

***ESTATE OF BRADEN EX REL.
GABALDON V. STATE
AND STATUTORY CONSTRUCTION IN THE
ARIZONA SUPREME COURT***

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In Estate of Braden, the Arizona Supreme Court held 3–2 that the State of Arizona could not be a defendant under section 46-455 of the Adult Protective Services Act. The majority and the dissent both employed a comprehensive set of statutory interpretation tools in their analysis. This Case Note explores how the court used these tools of interpretation in Estate of Braden and in other recent decisions to illustrate how the current court analyzes ambiguous statutes. It concludes with two general observations about the Arizona Supreme Court’s statutory interpretation theories. First, the court adheres closely to the text and is not easily persuaded to read requirements into statutes. Second, the court is open to considering a wide range of tools and sources when discerning the meaning of an ambiguous statute.

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INTRODUCTION

In 2011, the Arizona Supreme Court issued 36 opinions. Only four of those opinions featured dissents. Notably, three of the four divided opinions involved questions of statutory interpretation.¹ The fact that the court is so consistently able to issue unanimous opinions is remarkable. The divided opinions, however, are quite telling as to key differences in the justices’ approaches to statutory interpretation.

The dispute in one of these cases, *Estate of Braden ex rel. Gabaldon v. State*,² provides a framework for a discussion of the statutory interpretation theories currently used by the Arizona Supreme Court. In *Estate of Braden*, the court held 3–2 that the State of Arizona could not be a defendant under section 46-455 of the Adult Protective Services Act (“APSA”).³ Both the majority and the dissent employed a comprehensive set of statutory interpretation tools in their analyses, which included punctuation rules, substantive and textual canons of construction, the borrowed statute rule, and an evaluation of the statute’s amendments. The division within the court centered on a disagreement about how the theories should be applied and which tools were more persuasive.

This Case Note will explore how the Arizona Supreme Court used these tools of interpretation in *Estate of Braden* and in other recent decisions to illuminate how the current court construes ambiguous statutes. As a preliminary note, this discussion uses “statutory interpretation” to encompass both

1. More than half of the court’s 2011 opinions dealt with statutory interpretation issues if those issues are construed broadly to include construction of Arizona constitutional provisions and rules of procedure. *See infra* text accompanying note 4.

2. *Estate of Braden ex rel. Gabaldon v. State (Braden II)*, 266 P.3d 349 (Ariz. 2011).

3. *Id.* at 352, 354.

interpretation of Arizona constitutional provisions and rules of procedure.⁴ Part I explains the court's opinion in *Estate of Braden*. Using the *Estate of Braden* opinion as a framework, Part II provides critical analysis for how the current court has applied statutory interpretation tools in recent years. This inquiry focuses primarily on 2011 decisions with some reference to cases decided since 2000. In addition, this analysis makes some generalizations about whether the court is consistent in its application of interpretation tools and which justices are more persuaded by some tools than others.

Part III concludes with two observations about the Arizona Supreme Court's statutory interpretation theories. The first is that the court adheres closely to the text and is not easily persuaded to read requirements into a statute that are not explicitly stated. The second observation is that the court is open to considering a nearly limitless range of tools and sources when discerning the meaning of an ambiguous statute.

I. *ESTATE OF BRADEN EX REL. GABALDON V. STATE*

Jacob Braden was a 20-year-old with severe developmental disabilities.⁵ His entire life he had been completely dependent on others for basic care.⁶ Because of his disabilities, Braden was considered a "vulnerable adult" under APSA, and he was entitled to certain state services.⁷ In July 2004, the State of Arizona contracted with Arizona Integrated Residential and Educational Services ("AIRES"), a private corporation, to care for Braden in an AIRES facility.⁸ Eight months later, Braden died from serious injuries that occurred while he was at the AIRES facility.⁹

Braden's estate filed suit against the State and AIRES alleging, among other things, liability for abuse and neglect under APSA, Arizona Revised Statutes ("A.R.S.") section 46-455.¹⁰ Section 46-455(B) provides:

A vulnerable adult whose life or health is being or has been endangered or injured by neglect, abuse or exploitation may file an action in superior court against *any person or enterprise* that has

4. See, e.g., *Adams v. Comm'n on Appellate Court Appointments*, 254 P.3d 367, 374 (Ariz. 2011) (explaining that the court applies the same principles to interpreting statutes as to interpreting Arizona constitutional provisions); *Preston v. Kindred Hosps. W., L.L.C.*, 249 P.3d 771, 773 (Ariz. 2011) ("We apply principles of statutory construction to interpret court rules." (citing *State v. Aguilar*, 97 P.3d 865, 872 (Ariz. 2004))).

5. *Estate of Braden ex rel. Gabaldon v. State (Braden I)*, 238 P.3d 1265, 1267 (Ariz. Ct. App. 2010), *vacated*, 266 P.3d 349 (Ariz. 2011); Opening Brief of Appellant at 7, *Braden I*, 238 P.3d 1265 (No. 1 CA-CV 08-0764).

6. Opening Brief of Appellant at 7, *Braden I*, 238 P.3d 1265 (No. 1 CA-CV 08-0764).

7. *Id.* at 1, 8; see also ARIZ. REV. STAT. ANN. § 46-451(A)(9) (2011).

8. Opening Brief of Appellant, *supra* note 6, at 10.

9. *Id.* at 13. Braden died from internal bleeding caused by a broken back. *Id.* According to Braden's estate, the Medical Examiner found the death "suspicious, unnatural and unusual." *Id.* The State asserted that Braden had "a history of self-injury." Answering Brief of Appellee at 3, *Braden I*, 238 P.3d 1265 (No. 1 CA-CV 08-0764).

