

GETTING THE ARIZONA COURTS AND ARIZONA LEGISLATURE ON THE SAME (DRAFTING) PAGE

Tamara Herrera*

INTRODUCTION

*“If interpretation is bounded by language, what, if anything, binds language?”*¹

One only needs to read the latest legal blog or newspaper to find a story about ambiguous statutory language at the center of a dispute.² Courts solve these disputes in a variety of ways, including using statutory interpretation tools, such as textual aids, canons of construction, and legislative history.³ Of course, not every scholar or judge agrees on when, how, and even *if* a court should employ these tools.⁴ On the one hand, textualists follow a formalist approach that requires a court to look to just the text in interpreting a statute and to reject tools that consider extrinsic evidence, such as legislative history.⁵ On the other hand, purposivists believe the most important goal is to find the legislative purpose or intent behind the statute,

* Clinical Professor of Law, Sandra Day O'Connor College of Law. The author wishes to specifically thank Susan Chesler, Amy Langenfeld, Judy Stinson, Kimberly Holst, Andrew Carter, and Chad Noreuil for their valuable input. In addition, the author owes a debt of gratitude to Cory Tyszka and all future and past students in her Writing for Law Practice course for their enthusiasm and support of legal writing and statutory interpretation.

1. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 23 (Sari Bashi trans., 2005).

2. In Arizona, this kind of dispute can even become front-page, political news. *E.g.*, Yvonne Wingett Sanchez, *Ducey, Douglas Engage in Public Spat over Board Firings*, ARIZONA REPUBLIC, Feb. 14, 2015, <http://www.azcentral.com/story/news/arizona/politics/2015/02/12/education-firing-diane-douglas-ducey-illegal/23293037/>.

In early 2015, Governor Doug Ducey and Superintendent of Public Instruction, Diane Douglas, disagreed about who had hiring and firing authority of Board of Education staff members. *Id.* Douglas claimed the dispute arose over ambiguous statutory language. *Id.*

3. See Erin F. Norris, Note, *Estate of Braden Ex Rel. Gabaldon v. State and Statutory Construction in the Arizona Supreme Court*, 54 ARIZ. L. REV. 311, 316–27 (2012) (discussing the Arizona Supreme Court's use of punctuation, canons of construction, borrowed statutes, and statutory amendment as statutory interpretation tools).

4. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 913–15 (2013) [hereinafter Bressman & Gluck, *Part I*].

5. *Id.* at 913.

which may require the court to rely on legislative history.⁶ What is missing from this debate about how to use statutory interpretation tools, though, is how a court should treat materials that legislative drafters actually use when drafting the law.⁷

Arizona,⁸ like most states⁹ and the United States Congress,¹⁰ has a prescribed set of drafting instructions set forth in the legislative body's drafting manual. These manuals generally include requirements on formatting, substantive concerns, and textual concerns, including grammar and style.¹¹ In the past two years, at least four scholars have tackled the question of how courts should take into account the realities of legislative drafting, and not one of them suggests that legislative drafting manuals should be part of a court's statutory interpretation tools.¹² These articles

6. *Id.*

7. *See id.* at 905 (stating the need for more study because “almost no empirical work has been done to shed light on the relationship, if any, between the theories and doctrines of [statutory interpretation] and the actual statute-creating process”); BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185, 187 (2010) (“To date, no scholar has examined these manuals in any detail, and they are seldom cited in the federal courts.”).

8. ARIZ. LEGISLATIVE COUNCIL, THE ARIZONA LEGISLATIVE BILL DRAFTING MANUAL (2015), available at http://www.azleg.gov/alisPDFs/council/2015-2016_bill_drafting_manual.pdf (last visited June 18, 2015) [hereinafter ARIZONA MANUAL].

9. The National Conference of State Legislatures maintains a list of publicly available bill drafting manuals. *Bill Drafting Manuals*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/bill-drafting-manuals.aspx> (last visited June 18, 2015).

10. The United States House of Representatives has two drafting manuals that are available on its official website: the House Manual and the HOLC Guide. OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE (1995), available at http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf (last visited June 18, 2015); OFFICE OF THE LEGISLATIVE COUNSEL, UNITED STATES HOUSE OF REPRESENTATIVES, HOUSE OFFICE OF THE LEGISLATIVE COUNSEL GUIDE TO LEGISLATIVE DRAFTING, available at http://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html (last visited June 18, 2015). The United States Senate Legislative Drafting Manual is not available publicly on the Senate's website. *See infra* note 147.

11. *E.g.*, ARIZONA MANUAL, *supra* note 8, at 27–101. Chapter 4 of the manual sets forth the rules for drafting substantive provisions, such as definitions and remedies. *Id.* at 34–78. Chapter 5 sets forth the instructions for form and style, including punctuation and use of specific words. *Id.* at 79–108.

12. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 750–52 (2014) [hereinafter Bressman & Gluck, *Part II*]; Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 732–34 (2014); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative*

focus on the drafting processes of the United States Congress, though, and not on any individual state; they reason that the legislative drafting procedures and manuals are not helpful interpretive tools because several committees and individuals are involved in the Congressional drafting process.¹³ Also, Congress's drafting manuals are not consistent among committees and individual drafters, and the various manuals are not always available to the public.¹⁴ This article argues that Arizona's (and likely many other states')¹⁵ legislative drafting procedure and manual do not suffer from these same faults. Because Arizona has just one legislative drafting body and one legislative drafting manual that is (1) publicly available and (2) required for all legislative drafting in the state, Arizona courts should turn to *The Arizona Legislative Bill Drafting Manual*¹⁶ to interpret ambiguous statutory language, much like they already use dictionaries. At the very least, they should engage in a dialogue on the best way to use the *Arizona Manual* because there is tension between what rules the *Arizona Manual* requires legislative drafters to follow and what rules the Arizona Supreme Court follows, as evidenced in the 2011 case *Estate of Braden ex. rel. Gabaldon v. State*.¹⁷ Legislative drafters and practitioners are left uncertain about how to treat the *Arizona Manual*, at least on the issue of the serial comma.¹⁸

Part I of this article will provide a brief overview of how legislation is drafted in Arizona, followed by a discussion of how Arizona courts use the *Arizona Manual* in Part II. In addition, Part II will detail the Arizona

Intent and History, 55 B.C. L. REV. 1613, 1657–58 (2014); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 877 (2014).

