DISSENTS OF THE BERCH COURT: EMPIRICAL ANALYSIS OF UNANIMITY IN A STATE SUPREME COURT

Kevin M. Morrow[*]

> "My brief judicial experience has convinced me that the custom of filing long dissenting opinions is one 'more honored in the breach than in the observance.'"
>
> – Justice E. White[1]

INTRODUCTION

Rebecca White Berch took office as the forty-third Chief Justice of the Arizona Supreme Court on July 1, 2009.[2] She was the twenty-third person and the third woman to hold the office.[3] Justice Berch received her bachelor's degree in 1976, her law degree in 1979, and her master's degree in 1990, all from Arizona State University.[4] Berch began her career in private practice, later teaching legal writing at her alma mater, and served as State Solicitor General from 1991–1994.[5] She became First Assistant Attorney General in 1996 and served until her appointment to the Arizona Court of Appeals in 1998.[6] In 2002, Republican Governor Jane Dee Hull appointed Berch to the Arizona Supreme Court, where she remained until her retirement in 2014.[7]

[*] Member of the Arizona State Bar; J.D., Sandra Day O'Connor College of Law; B.S., Northern Arizona University. All opinions or mistakes are the author's alone. Special thanks to Professor Jessica Berch for her wisdom, advice, and guidance while researching this Article.

[1] Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 608 (1895) (White, J., dissenting), *overruled by* South Carolina v. Baker, 485 U.S. 505 (1988).

[2] *See Judicial History*, AZCOURTS.GOV, https://www.azcourts.gov/meetthejustices/Judicial-History (last visited Apr. 12, 2019).

[3] *See* Rebecca White Berch, *A History of the Arizona Courts*, 3 PHX. L. REV. 11, 40–42 (2010).

[4] *See Rebecca White Berch*, AZCOURTS.GOV, https://www.azcourts.gov/coa1/Former-Judges/REBECCA-WHITE-BERCH (last visited Apr. 12, 2019).

[5] *See* Judy Nichols, *Rebecca White Berch ('79) Elected Chief Justice of Arizona Supreme Court*, ARIZ. ST. U. (Mar. 30, 2009), https://asunow.asu.edu/content/rebecca-white-berch-79-elected-chief-justice-arizona-supreme-court; *Rebecca White Berch*, *supra* note 4.

[6] *See Rebecca White Berch*, *supra* note 4.

[7] *See* Michael Kiefer, *Brewer Fills Arizona Courts with Republican Judges*, ARIZ. REPUBLIC (Sept. 28, 2012), http://archive.azcentral.com/ic/pdf/brewer-judge-appointments.pdf (last visited Apr. 12, 2019); *Rebecca White Berch*, *supra* note 4.

During Berch's five-year tenure as chief justice,[8] the court issued 182 decisions; only six included a dissent.[9] In the same time period, the United States Supreme Court decided 409 cases, 205 of which had dissenting opinions,[10] a rate of dissent of 3.29% compared to 50.1% respectively.[11] For comparison, under Chief Justice Ruth McGregor, the court issued 153 decisions; 9 opinions were followed by a dissent, for a dissent rate of 5.8%. The first half of the current Bales court issued 101 decisions, with 15 opinions including a dissent, or 14.9%. The amount of dissenting opinions has therefore increased in the years since Bales replaced Berch as chief justice.

A significant goal of legal scholars is attempting to understand how judges reach their decisions.[12] In investigating the low rate of dissenting opinions under Chief Justice Berch, this Article examines the possible role of ideology in the split decisions, the subject-matter of the cases in question, and the relative importance of the divided opinions.

I. BACKGROUND AND COURT STRUCTURE

A court's formal structural arrangements have a strong influence on its rate of dissenting opinions.[13] Justices of the Arizona Supreme Court are appointed through a merit selection system, making them less likely to issue dissenting opinions.[14] Potential justices are screened and selected by a public committee and appointed by the

[8] *See AZ Supreme Court*, AZCOURTS.GOV, http://www.azcourts.gov/AZ-Supreme-Court (last visited Apr. 12, 2019) ("One justice is selected by fellow justices to serve as Chief Justice for a five year term.").

[9] An additional six decisions had concurrences. Statistics are calculated using information generated on the Arizona Supreme Court's website. *See Search Opinions/Memorandum Decisions*, AZCOURTS.GOV, https://www.azcourts.gov/opinions/Search-Opinions-Memo-Decs (last visited Apr. 24, 2019). Calculations are based on full or partial dissents.