10. *Braden I*, 238 P.3d at 1267.

been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care to such vulnerable adult for having caused or permitted such conduct.¹¹

The Arizona Legislature enacted APSA in 1988 to bolster common law protections for vulnerable adults.¹²

The trial court granted the State's motion for summary judgment on the grounds that the State was not a proper defendant under section 46-455 because the State neither "provided care" nor "assumed a legal duty" to do so.¹³ A divided court of appeals reversed, holding that the State did "provide care," and that it did "assume a legal duty" to do so, even though the duty was statutorily imposed rather than voluntarily assumed.¹⁴ The appellate court also found that APSA did not exempt the State from liability.¹⁵

The Arizona Supreme Court vacated this decision by holding that APSA did not authorize a cause of action against the State.¹⁶ The court reasoned that APSA permits an action to be brought against a "person or enterprise."¹⁷ Because it was clear that the State is not a "person," the State could be sued under APSA only if it met the definition of "enterprise."¹⁸

APSA defines "enterprise" as "any corporation, partnership, association, labor union or *other legal entity*, or any group of persons associated in fact although not a legal entity, that is involved with providing care to a vulnerable adult."¹⁹ The court focused on whether the State was included within the term "other legal entity."²⁰ Writing for the majority, Justice Brutinel acknowledged that the State was normally considered a "legal entity" but reasoned that, here, the context of the words gave them a more limited meaning.²¹

After noting that remedial statutes such as APSA are to be interpreted broadly, the majority focused on the statute's punctuation. Justice Brutinel observed that there was no comma between "labor union" and "other legal entity."²² Because a serial comma²³ distinguishes items in a series, the absence of a comma indicated that "'other legal entity' does not function as an independent

11. ARIZ. REV. STAT. ANN. § 46-455(B) (2011) (emphasis added).

12. See H.B. 2399, 38th Leg., 2d Reg. Sess. (Ariz. 1988) (codifying A.R.S. section 46-455); see also *Braden II*, 266 P.3d 349, 351 (Ariz. 2011) (explaining the history of APSA's enactment).

13. *Braden I*, 238 P.3d at 1267–68; see also ARIZ. REV. STAT. ANN. § 46-455(B) (2011).

14. *Braden I*, 238 P.3d at 1269, 1271.

15. *Id.* at 1272–73.

16. *Braden II*, 266 P.3d at 352, 354.

17. *Id.* at 351 (citing ARIZ. REV. STAT. ANN. § 46-455(B) (2011)).

18. *Id.* at 351–52.

19. ARIZ. REV. STAT. ANN. § 46-455(Q) (2011) (emphasis added).

20. *Braden II*, 266 P.3d at 352.

21. *Id.*

22. *Id.*

23. A serial comma, also known as an "Oxford comma," is a comma that appears at the end of a series or list and is "placed before the conjunction *and* or *or*." BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 1.3, at 3 (2d ed. 2006).

catch-all category, but instead relates to legal entities like labor unions.”²⁴ Thus, the State did not meet the definition of “enterprise” because it is not like a labor union.²⁵

The dissent, written by Justice Bales and joined by Vice Chief Justice Hurwitz, disagreed with this analysis.²⁶ The dissent noted that there is no universal rule regarding the use of a serial comma, and the Arizona Legislative Bill Drafting Manual recommends omitting the serial comma.²⁷ The dissent went on to explain that a comma existed after “labor union” until 2009, when the Arizona Legislature amended APSA.²⁸ The 2009 amendments expanded civil liability for financial abuse and made “certain technical and conforming changes,” including deleting the comma after “labor union.”²⁹ The decision to delete the comma “was obviously non-substantive,” wrote Justice Bales, noting that it was implausible that the legislature “silently narrowed the field of potential ‘other legal entity’ defendants.”³⁰

The majority supported its conclusion with reference to two semantic canons of construction: *ejusdem generis* and *noscitur a sociis*.³¹ Both canons roughly mean that an ambiguous word in a statute should be construed as being similar to and limited by surrounding words.³² Justice Brutinel noted that “other legal entity” was listed along with other, generally private, business entities, buttressing his conclusion that the phrase did not encompass the State.³³ The dissent disputed this reasoning, arguing that the other items listed were not limited to business entities, because “the term ‘corporation’ may embrace both private and public entities.”³⁴

The majority also reasoned that if the legislature intended the State to be a potential defendant under APSA it would have explicitly said so, noting that public actors are specifically mentioned in other statutes.³⁵ Justice Brutinel extended this reasoning further, stating that the legislature specifically referred to the State and the attorney general several times throughout APSA.³⁶ These specific references to public actors in other areas highlighted the absence of any mention of the State in section 46-455(B) and (Q), strengthening the majority’s rationale.

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24. *Braden II*, 266 P.3d at 352 (footnote omitted).
 25. *Id.*
 26. *Id.* at 355–56 (Bales, J., dissenting).
 27. *Id.* (citing ARIZ. LEGISLATIVE COUNCIL, THE ARIZONA LEGISLATIVE BILL DRAFTING MANUAL 2011 – 2012, at 83 (2011), available at <http://www.azleg.gov/alisPDFs/council/2011-2012%20Bill%20Drafting%20Manual.pdf>).
 28. *Id.* at 356.
 29. *Id.* (citation omitted).
 30. *Id.*
 31. *Id.* at 352 (majority opinion).
 32. These canons are discussed in more detail *infra* Part II.B.
 33. *Braden II*, 266 P.3d at 352.
 34. *Id.* at 356 (Bales, J., dissenting) (footnote omitted).
 35. *Id.* at 353 (majority opinion) (listing statutes that explicitly list state actors).
 36. *Id.* at 354.

In addition, the majority bolstered its analysis by looking to the structure of APSA.³⁷ The majority found that allowing the State to be sued under APSA would “result[] in some tension with the statute’s enforcement scheme,” given that the State is responsible for enforcing the Act.³⁸ The dissent disagreed, citing the Arizona Disabilities Act as an example of a statute that the State both enforces and is subject to liability under.³⁹

The majority acknowledged that it would be possible for the State to subject itself to liability under a statute it also enforces but noted that, when it has done so in other statutes, it has been explicit.⁴⁰ The dissent contended that the majority had it backward, because “Arizona governmental liability is the rule and not the exception . . . [I]f the legislature had intended to exclude the state from [liability], it could have said so.”⁴¹

The dissent reasoned that the State could be sued under APSA, because the State is clearly a legal entity, and because of APSA’s broad language and remedial purpose.⁴² Justice Bales further noted that APSA borrowed its definition of “enterprise” from federal racketeering statutes, and that federal courts had construed this language to include public entities.⁴³ In short, the dissent thought that the State could be a defendant under APSA.