13. E.g., Bressman & Gluck, *Part II*, *supra* note 12, at 752 (“[T]he proliferation and variation of these kinds of materials inside Congress would make suggestions about standardization exceedingly difficult to implement.”).

14. See *id.*; Ard, *supra* note 7, at 198 (“Even if drafting manuals might be criticized because it is unlikely that legislators or the general public consult them in order to understand a bill, the manuals are unlike legislative history because the covert nature of the manuals is simply a product of a lack of awareness.”).

15. *Bill Drafting Manuals*, *supra* note 9. This website includes links to thirty-two states' drafting manuals. *Id.*

16. ARIZONA MANUAL, *supra* note 8.

17. See *Estate of Braden ex rel. Gabaldon v. State*, 266 P.3d 349, 356 (Ariz. 2011) (Bales, J., dissenting).

18. See Norris, *supra* note 3, at 318 (discussing the ambiguity caused by the removal of the serial comma from Arizona Revised Statutes section 46-455); Daniel P. Schaack, *A Matter of Punctuation: Comma Creates Division in Arizona Supreme Court Case*, MARICOPA LAW., Jan. 2012, at 15, available at http://c.ymcdn.com/sites/www.maricopabar.org/resource/resmgr/ml_archives/mljan12.pdf.

Supreme Court's most recent treatment of the *Arizona Manual* in *Estate of Braden*. Part III will then explain the tension created by the case. Finally, Part IV will compare and contrast the United States Congress's drafting procedures and manuals with Arizona's procedure and manual in concluding that Arizona courts should not be worried about the same concerns that hamper the federal courts' reliance on the federal drafting manuals. In short, Arizona courts should turn to the *Arizona Manual* as a reliable statutory interpretation tool and use it in the same way they would use a dictionary to interpret an ambiguous statutory word or provision.

I. DRAFTING ARIZONA LAW

In Arizona, the procedure for drafting proposed legislation is set forth in the *Arizona Legislative Manual*.¹⁹ Any current member of the Senate or House of Representatives may introduce and sponsor legislation,²⁰ but the drafting responsibilities fall solely to the Arizona Legislative Council.

Legislative Council staff is legally responsible for drafting all proposed legislation in suitable form and terminology, regardless of the form in which it is presented. The Legislative Council employs permanent legal, editorial and technical staff to provide this service for all legislators, regardless of house or political party. The service is confidential, and the contents of proposed legislation, including supporting documentation, will not be divulged without the express consent of the sponsor. Legislation is drafted according to standards and requirements set forth in *The Arizona Legislative Bill Drafting Manual*.²¹

Because the drafting responsibilities fall to one body in Arizona, dissecting how that body carries out its duties should illuminate how to read and interpret Arizona law.

A. *Arizona Legislative Council*

The Arizona Legislative Council is a statutorily-created, non-partisan body that "provide[s] a variety of nonpartisan bill drafting, research,

19. ARIZ. LEGISLATIVE COUNCIL, ARIZONA LEGISLATIVE MANUAL 34–36 (2003), available at <http://www.azleg.state.az.us/alisPDFs/council/legman2003.pdf>.

20. *Id.* at 34. Although only current legislative members may sponsor and introduce legislation, the idea for a bill, memorial, or resolution can come from any source, including individuals, special interest groups, and agencies. *Id.*

21. *Id.*

computer and other administrative services to all of the members of both houses of the Legislature.”²² The Council consists of a chair, six staff members from the Senate, and six staff members from the House of Representatives.²³ The chair position rotates each year between the President of the Senate and the Speaker of the House of Representatives.²⁴

According to its website, the Council’s top two responsibilities are: (1) to prepare all bills for the legislative session, and (2) to review all laws and make clerical corrections.²⁵ The website also lists the Council’s current staff members,²⁶ each staff member’s drafting assignments by subject area,²⁷ and the Council’s publications.²⁸ The publications list is labeled “complete” and includes not only documents related to current statutes and pending legislation,²⁹ but also documents used for drafting purposes.³⁰ The *Arizona Manual* is the key publication listed for drafting legislative language.³¹

B. *The Arizona Legislative Drafting Manual*

The *Arizona Manual* is “the manual of form and style to be used in preparing bills and other legislative proposals” and “is based on generally accepted drafting principles and conventions.”³² The *Arizona Manual* is published every year and spans 169 pages, including over eighty pages of sample language in both Chapter 4 and the first appendix.³³ The Scope and Use section of the *Arizona Manual* notes the limitations of these samples: “[h]owever, the samples used in this manual should not be copied without careful consideration of their appropriateness for a particular legislative

22. *Welcome to the Arizona Legislative Council*, ARIZONA LEGIS. COUNCIL, http://azleg.gov/az_leg_council/default.htm (last visited June 18, 2015).

23. *Id.*

24. *Id.*

25. *Responsibilities of the Council*, ARIZONA LEGISLATIVE COUNCIL, http://azleg.gov/az_leg_council/responsibilities.htm (last visited June 18, 2015).

26. *Our Staff*, ARIZONA LEGISLATIVE COUNCIL, http://azleg.gov/az_leg_council/staff.htm (last visited June 18, 2015).

27. *Publications*, ARIZONA LEGISLATIVE COUNCIL, http://azleg.gov/az_leg_council/documentation.htm (last visited June 18, 2015).

28. *Id.*

29. *Id.* The publications lists includes a table of affected sections for the 52nd Legislature (2015) and a list of programs set to terminate, for example.

30. *Id.* In addition to the ARIZONA LEGISLATIVE BILL DRAFTING MANUAL, the list also includes an internal reference manual.

31. ARIZONA MANUAL, *supra* note 8, at 1.

32. *Id.*

33. *Id.* at 27–71, 111–51.

proposal.”³⁴ Thus, the *Arizona Manual* itself contemplates that it cannot address every possible drafting concern, but it is the place for drafters to start.

