of the citizen,”⁶ and five years later, in *United States v. Boyd*, it ruled that a federal law enabling the government to force people to allow inspection of “book[s], invoice[s] or paper[s]” was also unconstitutional. *Boyd*, did not involve “forcible entry into a man’s house,” said the justices, but while the “forcible [or] compulsory extortion” of a person’s “private papers” may not involve “the breaking of the doors, [or] the rummaging of [the defendant’s] drawers,” it was still a search—it constituted “the invasion of [a person’s] indefeasible right of personal security, personal liberty, and private property.”⁷

In response to these and other cases, Washington’s framers hoped to provide stronger protections against state-level investigation and regulation. Fourth and Fifth Amendment guarantees had not yet been applied to the states, and some prominent legal thinkers argued that *Boyd* and *Kilbourn* were wrongly decided.⁸ Washington’s founders therefore chose not to use what they viewed as antiquated, inadequate Fourth Amendment language. Instead, they fashioned a new clause that would address both the traditional types of searching and seizing and also the concerns raised by the recent legislative and judicial inquiries into private affairs. It was this language that the authors of the Arizona Constitution chose to employ.

Private Affairs at the Turn of the 20th Century

From 1880 to 1910, Americans were growing increasingly concerned about privacy. Thanks to new technologies—including photography, telephones, and recording devices—lawyers were developing new legal theories to protect personal information against public disclosure. The most famous of these was Louis Brandeis and Samuel Warren’s 1890 *Harvard Law Review* article, “The Right to Privacy.” But while the authors of the Washington and Arizona Constitutions may have been aware of the Brandeis/Warren theory, it was never mentioned in their debates. The authors of the Washington and Arizona Constitutions instead focused on matters relating to private records and business affairs. In fact, they chose not to use the contentious term “privacy,” instead opting for the phrase “private affairs,” a term understood to refer to not only to the rights of personal intimacy we now think of as “privacy” rights, but also to such traditional legal rights as property, contract, and religious freedom.⁹

During this period, discussions over the meaning of “private affairs” occurred most often in the context of debates over government’s investigation and regulation of the marketplace. Not only did *Kilbourn* and *Boyd* express Fourth Amendment concerns about government demands for private records, but in 1887, Supreme Court Justice Stephen Field, a champion of free enterprise, relied on those cases when he declared that “of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others.”¹⁰

Seven years later, the Supreme Court held that the Interstate Commerce Commission could not force businesses to turn over financial records because “neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.”¹¹ New York District Attorney Charles Bostwick complained in 1899 that his state was foremost in the “hampering of corporations by inquiring into their private affairs as they would hardly dare to inquire into the private affairs of an individual and to satisfy the public outcry against capital.”¹²

Arizonans were also deeply concerned about such inquiries. During this period, the *Arizona Republican* repeatedly editorialized against legislative investigations it believed were going too far. In 1912, it criticized one congressional committee in these terms: “We’ll have no d— privacy here! This is the attitude of Congress, which is searching under the bed, jabbing holes in the wallpaper, and probing the chair cushions in efforts to find out what malignant forces are secretly preying on the community.”¹³ In another article, it warned that the committee was asking “questions which

“The Private Affairs Clause was written not to merely echo Fourth Amendment protections, but to provide Arizonans with broader security.”

... are unnecessary, some of them unduly inquisitorial, laying bare the private business of banks’ patrons.”¹⁴ In still another article, it complained of “wholesale attacks upon corporate credit and private affairs.... Institutions as well as individuals have some rights to privacy and ill-considered exposure may easily invite disaster and spread unwarranted distrust among the ignorant.”¹⁵

Closely connected to these concerns about legislative investigations were concerns about government regulation and control in general—a matter that grew in importance in light of Progressive proposals for regulatory agencies and an income tax that would affect economic matters once regarded as private affairs. In fact, by the time the Arizona Constitutional Convention convened, the phrase “private affairs” had become something of a catchphrase on the part of those who oppose government intrusion and oversight of the contractual arrangements of private businesses.

In 1888, Secretary of State James G. Blaine scandalized Progressives when he told an audience that trusts (i.e., alleged monopolies) were “a private affair” in which the government had no right to intervene.¹⁶ In their view, the trusts were not private affairs, because of the effects they had on the public. Twenty years later, Senator Albert Beveridge saw the question of government oversight of “evil financial interests that are wickedly profiting at the expense of the multitude” as a “movement for righteousness,” and used the

federal investigation of the beef industry as an example: “The Beef Trust said...that what it did was its own private affair, with which the public or government had nothing to do. But the public and the government had to have something to do with it.”¹⁷

Only months before the Arizona Constitutional Convention began its work, President William Howard Taft warned an audience in Colorado that the proposed federal income tax would necessarily lead to drastic government intrusions into the personal affairs of citizens: “[T]he power given to collectors of internal revenue and deputy collectors to look into a man’s private affairs and to compel him to produce his private papers in order that his actual income may be ascertained” would be “harassing” and “inquisitorial.”¹⁸ Many in Arizona shared these concerns about government intervention in private matters.¹⁹

While the Arizona Constitution has often been described as a Progressive document, its authors actually took a moderate path. They sought to balance a Progressive desire for regulation with traditional constitutional protections for free enterprise.²⁰ This is not surprising; written at the height of the so-called “*Lochner* era,” the Arizona Private Affairs Clause reflects the authors’ understanding of the prevailing legal doctrine of the time: Economic transactions were presumptively private matters except where they affected the public so significantly as to warrant government intervention.²¹

The Debate over the Corporation Commission

The finished Arizona Constitution devoted whole articles to the regulation of corporations²² and to labor relations,²³ but did so expressly rather than leaving regulatory authority to judicial inference. The Constitution prohibited child labor, created a worker compensation system, and forbade certain

forms of immigrant labor, but stopped short of setting an eight-hour work day for private businesses. It applied that requirement only to public employees and businesses working on public contracts.²⁴

Even more noteworthy was the balance the Constitution’s authors struck when creating the state’s Corporation Commission. Delegates rejected a proposal that would have allowed the Commission to exercise “general supervision of all private corporations doing business in this state.”²⁵ Insofar as this related to public service corporations, said Delegate Andrew Lynch, it was “all right,” but “if you stop and think, there are hundreds of little corporations, some doing a mercantile business or cattle companies,” and they were “engaged in private pursuits” that the government should not be overseeing. “If you went into a partnership,” he said,

what would you say when a state board came to investigate your partnership concern, that is, your particular private business. That is exactly what they could do under this proposition, and I do not believe the members really mean that this corporation commission shall have charge of all private corporations. The intent certainly must be these public service corporations in which the public is interested.