II. HOW THE COURT USES STATUTORY INTERPRETATION TOOLS

Both the majority and dissent in *Estate of Braden* utilized a range of statutory interpretation tools, providing a framework to analyze how the Arizona Supreme Court decides questions of statutory construction. This Section will examine each of the interpretation techniques used in *Estate of Braden* and compare them to how the court has used the technique in recent cases. Although an imperfect and non-exhaustive review, this comparison introduces the current justices’ statutory interpretation theories, as well as provides insight into which of those theories persuades them.

A. Punctuation

Possibly the most discussed aspect of the court’s decision in *Estate of Braden* was that its conclusion relied in large part on the absence of a comma.⁴⁴

37. *Id.*

38. *Id.*

39. *Id.* at 357 (Bales, J., dissenting).

40. *Id.* at 354 (majority opinion).

41. *Id.* at 357 (Bales, J., dissenting) (citing *Backus v. State*, 203 P.3d 499, 502 (Ariz. 2009)).

42. *Id.* at 355.

43. *Id.* at 356–57; *see also* Appellees’ Supplemental Brief at 7, *Braden II*, 266 P.3d 349 (No. CV-10-0300-PR).

44. *See, e.g., Braden II*, 266 P.3d at 355–56 (Bales, J., dissenting) (disagreeing with the majority’s comma reasoning); Motion for Reconsideration of Opinion Filed on November 30, 2011 at 2–6, *Braden II*, 266 P.3d 349 (No. CV-10-0300-PR) [hereinafter Motion for Reconsideration] (arguing that reliance on the comma was an illegal retroactive amendment, because the comma was added four years after Braden’s death and three years after his estate filed suit); Daniel P. Schaack, *A Matter of Punctuation: Comma Creates*

Indeed, neither party made arguments about the statute's punctuation, nor was it discussed at oral argument.⁴⁵ But courts have long looked to punctuation to help discern the meaning of a statute.⁴⁶

In general, courts presume that the legislature uses ordinary rules of grammar and punctuation to convey its meaning.⁴⁷ Legal scholars differ, however, on the appropriate role that punctuation should play in statutory interpretation.⁴⁸ The modern rule is that punctuation may be considered in interpreting a statute, "but not when it would yield an absurd result or undercut the statutory goal."⁴⁹ That is, if the punctuation leads to a reading that would conflict with the statute's purpose, the punctuation should be ignored.⁵⁰

Aside from any academic debates, the Arizona Supreme Court appears responsive to punctuation arguments. In *City of Peoria v. Brink's Home Security, Inc.*, for instance, the court relied on punctuation to conclude that a statute did not require the phrase "interstate telecommunications services" to be defined by federal law.⁵¹ The statute at issue exempted from municipal taxes "[i]nterstate telecommunications services, which include that portion of telecommunications services . . . allocable by federal law to interstate telecommunications service."⁵² Writing for a unanimous court, Justice Bales noted that "the insertion of the comma that precedes 'which include' makes the clause non-restrictive."⁵³ In other words, the section 42-6004(A)(2) exemption encompassed more than just those interstate telecommunications services that fell within the federal definition.

The majority in *Estate of Braden* likewise relied on a statute's comma, or lack thereof. A key difference, however, was that the majority in *Estate of Braden* considered punctuation in a manner that arguably conflicted with section 46-455(B)'s purpose. APSA is a statutory scheme that is intended to protect vulnerable adults by increasing the remedies available to them if they are abused, financially or physically.⁵⁴ In holding that APSA does not impose liability on the

Division in Arizona Supreme Court Case, MARICOPA LAW., Jan. 2012, at 1, 1. Interestingly, Daniel P. Schaack was one of the attorneys for the State at the Arizona Supreme Court in *Estate of Braden*.

45. See Oral Argument, *Braden II*, 266 P.3d 349 (No. CV-10-0300-PR), available at <http://azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx>; Supplemental Brief of Appellant Braden, *Braden II*, 266 P.3d 349 (No. CV-10-0300-PR); Appellees' Supplemental Brief, *supra* note 43.

46. See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989); *City of Peoria v. Brink's Home Sec., Inc.*, 247 P.3d 1002, 1004–05 (Ariz. 2011).

47. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 256–57 (2000).

48. *Id.*; 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:15 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007 & Supp. 2011) [hereinafter SUTHERLAND STATUTORY CONSTRUCTION].

49. ESKRIDGE ET AL., *supra* note 47, at 258.

50. *Id.*; SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 48, § 47:15.

51. 247 P.3d at 1004–05.

52. *Id.* at 1003 (quoting ARIZ. REV. STAT. ANN. § 42-6004(A)(2) (2011)).

53. *Id.* at 1005.

54. *Braden II*, 266 P.3d 349, 351 (Ariz. 2011); see also *Estate of McGill ex rel. McGill v. Albrecht*, 57 P.3d 384, 387 (Ariz. 2002).

State of Arizona, the majority used punctuation to decrease the remedies available to vulnerable adults. This is not to say that the court reached the wrong decision; rather, some scholars of statutory interpretation would urge that the court use more caution when relying on punctuation to read a statute in a way that hinders the statute's goal.⁵⁵

Moreover, the comma at issue in *Estate of Braden* was more ambiguous than the comma in *Brink's Home Security*. As mentioned in Part I, a comma once existed between "labor union" and "other legal entity" but was deleted in 2009.⁵⁶ Adding to the ambiguity, writing experts disagree on the proper use of a serial comma.⁵⁷ Finally, the Arizona Legislative Bill Drafting Manual recommends omitting the serial comma.⁵⁸ Thus, the missing comma in the statute was particularly ambiguous for the majority to use as evidence of legislative intent. Nevertheless, in *Estate of Braden*, the majority used several other interpretation tools to reach its conclusion.