[10] Measuring from Corcoran v. Levenhagen, 558 U.S. 1 (2009), decided October 20, 2009, to Williams v. Johnson, 573 U.S. 773 (2014), decided July 1, 2014, not counting *per curiam* opinions. All calculations completed by author.

[11] Although one study found that courts with more discretion experienced fewer unanimous decisions. *See* Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 789 (1981). This likely does not explain the discrepancy; for while the United States Supreme Court issues opinions in 1% of cases filed with the Court, the Arizona Supreme Court issues opinions in only 3% of cases.

[12] *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 941 (1995); *see, e.g.*, Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 993–995 (1993).

[13] *See* Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 59 (1990).

[14] *See* Joanna M. Shepherd, *The Politics of Judicial Opposition*, 166 J. INST. & THEORETICAL ECON. 88, 88, 90 (2010) (scholars conclude that judicial elections entail greater risk, and appeal to risk-acceptant judges, who are more likely dissent).

governor; they are then subject to a retention election every four years.[15]

In 2016, the Arizona Supreme Court increased from five to seven members.[16] While this increase would logically decrease the rate of unanimity,[17] the Arizona Supreme Court had one of the lightest workloads amongst all state high courts prior to its membership expansion[18] and issued more unanimous decisions than the average state supreme court.[19] The full impact of this change on the court's collegiality remains to be seen.[20] Since the membership expansion, the court has issued seventy-seven decisions; with seventeen opinions followed by a dissent, for a dissent rate of 22.1%.[21] While this is considerably more than the dissent rate in the Berch court, dissents were already on the rise before the court increased in size, with a pre-expansion dissent rate of 11.2%.[22] Therefore, the expansion of the court's membership is not the only explanation for the current decrease in unanimity.

Scholars have long considered unanimity a stronger institutional value within the Arizona Supreme Court compared to the United States Supreme Court.[23] However, the court did not always demonstrate the unanimity in its decisions like it did during the Berch court. Under Chief Justice Thomas Zlaket in the late 1990s, the court issued dissenting opinions in 19.3% of cases; and under Chief Justice Stanly Feldman in the early 1990s, justices dissented

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[15] *See Selection of Judges*, AZCOURTS.GOV, https://www.azcourts.gov/guidetoazcourts/Selection-of-Judges (last visited Apr. 13, 2019).

[16] *See* Yvonne Wingett Sanchez, *Gov. Doug Ducey Signs Legislation to Expand Arizona Supreme Court*, ARIZ. CENT. (May 18, 2016), https://www.azcentral.com/story/news/politics/arizona/2016/05/18/gov-doug-ducey-signs-legislation-expand-arizona-supreme-court/84544008/.

[17] *See* Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 129 (2011) ("A greater number of judges lowers the collegiality cost of dissenting, a lighter workload lowers the opportunity cost of dissenting.").

[18] *See* Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1335 (2009) (Arizona Supreme Court ranked 48th in terms of judicial productivity during the time period from 1998 to 2000).

[19] *See* Richard L. Vining Jr. & Teena Wilhelm, *Measuring Case Salience in State Courts of Last Resort*, 64 POL. RES. Q. 559, 567 (2011) ("Nearly 70 percent of all state supreme court decisions from 1995 to 1998 were unanimous without any separate opinions (including concurrences).").

[20] *See, e.g.*, Robert Robb, *Robb: Justice was Served in GPS Tracking Case . . . by Accident*, ARIZ. CENT. (Jan. 8, 2018) (describing heavily fractured case that resulted in four different opinions), https://www.azcentral.com/story/opinion/op-ed/robertrobb/2018/01/08/arizona-supreme-court-becomes-many-splintered-thing/1008348001.

[21] Calculation current as of December 31, 2018, and only includes cases with seven justices.

[22] The five-member Bales court issued 103 decisions with eleven dissents.