When advocates of the proposal resisted, Lynch doubled down: “The business of a private corporation is not a matter of public concern.” While the state should oversee public service corporations, it should not intrude into private businesses. “There is not a member on this floor but has some little private business concern. ... As the public, you have nothing to do with those things; it is none of your business. I want to impress upon you again that this is not a public matter...

Why would we expend money as the public to investigate private affairs?”

After further debate, the delegates chose to strike out the entire proposal.²⁶ They replaced it with wording that allows the Commission to inspect the “books, papers, business, methods, and affairs” of corporations that sell stock to the public, and of public service corporations, but not privately held corporations.²⁷ At the same time, they drafted what became Article XIV of the Constitution, which requires that the “records, books, and files” of all “building and loan associations, trust, insurance, and guaranty companies” be open “at all times” to the “full visitorial and inquisitorial powers of the State, *notwithstanding the immunities and privileges secured in the Declaration of Rights of this Constitution.*”²⁸ This italicized phrase points to the Private Affairs guarantee—indicating that the delegates understood that that Clause would bar public inspections of such records without such an explicit exception.

Intimacy and Personal Rights

While government investigation and oversight of business affairs was the primary consideration in formulating the Private Affairs Clause, other factors also played a role. Progressives sought not only to regulate businesses but also to regulate personal moral behavior—prohibiting divorce, adultery, prostitution, and, of course, alcohol.²⁹ The protection for intimacy rights that are today viewed as basic constitutional “privacy” actually originated in legal controversies over economic liberty,³⁰ and questions over what would today be considered personal freedoms were typically debated in their economic aspects during this period. Rights of sexual autonomy were rarely addressed publicly,³¹ and they were never debated at the Arizona Constitutional Convention. Instead, the primary focus of personal privacy debates during this period was over the prohibition of alcohol, a movement that had gone on for decades

already and triumphed statewide in 1914 with an amendment to the new state’s Constitution.

Opponents viewed Prohibition as an assault on a person’s private affairs.³² And the individual’s right to take intoxicants in his home was widely regarded as within the scope of his private affairs. For instance, a federal court in Oregon ruled in 1886 that a Portland ordinance against opium dens did not authorize the prosecution of a person who smoked opium in his own home. The government could “punish opium or tobacco smoking or whisky drinking on the street, or other public place,” but to intrude into the home was something the court could not allow.³⁴

The authors of the Arizona Constitution, concerned to avoid a controversy that might delay statehood,³³ chose not to take any position on Prohibition but instead left that to be resolved by the initiative and referendum process.³⁵ And when the campaign to amend the Constitution to prohibit alcohol began two years after statehood, Prohibitionists sought to defuse the criticism that they were seeking unprecedented intrusion into private matters by phrasing their proposal as forbidding the *manufacture and sale* of liquor not its possession and use. “This omission,” writes one historian, enabled Prohibitionists “to claim plausibly that the law aimed to extinguish the liquor trade but not a citizen’s right to consume his or her tipples of choice at home.”³⁶

Debates over the Prohibition Amendment made no reference to the Private Affairs Clause, not only because as a constitutional amendment it would necessarily supersede the Clause, but also because, in theory, prohibition did not intrude into private affairs or forbid private conduct; it only prohibited the importation and sale of liquor in public. In 1916, the Arizona Supreme Court indeed ruled that that the Prohibition Amendment did not forbid people from possessing or drinking alcohol in private.³⁷

Yet anti-Prohibitionists' fears of the impact it would have on privacy soon proved well-founded. A follow-up initiative in 1916 forbade possession of liquor, as well—but even here, enforcement foundered on Arizonans' hostility to the notion of police searches. One proposal that would have

allowed warrantless home searches proved wildly unpopular. Dubbed “the search and seizure act” in the press,³⁸ it was defeated overwhelmingly in the legislature after one senator labeled it “the ravings of a prohibition maniac.”³⁹ New legislation was later passed that lacked the provisions that would have authorized warrantless searches.

Still, the Prohibition era did witness “a proliferation of search and seizure law” simply “because there was a proliferation of searches and seizures.”⁴⁰ One Oklahoma court complained in 1923 of the “insidious encroachments upon the liberty and private affairs of the individual by boards, commissions, examiners, detectives, inspectors, and other agents of the state and municipalities”—encroachments that had become so prevalent that “self-respecting citizens, in urban communities especially, do not know in the course of a day how many rules or regulations they have violated.” It warned that “if these government agencies...are encouraged or condoned by the courts in their invasion of the privacy of homes, offices and places of business, forcibly and without invitation,” they would “make our vaunted freedom a mere pretense.”⁴¹

Not long after nationwide Prohibition went into effect, Washington State courts reacted to the government's increasingly invasive surveillance practices by taking the first steps toward adopting a more protective interpretation of that state's Private Affairs Clause: it adopted the “exclusionary rule” as a matter of state law, long before federal courts did the same.⁴² Arizona courts, however, did not get around to discussing the exclusionary rule until 1963, and then only as a matter of fed-

eral law.⁴³ In fact, even in *State v. Bolt*, the 1984 case that acknowledged that the state Private Affairs Clause provides greater protections than the Fourth Amendment, the Arizona Supreme Court refused to endorse the rule as a matter of state law.⁴⁴

The Private Affairs Clause Contrasted with the Fourth Amendment

To summarize, “private affairs” was a contested category in the period between the 1880s and 1910s, just as it is now. As in our own day, the phrase seems insusceptible of a simple definition;⁴⁵ it meant “not public.”⁴⁶ But during this period, the term did at least cover (a) the traditional security for personal affairs afforded by longstanding property and contract law, guarantees of religious freedom, and similar matters; (b) protections against intrusive governmental investigation powers, such as legislative subpoenas and the abuse of discovery in litigation; and possibly (c) the relatively new Brandeis/Warren concept of privacy, involving unwanted publicity and other privacy torts. One thing is clear: The Private Affairs Clause, by reference to both “private affairs” and also “home[s],” intended to cover two different things. In addition to home protection, it was designed to protect private personal information against unjustified government investigation and surveillance.

The Fourth Amendment, by contrast, is longer and uses narrower wording than the Private Affairs Clause. It applies to “persons, houses, papers, and effects,” and only forbids “unreasonable” searches and seizures. The most important cases interpreting the Fourth Amendment, therefore, have turned on whether or not a search was “reasonable” and on whether certain types of government-issued search authorizations, such as administrative subpoenas, satisfy the warrant



requirement.⁴⁷ Given that the Private Affairs Clause does not use the word “reasonable,” but allows only searches that are authorized by law, and makes no reference to warrants, these Fourth Amendment precedents are simply not applicable.