B. Textual Canons of Construction

One such tool was the majority's use of textual canons of construction. Textual canons of construction, also called semantic or linguistic canons of construction, are tools that capture common rules of the English language and how people ordinarily interpret text.⁵⁹ The majority opinion in *Estate of Braden* used two of the most common canons: *ejusdem generis* and *noscitur a sociis*.⁶⁰

If a statute lists items that all belong to a specific class and ends the list with a general catch-all word, *ejusdem generis* dictates reading the catch-all word narrowly so that it encompasses only items in the same class.⁶¹ Part of the rationale behind the canon is that if the general word was given its full meaning, it would include the more specific words, making them superfluous.⁶² Similarly, *noscitur a sociis* provides that a word is known by its associates; that is, a word may be defined by the words surrounding it.⁶³ This canon generally produces the same result as *ejusdem generis*.⁶⁴

55. See, e.g., ESKRIDGE ET AL., *supra* note 47, at 258; SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 48, § 47:15.

56. See *supra* text accompanying notes 28–30.

57. Compare BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 654 (2d ed. 2003) (recommending the use of serial commas to avoid ambiguity), with BILL WALSH, LAPSING INTO A COMMA: A CURMUDGEON'S GUIDE TO THE MANY THINGS THAT CAN GO WRONG IN PRINT—AND HOW TO AVOID THEM 81 (2000) (describing a convention to eliminate serial commas for newspaper publications).

58. ARIZ. LEGISLATIVE COUNCIL, *supra* note 27, at 83–84.

59. ESKRIDGE ET AL., *supra* note 47, at 249; CALEB NELSON, STATUTORY INTERPRETATION 81–83 (2011).

60. *Braden II*, 266 P.3d 349, 352 (Ariz. 2011).

61. SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 48, § 47:17.

62. *Id.* A related concept is the rule against surplusage. See ESKRIDGE ET AL., *supra* note 47, at 266.

63. SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 48, § 47:16.

64. *Id.*

A related canon, *expressio unius est exclusio alterius*, commands that the expression of one thing implies the exclusion of others.⁶⁵ Where a statute contains a list of who is entitled to sue, for instance, this canon directs courts to read it as an exhaustive list; if a person is not explicitly mentioned in the statute as being entitled to sue, then that person has no right to sue.⁶⁶

These canons provide useful guidance for discerning the meaning of ambiguous words. They are, however, not perfect tools, and there are a number of critiques of textual canons of construction. The most famous criticism, perhaps, is Karl Llewellyn's point that every canon has an equal and opposite counter-canon, and thus a judge can always support a particular reading with a canon of construction.⁶⁷ Similarly, the canons are often criticized as being too malleable, as exemplified by the disagreement between the majority and the dissent in *Estate of Braden* over the use of *ejusdem generis*.⁶⁸

The Arizona Supreme Court does not often invoke textual canons of construction. Since 2000, and aside from the court's use of the canons in *Estate of Braden*, the court has applied *ejusdem generis* once and rejected its application twice.⁶⁹ The court has not invoked *noscitur a sociis*, at least not by name, since 1985.⁷⁰ The court supported its holding with *expressio unius est exclusio alterius* once since 2000.⁷¹ Moreover, only one of these opinions was authored by a justice that still sits on the court.⁷² Thus, it is difficult to draw conclusions about how the current court views and applies these canons.

Nevertheless, the court's general approach toward statutory interpretation is such that any one of the current justices might be persuaded by a textual canon

65. *Id.* § 47:23.

66. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc); *see also Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (holding that federal courts lack authority to add to Federal Rule of Civil Procedure 8(a) by imposing heightened pleading requirements on complaints alleging anything other than those causes of action listed in Rule 9(b)).

67. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

68. *See Braden II*, 266 P.3d 349, 352 (Ariz. 2011); *id.* at 356 (Bales, J., dissenting).

69. *See Carbajal v. Indus. Comm'n of Ariz.*, 219 P.3d 211, 213–14 (Ariz. 2009) (rejecting the court of appeals' application of the canon); *Bilke v. State*, 80 P.3d 269, 272–73 (Ariz. 2003) (same); *In re Julio L.*, 3 P.3d 383, 385–86 (Ariz. 2000) (applying *ejusdem generis* to read “seriously disruptive behavior” to mean of the same general nature as “fighting” or “violent . . . behavior”). This data comes from searching Westlaw's Arizona cases (“az-cs”) database for the terms “*ejusdem generis*,” “*noscitur a sociis*,” and “*expressio unius*.”

70. *See In re Rubi*, 713 P.2d 1225, 1230–31 (Ariz. 1985).

71. *See Mejak v. Granville*, 136 P.3d 874, 877 (Ariz. 2006) (citing *Champlin v. Sargeant*, 965 P.2d 763, 766 (Ariz. 1998)). In a dissent, then-Justice Feldman also briefly invoked the canon. *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 717 (Ariz. 2000) (Feldman, J., dissenting).

72. Now-Chief Justice Berch authored the opinion in *Carbajal*, 219 P.3d 211.

of construction in the right case.⁷³ The *Estate of Braden* opinion illustrates that at least some of the current justices are willing to utilize textual canons of construction. There, the majority used the canons as one of many factors that supported its interpretation.⁷⁴ Indeed, at oral argument, Justice Pelander specifically inquired about the effect of *ejusdem generis* on section 46-455.⁷⁵ Thus, it may be that the court would be hesitant to rely solely on textual canons of construction, but the court is certainly open to the arguments.