[23] *See* Paul Bender, *The Arizona Supreme Court: Its 1997-98 Decisions*, 30 ARIZ. ST. L.J. 875, 889 (1998).

in 16.8% of cases.[24] This trend peaked during the court's 1999–2000 term when 33% of cases featured a dissent.[25] The dissent rate then declined throughout the 2000s.[26] Figure 1 shows the dissent rate experienced by the last six chief justices calculated by dividing the total number of opinions issued during the chief justice's term and divided by the number of opinions that included a full or partial dissenting opinion.[27]

Figure 1: Court Term	Dissent Rate
Feldman (1992-97)	16.80%
Zlaket (1997-02)	19.30%
Jones (2002-05)	20%
McGregor (2005-09)	5.80%
Berch (2009-14)	3%
Bales I (2014-17)	11.20%
Bales II (2017-present)	22.10%

The court in the 1990s was called "dysfunction[al],"[28] and that the animosity between some justices created an "unpleasant working environment."[29] Under Chief Justice Zlaket (1999–2002), the court was criticized as a "very, very activist court."[30] Other issues during

[24] Calculations do not include withdrawn opinions, orders, amendments, supplements, or decisions without a published opinion.

[25] David Kader et al., *The Arizona Supreme Court: Its 1999-2000 Decisions*, 33 ARIZ. ST. L.J. 139, 146 (2001).

[26] Chief Justice Charles Jones served fewer than four years as chief justice, from 2002 to 2005. During this time, the court experienced a 20% dissent rate; however, most of these dissents are duplicates of Chief Justice Jones's dissents in the numerous '*Ring*' cases. *See* State v. Ring, 76 P.3d 421, 423–24 (Ariz. 2003) (Jones, C.J., dissenting); *see also* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires a jury, not a judge, to find the aggravating factors necessary for the death penalty).

[27] Outside the scope of this Article is whether gender affects the cordiality of a state supreme court. *See generally* Charles C. Turner, *Gender, Judging, and the Decision to Concur: Female Justices and the Supreme Court* 1 (Apr. 2015), https://wpsa.research.pdx.edu/papers/docs/TurnerWPSA15.pdf (discussing the role of gender in judicial decision making).

[28] Robb, s*upra* note 20.

[29] Robert Robb, *Healthy Dissent Reviving on State Supreme Court*, ARIZ. CENT. (July 17, 2011), http://archive.azcentral.com/arizonarepublic/viewpoints/articles/2011/07/16/20110716robb071711-healthy-dissent.html.

[30] Howard Fischer, *Arizona Supreme Court Justice Thomas Zlaket Says He'll Retire*, ARIZ. DAILY SUN (Mar. 15 2002), http://azdailysun.com/arizona-supreme-court-justice-thomas-zlaket-says-he-ll-retire/article_1624baae-b13d-59e7-a0ff-bb5107027b81.html.

this time are attributed to Chief Justice Feldman's (1992–1997) repeated conflicts with Republican Governor Fife Symington.[31] Feldman, a Democrat, publicly opposed to legislation transferring juveniles to adult court and fought Symington's effort to dismantle Arizona's merit selection of judges.[32] Other issues include Chief Justice Feldman's fights with Justice Frederick Martone, a Symington appointee who often voted against Feldman.[33] Many of these cases feature acerbic remarks aimed at the opposing Justice.[34] After leaving the court, Justice Martone admitted that disputes sometimes got personal between himself and Chief Justice Feldman.[35]

II. IDEOLOGY OF THE ARIZONA SUPREME COURT

Ideological diversity on a court increases the likelihood of dissenting opinions,[36] and political ideology can impact judicial decision-making even on otherwise collegial courts.[37] While dissenting opinions of the Berch court were rare, they likely represent cases of particularly polarizing issues in order to cause a breakdown in the typical cordial unanimity and provide an opportunity to analyze the "liberal" and "conservative" leanings of the court by looking at decisions with a clear partisan breakdown into either a "liberal" or "conservative" majority.

Determining what constitutes a "liberal" or a "conservative" majority decision requires a method to measure judicial ideology. One measure would be the political party registration of the justices, while another might by the ideology of the appointing governor.[38] Professors Bonica and Woodruff attempted to determine the partisan

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[31] *See* Jodi Weisberg, *Courtside Seat: Justice Feldman Steps Down*, 39 ARIZ. ATT'Y 14, 16 (2003).

[32] *Id.*

[33] James S. Todd, *Stanley G. Feldman: What One Lawyer Can Do*, 66 ALB. L. REV. 583, 586 (2003).