The Clause forbids any search that lacks legal authorization, *even if* that search is “reasonable.” This is important because nothing that is unreasonable can be lawfully authorized,⁴⁸ whereas something can be reasonable, but still not legally permitted. That means an act that is reasonable but unauthorized—such as good faith reliance on an invalid warrant—can satisfy the federal Fourth Amendment, but *not* the Private Affairs Clause, which focuses on *lawfulness* instead of *reasonableness*. As for the phrase “without lawful authority,” it is best interpreted as referring either to a valid warrant or to statutory or common law principles authorizing an invasion—as opposed to government officials engaging in freewheeling investigations or general inquiries.⁴⁹ It should also be understood in light of the principles of due process of law—what is today called “substantive due process”—which prevailed at the time the Clause was written.⁵⁰

Most importantly, the “lawful authority” requirement provides an express *judicial* check on intrusions into private affairs.⁵¹ This language resists any interpretation that aims at “judicial restraint.” Instead, like many other provisions of the Arizona Constitution, it was written in anticipation of an *engaged* judiciary that will ensure that intrusions into private affairs are not only reasonable, but also authorized by principles of law.

How Washington Courts Have Interpreted the Private Affairs Clause

Because the Private Affairs Clause uses wholly different wording from the Fourth Amendment, it is illogical for state courts to rely on Fourth Amendment precedents to apply the Private Affairs Clause. The Washington Supreme Court acknowledged this in *State v. Gunwall*,⁵² when it explained why the Private Affairs Clause should be read as protecting a broader set of rights than does the federal Constitution.

It makes sense that Washington’s highest court chose to interpret its constitution differently from

the way federal judges have interpreted the U.S. Constitution. Given their place in the federalist system, state courts should presume *against* following federal jurisprudence unless good reason exists to do so. The U.S. Constitution is simply a different animal than a state constitution. It is a grant of limited, enumerated powers—powers that are “few and defined.” It was written to accommodate existing state practices and to allow states to govern “all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.”⁵³ The federal Constitution limits legislative powers to those specified, and sharply restricts federal court jurisdiction. State constitutions, by contrast, are more malleable and address a far wider range of topics. They impose fewer limits on legislative authority or the jurisdiction of courts, and they are easier to amend, in the event that state courts make a wrong decision. State courts should therefore prioritize their state constitutions and address questions of federal law only when necessary.

That wasn't how Washington courts approached the matter, at first. The earliest state cases interpreting the Clause began by ignoring the differences in wording, and asserting that “these guaranties are in substance the same in both.” For years, Washington courts followed the decisions of federal courts in Fourth Amendment cases, and although they acknowledged that the “guarantees as expressed in the federal Constitution” might not be “controlling ... under our state laws,”⁵⁴ they issued no decisions diverging from federal precedent in any significant way. The only exception was the 1922 case in which the state adopted the exclusionary rule, four decades before federal courts did so.⁵⁵

Then, in 1980, Washington courts began the process of interpreting the Private Affairs Clause as broader than the Fourth Amendment.⁵⁶ Concerned at the federal judiciary's apparent retreat

from strong Fourth Amendment protections, the state Supreme Court began in *State v. Simpson* by holding that a defendant who for technical reasons could not make a Fourth Amendment argument about the search of a stolen car *could* make that argument under the Private Affairs Clause.⁵⁷ The difference in the two guarantees, said the court, “naturally does not permit” judges to interpret them as though they are identical.⁵⁸

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

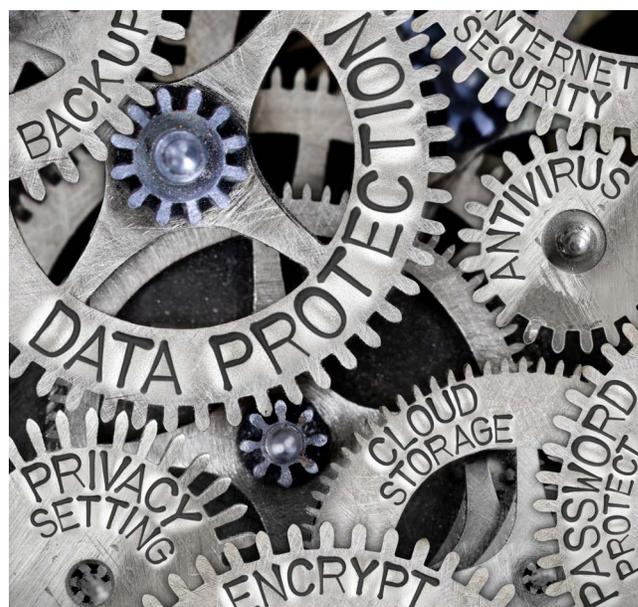
To determine whether a search necessitating a warrant has taken place under [the Fourth Amendment], the inquiry is whether the defendant possessed a “reasonable expectation of privacy.” In contrast, due to the explicit language of...the [Private Affairs Clause] the relevant inquiry...is whether the state unreasonably intruded into the defendant’s “private affairs...” [This] analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment; but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives... Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.⁵⁹

Myrick refused to adopt the federal Supreme Court's analysis in *Oliver v. United States*,⁶⁰ which also concerned aerial surveillance, because that de-

cision focused on the question of whether the defendant's open field "could not be classified as an 'effect'" under the Fourth Amendment—whereas the Private Affairs Clause does not use the word "effects." It uses the term "private affairs." That, the court said, "precludes" state courts from relying on *Oliver*.⁶¹ Since then, Washington courts have made clear that—for the same reason—cases involving the Private Affairs Clause do not turn on whether or not a search was "reasonable."⁶²

In fact, Washington courts have fashioned a robust Private Affairs jurisprudence. This body of precedent is superior to federal Fourth Amendment precedent in many ways, especially due to its greater objectivity. Where federal courts ask first whether or not the person had a reasonable expectation of privacy—a question that is overly subjective and changes over time with changes in social attitudes toward privacy—Washington courts ask whether the privacy interest in question is one the state's citizens have historically held, and are rightly entitled to hold, secure from unauthorized intrusion. This means courts examine the protections that have been traditionally afforded to the activity in question, and the nature and extent of information that the government obtained seized or that it *could have* obtained by the surveillance method in question.