C. Substantive Canons of Construction

In contrast to textual canons of construction, substantive canons of construction instruct courts to interpret ambiguous statutes consistent with substantive policies that derive from common law, other statutes, or constitutions.⁷⁶ The court in *Estate of Braden* invoked one of the most common substantive canons: remedial statutes are to be interpreted broadly.⁷⁷ The corollary to this canon is that statutes in derogation of common law are to be narrowly construed.⁷⁸

As with textual canons, substantive canons receive a fair share of criticism. One critique is that these canons are “mutually contradictory—for every statute that alters the common law would seem an attempt to remedy a defect in the common law.”⁷⁹ Arguably, the choice of which canon to apply in a particular circumstance depends on judicial preferences and assumptions about the political process.⁸⁰ Indeed, judicial reliance on these canons has become less prominent in recent years.⁸¹

Nevertheless, both the majority and the dissent in *Estate of Braden* invoked the canon that remedial statutes should be interpreted broadly, but they did so in very different ways.⁸² Both agreed that APSA was a remedial statute; their disagreement lay in application of the substantive canon.⁸³ The dissent adhered to the canon’s mandate, interpreting “other legal entity” broadly to include the State.⁸⁴ In contrast, the majority immediately cabined the canon by saying a

73. See *infra* Part III. In a recent presentation, for example, Chief Justice Berch implied that the justices are amenable to considering almost any source that evinces the legislature’s intent. Chief Justice Rebecca White Berch, Remarks at a CLE event hosted by the Sandra Day O’Connor College of Law: Statutory Interpretation from Blackstone to Scalia and Beyond (Feb. 6, 2009) [hereinafter Remarks of Chief Justice Berch] (video available at <http://www.law.asu.edu/files/Events/StatInterpCLE/rberch.html>).

74. *Braden II*, 266 P.3d 349, 351 (Ariz. 2011); see also *id.* at 356 (Bales, J., dissenting) (disagreeing with the majority’s application of *ejusdem generis* but not opposing the canon itself).

75. Oral Argument, *Braden II*, *supra* note 45, at 33:20.

76. See ESKRIDGE ET AL., *supra* note 47, at 330.

77. *Braden II*, 266 P.3d at 351; *id.* at 355 (Bales, J., dissenting).

78. ESKRIDGE ET AL., *supra* note 47, at 331.

79. *Id.*; see also NELSON, *supra* note 59, at 224.

80. See ESKRIDGE ET AL., *supra* note 47, at 332–39.

81. NELSON, *supra* note 59, at 224.

82. *Braden II*, 266 P.3d at 351; *id.* at 356 (Bales, J., dissenting).

83. *Id.* at 351 (majority opinion); *id.* at 356 (Bales, J., dissenting).

84. *Id.* at 356–57 (Bales, J., dissenting).

“liberal construction is not synonymous with a generous interpretation.”⁸⁵ The majority’s analysis seemed to ignore the canon completely, ultimately interpreting “other legal entity” as narrowly as possible to mean only “legal entities like labor unions.”⁸⁶

Despite the majority’s analysis in *Estate of Braden*, the court is generally consistent in its application of substantive canons. In other words, when the court says that it is reading a statute in light of a substantive canon, its analysis matches the mandate of the canon. In *Ross v. Bennett*, for instance, the court explained that it liberally interprets recall election provisions in light of Arizona’s recall provision history, and its analysis followed suit.⁸⁷ Likewise, in *Young v. Beck*, the court applied a cousin of the canon that statutes in derogation of common law should be interpreted narrowly.⁸⁸ Writing for the court, Justice Pelander began by announcing the principle that the court does not find that a statute has changed the common law absent a clear expression of intent from the Arizona Legislature.⁸⁹ Justice Pelander went on to interpret the Uniform Contribution Among Tortfeasors Act, A.R.S. section 12-2506(D) narrowly, finding that the statute did not abrogate the common law family purpose doctrine.⁹⁰ In sum, despite the criticisms of substantive canons of construction, the Arizona Supreme Court continues to invoke substantive canons of construction and usually applies them in a consistent manner.

D. Borrowed Statutes and Similar Statutes

The dissent in *Estate of Braden* presented a well-reasoned argument that “other legal entity” should be interpreted to include the State.⁹¹ The dissent reasoned that, because APSA borrowed its definition of “enterprise” from federal racketeering statutes, APSA’s definition should be informed by how courts interpreted those statutes. Federal courts had construed “enterprise” in federal racketeering statutes to include public entities. Thus, the dissent argued, APSA’s definition of enterprise should be similarly construed.⁹²

This argument encompasses the borrowed statute rule—a tool of statutory construction providing that when a legislature borrows phrases from other statutes, it is presumed to be aware of how that phrase has been interpreted and to adopt that interpretation when it enacts identical language.⁹³ This rule is strongest at the state level, probably because of how often state legislatures borrow statutes from other jurisdictions or from uniform laws.⁹⁴ A related concept is statutes *in pari*

85. *Id.* at 351 (majority opinion) (quoting *Nicholson v. Indus. Comm’n*, 259 P.2d 547, 549 (Ariz. 1953)).

86. *Id.* at 352.

87. 265 P.3d 356, 358–59 (Ariz. 2011).

88. 251 P.3d 380, 383–84 (Ariz. 2011).

89. *Id.* at 383. The court said that this approach encourages the legislators to do better a job. *Id.*

90. *Id.* at 384–85.

91. *Braden II*, 266 P.3d at 355 (Bales, J., dissenting).

92. *Id.*

93. *ESKRIDGE ET AL.*, *supra* note 47, at 283.