The *Arizona Manual* addresses a wide range of drafting concerns, from the structural and substantive requirements of legislative bills to more textual concerns, such as word choice and punctuation. Chapters 1 through 3 explain the drafting process³⁵ and the required parts of a bill,³⁶ resolution,³⁷ and memorial,³⁸ while Chapters 4 and 5 detail the common bill provisions³⁹ and the *instructions* about form and style.⁴⁰

The word “instructions” is an explicit part of the title of Chapter 5 (“General Instructions as to Form and Style”),⁴¹ and twenty-one out of forty-seven of the sections include the imperative voice.⁴² For example, section 5.4⁴³ says “[u]se the following language to prescribe age categories,” section 5.12⁴⁴ says “[d]o not use synonyms,” and section 5.14 says “[u]se the present tense in drafting since a statute speaks as of the time it is read.”⁴⁵ This focus on instructions, as well as the use of the imperative voice, is consistent with the goal set out in section 5.1: “The goal of good bill drafting is to make legislation as short, simple and readable as possible while not sacrificing clarity or precision.”⁴⁶ To that end, section 5.1 lists fourteen of the “most basic drafting rules” and presents them as a bulleted list of imperatives.⁴⁷

Thus, there is no question that the drafters of Arizona law rely on the *Arizona Manual* as the preferred—and, indeed, required—authority on grammar and style. What remains in question is how Arizona courts view and use the *Arizona Manual* as a statutory interpretation tool.

34. *Id.* at 1.

35. *Id.* at 2–4.

36. *Id.* at 5–19.

37. *Id.* at 20–23.

38. *Id.*

39. *Id.* at 27–71.

40. *Id.* at 72–101 (emphasis added).

41. *Id.* at 72, 74.

42. *See id.* at 74–101. Even those sections that do not use the imperative voice are generally written with “drafter” as the stated or understood subject. *E.g.*, *id.* at 82 (“Precision requires that a drafter use the proper title of any officer or governmental agency.”).

43. *Id.* at 76.

44. *Id.* at 86.

45. *Id.* at 90.

46. *Id.* at 74.

47. *Id.*

II. ARIZONA COURTS' USE OF THE ARIZONA LEGISLATIVE BILL DRAFTING MANUAL

The Arizona Supreme Court has cited to the *Arizona Manual* twice.⁴⁸ The Arizona Court of Appeals has never cited to the *Arizona Manual*.⁴⁹

The Court first mentioned the *Arizona Manual* in the 2007 case *Garcia v. Browning*.⁵⁰ Its mention was in a footnote and was without controversy: “In any event, legislative history does not satisfy A.R.S. § 1-244’s requirement that the law expressly declare that it is retroactive. See Ariz. Legis. Council, *The Arizona Legislative Bill Drafting Manual* § 4.11, at 41 (2006) . . . (stating that A.R.S. § 1-244 requires “that the retroactivity of a statute be ‘expressly declared’”).”⁵¹ The *Arizona Manual*’s second mention, however, has generated some discussion.⁵²

In *Estate of Braden*,⁵³ the Court’s opinion hinged on the absence of a serial comma in a statute. Specifically, the Court noted that a serial comma is needed to indicate individual components of a list in deciding whether the last term in a list could be a broad-reaching, catch-all term.⁵⁴ The dissenting opinion, however, pointed out that the *Arizona Manual* does not require the use of the serial comma and, in fact, discourages its use.⁵⁵ Thus, the dissent stated the absence of a comma cannot be instructive to statutory interpretation in Arizona.⁵⁶

What is unexpected about this case is that neither party argued—either in the briefs or at oral argument—about the statute’s punctuation prior to the Court’s decision.⁵⁷ One is left to wonder why this would be. Were the parties aware of the drafting convention in the *Arizona Manual* and thought arguing about the absence of a serial comma would not be fruitful? Did they leave out the punctuation issue because it was clearer to argue the canons of construction based on the Court’s past reliance on these types of statutory

48. See *Estate of Braden ex rel. Gabaldon v. State*, 266 P.3d 349, 356 (Ariz. 2011) (Bales, J., dissenting); *Garcia v. Browning*, 151 P.3d 533, 536 n.2 (Ariz. 2007).

49. The author last ran a search on WestlawNext on February 23, 2015 by using the search terms “bill drafting manual” and its various combinations.

50. *Garcia*, 151 P.3d at 536 n.2.

51. *Id.*

52. See *Norris*, *supra* note 3, at 318; *Schaack*, *supra* note 18, at 1.

53. *Estate of Braden*, 266 P.3d at 352.

54. *Id.*

55. *Estate of Braden*, 266 P.3d at 356 (Bales, J., dissenting).

56. *Id.* at 355.

57. See Supplemental Brief of Appellant Braden at 13–14, *Estate of Braden*, 266 P.3d 349 (No. CV-10-0300-PR); Answering Brief of Appellee at i, 7–8, *Estate of Braden*, 266 P.3d 349 (No. CV-10-0300-PR); Oral Argument, *Estate of Braden*, 266 P.3d 349 (No. CV-10-0300-PR), available at <http://www.azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx>.

interpretation tools?⁵⁸ Either way, this case illustrates the tension that exists when a court does not look to a state's drafting manual for potential guidance in interpreting ambiguous statutory language and instead picks a different default rule than what is in the manual. More importantly, this tension and its resulting divide in rules leaves both legislative drafters and practitioners unclear about how to rely on the manual in the future.

A. *Estate of Braden ex. rel. Gabaldon v. State*

The facts were not in dispute in *Estate of Braden*.⁵⁹ Arizona Integrated Residential Educational Services (AIRES) provided Jason Braden with developmental disability services.⁶⁰ Specifically, Braden was an adult with severe developmental disabilities.⁶¹ He sought services from AIRES, a licensed private corporation that contracted with the State of Arizona.⁶² In 2005, Braden died from injuries he suffered while residing in an AIRES facility.⁶³ His estate sued the State for its role in Braden's death.⁶⁴

The estate claimed that the State failed to provide Braden with a suitable living arrangement and alleged that the State was liable for the abuse and neglect under the Adult Protective Services Act (APSA), Arizona Revised Statutes section 46-455.⁶⁵ The relevant section requires the plaintiff be a vulnerable adult:

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 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.⁶⁶

58. Similarly, one can ask parallel questions of the Court's decision: Did the majority opinion not address the *Arizona Manual* because the manual's rule is not consistent with the Court's practice? Does the Court prefer to rely on canons of construction versus other textual aids, like drafting manuals and dictionaries?

59. See *Estate of Braden*, 266 P.3d at 350.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 351 (emphasis omitted).