Thus, for example, when police officers read a suspect's text messages on his smartphone without a warrant, Washington courts found their actions unconstitutional, because text messages are a private affair: "[T]o determine whether governmental conduct intrudes on a private affair," the court explained, "we look at the 'nature and extent of the information which may be obtained as a result of the government conduct' and at the historical treatment of the interest asserted.... Text messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically



been strongly protected under Washington law ...Technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold."⁶³ Using the same reasoning, Washington courts have concluded that the Clause bars warrantless searches of private bank records,⁶⁴ or the contents of trash bags set by the curb,⁶⁵ or the obtaining of phone numbers a person has dialed,⁶⁶ none of which are covered by the Fourth Amendment's more subjective reasonable-expectation-of-privacy inquiry.⁶⁷

Along with their stricter application of the phrase "private affairs," Washington courts have also applied the phrase "lawful authority" with greater precision, by refusing to adopt exceptions to the warrant requirement that federal courts have created over the past century. Because most such exceptions depend on interpretations of "reasonableness," they do not apply under the Private Affairs Clause.

Thus, for example, Washington courts apply a much more limited version of the "good faith" exception to the warrant requirement. Under federal law, this exception allows the use of evidence that was obtained unlawfully if the police officer believed at the time that his or her actions were proper. But because the Private Affairs Clause

prohibits unlawful searches even if they might be considered reasonable, Washington state courts forbid such evidence regardless of the officers' good faith. Where federal law "depends upon a consideration of the reasonableness of an arresting officer's beliefs," the Washington courts have said, "the paramount concern of our state's [constitution] is protecting an individual's right of privacy.... We do not ask whether the officer's belief that the [search] was justified was objectively reasonable, but simply whether the officer had the requisite 'authority of law.'"⁶⁸ Washington courts have also refused to create exceptions for mandatory traffic checkpoints,⁶⁹ or searching the trunk of a car during an inventory search,⁷⁰ or for laws under which administrative agencies can demand information without reason to believe a crime has occurred.⁷¹

How Arizona Courts Have Interpreted the Private Affairs Clause

Arizona's development of the Private Affairs Clause has been quite different. During Prohibition, the state Supreme Court ruled in *Malmin v. State* that police officers did not violate the law when they searched a car without a warrant.⁷² It did so by relying on federal Fourth Amendment precedent. "Although different in its language," the court said, the Private Affairs Clause "is of the same general effect and purpose as the Fourth Amendment, and for that reason, decisions on the right of search under the latter are well in point."⁷³ It then adopted a brand-new exception to the warrant requirement—one established by the U.S. Supreme Court in *Carroll v. United States*, which allows officers to search cars without warrants.⁷⁴

This was problematic, first because the Arizona Constitution was written after the advent of the automobile⁷⁵ and before the creation of the

automobile exception—which means it is unlikely that those who wrote and ratified the Arizona Constitution expected automobiles would fall outside the warrant requirement⁷⁶—and second, because *Carroll* depended entirely on considerations of "reasonableness" that are *unique to federal law*.

In *Carroll*, the Supreme Court placed great weight on the idea that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when *it* was adopted,"⁷⁷ and pointed to federal laws from 1789 and 1815 that allowed naval officers to search boats without warrants. These cases, said the Court, proved that "contemporaneously with the adoption of the Fourth Amendment" the law recognized "a difference...as to the necessity for a search warrant" with regard to contraband in "a movable vessel."⁷⁸ And that showed that the Fourth Amendment had always been understood "as recognizing a necessary difference between a search of a...structure...and a search of a ship, motor boat, wagon, or automobile ... where it is not practicable to secure a warrant."⁷⁹

None of these considerations, however, can apply under the Arizona Constitution, which makes no reference to "reasonableness," and where there is, obviously, no Navy! *Malmin* represents a complete abdication of judicial responsibility to enforce the Arizona Constitution as written.

Not until the 1980s did Arizona courts resolve a case expressly in reliance on the state Constitution, as opposed to the Fourth Amendment. In *State v. Bolt*,⁸⁰ police officers were surveilling the house of a suspected drug dealer. While some of the officers were preparing the affidavit to obtain a search warrant, the suspect drove away in a pickup truck. Officers stopped him, then "secured" the house and its occupants" until the warrant was obtained, whereupon the search was conducted.⁸¹ The court found that this violated

the Private Affairs Clause because “while Arizona’s constitutional provisions generally were intended to incorporate the federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy,”⁸² and these provisions forbid warrantless entries of the home absent some urgent “necessity.”⁸³

Two years later, in *State v. Ault*,⁸⁴ the court again held that officers violated the Private Affairs Clause when they entered a suspect’s apartment and searched it without a warrant, without his permission, and without arresting him.⁸⁵ Because the Arizona Constitution is “even more explicit than its federal counterpart” with regard to the security of the home, the court ruled the search invalid “as a matter of Arizona law.”⁸⁶ The court emphasized that the decision was based on its interpretation of the state constitution’s specific reference to homes, and that it “strongly adhere[s] to the policy that unlawful entry into homes and seizure of evidence cannot be tolerated.”⁸⁷

Since then, however, Arizona courts have done little to elaborate on the differences between the state and federal constitutions. Most notably, they have never applied the clause outside the search and seizure context, with a single exception: In *Rasmussen v. Mitchell*,⁸⁸ the Arizona Supreme Court relied in part on the Private Affairs Clause to uphold the right to refuse medical treatment, anticipating federal jurisprudence by several years.⁸⁹ “An individual’s right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally protected privacy than does an individual’s home or automobile,” it noted.⁹⁰ But Arizona courts have otherwise never acknowledged that the Private Affairs Clause provides protection for rights other than freedom from warrantless searches and seizures, and they have never ventured any significant textual or historical analysis of the Clause.⁹¹

Instead, they have largely parroted federal Fourth Amendment precedent, and disregarded the differences between the federal and state provisions. The Court of Appeals concluded in 2009 that there is “no authority” for concluding that the Private Affairs Clause is “broader in scope than the corresponding right to privacy in the United States Constitution,” except for cases involving home searches⁹²—despite the fact that the Clause refers expressly to *both* “private affairs” and “homes.” Seven years later, in *State v. Peoples*,⁹³ the state Supreme Court ruled that police acted unconstitutionally when they looked at information on a suspect’s smartphone without first obtaining a warrant; it cited the Private Affairs Clause for that holding—but once more it treated the Clause as redundant of the Fourth Amendment, which had already been interpreted as requiring a warrant for cellphone searches.⁹⁴

Thus even where criminal defendants do prevail in Arizona Private Affairs Clause cases, courts treat that Clause as paralleling the Fourth Amendment.⁹⁵ Mostly, courts just say that “the federal and state protections are coterminous except in cases involving warrantless home entries,”⁹⁶ even though the historical record shows the opposite: that it was designed specifically for instances *not* involving home entries, such as government demands for private records. The federal Fourth Amendment is already at its most protective with regard to private homes. The Private Affairs Clause was written not to merely echo those protections, but to provide Arizonans with broader security.