94. *Id.*

materia, which essentially captures the idea that when construing ambiguous statutes, courts should look to other related statutes.⁹⁵ Although there are different formulations of this idea, text-based versions say that when two statutes are *in pari materia*, courts should apply a rebuttable presumption that the legislature intended the word to mean the same thing in both statutes.⁹⁶

Two key factors may weigh on the persuasiveness of a borrowed or similar statute. The first requires a judge to consider the policies of his jurisdiction as compared to the policies of the statute's originating jurisdiction.⁹⁷ If the policy of the judge's state is sufficiently dissimilar from that of the statute's original jurisdiction, then judges often find the presumption that the legislature intended to adopt the prior interpretation rebutted.⁹⁸ The second consideration is timing: when the originating jurisdiction interpreted the statute as compared with when the judge's jurisdiction adopted the statute.⁹⁹ If the originating jurisdiction's interpretation came *after* the judge's jurisdiction adopted it, the prior interpretation carries much less force.¹⁰⁰

In comparing *Estate of Braden* with *Adams v. Commission on Appellate Court Appointments*,¹⁰¹ it appears that Justice Bales and Vice Chief Justice Hurwitz are most receptive to arguments about borrowed or similar statutes, whereas Justices Brutinel and Pelander are least receptive.¹⁰² At issue in *Adams* was the meaning of "public office" within the Arizona Constitution's Independent Redistricting Commission provision.¹⁰³ The justices' specific disagreement centered on whether a tribal judge held a "public office" and thus was ineligible to serve on the Redistricting Commission.¹⁰⁴

Justice Bales wrote for the majority, joined by Vice Chief Justice Hurwitz and retired Justice Ryan. Noting that constitutions must be interpreted as a whole, Justice Bales analyzed numerous provisions of the Arizona Constitution and other Arizona laws involving American Indian tribes.¹⁰⁵ Justice Bales observed that, because American Indian tribes are not political subdivisions of the state but rather

95. NELSON, *supra* note 59, at 486–87.

96. *Id.* at 487.

97. ESKRIDGE ET AL., *supra* note 47, at 284.

98. *Id.* at 284–85 (citing *Van Horn v. William Blanchard Co.*, 438 A.2d 552 (N.J. 1981), as an example of this canon).

99. NELSON, *supra* note 59, at 487; *see also* Vice Chief Justice Andrew D. Hurwitz, Remarks at a CLE event hosted by the Sandra Day O'Connor College of Law: Statutory Interpretation from Blackstone to Scalia and Beyond (Feb. 6, 2009) [hereinafter Remarks of Vice Chief Justice Hurwitz] (video available at <http://www.law.asu.edu/files/Events/StatInterpCLE/hurwitz.html>).

100. NELSON, *supra* note 59, at 487; Remarks of Vice Chief Justice Hurwitz, *supra* note 99.

101. 254 P.3d 367 (Ariz. 2011).

102. *See* Remarks of Vice Chief Justice Hurwitz, *supra* note 99 (stating that with uniform laws and borrowed statutes, he is persuaded by how other jurisdictions have interpreted the law at issue). Chief Justice Berch took no part in deciding *Adams* due to her position as Chair of the Commission on Appellate Court Appointments.

103. 254 P.3d at 369; *see also* ARIZ. CONST. art. 4, pt. 2, § 1(3).

104. *See Adams*, 254 P.3d at 376–79 (Brutinel, J., dissenting).

105. *Id.* at 374–75 (majority opinion).

have special sovereign status, Arizona's constitution and laws normally do not include American Indian tribes within the word "public."¹⁰⁶ Thus, it was more consistent with the body of Arizona law to read "public office" as not including a tribal judge.

Conversely, Justice Brutinel, joined by Justice Pelander, declined to look at any other constitutional provision or statute.¹⁰⁷ In their view, the provision was not ambiguous at all, and it clearly encompassed a tribal judge.¹⁰⁸

Similarly, in *Estate of Braden*, Justice Brutinel's majority opinion, which Justice Pelander joined, did not look to the fact that APSA had borrowed its definition from federal racketeering laws.¹⁰⁹ Even though this was a significant factor in Justice Bales's dissenting opinion, and it was a fact conceded by the State,¹¹⁰ the majority opinion only mentioned this argument in a footnote.¹¹¹ Although the majority acknowledged that the definition of "enterprise" was "substantially similar" to the definition used in federal racketeering statutes, and that the term has been interpreted in those statutes to include public entities, the majority stated that "nothing in APSA's legislative history indicates any intent to subject the state to civil liability."¹¹²

Nevertheless, Justices Brutinel and Pelander are not wholly unresponsive to all borrowed or similar statute arguments. In *Estate of Braden*, the majority looked to other statutes to support its contention that when the legislature intends to include (or exclude) the State, it specifically says so.¹¹³ But this was the majority's fourth listed reason for concluding that the State was not included in "other legal entity."¹¹⁴ Similarly, in *Preston v. Kindred Hospitals West, L.L.C.*, Justice Pelander, writing for a unanimous court, looked to federal courts' interpretations of Federal Rule of Civil Procedure 17 to guide it in its construction of Arizona's analogue provision.¹¹⁵ Looking to the Federal Rules of Civil Procedure to interpret the state rules is fairly standard practice, however. Thus, it seems safest to read this case narrowly, and not as implying Justice Pelander's wholesale endorsement of looking to borrowed and similar statutes. Considering these cases, it appears that Justices Brutinel and Pelander are willing to look to borrowed or similar statutes in limited circumstances, whereas Justice Bales and Vice Chief Justice Hurwitz are apparently willing to draw more heavily on statutes *in pari materia*.

106. *Id.* at 374.

107. *Id.* at 376–79 (Brutinel, J., dissenting).

108. *Id.* at 376–77 ("A straightforward reading of the constitutional provisions at issue reveals a clear, unambiguous intent to broadly curtail the influence of the politically entrenched and politically ambitious on [the Independent Redistricting Commission's] work and decisions." (citing *Carrow Co. v. Lusby*, 804 P.2d 747, 749–50 (Ariz. 1990))).

109. See *Braden II*, 266 P.3d 349, 353 n.4 (Ariz. 2011).

110. *Id.* at 355 (Bales, J., dissenting); Appellees' Supplemental Brief, *supra* note 43, at 7.

111. *Braden II*, 266 P.3d at 353 n.4 (majority opinion).

112. *Id.*

113. *Id.* at 353.

114. *Id.*

115. 249 P.3d 771, 773 (Ariz. 2011).