Neither party disputed that Braden was a vulnerable adult.⁶⁷ The requirement in dispute, however, was whether the State was a proper defendant as “any person or enterprise.”⁶⁸

The State moved for summary judgment, arguing it was exempt from liability under section 46-455.⁶⁹ The trial court agreed and granted the State’s motion.⁷⁰ Specifically, the trial court found the State was not a proper defendant because the State itself did not take on the duty to care for Braden; rather, it contracted with a third party and oversaw the care.⁷¹ The Arizona Court of Appeals divided on this issue, but the majority disagreed and found that the State was not exempt from liability under section 46-455.⁷²

The Arizona Supreme Court granted review on the sole issue of whether the State should be “expos[ed] to liability under ASPA.”⁷³

1. Arizona Supreme Court: Majority Opinion

The Court reversed the court of appeals and held that the State was *not* a proper defendant under APSA.⁷⁴ Justice Brutinel wrote the majority opinion⁷⁵ and focused on the absence of a comma in the relevant statute creating a private right of action.⁷⁶ Specifically, the Court noted that the State must meet the definition of “enterprise” to be subject to liability under section 46-455.⁷⁷ 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.”⁷⁸ The Court noted that remedial

67. *Id.*

68. *Id.* (emphasis omitted).

69. *Id.* at 350.

70. *Id.*

71. Estate of Braden *ex rel.* Gabaldon v. State, 238 P.3d 1265, 1269 (Ariz. Ct. App. 2010), *vacated*, 266 P.3d 349 (2011).

72. *Id.* at 1273.

73. *Estate of Braden*, 266 P.3d at 351. The Court specifically noted that it was not considering whether the State would “be liable under a common law negligence theory or under Arizona’s wrongful death statute.” *Id.* In addition, the Court did not “consider the potential liability of individual state employees.” *Id.*

74. *Id.* at 354.

75. *Id.* at 350. Chief Justice Berch and Justice Pelander concurred with the majority opinion. *Id.* at 354.

76. *Id.* at 352.

77. *Id.*

78. *Id.* (citation and emphasis omitted).

statutes are to be liberally construed and focused on the punctuation (or lack of punctuation) in the list “any corporation, partnership, association, labor union or other legal entity.”⁷⁹

Specifically, the Court noted that looking at the phrase “other legal entity” in isolation and as a separate category in the list would require it to find that State was indeed a legal entity under the traditional *Black’s Law Dictionary* definition.⁸⁰ The Court went on to say that it would not consider words in isolation when interpreting statutes, though.⁸¹ The lack of a comma between “labor union” and “other legal entity” signaled that “other legal entity” could not be a catch-all phrase including the State.⁸² A serial comma is needed before the conjunction to indicate that each item in the series functions as a separate category, thus making “other legal entity” a catch-all provision.⁸³ The Court cited no legal writing style manual in support of its assertion about the use of the serial comma, and, more importantly, it never mentioned the *Arizona Manual* that affirmatively advises against use of the serial comma.⁸⁴

Instead, the Court buttressed its argument with two canons of construction: *ejusdem generis*⁸⁵ and *nosicitur a sociis*.⁸⁶ *Ejusdem generis* requires that “general words [that] follow the enumeration of a particular classes of person or things should be interpreted as applicable only to persons or things of the same general nature or class.”⁸⁷ Similarly, *nosicitur a sociis* requires that any ambiguous words be interpreted akin to the words used in the statute.⁸⁸ Because “other legal entity” was included in a list of private entities, such as a corporation, the Court found that the phrase could not be interpreted to include a public entity, such as the State, as a proper defendant.⁸⁹

In addition, the Court noted that if the legislature wanted to include the State as a proper defendant under APSA, it could have done so by mentioning the State explicitly as it did in several other statutory schemes,

79. *Id.*

80. *Id.* (“A ‘legal entity’ is ‘[a] body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents.’”) (quoting BLACK’S LAW DICTIONARY 976 (9th ed. 2009)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 352.

including other portions of APSA.⁹⁰ The Court also observed that permitting the State to be a proper defendant under APSA would “result[] in some tension with the statute’s enforcement scheme” because the State is also APSA’s enforcer.⁹¹ When the State is both the enforcer of a statute and subject to liability under the same statute, the legislature has made this intent express.⁹² Thus, the Court held that the State could not be a proper defendant under section 46-455 and vacated the court of appeals while affirming the trial court’s decision in favor of the State.⁹³

2. Arizona Supreme Court: Dissenting Opinion

In his dissent, Justice Bales (joined by Vice Chief Justice Hurwitz) primarily disagreed with the majority’s reliance on the absence of a serial comma to find that the State would not be liable as an “other legal entity.”⁹⁴ “The absence of a comma sheds no light on the meaning” of the statute because grammarians do not agree about the use of the serial comma.⁹⁵ More importantly, the dissent noted that the *Arizona Manual* has a clear directive that legislative drafters *not* place a comma before the conjunction in a series.⁹⁶ The dissent even went as far as to say that the majority opinion purposefully discounted the legislature’s own style conventions to reach its conclusion.⁹⁷

In addition to the *Arizona Manual*, the dissent relied on the history of APSA.⁹⁸ For twenty years after APSA’s enactment, a serial comma existed between “labor union” and “other legal entity.”⁹⁹ When the legislature amended the statute in 2009, the comma was removed.¹⁰⁰ The dissent noted that this change was considered a “certain technical and conforming change[].”¹⁰¹ Thus, the removal of the comma was not a substantive change,

90. *Id.* at 353.

91. *Id.* at 354.

92. *Id.*

93. *Id.*

94. *Id.* at 355 (Bales, J., dissenting).

95. *Id.*

96. *Id.* at 356.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* A serial comma existed between the words “labor union” and “other legal entity” from 1989 until 2009 when the legislature amended APSA. *Id.* Part of the changes included expanding the definition of “vulnerable adults” and changing the definition of “enterprise” by (1) changing a “which” into a “that” and (2) omitting the serial comma. *Id.*

101. *Id.*

and the legislature did not intend to “silently narrow[] the field of potential ‘other legal entity’ defendants.”¹⁰² According to the dissent, the State should be a proper defendant under APSA, and it would have affirmed the appeals court.¹⁰³

III. THE RESULTING TENSION: THE ARIZONA COURTS AND THE ARIZONA LEGISLATURE ARE NOT ON THE SAME (DRAFTING) PAGE

The dissent’s discussion about how to use the *Arizona Manual* in *Estate of Braden* illustrates the tension that scholars have noted: courts have not fully taken into account the realities of legislative drafting.¹⁰⁴ Specifically, although the Court does recognize and use textual aids in interpreting statutes, it does not recognize the legislature’s own required textual aid.