Today’s Demands for Private Records

The anomalous state of Arizona’s Private Affairs Clause jurisprudence is made clearest by comparing two cases: Washington’s *State v. Miles*,⁹⁷ which held that a statute allowing regulators to demand

certain records violated that state's Private Affairs Clause, and Arizona's *Carrington v. Arizona Corporation Commission*,⁹⁸ which held the opposite.

Miles involved the subpoena power of Washington's Department of Financial Institutions, charged with regulating the sale of securities in the state. The Department was statutorily authorized to investigate companies suspected of illegal dealing in securities, and could subpoena business records. During an investigation, it issued an administrative subpoena to a bank to obtain records showing that the defendant, Miles, was dealing illegally in securities.⁹⁹ Miles argued that the evidence was inadmissible because the law giving the department its subpoena power violated the Private Affairs Clause. The state supreme court agreed.

Refusing to adopt "a pervasively regulated industry exception to the warrant requirement," it applied Washington's two-step Private Affairs Clause test. First, it found that "banking records are within the constitutional protection of private affairs" because such records could reveal "sensitive personal information," including data about a person's purchases, political and religious affiliations, travels, reading and television viewing habits, and so forth. The court emphasized that it was not the content of Miles's *own* information that was determinative, but the information that could *potentially* be disclosed by that *type* of search. Second, it found that the statute allowing the issuance of administrative subpoenas did not qualify as lawful authority, because such subpoenas were issued by the agency itself, not by a neutral magistrate. And the statute provided no evidentiary standard for the issuance of subpoenas; they could be sent "for little or no reason." Finally, the statute made no provision for pre-compliance review, such as a hearing to quash such a subpoena in the event that it was wrongly issued.¹⁰⁰ Thus the subpoena was not an adequate

substitute for a warrant, and the search of Miles's records was unconstitutional.

Carrington ruled the opposite way. That case involved an investigation by the Arizona Corporation Commission, which is charged with regulating the sales of securities. The Commission has statutory subpoena power similar to that at issue in *Miles*, and it issued a subpoena to a defendant it suspected of unlawful activities. He sued, seeking to quash the subpoena—no pre-compliance review procedure is provided by statute—and proved to the court that he was not engaged in the sale of securities. Yet the court still upheld the legality of the subpoena on the grounds that the Commission was entitled to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."¹⁰¹ Such a broad interpretation of the Commission's mandate makes it hard to imagine what demand of information could possibly be deemed excessive. Under *Carrington*, Commission officials can do just what the *Miles* court found unacceptable: issue administrative subpoenas with no

“For nearly a century now, Arizona courts have failed to apply the Private Affairs Clause as written, but have instead largely copied federal Fourth Amendment precedent—despite the fact that that precedent is devoted to interpreting entirely different words.”

evidentiary basis whatsoever and without any opportunity for pre-compliance review by a neutral magistrate.¹⁰²

While businesses are often the target of government records demands, individuals' rights to privacy are also increasingly threatened by demands for the public disclosure of personal information by donors to nonprofit groups. So called "dark money" laws mandate that nonprofit organizations disclose the names, addresses, and names of employers of donors—sometimes of those who give as little as \$100. These rules have raised concerns on the grounds that they lead to retaliation, intimidation, or even violence against donors, and they have been the focus of First Amendment litigation in state and federal courts.¹⁰³ But such mandates also appear to violate the Private Affairs Clause: They are efforts to compel disclosure to the government of a donor's personal affairs in precisely the same manner as the legislative investigations that gave rise to the Clause in the first place. Such mandates compel disclosure of private matters, not on the suspicion of wrongdoing, but across the board, and not for the determination of wrongdoing, but solely for purposes of publicizing the information—at levels that federal courts have said result in a "minimal, if not non-existent" public benefit.¹⁰⁴ While the merits of these anti-privacy mandates are beyond the scope of this paper, it is plain they threaten the values protected by the Private Affairs Clause.

The Way Forward?

The Arizona Supreme Court has recognized that "whenever a right that the Arizona Constitution guarantees is in question," state courts should "first consult *our* constitution."¹⁰⁵ Yet for nearly a century now, Arizona courts have failed to apply the Private Affairs Clause as written, but have instead largely copied federal Fourth Amendment precedent—despite the fact that that precedent is devoted to interpreting *entirely* different words.

Even more remarkably, Arizona courts have failed to consult Washington State precedent which *does* interpret the wording of the Private Affairs Clause—even though the Arizona Clause was expressly based on that of Washington. Arizona courts routinely consult Washington precedent when interpreting other Arizona provisions that were copied from Washington, including the free speech, eminent domain, and government immunity clauses. Yet they largely ignore Washington's Private Affairs Clause precedents—and have never given a satisfactory explanation why.¹⁰⁶

Washington courts have created a rational, workable, effective body of case law under the Private Affairs Clause, that—without unduly hindering police investigations—protects Washingtonians against warrantless searches. The most laudable aspect of this precedent is that it is objective, and depends not on questions about shifting social attitudes toward privacy, the way federal Fourth Amendment precedent does, but on whether the type of information the government has obtained is a private affair. These cases have also refused to create new exceptions that weaken and undermine the warrant requirement. Arizona courts should consult these cases rather than continuing to outsource their constitutional responsibilities to federal courts.

Moreover, the historical record shows that the Private Affairs Clause was not only intended to prohibit warrantless searches or to protect homes, but was intended to bar a wide variety of intrusions into private matters, and especially to forbid the government from compelling the disclosure of private financial information. Increasing demands for the publicizing of personal data—most notably in the realm of "donor disclosure" mandates—should therefore prompt a careful examination and a vigilant application of the Private Affairs Clause.