Chief Justice Berch appears to follow a similar approach as Justice Bales and Vice Chief Justice Hurwitz. Her opinion in *Bunker's Glass Co. v. Pilkington, PLC* is informative.¹¹⁶ At issue in that case was whether the Arizona Antitrust Act permitted indirect purchasers of goods to sue for injuries resulting from antitrust violations, or whether such suits were restricted to direct purchasers.¹¹⁷ In *Illinois Brick Co. v. Illinois*, the U.S. Supreme Court interpreted an identical provision in the federal antitrust law to permit suits only by direct purchasers.¹¹⁸ Chief Justice Berch declined to follow the U.S. Supreme Court's interpretation because she concluded that the Arizona Legislature intended indirect purchasers to be able to sue.¹¹⁹ Among the evidence of the legislature's intent was that, when Arizona adopted its statute in 1974, the Ninth Circuit Court of Appeals permitted suits by indirect purchasers.¹²⁰ Moreover, the U.S. Supreme Court did not decide *Illinois Brick* until three years after Arizona enacted its law.¹²¹ Thus, as *Bunker's Glass Co.* demonstrates, Chief Justice Berch is also open to considering other jurisdictions' interpretations of borrowed statutes.¹²²

E. Statutory Amendment

The court is also receptive to arguments relating to how a statute has been amended. In *Ballesteros v. American Standard Insurance Co. of Wisconsin*, for example, the court unanimously held that A.R.S. section 20-259.01 did not require insurers to translate English forms to Spanish-speaking insureds.¹²³ The court supported its conclusion with reference to the fact that the statute once required insurers to provide forms in Spanish, but the Arizona Legislature removed the requirement.¹²⁴

Likewise, in *Estate of Braden*, both the majority and the dissent used a 2009 amendment as evidence of legislative intent; they just disagreed about what it proved. In A.R.S. section 46-455, the divisive serial comma once existed between "labor union" and "other legal entity" but was deleted in 2009.¹²⁵ The majority opinion used the 2009 amendment as proof that the omission of the comma was "substantive and not merely stylistic," although Justice Brutinel did not explain this conclusion further.¹²⁶

116. 75 P.3d 99 (Ariz. 2003).

117. *Id.* at 101.

118. 431 U.S. 720, 728–29 (1977) (interpreting the meaning of § 4 of the Clayton Act).

119. *Bunker's Glass Co.*, 75 P.3d at 102–03, 105.

120. *Id.* at 103 (citing *In re W. Liquid Asphalt Cases*, 487 F.2d 191, 200 (9th Cir. 1973)).

121. *See id.* at 102.

122. *See* Remarks of Chief Justice Berch, *supra* note 73 (implying that she is amenable to considering almost any source that evinces the legislature's intent).

123. 248 P.3d 193, 197 (Ariz. 2011).

124. *Id.* (citing Act of May 29, 1998, ch. 288, § 2, 1998 Ariz. Sess. Laws 1970, 1970–71 (codified as amended at ARIZ. REV. STAT. ANN. § 20-259.01 (2011))).

125. *Braden II*, 266 P.3d 349, 352 n.3; *id.* at 356 (Bales, J., dissenting).

126. *Id.* at 352 n.3 (majority opinion).

In contrast, Justice Bales relied on the amendment to support his conclusion that the absence of a comma had “no substantive import.”¹²⁷ Justice Bales explained that the 2009 amendments were made primarily to increase civil liability for financial exploitation and theft, as well as “to make certain technical and conforming changes.”¹²⁸ Justice Bales gave examples of such technical changes, including substituting “that” for “which” in the definition of “enterprise.”¹²⁹ This was evidence, according to the dissent, that the deletion of the comma was “obviously non-substantive.”¹³⁰ Moreover, to assume that the legislature meant to remove the State from the potential field of APSA defendants by merely deleting a comma would be to “infer that the legislature ‘hide[s] elephants in mouseholes.’”¹³¹ Thus, Justice Bales reasoned that amendments were proof that the absence of a comma should not dictate the court’s interpretation of the statute.

Using amendments to shed light on a statute is a relatively uncontroversial statutory interpretation tool.¹³² In *Estate of Braden*, however, it became a point of division because the majority rested its conclusion that the State could not be a defendant under APSA, in part, on the absence of a comma that had existed prior to 2009.¹³³ In its motion for reconsideration, Braden’s estate argued that the majority’s interpretation had the effect of applying the amendment retroactively.¹³⁴ The estate argued that because Braden died in 2005 and the lawsuit was filed in 2006, the court should have interpreted the pre-2009 version of section 46-455(Q), which included the comma between “labor union” and “other legal entity.”¹³⁵ The court denied this motion on January 3, 2012.¹³⁶

127. *Id.* at 356 (Bales, J., dissenting).

128. *Id.* (citation omitted).

129. *Id.* (citing Act of July 13, 2009, ch. 119, § 8, 2009 Ariz. Sess. Laws 1096, 1096–99 (codified as amended at ARIZ. REV. STAT. ANN. § 46-455 (2011))).

130. *Id.*

131. *Id.* (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)). Notably, it is possible that a legislative staff member, rather than an elected official, deleted the comma in the 2009 amendment. *See* ARIZ. REV. STAT. ANN. § 41-1224(B) (2011) (“The enrolling and engrossing clerk may make corrections in capitalization, spelling, form or punctuation necessary for proper style and composition of the bill which do not alter its meaning or intent.”); ARIZ. LEGISLATIVE COUNCIL, *supra* note 27, at 83 (stating that serial commas should be omitted). If it was not a legislator who removed the comma, this would strongly support Justice Bales’s argument that the deletion was non-substantive. Unfortunately, it is not possible to know who made this edit. The legislature could help remove future ambiguity in this area by documenting when amendments are made pursuant to section 41-1224.

132. *See, e.g., Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (using statutory amendments as evidence of congressional intent); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (same).

133. *Braden II*, 266 P.3d at 352.

134. Motion for Reconsideration, *supra* note 44, at 2–8.

135. *Id.*

136. Order, *Braden II*, 266 P.3d 349 (No. CV-10-0300-PR) (denying motion for reconsideration).

In short, the current Arizona Supreme Court justices are amenable to arguments about the import of statutory amendments. In light of the court's division in *Estate of Braden*, lawyers arguing to the court would be wise to make explicit arguments about how an amendment supports a party's reading of the statute.