[34] *See, e.g.*, Forest Guardians v. Wells, 34 P.3d 364, 372 (Ariz. 2001) ("[Justice Martone] attempts to make a federal case out of a plain question of fiduciary duty."); Florez v. Sargeant, 917 P.2d 250, 262, 267 (Ariz. 1996) (Feldman, C.J., dissenting) ("[Justice Martone] clearly ignores the detailed and voluminous reports attached to the affidavits, . . . [and he] needs to follow one legal test or the other."); State v. McKinney, 917 P.2d 1214, 1234 (Ariz. 1996) (Martone, J., dissenting in part) ("[U]nlike the majority, I believe that murder is a crime of violence.").

[35] Amy Silverman, *Judging Stanley*, PHX. NEW TIMES (Jan. 23, 2003), https://www.phoenixnewtimes.com/news/judging-stanley-6409599.

[36] *See* Epstein et al., *supra* note 17, at 134.

[37] Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399, 1408 (2009).

[38] *See* Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J. L. ECON. & ORG. 472, 477–78 (2014).

ideology of state supreme court justices using a scoring system where a number above zero indicated a more conservative-leaning justice, while scores below zero indicated a more liberal-leaning justice.[39] Their methodology examined justice's recorded campaign finance behavior or the score of their appointer when data was unavailable.[40] There have been few attempts by other researchers to determine whether Bonica and Woodruff's ideological measure is reflected in judicial decision making.[41]

The ideological scores for the Arizona Supreme Court justices predictably followed the partisan registration of the justices and their appointing governors.[42] The resulting scores for the justices are: Scott Bales (-.93), Andrew Hurwitz (-.61), Ruth McGregor (-.15), Rebecca Berch (.24), Michael Ryan (.74), John Pelander (.75), and Robert Brutinel (1.04).[43] Justice Ann Timmer was not appointed at the time of the study; however, for justices who lacked sufficient campaign finance data, the score of the appointing governor was

[39] *See id.* at 473, 476–77, 479 tbl.1, 481 fig.2; Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 369 (2014).

[40] *See* Bonica & Woodruff, *supra* note 38, at 477–78. Bonica & Woodruff's research is not without controversy. In 2014, Bonica and two other professors mailed 100,000 fliers to Montana voters, purporting to be a "Voter Information Guide," and showing what the researches described as the partisan ideology scores of candidates for two seats on the Montana Supreme Court. However, this action violated multiple state election laws and resulted in a formal complaint against their universities. *See* McCulloch v. Stanford and Dartmouth, No. COPP 2014-CFP–046 at 3, 5, 8 n.15, 21 (Comm'r of Political Practice of the State of Mont. May 11, 2015), https://politicalpractices.mt.gov/Portals/144/2recentdecisions/McCullochvStanfordandDartmouthFinalDecision.pdf ("The Commissioner determines that there are sufficient facts to show that . . . [the] researchers violated Montana campaign practice laws."). Stanford University sent apology letters to the 100,000 households that received the mailers, at the cost of $51,343. Charles S. Johnson, *Montana: Stanford, Dartmouth Mailers Broke Campaign Laws*, BILLINGS GAZETTE (May 12, 2015), http://billingsgazette.com/news/government-and-politics/montana-stanford-dartmouth-mailers-broke-campaign-laws/article_4367465d-6899-5dee-9020-0c628e979150.html. Stanford and Dartmouth eventually settled the case and paid fines of $13,599 to Montana. *See* Settlement Agreement at 2, McCulloch v. Stanford and Dartmouth, No. COPP 2014-CFP–046 (Comm'r of Political Practice of the State of Mont. May 11, 2015), http://politicalpractices.mt.gov/Portals/144/2recentdecisions/McCullochvStanfordanddDartmouthSettlement.pdf.

[41] *See, e.g.*, Thomas Gray, *Criminal Law—An Empirical Assessment of Massachusetts Supreme Judicial Court Decision-Making on Criminal Law from 1995 to 2014*, 38 W. NEW ENG. L. REV. 285, 300 n.48 (2016); *see also* Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 850 (2017) (citing Bonica's judicial methodology).

[42] *See* Howard Fischer, *Brewer Appoints Republican Timmer to Arizona Supreme Court*, E. VALLEY TRIB. (Oct. 15, 2012), http://www.eastvalleytribune.com/arizona/brewer-appoints-republican-timmer-to-arizona-supreme-court/article_7970042c-16f5-11e2-ade9-0019bb2963f4.html; Kiefer, *supra* note 7.