First, a court’s reliance on a comma (or its absence) is not an unusual or rarely used interpretive tool.¹⁰⁵ Although scholars may argue about the role punctuation should play in interpreting a statute,¹⁰⁶ Arizona courts have long used punctuation as an interpretive tool as long as the interpretation is in harmony with the statute’s purpose and does not lead to an absurd result.¹⁰⁷ For example, the Court recently and unanimously approved the use of punctuation as an interpretive tool in *City of Peoria v. Brink’s Home Security, Inc.*¹⁰⁸

In *Brink’s Home Security*, the Court was asked to interpret the reach of the phrase “interstate telecommunications services” in Ariz. Rev. Stat. Ann.

102. *Id.*

103. *Id.* at 358. In reaching its conclusion, the dissent was not persuaded by the majority’s use of the canons of construction either. *Id.* at 356. Specifically, the dissent was not persuaded that the list of entities in the definition of “enterprise” were limited to private entities. *Id.* “Under Arizona law the term ‘corporation’ may embrace both private and public entities.” *Id.* The dissent was also not persuaded that there was anything worrisome about subjecting the state to liability under an act that it also had the duty to enforce. *Id.* at 357. Finally, the dissent noted that nothing in Arizona law requires the legislature to specifically assert its intent to impose liability on the state. *Id.*

104. *See, e.g.*, Shobe, *supra* note 12, at 809 (arguing that the literature in this field has an “underdeveloped and ungrounded understanding of what Congress is and how it works”).

105. *See, e.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989).

106. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990).

107. *See Garrison v. Luke*, 78 P.2d 1120, 1122 (Ariz. 1938) (stating that if “language leads to a result which produces an absurdity, it is our duty to construe the act, if possible, so that it is a reasonable and workable law, not inconsistent with the general policy of the Legislature, even though in so doing we may be compelled to change the punctuation or even the precise language of the act”).

108. 247 P.3d 1002, 1005 (Ariz. 2011).

§ 42–6004(A)(2).¹⁰⁹ Specifically, this section exempted the following services from municipal taxes: “[i]nterstate telecommunications services, which include that portion of telecommunication services . . . allocable by federal law to interstate telecommunications service.”¹¹⁰ The Court stated that the use of the comma before “which” showed that the following phrase was non-restrictive, meaning that more services are exempt from municipal taxes than just those “allocable by federal law to interstate telecommunications service.”¹¹¹

Second, the Court has used textual canons of construction to interpret statutes, although not very frequently. Since 1866, the Court has discussed *ejusdem generis* by name fifty-seven times.¹¹² In addition to *Estate of Braden*, the Court has applied *ejusdem generis* two times since 2000,¹¹³ with the most recent application in 2014,¹¹⁴ while discussing and rejecting it twice.¹¹⁵ As for *nocsitur a sociis*, the Court discussed this canon by name in twelve cases, most recently in *Estate of Braden*.¹¹⁶ The Court has also mentioned the related canon *expressio unius est exclusion alterius*¹¹⁷ forty-seven times.¹¹⁸

Thus, the Court does not hesitate to employ textual aids, like punctuation and textual canons of construction, when interpreting statutes. Interestingly, though, the Court did not cite to authority for its grammar and style rules in either *Brink’s Home Security*¹¹⁹ or *Estate of Braden* (majority opinion),¹²⁰ even though there are no universally accepted grammar and style rules.¹²¹ But, as the dissent in *Estate of Braden* pointed out, the Arizona Legislature

109. *Id.* at 1003–04.

110. *Id.* at 1003.

111. *Id.* at 1005.

112. *See, e.g., Metzler v. BCI Coca-Cola Bottling Co. of L. A., Inc.*, 329 P.3d 1043, 1047 (Ariz. 2014).

113. *Id.*; *In re Julio L.*, 3 P.3d 383, 386 (Ariz. 2000).

114. *Metzler*, 329 P.3d at 1047.

115. *Carbajal v. Indus. Comm’n of Ariz.*, 219 P.3d 211, 214 (Ariz. 2009); *Bilke v. State*, 80 P.3d 269, 272 (Ariz. 2003).

116. *See, e.g., Estate of Braden ex rel. Gabaldon v. State*, 266 P.3d 349, 352 (Ariz. 2011); *In re Rubi*, 713 P.2d 1225, 1230 (Ariz. 1985).

117. This canon requires that “[t]he expression of one thing is the exclusion of another.” *Jennings v. Woods*, 982 P.2d 274, 290 (Ariz. 1999) (citations omitted).

118. *See, e.g., Mejak v. Granville*, 136 P.3d 874, 877 (Ariz. 2006); *Pima Cnty. v. Heinfeld*, 654 P.2d 281, 282 (Ariz. 1982).

119. *City of Peoria v. Brink’s Home Sec.*, 247 P.3d 1002, 1005 (Ariz. 2011).

120. *Estate of Braden*, 266 P.3d at 352.

121. *See id.* at 355 (Bales, J., dissenting) (noting that “grammarians disagree whether the penultimate entry in a series should be followed by a comma”) (citations omitted).

does provide at least legislature-wide drafting guidance in the *Arizona Manual*.¹²²

The *Arizona Manual*'s instructions on punctuation are detailed in section 5.10.¹²³ Section 5.10 begins with a guiding principle for drafters to follow: "A properly drafted bill requires little punctuation."¹²⁴ To that end, the *Arizona Manual* specifically addresses just three punctuation marks.¹²⁵

First, the *Arizona Manual* addresses the colon by instructing the drafter to "not use a colon in the text of a section except to introduce a series."¹²⁶ Second, the *Arizona Manual* addresses quotation marks by presenting two opposite conventions, depending on the document being drafted.

In bill drafting place periods and commas outside the last quotation mark. For example: FOR THE PURPOSES OF THIS SUBSECTION, "STOP", "STOPPED" OR "STOPPING" MEANS However, in memorials and resolutions and in legal memos, use the correct grammatical placement of punctuation inside the last quotation marks.¹²⁷

Finally, the *Arizona Manual* addresses comma usage by listing five instances in which a comma "should be used."¹²⁸ The key instruction relevant in *Estate of Braden* states that drafters should "[o]mit commas before the conjunction 'and' or 'or' within a series of words, phrases or clauses, unless the elements in the series are unusually complex."¹²⁹

This resulting tension between what rules the Court follows and what rules the legislative drafters follow is not a bad thing, though. A tension like the one highlighted in *Estate of Braden* offers the opportunity for Arizona courts to shape future rules that keep up with the changing nature of how lawyers—and in this case, drafters—do their job.