III. THE ARIZONA SUPREME COURT'S CURRENT STATUTORY INTERPRETATION THEORY

As Part II demonstrates, the court considers a broad range of tools when tackling an ambiguous statute. On one hand, this diversity makes it difficult to label any one justice's overall statutory interpretation theory. Not one justice embraces Scalia's strict textualism theory; nor does any one justice adhere to a pure purposivist method.¹³⁷

On the other hand, two patterns emerge from the current court's analytical approach. First, the court adheres closely to the text of the statute.¹³⁸ That is, any litigant arguing that a court should read a requirement into a statute is facing an uphill battle. This is true even where there are strong arguments in favor of reading requirements into a statute.¹³⁹

Estate of Braden demonstrates this point. Absent a clear statement that the State could be sued under APSA, the court was unwilling to read state liability into the statute.¹⁴⁰ This was true even despite good arguments that the legislature may have intended the state to be included under "other legal entity."¹⁴¹ Moreover, notably absent from both the majority and dissenting opinions in *Estate of Braden* was any discussion of the policies behind whether the State *should* be held liable under APSA, despite the fact that Braden's estate made policy arguments in its briefing.¹⁴² Instead, the court focused its analysis on the text of the statute and clues that provided evidence of the legislature's intent with respect to the meaning of the phrase "other legal entity." The disagreement within the court centered on

137. See ESKRIDGE ET AL., *supra* note 47, at 220–22, 227–30 (explaining textualism and purposivism).

138. See, e.g., Remarks of Chief Justice Berch, *supra* note 73 (advocating that all judges should adhere closely to the words of the statute); Remarks of Vice Chief Justice Hurwitz, *supra* note 99 (same).

139. See, e.g., *Albano v. Shea Homes Ltd. P'ship*, 254 P.3d 360, 366 (Ariz. 2011) (declining to read an implied tolling provision into an Arizona statute despite strong policy considerations identified by the U.S. Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)); *Preston v. Kindred Hosps. W., L.L.C.*, 249 P.3d 771, 773 (Ariz. 2011) (declining to read additional requirements into Arizona Rule of Civil Procedure Rule 17(a) notwithstanding support to do so in the Rule's accompanying notes and federal court interpretations of Federal Rule of Civil Procedure Rule 17(a)); *State v. Regenold*, 249 P.3d 337, 339 (Ariz. 2011) (Pelander, J., dissenting) (acknowledging that the majority's interpretation was preferable for policy reasons but finding his reading more in line with the statutory text); Remarks of Vice Chief Justice Hurwitz, *supra* note 99 (stating that it is the judge's duty to adhere to the text and that the legislature must live with the consequences of the words it has chosen).

140. *Braden II*, 266 P.3d at 354.

141. See *id.* at 355–56 (Bales, J., dissenting).

142. Supplemental Brief of Appellant Braden, *supra* note 45, at 14–15.

which clues were more persuasive. This is a signal that the court's loyalty to a statute's text may trump even strong policy arguments in favor of an alternative reading.

In fact, Vice Chief Justice Hurwitz has explicitly stated that he thinks "legislators ought to live with the consequences of the words they have chosen."¹⁴³ In other words, the judge should adhere closely to the text of the statute even where that reading may lead to bad policy. Judges are not legislators. This view, if applied consistently, may encourage legislators to draft clearer statutes.¹⁴⁴ In any case, the court is persuaded by arguments that allow it to adhere closely to the statute's text and cautious of arguments that ask it to read requirements into a statute.

The second observation about the court's general approach is that the current justices appear willing to consider any source that provides clues as to the legislature's intent. In the cases discussed, the court utilized everything from historical context,¹⁴⁵ to statutory purpose,¹⁴⁶ to federal courts' interpretations of similar statutes.¹⁴⁷ Indeed, the justices have yet to explicitly state that they do not find it appropriate to consider one particular source.¹⁴⁸ The exception to this would be that the court has been unreceptive to pure policy arguments.¹⁴⁹ Clearly, some justices find certain sources more persuasive than others,¹⁵⁰ but it appears that all of the justices are at least open to hearing arguments based on a variety of statutory interpretation tools.

Estate of Braden likewise illustrates this second point. Both the majority and the dissent employed a range of tools and sources to support their respective arguments. The very structure of Part II is based on the scope of statutory interpretation tools the court used to analyze section 46-455(B). And the division between the majority and the dissent in *Estate of Braden* demonstrates which tools certain justices find more persuasive than others.

CONCLUSION

The current justices on the Arizona Supreme Court may disagree about the precise application of some of the tools of statutory construction, and some justices may be more persuaded by some tools than others. In general, however, the court shares a similar philosophy regarding statutory interpretation. The court appears to feel strongly about adhering closely to the text of the statute and is

143. Remarks of Vice Chief Justice Hurwitz, *supra* note 99.

144. See, e.g., RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 29–30 (2002).

145. *Ross v. Bennett*, 265 P.3d 356, 358 (Ariz. 2011); *Adams v. Comm'n on Appellate Court Appointments*, 254 P.3d 367, 369–70, 372–73 (Ariz. 2011).

146. *State v. Regenold*, 249 P.3d 337, 339 (Ariz. 2011) (Pelander, J., dissenting).

147. *Braden II*, 266 P.3d 349, 356 (Ariz. 2011) (Bales, J., dissenting); *Preston v. Kindred Hosps. W., L.L.C.*, 249 P.3d 771, 773 (Ariz. 2011).

148. See Remarks of Chief Justice Berch, *supra* note 73 (stating that she will look to whatever context is available).

149. See *supra* notes 138–44 and accompanying text.

150. See *supra* text accompanying notes 101–19.

cautious about arguments asking it to read requirements into a statute that are not expressly stated. Even with this strict loyalty to the text, the court seems open to considering a wide range of sources that evidence the legislative intent with respect to the meaning of the statute's words.