ENDNOTES

- ¹ ARIZ. CONST. art. II § 8.
- ² *State v. Hernandez*, 417 P.3d 207, 212 (Ariz. 2018).
- ³ See, e.g., *Bailey v. Myers*, 206 Ariz. 224, 229–30 (Ct. App. 2003) (eminent domain); Clouse ex rel. *Clouse v. State*, 199 Ariz. 196, 200 n.9 (2001) (state immunity); *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n*, 160 Ariz. 350, 355 (1989) (free speech).
- ⁴ Arizona’s borrowing from the Washington Constitution has long been remarked upon. See, e.g., John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 82 (1988).
- ⁵ See generally Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 434–36, 508 (2008); John S. Goff, ed., *THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 at 1293* (1991).
- ⁶ 103 U.S. 168, 190 (1881).
- ⁷ 116 U.S. 616, 630 (1886).
- ⁸ Johnson & Beetham, *supra* note 5 at 442.
- ⁹ In 1911, the influential judge Thomas Cooley used the phrase “private affairs” to describe religious liberty. Thomas Cooley, foreword, *AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION* 21 (1911) (emphasis added).
- ¹⁰ *In re. Pac. Ry. Comm’n*, 32 F. 241, 250 (C.C.N.D. Cal. 1887). See also *In re Attorney Gen.*, 47 N.Y.S. 883, 887 (App. Div. 1897) (involving Attorney General’s investigation into alleged monopoly activities; “it is objected that this is an inquisition into the private affairs of private citizens.”); *Pynchon v. Day*, 18 Ill. App. 147, 149–50 (Ill. App. Ct.), *aff’d*, 118 Ill. 9 (1886) (discovery process “should never be exercised so as needlessly to expose the private affairs of those in whose custody the books or writings may be.... It is a very proper exercise of discretion...to refuse an inspection of those parts of the writings which...will tend unnecessarily to expose business or other private affairs with which the party seeking to make the inspection has no concern.”).
- ¹¹ *Interstate Commerce Comm’n v. Brimson*, 154 U.S. 447, 478 (1894).
- ¹² *Legislative Competition for Corporate Capital*, 7 AM. LAW. 136, 140 (1899).
- ¹³ *No Privacy Tolerated*, ARIZONA REPUBLICAN, July 2, 1912 at 7.
- ¹⁴ *The Banking Inquisition*, ARIZONA REPUBLICAN, May 13, 1912 at 4.
- ¹⁵ Henry Clews, *Weekly Financial Review*, ARIZONA REPUBLICAN, Mar. 17, 1912 at 2.
- ¹⁶ Davis Rich Dewey, *THE AMERICAN NATION: A HISTORY—NATIONAL PROBLEMS 1885-1897 at 196* (1907); see also Charles A. Beard, *CONTEMPORARY AMERICAN HISTORY 1877-1913 at 134* (1921).
- ¹⁷ Albert J. Beveridge, *The Issue*, THE SATURDAY EVENING POST, June 27, 1908 at 1-2.
- ¹⁸ Address at Denver, Colorado, Sept. 21, 1909, in *1 PRESIDENTIAL ADDRESSES AND STATE PAPERS OF WILLIAM HOWARD TAFT 251* (1910). See also Elihu Root, Address at Saratoga Springs, Aug. 18, 1914, in Robert Bacon & James Brown Scott, eds., *THE UNITED STATES AND THE WAR: POLITICAL ADDRESSES 313* (1918) (“The Trade Commission is to command the disclosure of all the private affairs of all industry, with the tremendous power of black mail, destruction of credit, and ruin, which that involves. The Internal Revenue bureau may carry inquisitorial proceedings into the private affairs of every individual.”).
- ¹⁹ See, e.g., *Borah’s Bill Draws Senate Opposition*, ARIZONA REPUBLICAN, Jan. 31, 1912 at 2 (noting concerns that a federal bill “to investigate and report on all matters affecting the welfare of children” represented “an unwarranted intrusion upon private affairs”); *Which Should Win?*, ARIZONA REPUBLICAN, Oct. 27, 1911 at 2 (“the democratic party of Arizona would make government the trustees of the people’s private

affairs. Its creed is the creed of paternalism. It believes everything and everybody should be regulated by law.”).

²⁰ See John D. Leshy, *THE ARIZONA CONSTITUTION* 7-20 (2013).

²¹ Thus, for example, when the proposal to forbid alien labor was debated, one delegate objected on the ground that “the only ground on which this could be sustained is the police power of the state, which allows laws relating to public health, public safety, or public morals. The legislature cannot under the guise of the police power arbitrarily invade the rights of the people.” Goff, *supra* note 5 at 552. See further Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 *ARIZ. ST. L.J.* 355, 388-95 (2017) (explaining that Arizona’s framers, as “Western Progressives” sought to limit “rent-seeking” and protect individual economic liberty); David N. Mayer, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011) (detailing protections for economic liberty in the 1910-1912 period).

²² *ARIZ. CONST.* art. XIV, XV.

²³ *ARIZ. CONST.* art. XVIII. Some of these provisions proved highly controversial at the 1910 convention, particularly the prohibition on child labor, which critics feared would deprive people who lacked any other means of the opportunity for employment. The child labor provision passed only narrowly. Goff, *supra* note 5 at 440-48.

²⁴ *Id.*

²⁵ Substitute Proposition 113 in Goff, *supra* note 5 at 1276.

²⁶ Goff, *supra* note 5 at 613-15.

²⁷ *ARIZ. CONST.* art XV § 3.

²⁸ *ARIZ. CONST.* art XIV § 16 (emphasis added).

²⁹ See Michael McGerr, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870-1910* at 90-92, 267-74 (2003). Even debates over these more intimate dimensions of privacy tended

to involve economic affairs; the popularity of liquor, wrote one muckraking reporter, was due to “commercial forces” that were “fighting to saturate the populations of cities” with alcohol. Richard Hofstadter, *THE AGE OF REFORM* 291 (1955) (quoting George Kibbe Turner, an investigative reporter for *McClure’s* magazine).

³⁰ See Mayer, *supra* note 21 at 89-91.

³¹ See generally John D’Emilio & Estelle B. Freedman, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* ch. 10 (3d ed. 2010). Arizona had an anti-miscegenation law from territorial days, which was repealed in 1959. See Roger D. Hardaway, *Unlawful Love: A History of Arizona’s Miscegenation Law*, 27 *J. ARIZONA HIST.* 377 (1986); Paul Rees, *A Civil Rights Victory, Pre-Loving*, *ARIZ. ATT’Y*, July/August 2017, at 84. There is no record of it being disputed on Private Affairs Clause grounds. Nor was polygamy discussed at the Convention or afterwards; Congress had declared in its enabling act that the Arizona Constitution must forbid polygamy, and that requirement was complied with without discussion. See Leshy, *supra* note 20 at 408.

³² See, e.g., *Wattersons Lamentation Proclamation*, *ARIZONA DAILY STAR*, June 27, 1908 (“Prohibition is the very essence of puritanism.... It is laid in the belief that the government may regulate the personal life and private affairs of the citizens.”); *Which Western States Will Go Dry?*, *SUNSET*, Nov. 1914 at 860 (“Opponents of prohibition...consciously or unconsciously resent[] state interference in what [they] consider [their] private affairs.”). See also *Prohibition’s New Recruit*, *LITERARY DIGEST*, Dec. 1909 at 1051 (quoting Indianapolis newspaper editorial saying that opponents of Prohibition believed “there were limits beyond which the State should not be allowed to go in its effort to control personal habits and the management of domestic and personal affairs.”).

³³ *Ex parte Ah Lit*, 26 F. 512, 515 (D. Or. 1886).