[43] *See* Adam Bonica, Stanford University: Department of Political Science, https://web.stanford.edu/~bonica/ (last visited Apr. 13, 2019) (follow "A Common-Space Measure of State Supreme Court Ideology: Replication Materials" hyperlink).

substituted.[44] Timmer therefore would receive a score of .751.[45] The ideological scores align with the justices' voter registration as Justices Bales, Hurwitz, and McGregor are registered Democrats while Justices Berch, Ryan, Pelander, Brutinel, and Timmer are registered Republicans.[46] Under this score structure, McGregor is identified as the most moderate justice and is the only member of the court to be appointed by a governor from the opposing political party.[47]

Bonica and Woodruff's assessment of the Arizona Supreme Court appears consistent with the justices' general voting behavior, with one exception. Justice Ryan never authored nor joined a dissenting opinion during his career on the court and in some cases, he served as a swing vote with more "liberal" justices against his "conservative" colleagues.[48] This behavior suggests that Justice Ryan maintained a more moderate position on the court than represented by his ideological score. For comparison, Justice Kennedy, widely considered the most moderate justice on the United States Supreme Court, also authors the fewest dissenting opinions.[49]

Although the Arizona Supreme Court produces few dissenting opinions for examination,[50] these cases can reveal the views of an individual judge. Judges' decisions to take sides on important issues often reveal ideological or personal motivations that influence their voting.[51] Dissenting judges do not need to compromise on their views and can instead fall back on their ideological perspectives. Although called "as nonpolitical as the courts can be,"[52] during the Berch court, a clear partisan clash can be seen each time the court narrowly decided a case 3-2; twice with a conservative majority and once with

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[44] See Adam Bonica & Michael Woodruff, *A Common Space Measure of State Supreme Court Ideology*, 31 J.L. ECON., & ORG. 472, 476, 478 (2014); Fischer, *supra* note 42.

[45] *See id.*

[46] *See* Fischer, *supra* note 42; Kiefer, *supra* note 7.

[47] *See* Kiefer, *supra* note 7.

[48] *See, e.g.*, Adams v. Comm'n. on Appellate Court Appointments, 254 P.3d 367, 376 (Ariz. 2011) (joining two liberal justices against two conservative justices to hold that a tribal judge may serve on the Independent Redistricting Commission); Lee v. State, 182 P.3d 1169, 1173 (Ariz. 2008) (joining two liberal justices against two moderates to hold in favor of a tort plaintiff); State v. Gomez, 127 P.3d 873, 879 (Ariz. 2006) (joining two liberal justices against two moderates to hold in favor of a criminal defendant).

[49] *See* Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1323 fig.2 (2011); *see also* Kenneth M. Murchison*, Four Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine*, 39 U. BALT. L. REV. 1, 5 (2009) (noting how Justice Kennedy's swing vote forms the majority).

[50] *See supra* text accompanying notes 9–12.

[51] *See* Shepherd, *supra* note 14, at 104–05.

[52] *See* Kiefer, *supra* note 7.

a liberal majority.[53] The other three decisions contained a single dissenter.[54]

III. ARE DISSENTING OPINIONS SALIENT?

Judicial decision-making behavior can be affected by characteristics such as the case facts, the litigants involved, or the subject-matter of the case at hand.[55] Among court cases, "it is clear that some are more important than others, to outside observers, to potential litigants, and to the justices themselves."[56] A case's relative notability, or salience, is one important trait that can affect judicial decisions.[57] Some scholars suggest that salient cases enhance the role of ideology and the pursuit of policy preferences.[58] This leads to the question of whether salient cases lead to less unanimity or whether the very nature of a dissenting opinion can make a case more salient. For comparison, at the United States Supreme Court, unanimity is less common in salient cases.[59]

A. Methodology

To determine if opinions followed by a dissent are considered relatively more important than unanimous decisions requires a metric to measure salience.[60] Early work on salience cited by professors Epstein and Segal included eight measures to test whether a United State Supreme Court decision is salient, including: (1) appears in a constitutional law book, (2) identified in *Congressional Quarterly*, (3) listed as a major decision in *The Supreme Court Compendium*, (4) substantial Supreme Court citations within five years of the decision date, (5) generated at least eight law review articles within two years of the decision date; (6) headlined on the

[53] *See* Ariz. Citizens Clean Elections Comm'n v. Brain, 322 P.3d 139, 139 (Ariz. 2014); Estate of Braden v. State, 266 P.3d 349, 349 (Ariz. 2011); *Adams*, 254 P.3d at 367.