IV. ANALYSIS: ARIZONA COURTS ARE IN A UNIQUE POSITION TO RESHAPE HOW A COURT SHOULD USE A LEGISLATIVE DRAFTING MANUAL

The *Arizona Manual*'s specific instructions detailed above in Part III are not unusual. Most legislative drafting manuals—even the United States

122. *Id.* at 356.

123. ARIZONA MANUAL, *supra* note 8, at 84.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 85.

128. *Id.*

129. *Id.*

Congress's drafting manuals—include instructions on both substantive and textual concerns, such as effective dates and punctuation.¹³⁰ Currently, scholars have only considered the value federal courts should place on the United States Congress's drafting manuals; state legislative drafting manuals have not been the subject of any large study or article.¹³¹ In short, the United States Congress's drafting manuals suffer from several transparency issues that prevent them from being consistently reliable statutory interpretation tools, while the *Arizona Manual* does not have those same concerns. Arizona courts should not hesitate to look to the *Arizona Manual* for interpretive guidance. At the very least, they should engage in a dialogue on the best way to use a legislative drafting manual.

A. Why the United States Congress's Drafting Manuals are Not Reliable Statutory Interpretation Tools . . .

In discussing the unreliability of the federal legislative drafting manuals as statutory interpretation tools, scholars note that (1) Congress has a complicated bill drafting procedure and (2) Congressional committees and individual legislators and staff members use many drafting manuals when drafting Congressional legislation.¹³² Scholars generally first point out that Congress's drafting process is rooted in its system of committees.¹³³ "Congress is structurally divided into twenty-one standing committees in the House and sixteen in the Senate, plus eight other committees of special types (so-called 'special,' 'select,' and 'joint' committees)."¹³⁴ According to a recent survey of legislative drafters, these committees do not always regularly communicate with one another, especially on drafting issues.¹³⁵ These committees also vary in the way they draft and in how much they are focused on policy issues.¹³⁶

Drafting responsibility also falls to the Offices of Legislative Counsel; both the United States Senate and the United States House of

130. See, e.g., OFFICE OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL, *supra* note 10, at 33–34, 56–61.

131. See, e.g., Ard, *supra* note 7, at 185–87; Bressman & Gluck, *Part I*, *supra* note 4, at 905.

132. See Bressman & Gluck, *Part II*, *supra* note 12, at 747–52.

133. *Id.*

134. *Id.* at 749.

135. *Id.* at 738.

136. See *id.* at 750. Some committees use a more conceptual approach and do not debate or craft specific bill language. *Id.*

Representatives have their own Office of Legislative Counsel.¹³⁷ Like Arizona's Legislative Council, the Offices of Legislative Counsel are made up of non-partisan, professional drafters.¹³⁸ Use of the Offices of Legislative Counsel is not mandatory, however.¹³⁹ Any committee or individual staff member can request drafting help from their respective Office of Legislative Council.¹⁴⁰ The Offices of Legislative Council do not see every bill drafted and do not perform regular reviews, although they may "notify congressional staff if a provision of an existing law needs to be repealed or amended to effectuate the new law's purpose."¹⁴¹

Most notably, both the United States Senate and the United States House of Representatives Office of Legislative Counsel have their own drafting manuals.¹⁴² The United States House of Representatives Office of Legislative Counsel maintains a website that contains both a guide for before drafting and the HOLC Guide to Legislative Drafting.¹⁴³ The website even has a link for a four-page Quick Guide to Legislative Drafting.¹⁴⁴ The United States Senate Office of Legislative Counsel, however, does not include its current drafting processes or manual on its website.¹⁴⁵ The 1997 version of the Senate Legislative Drafting Guide is available on a third-party website.¹⁴⁶

In addition, different individual Congressional committees have their own practices and manuals since bill drafting can occur at the committee level too.¹⁴⁷ For example, the Appropriations Committee follows the GAO Redbook,¹⁴⁸ and the Commerce Committee follows its Guide for Preparation of Committee Reports.¹⁴⁹ Not all committees make their

137. Shobe, *supra* note 12, at 818.

138. *Id.*

139. *Id.* at 826.

140. *Id.*

141. *Id.* at 827.

142. *See, e.g.*, OFFICE OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL, *supra* note 10.

143. OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE REPS., <http://legcounsel.house.gov/> (last visited June 18, 2015).

144. *Id.*

145. *Responsibilities of the Legislative Drafter*, OFFICE OF THE LEGISLATIVE COUNSEL, U.S. SENATE, <http://www.sl.c.senate.gov/Drafting/drafting.htm> (last visited June 18, 2015).

146. Office of the Legislative Counsel, U.S. Senate, *Legislative Drafting Manual*, LAW.YALE.EDU, [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf) (last visited June 18, 2015).

147. *See* Bressman & Gluck, *Part II*, *supra* note 12, at 747–52.

148. *Id.* at 750.

149. *Id.*

manuals and checklists public, though,¹⁵⁰ and individual legislators are free to consult any source; one can never know exactly what documents an individual legislator consults.¹⁵¹

This variation in federal drafting procedures and manuals poses two basic problems for courts. First, it is not clear what manuals or other sources a federal legislative drafter actually consults when drafting. Second, not all of these drafting manuals are readily available to the public or to the courts.

Even more alarming is that these different drafting manuals are not identical in scope and may even have some potential conflicting advice. Most notably, the Senate's Legislative Drafting Manual notes one canon of construction against surplus words, while the House Manual does not seem to reference any canons of construction by name.¹⁵² The House Manual also specifically encourages the use of dictionary definitions and tells drafters to consult other sources, such as the Legislative Counsel head's treatise, which does contain information on canons of construction.¹⁵³ Compounding this problem of multiple manuals is the problem that neither Office of Legislative Counsel regularly reviews every statute.¹⁵⁴

It should come as no surprise, then, the federal legislative drafting manuals are not cited often. As of 2013, the United States Supreme Court cited the GAO Redbook four times, while the federal appellate courts cited it twenty times.¹⁵⁵ Similarly, the United States Supreme Court cited the various Legislative Counsel's drafting manuals just three times, while the federal appellate courts cited them six times.¹⁵⁶

In 2009, Justice Alito mentioned both the Senate *Legislative Drafting Guide* and the HOLC *Guide to Legislative Drafting* during oral argument in *Carr v. United States*.¹⁵⁷ Specifically, Justice Alito stated there was a universal practice for drafting statutes in the present tense, as required in both drafting manuals, and he noted that a drafter will "[a]lways use the present tense unless the provision addresses only the past, the future or a sequence of events that requires a different tense."¹⁵⁸ He then questioned

150. See Ard, *supra* note 7, at 198.

151. See Bressman & Gluck, *Part II, supra* note 12, at 752.

152. *Id.* at 751.