³⁴ President Taft had recently given a speech strongly advising the Arizona framers not to include in the constitution ordinary matters better suited to legislation. Leshy, *supra* note

20 at 9; L.J. Abbott, *The “Zoological Garden of Cranks,”* 69 THE INDEPENDENT 870 (1910).

³⁵ See, e.g., Goff, *supra* note 5 at 411-17.

³⁶ Harry David Ware, Alcohol, Temperance and Prohibition in Arizona 238 (Dec. 1995) (unpublished Ph.D. dissertation, Arizona State University) (on file with author). See also *id.* at 278 (advocates of prohibition claimed that “any individual should be able to bring in any quantity [of alcohol] for personal use”).

³⁷ *Sturgeon v. State*, 17 Ariz. 513, 521 (1916). A year later, however, the Washington Supreme Court declared that that state’s prohibition law did, indeed, make it a crime to make wine on one’s own property for personal consumption. *State v. Fabbri*, 98 Wash. 207 (1917). The *Yale Law Journal* viewed this as “the first [case] actually holding it constitutional to forbid the manufacture of liquor for personal use.” *Constitutional Law-Due Process-Prohibition of Manufacture of Intoxicating Liquors*, 27 YALE L.J. 286 (1917).

³⁸ *Little Arizona Items*, CASA GRANDE DISPATCH, Mar. 5, 1915 at 2; 99 *Bills Introduced in Legislature*, ARIZONA DAILY STAR, Feb. 1, 1915 at 2.

³⁹ Ware, *supra* note 36 at 280. See also *More Drastic Dry Legislation Than Ever Is Proposed*, BISBEE DAILY REVIEW, Jan. 14, 1915 at 4 (“probably the most drastic feature of the law is the one that makes it a crime to keep liquor in a private home for the personal use of the owner...and also empowers officers to break into a house in search of such evidence without a search warrant”); *Drachman Bill is Unpopular in City*, BISBEE DAILY REVIEW, Jan. 21, 1915 at 3 (warrantless search provisions would be unconstitutional).

⁴⁰ Wesley M. Oliver, *Prohibition’s Anachronistic Exclusionary Rule*, 67 DEPAUL L. REV. 473, 502 (2018).

⁴¹ *Gore v. State*, 218 P. 545, 549-50 (Okl. Crim. Ct. App. 1923).

⁴² *State v. Gibbons*, 118 Wash. 171 (1922). See Sanford E. Pitler, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally*

Compelled Remedy, 61 WASH. L. REV. 459, 473 (1986).

⁴³ *State v. Pina*, 94 Ariz. 243, 245 (1963).

⁴⁴ 142 Ariz. 260, 269 (1984).

⁴⁵ As a 1902 law review article put it, “it is quite impossible to define with anything like precision what the right of privacy is or what its limitations are, if any.” Dennis O’Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 445 (1902). The Supreme Court of Missouri referred to privacy in 1880 as covering “matters which it deeply concerned the parties to keep secret from the world, and of no importance or value as evidence,” which the public “had no right to obtain,” and disclosure of which would lead to “the annoyance and shame of the only persons interested.” Ex parte Brown, 72 Mo. 83, 94-95 (1880). Two years later, the Massachusetts federal district court drew the line between public and private in a defamation case by pointing to the question of whether the parties involved could, in principle, be ascertained: the question the safety of a railroad bridge was a public question because “the public...is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers...are the public, in respect to the safety of the bridge, and as they cannot be pointed out, you may discuss the construction of the bridge in public, though you thereby [utter statements that might otherwise slander]...the builder.” *Crane v. Waters*, 10 F. 619, 621 (C.C.D. Mass. 1882) (emphasis added). But where the persons whose interests were involved “are easily ascertained,” the matter becomes private. Lowell analogized the question to “the right of legislative interference,” because “the legislature cannot interfere in the purely private affairs of a company, but it may control such of them as affect the public,” because “the public, consisting of the unascertained persons who will be asked to take shares in it, and those through whose land it will pass or whose business will be helped or hindered by it,” was affected. *Id.*

⁴⁶ See, e.g., 3 F. Stroud, THE JUDICIAL DICTIONARY 1557 (2d ed. 1903) (defining “private purpose” as “[see] public purpose”).

- ⁴⁷ See, e.g., *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523 (1967); *Abel v. United States*, 362 U.S. 217 (1960).
- ⁴⁸ See Timothy Sandefur, *THE CONSCIENCE OF THE CONSTITUTION* 71-121 (2014).
- ⁴⁹ Johnson & Beetham, *supra* note 5 at 448, 451-52. The authors of the Clause may also have had in mind the unlawful or quasi-legal acts of vigilante groups, which were often a problem in early Washington State and Arizona.
- ⁵⁰ See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884).
- ⁵¹ Johnson & Beetham, *supra* note 5 at 466.
- ⁵² 106 Wash.2d 54 (1986).
- ⁵³ THE FEDERALIST NO. 45 at 313 (J. Cooke, ed., 1961) (James Madison).
- ⁵⁴ *State v. Gibbons*, 118 Wash. 171, 184 (1922).
- ⁵⁵ See generally Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459 (1986). It is possible that one reason Washington courts did not establish an independent state jurisprudence is because litigants failed to raise the argument during this era. It is impossible now to determine one way or the other, but given that incorporation of criminal procedure rights through the Fourteenth Amendment was only in its beginning stages during this period, it seems unlikely that litigants failed to raise state-law arguments.
- ⁵⁶ See George R. Nock, *Seizing Opportunity, Searching for Theory: Article I Section 7*, 8 U. PUGET SOUND L. REV. 331, 333 (1985); Johnson & Beetham, *supra* note 5 at 431.
- ⁵⁷ 95 Wash. 2d 170, 177 (1980).
- ⁵⁸ *Id.* at 178.
- ⁵⁹ 102 Wash. 2d 506, 510-11 (1984) (citations omitted). One notable advantage to the *Myrick* approach is that the federal “expectation of privacy” analysis is subject to change with time, whereas the *Myrick* test considers not the subjective and shifting expectations citizens might have, but the strength of the justifications

advanced for protecting privacy. In *Has Technology Killed the Fourth Amendment?* 2011-2012 CATO SUP. CT. REV. 15, Judge Kozinski warned that this creates a downward spiral of “reasonableness,” at least as far as courts are concerned: over time, a lower expectation of privacy in one area makes it unreasonable to expect privacy in another, which risks destroying all privacy expectations. The Washington State approach, by contrast, emphasizes *principles*, and is therefore more stable and less prone to fluctuation. This is an example of how, robust state enforcement of different constitutional language can lead to a less “activist,” less fluctuating jurisprudence.