[54] *See* State *ex rel.* Montgomery v. Harris, 346 P.3d 984, 990 (Ariz. 2014) (Timmer, J., dissenting); State v. Payne, 314 P.3d 1239, 1275 (Ariz. 2013) (Bales, V.C.J., concurring in part and dissenting in part); State v. Styers, 254 P.3d 1132, 1136 (Ariz. 2011) (Hurwitz, V.C.J., dissenting); State v. Regenold, 249 P.3d 337, 339 (Ariz. 2010) (Pelander, J., dissenting).

[55] *See* Vining & Wilhelm, *supra* note 19, at 559–60.

[56] Tom S. Clark et al., *Measuring the Political Salience of Supreme Court Cases*, 3 J.L. & CTS. 37, 37–38 (2015).

[57] *See* Todd A. Collins & Christopher A. Cooper, *Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure*, 65 POL. RES. Q. 396, 397 (2012).

[58] *See* Vining & Wilhelm, *supra* note 19, at 559, 566.

[59] *See id.* at 567.

[60] *See* David A. Lewis & Roger P. Rose, *Case Salience and the Attitudinal Model: An Analysis of Ordered and Unanimous Votes on the Rehnquist Court*, 35 JUST. SYS. J. 27, 36 (2014).

advance sheets of the *Lawyer's Edition*, (7) substantial amicus curiae participation, or (8) whether the opinion was the subject of a front-page story in the *New York Times* the day after the decision was published.[61] However, most of these measures are not transferable to state supreme court opinions.[62] State supreme court opinions do not appear in *Congressional Quarterly*, *The Supreme Court Compendium*, the *Lawyer's Edition*, or the front page of the *New York Times*.[63] Given the limited number of journals that publish cases on state supreme court opinions, eight law review articles within two years is impracticable.[64] The Arizona Supreme Court Clerk's Office does not maintain amicus brief filings or docket information for inactive cases online.[65] Both commercially available textbooks on Arizona constitutional law were published during the Berch court and therefore would not include all the published decisions.[66]

One substitute measure to determine whether a state court opinion is salient is if it appeared on the front page of "the state's most-circulated newspaper on the day immediately following the announcement of a ruling."[67] The most-circulated newspaper in Arizona is the *Arizona Republic*, based in the state capital, Phoenix.[68] A second substitute metric measures "the number of citations to a particular opinion."[69] "[T]he more citations [there are] to an opinion, the greater its influence is likely to be in shaping the law" and

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[61] *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 69 tbl.1, 72 (2000).

[62] *See* Vining & Wilhelm, *supra* note 19, at 562.

[63] The only *New York Times* article on an Arizona Supreme Court case during the Berch court was a 56-word, page 22, AP bulletin on marijuana possession. *See* Associated Press, *Arizona: Drug Ruling*, N.Y. TIMES (Sept. 8, 2009), https://www.nytimes.com/2009/09/09/us/09brfs-DRUGRULING_BRF.html.

[64] From 1998 until 2010, the *Arizona State Law Journal* published an annual review of Arizona Supreme Court decisions. *See* Benjamin D. Kreutzberg, *Introduction and Statistical Analysis: A Discussion of the Arizona Supreme Court's 2008–2009 Decisions*, 42 ARIZ. ST. L.J. 517, 517 (2010).

[65] *See* E-mail from Kevin Morrow to Supreme Court Clerk Mail (Feb. 17, 2018, 1:21 AM) (on file with author); E-mail from Supreme Court Clerk Mail to Kevin Morrow (Feb. 19, 2018, 5:23 PM) (on file with author).

[66] *See* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION (2d ed. 2013); TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION (2d ed. 2010); *Rebecca Berch*, U. DENVER, https://iaals.du.edu/profile/rebecca-berch (last visited Apr. 18, 2019).

[67] Vining & Wilhelm, *supra* note 19, at 562.

[68] *See Contacting Republic Media*, ARIZ. REPUBLIC, http://static.azcentral.com/help/contact/ (last visited Apr. 18, 2019); *Top 10 Arizona Daily Newspapers by Circulation*, AGILITY PR SOLUTIONS, https://www.agilitypr.com/resources/top-media-outlets/top-10-arizona-daily-newspapers-by-circulation/ (last updated Jan. 2, 2019).