153. *Id.*

154. *Id.* at 752.

155. *Id.* at 751.

156. *Id.*

157. Transcript of Oral Argument at 4, *Carr v. United States*, 560 U.S. 438 (2010) (No. 08-1301), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1301.pdf (last visited June 18, 2015).

158. *Id.*

whether this convention would limit the scope of the Sex Offender Registration and Notification Act of 2006 to post-enactment conduct or whether the present tense language could also apply to past conduct, as the convention itself suggests.¹⁵⁹ The language of the Act in question requires a person to “travel[] in interstate or foreign commerce” as part of the requirements for conviction under the Act.¹⁶⁰ The issue centered on whether interstate travel prior to the passage of the Act would meet this requirement.¹⁶¹

The majority opinion answered this issue with a resounding “no,” ignored the drafting convention, and found that the present tense language meant the statute would apply to post-enactment conduct only.¹⁶² Justice Alito penned the dissent, specifically noting that the majority’s opinion could not stand against both the convention to draft statutes in the present tense and the convention “that a law should *not* be read to speak of the date of enactment” but instead “as of any day on which it is read.”¹⁶³ In making these arguments, he cited Congress’s drafting manuals four times¹⁶⁴ and even cited various states’ legislative drafting manuals to support his argument.¹⁶⁵

This case is similar to how the Arizona Supreme Court divided on its treatment of the *Arizona Manual* in *Estate of Braden*, even though the Arizona Legislature has a different drafting procedure than Congress.

B. . . . And Why the Arizona Legislative Bill Drafting Manual is an Exception

Because of the tension between what legislators rely on while drafting and what the Court looks at while interpreting statutes as evidenced in *Estate of Braden*, the Court is in a unique position to weigh in on how to resolve this tension. At the very least, the Court can promote a conversation between the legislative and judicial branches so that they are on the same page about drafting conventions.¹⁶⁶

159. *Id.* at 4–5.

160. *See Carr*, 560 U.S. at 445 (quoting 18 U.S.C. § 2250(a)(2)(B) (2006)).

161. *Id.* at 444.

162. *Id.* at 449.

163. *Id.* at 463 (Alito, J., dissenting).

164. *Id.* at 463–64.

165. *Id.* Specifically, he cited to Colorado, Hawaii, Kentucky, Maine, Massachusetts, New Mexico, Ohio, Texas, and West Virginia.

166. One way to start this dialogue is with a special task force or even some type of continuing legal education event where interested parties could discuss the issue.

The *Arizona Manual* is not subject to the same pitfalls that raise questions about the consistency and reliability of the federal legislative drafting procedures and manuals. Most importantly, the Arizona Legislative Council is responsible for all legislative drafting in Arizona,¹⁶⁷ and there is only one state drafting manual for the Court to reference.¹⁶⁸ The Court should not be confused about what the Arizona legislative drafters use while drafting because both the drafting process and necessary drafting documents are posted on the Arizona Legislative Council's website.¹⁶⁹ The website even explains which of the twelve specific Arizona Legislative Council staff members is in charge of drafting which specific legislation by subject area.¹⁷⁰

Although it is always possible that an individual staff member could secretly rely on a different style manual, this concern should not outweigh the value of using the *Arizona Manual* as an interpretation tool. First, the *Arizona Manual* is deliberate in using the imperative voice and calling itself a set of "instructions."¹⁷¹ By its own terms, a legislative drafter must follow the rules in the *Arizona Manual* unless the specific circumstances require otherwise.¹⁷² The *Arizona Manual* itself notes that drafting is not a perfect process and cannot be embodied in one set of guidelines, although the drafter should start with the manual.¹⁷³ To this end, it provides over eighty pages of specific examples and even includes smaller examples in the various individual instructions.¹⁷⁴ Second, the Arizona Legislative Council is in charge of reviewing all laws and making clerical corrections.¹⁷⁵ Thus, if a staff member somehow failed to follow the instructions in the *Arizona Manual*, the Arizona Legislative Council would likely catch any mistake and correct it during a review, just as it did with the statute at question in *Estate of Braden*.¹⁷⁶

In addition, the *Arizona Manual* is publicly available and easy to navigate. Not only is the current 2015–2016 *Arizona Manual* available on

167. ARIZONA LEGISLATIVE COUNCIL, *supra* note 19, at 34.

168. ARIZONA MANUAL, *supra* note 8.

169. *See Publications*, ARIZONA LEGISLATIVE COUNCIL, *supra* note 27.

170. *Id.*

171. ARIZONA MANUAL, *supra* note 8, at 72–73.

172. *See id.* at 1.

173. *Id.*

174. *Id.* at 27–71, 111–51.

175. *Responsibilities of the Council*, ARIZONA LEGISLATIVE COUNCIL, *supra* note 25.

176. *See Estate of Braden ex. rel. Gabaldon v. Arizona*, 266 P.3d 349, 356 (Bales, J., dissenting).

the Arizona Legislative Council's website,¹⁷⁷ but the 1998–2014 manuals are available on the Arizona Memory Project website.¹⁷⁸ Each manual is organized by chapters and has a table of contents for easy navigation.¹⁷⁹ Arizona courts—and even the general public who also have an interest in the meaning of statutes—would not have any trouble locating relevant drafting instructions or samples.

Recognizing the *Arizona Manual* as an important statutory interpretation tool also makes sense when viewed in light of the Court's recognition of various dictionaries as helpful in interpreting statutory language. Although some scholars disagree about the use of dictionaries as interpretive tools because of the ability for a court to cherry-pick the dictionary definition that best serves the intended result,¹⁸⁰ the United States Supreme Court frequently resorts to the use of dictionaries, especially recently.¹⁸¹ From 2000–2010, the United States Supreme Court used dictionaries in 225 opinions, as opposed to just sixteen uses in the 1960s.¹⁸² The Arizona Supreme Court is no exception.¹⁸³

In 2014, the Arizona Supreme Court sought to interpret the word “obligation” in Arizona Revised Statutes section 44–1201.¹⁸⁴ Because the word was not defined in the statute, the Court first looked to both *Black's Law Dictionary* and *Webster's II New College Dictionary* to find the ordinary meaning of the word.¹⁸⁵ The Court then noted that the word was ambiguous because it had several meanings that were all plausible in the statute.¹⁸⁶ Thus, the Court applied *ejusdem generis* to determine that “obligation” should be limited to things similar to “loan” and “indebtedness,” the two words preceding the word “obligation.”¹⁸⁷ The Court was unanimous in its decision; there was no dissent.¹⁸⁸

177. ARIZONA MANUAL, *supra* note 8.

178. *Arizona Memory Project*, ARIZONA STATE LIBRARIES, <http://azmemory.azlibrary.gov/cdm/> (last visited April 15, 2015).