- ⁶⁰ 466 U.S. 170 (1984).
- ⁶¹ *Myrick*, 102 Wash. 2d at 513.
- ⁶² See, e.g., *State v. Young*, 123 Wash. 2d 173, 181-82 (1994).
- ⁶³ *State v. Hinton*, 179 Wash. 2d 862, 869-70 (2014).
- ⁶⁴ *State v. Miles*, 160 Wash. 2d 236, 243-48 (2007).
- ⁶⁵ *State v. Boland*, 115 Wash. 2d 571, 576-79 (1990).
- ⁶⁶ *Gunwall*, 106 Wash. 2d at 64-70.
- ⁶⁷ *Miles*, 160 Wash. 2d at 244-45 (citing *Gunwall* and *State v. Boland*, 115 Wash.2d 571 (1990)).
- ⁶⁸ *State v. Afana*, 169 Wash. 2d 169, 182 (2010); *State v. Betancourth*, 190 Wash. 2d 357, 367 (2018) (punctuation altered).
- ⁶⁹ *Seattle v. Mesiani*, 110 Wash.2d 454, 458 (1988).
- ⁷⁰ *State v. Stroud*, 106 Wash.2d 144, 153 (1986).
- ⁷¹ *Miles*, 160 Wash. 2d at 247-52.
- ⁷² 30 Ariz. 258 (1926).
- ⁷³ *Id.* at 261.
- ⁷⁴ 267 U.S. 132 (1925).
- ⁷⁵ The Model T was first produced in 1908. While cars were available before then, they became widespread only in the first decade of the twentieth century.

⁷⁶ Prior to *Carroll*, some state courts, including Washington's, had held that warrants were required to search cars. *See, e.g.*, *Hoyer v. State*, 193 N.W. 89, 90 (Wis. 1923); *Butler v. State*, 93 So. 3, 3 (Miss. 1922); *State v. Gibbons*, 118 Wash. 171, 180-81 (1922).

⁷⁷ *Carroll*, 267 U.S. at 149 (emphasis added).

⁷⁸ *Id.* at 150-51.

⁷⁹ *Id.* at 153.

⁸⁰ 142 Ariz. 260 (1984).

⁸¹ *Id.* at 263.

⁸² *Id.* at 264-65 (citations omitted). The *Bolt* court did not *reject* any Fourth Amendment precedent, but simply found that there was no governing Fourth Amendment precedent on the question. *See id.* at 264.

⁸³ *Id.* at 265. As an example of "other necessity," the court cited *State v. Fisher*, 141 Ariz. 227 (1984), which involved the emergency aid exception.

⁸⁴ 150 Ariz. 459 (1986).

⁸⁵ *Id.* at 462.

⁸⁶ *Id.* at 463.

⁸⁷ *Id.* at 466. As in *Bolt*, the *Ault* court did not expressly reject any federal Fourth Amendment precedent. Although "the dissent cites a number of [federal] cases which it believes hold that direct evidence is admissible under the inevitable discovery doctrine," the majority said, "we disagree with their interpretation of those cases and...believe that the [U.S.] Supreme Court would require suppression of this evidence under the fourth amendment." *Id.* Thus neither *Bolt* nor *Ault* actually reached a conclusion at variance with what was understood to be federal Fourth Amendment doctrine.

⁸⁸ 154 Ariz. 207 (1987).

⁸⁹ In *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990), and *Washington v. Glucksberg*, 521 U.S. 702, 743-44 (1997), the U.S. Supreme Court held that the same right was protected by the Fourteenth Amendment's Due Process Clause.

⁹⁰ *Rasmussen*, 154 Ariz. at 215.

⁹¹ *See, e.g.*, *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 206 Ariz. 276, 285 (Ct. App. 2003) (rejecting claim of same-sex marriage rights); *Washburn v. Pima Cty.*, 206 Ariz. 571, 579 (Ct. App. 2003) (rejecting right to be free from aesthetic architecture regulations).

⁹² *State v. Johnson*, 220 Ariz. 551, 557 (Ct. App. 2009).

⁹³ 240 Ariz. 244 (2016).

⁹⁴ *Riley v. California*, 134 S.Ct. 2473 (2014).

⁹⁵ *See also State v. Wilson*, 237 Ariz. 296, 301 (2015).

⁹⁶ *State v. Meza-Contreras*, No. 1 CA-CR 15-0458, 2016 WL 3021977, at *2 (Ariz. Ct. App. May 24, 2016).

⁹⁷ 60 Wash.2d 236 (2007).

⁹⁸ 199 Ariz. 303 (Ct. App. 2000).

⁹⁹ *Id.*

¹⁰⁰ *Miles*, 60 Wash.2d at 241-51.

¹⁰¹ *Carrington*, 199 Ariz. at 304-05 (quoting *Polaris Int'l Metals Corp. v. Arizona Corp. Comm'n*, 133 Ariz. 500, 506 (1982)).

¹⁰² *See also Kadima Ventures v. Arizona Corporation Commission*, LC2018-000163-001 DT (filed Apr. 17, 2018) (on file with author) (challenging Commission subpoena).

¹⁰³ *See, e.g.*, *Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018); *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015); *Rio Grande Foundation v. City of Santa Fe* (D. N.M. No. 1:17-cv-00768-JCH-CG, filed June 11, 2018); *CUT v. Denver* (Denver Cnty. Dist. Ct. 2d Dist. No. 2017CV34617, filed Aug. 24, 2018).

¹⁰⁴ *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010).

¹⁰⁵ *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 356 (1989) (emphasis added).

¹⁰⁶ Arizona courts have recognized that there are situations in which the words of the Arizona Constitution are similar to that of another state's constitution, but were *not* meant to be interpreted the same way—and where consulting other states' precedent is improper. *Desert Waters, Inc. v. Superior Court In & For Pima Cty.*, 91 Ariz. 163, 168–69 (1962). But there is no evidence to suggest that conclusion with regard to the Private Affairs Clause. Nor has any Arizona court ever addressed that question. In *State v. Mixton*, No. 2 CA-CR 2017-0217, 2019 WL 3406661, at *5 n.5 (Ariz. Ct. App. July 29, 2019), the Court of Appeals observed that Arizona courts “have not adopted Washington's interpretations” of the Private Affairs Clause, but did not explain why. It cited *State v. Juarez*, 203 Ariz. 441, 447 (Ct. App. 2002), which, again, stated that Arizona courts have not followed Washington's—but, again, failed to provide any reason why.



GOLDWATER
I N S T I T U T E

500 East Coronado Road | Phoenix, Arizona 85004

Office (602) 462-5000 | Fax (602) 256-7045

www.GoldwaterInstitute.org