179. *See id.*; ARIZONA MANUAL, *supra* note 8, at 2, 5, 18, 26, 71, 99, 108, 146, 148, 149, 150.

180. *See, e.g.*, Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary when Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 402, 417 (2003) (“[T]he Court turns to a dictionary (or several dictionaries) to verify that a common English word can have a meaning that the Court chooses to assign it.”).

181. *See, e.g.*, Bressman & Gluck, *Part I*, *supra* note 4, at 938.

182. *See id.*

183. *See Metzler v. BCI Coca-Cola Bottling Co., Inc.*, 329 P.3d 1043, 1047 (2014).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1047–48.

188. *Id.* at 1049.

Interestingly, this case involved a statutory list of terms¹⁸⁹ similar to the statutory list in *Estate of Braden*, and the Arizona Supreme Court even cited *Estate of Braden* for its application of the textual canon *ejusdem generis*.¹⁹⁰ The Court did not revisit the punctuation arguments from *Estate of Braden*, however, even though those arguments could have applied to this statute as well.¹⁹¹ Thus, by its silence on the issue, the Arizona Supreme Court endorsed its position that the absence of a serial comma *does* make a difference in statutory interpretation. Without a serial comma before the last word in a series, the last word cannot be interpreted as a catch-all term. Thus, in a sense, the Arizona Supreme Court continues to give no weight to the *Arizona Manual*, at least on the use of a serial comma. Interestingly, the Arizona Legislature has also remained consistent on its instruction to avoid using the serial comma unless the material is complex. Although the Court made it clear in 2011 that it was not following the *Arizona Manual* on this punctuation rule, the Arizona Legislative Council has published at least three manuals since 2011 without altering its rule.¹⁹²

Thus, the Court should take the opportunity to address this inconsistency and make a statement about how Arizona courts should use the *Arizona Manual*.¹⁹³ By choosing to give interpretive weight to dictionaries but not the *Arizona Manual*, the Court is cherry-picking, in a sense, which types of textual aids it uses for interpreting language. The *Arizona Manual* is more technical and precise than a dictionary, plus its author is the legislative branch. It makes practical sense for the Court to treat the *Arizona Manual* at least on par with a commercial dictionary. This move would also make normative sense. By turning first to the *Arizona Manual* when interpreting a statute, the Court would legitimize the legislature's drafting role, especially in light of the more transparent drafting of modern statutes.¹⁹⁴ To be clear,

189. *See id.* at 1047 (interpreting the requirement that “[i]nterest on any loan, indebtedness or other obligation shall be at the rate of ten percent per annum . . .”).

190. *Id.*

191. *See id.* (“It is unclear from the text . . . whether, as the court of appeals concluded, the phrase ‘other obligation’ . . . should be construed broadly to include ‘prejudgment interest on unliquidated claims’ under Rule 68(g).”).

192. *See* ARIZONA MANUAL, *supra* note 8, at 84.

193. This statement may also be helpful to other state courts that may face similar issues with how to treat their legislatures' drafting manuals.

194. *See, e.g.,* Shobe, *supra* note 12, at 849–50 (noting that the overall quality and sophistication of Congressional legislative drafting has improved since the 1970s due, in part, to the increase in legislative counsel staff members and their expertise). *But cf.* Bressman & Gluck, *Part II*, *supra* note 12, at 747 (noting that the legislative counsel does not play a role in drafting every statute and that the office is subject to poor coordination and political deal-making that may trump the drafting advice they offer).

this article is not suggesting that the Court must always agree with an instruction set forth in the *Arizona Manual*. If the Court disagrees with a drafting instruction, though, it should at least reference the *Arizona Manual* and explain why it is not following that default instruction. This explanation would provide future legislative drafters and practitioners with the helpful information they need.

At the very least, the Court could start the conversation about how courts should treat the *Arizona Manual*.¹⁹⁵ Although this article takes no position on whether the Arizona Supreme Court's or the *Arizona Manual's* position on the use of the serial comma is correct,¹⁹⁶ it is an interesting and fruitful inquiry because: (1) it is important that the legislature understands how the courts interpret statutes, and (2) it is important that the courts understand how the legislature drafts the law. This understanding would avoid many future ambiguities in statutory interpretation and would provide a helpful feedback loop between the two government branches.¹⁹⁷

CONCLUSION

Given the availability of the *Arizona Manual* and the legislative drafters' reliance on its instructions, it makes sense for the Court to use the manual as a statutory interpretation tool. The *Arizona Manual* does not suffer from the shortcomings that have hampered the federal courts' reliance on the federal drafting manuals, and the Court would also be able to explain when it does not agree with the default instruction in the manual. In fact, at least one scholar has suggested that (legislative drafting) times are changing, and even the Congressional drafting procedures and manuals are becoming more transparent and reliable, which supports their usefulness as statutory interpretation tools.¹⁹⁸ Perhaps these changes will lead to further helpful

195. See *supra* note 166, which suggests this conversation does not have to be a formal opinion; it can consist of a task force or roundtable meeting.

196. A study of other states' drafting manuals and their rules on punctuation would be a good place to start this inquiry.

197. At least one scholar has suggested that courts are not interested in such a feedback loop because judges may be reluctant to give up any of their interpretation power. Bressman & Gluck, *Part II, supra* note 12, at 796–97. Specifically, many state legislatures have passed statutes that dictate interpretation rules, and state courts ignore them based on a separation of powers argument. See *id.* at 796. Drafting manuals, however, are generally more technical about format, grammar, and style; they do not dictate how courts should interpret language. Thus, courts should not be wary about losing interpretive powers when using a drafting manual as a statutory interpretation tool. If a court disagrees with a drafting instruction, the court is free to explain why that instruction is wrong.

198. Shobe, *supra* note 12, at 849–51.

work on statutory interpretation tools, such as a study on the various state's legislative drafting manuals and their best practices. Arizona courts are well-situated to be on the front-end of a best practices movement by specifically addressing how to treat the *Arizona Manual* in light of the tension created by *Estate of Braden*.