[69] Scott DeVito, The Many Saliences of Justice Michael D. Ryan: A Comparative Empirical Analysis of Concepts of Salience as Applied in State Appellate Courts 27 (Jan. 19, 2017) (unpublished essay), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902463.

creating precedent.[70] Although an older case has more opportunity for citation, scholars note that citations to cases decline over time.[71]

This study will use the citations measure and the most-circulated newspaper measure to test whether cases that include dissenting opinions are more salient than those that do not. Utilizing these metrics gives the benefit of measuring contemporaneous salience (important at the time the opinion was published) and retrospective salience (important as seen through the lens of history).[72] Neither of these metrics is foolproof.[73] To avoid the quandary of determining the relative value of citations (say, quantifying a reference in an unpublished Ninth Circuit opinion versus a citation in the *Alaska Law Review*),[74] this study utilizes raw Westlaw citation numbers, treating all citations equally.[75] Newspaper-based metrics have their own issues, including competition for printed space against other news of the day and multiple opinions issued the same day.[76] Despite these drawbacks, the newspaper-based metric remains a popular method of determining case salience.[77]

B. Salient Cases of the Berch Court

Cases with dissenting opinions are not more likely to appear on the front page of the following day's *Arizona Republic*. However, they are more likely than unanimous decisions to receive any form of coverage in the next day's paper. Cases with dissenting opinions are cited less often than other cases of the Berch court.[78] The results reject the hypothesis that cases with dissenting opinions are more salient.

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[70] Epstein et al., *supra* note 17, at 126.

[71] *See* Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 327 (2013).

[72] *See* Epstein & Segal, *supra* note 61, at 67 (defining retrospective and contemporaneous salience).

[73] *See id.* at 68, 75.

[74] *Cf.* Dennis Haines, *Rolling Back the Top on Chief Justice Burger's Opinion Assignment Desk*, 38 U. PITT. L. REV. 631, 641, 641 n.30 (1977) (concluding that a "noteworthy" opinion is the subject of eight or more law review notes).

[75] *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976) ("Sometimes a case is not cited as a precedent.").

[76] Saul Brenner & Theodore S. Arrington, *Measuring Salience on the Supreme Court: A Research Note*, 43 JURIMETRICS 99, 103, 104 (2002).

[77] *See* Vining & Wilhelm, *supra* note 19, at 560 tbl.1 (identifying 22 studies utilizing the *New York Times* metric).

[78] *See* Kevin M. Morrow, Datasheet for Salient Cases of the Berch Court (Feb. 7, 2018) (unpublished) (on file with author).

1. Next-Day Most-Circulated Newspaper Metric

Few cases obtain salience through the newspaper metric. Only three cases during the Berch court were reported on the front page of the *Arizona Republic* on the day immediately following the opinion's release. None of them contained a dissenting opinion. Occasionally, the Arizona Supreme Court's denial of review makes the front page.[79] More common was an appearance on the front page of the "Valley and State" section of the newspaper.[80] Only 24 cases received next-day coverage on any page of the *Arizona Republic*;[81] two of these cases included a dissenting opinion.

The first case on the front page was the highly controversial *CityNorth* case.[82] There, the court upheld tax incentives so a commercial development could proceed even though the deal appeared to violate the state constitution.[83] The court allowed the deal, but established stricter provisions for tax incentives.[84] The second case involved public pension plans.[85] In *Fields v. Elected Officials' Retirement Plan*, the court held that $375 million in cost-of-living raises to retired judges and elected officials must be restored.[86] The third and final case involved school funding.[87] In *Cave Creek Unified School District v. Ducey*,[88] the court ruled the state must pay $250 million in inflation funding to the K-12 system.[89] All of these cases were decided unanimously.[90]

Of the six cases with a dissent, two received next-day news

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[79] *See, e.g.*, Mary K. Reinhart, *Ariz. High Court Lets AHCCCS Cuts Stand*, ARIZ. REPUBLIC, Feb. 16, 2012, at A1.

[80] *See* Gary Nelson, *Tattoos Win Free-Speech Status*, ARIZ. REPUBLIC, Sept. 8, 2012, at B1; Mary Jo Pitzl, *Redistricting in Spotlight*, ARIZ. REPUBLIC, July 9, 2011, at B1; Mary K. Reinhart, *High Court Outlines Its Legal Rationale*, ARIZ. REPUBLIC, Nov. 15, 2011, at B1; Jim Walsh, *Ariz. Supreme Court Rules Electronic Data Is Public Record*, ARIZ. REPUBLIC, Oct. 30, 2009, at 1.

[81] *See* Morrow, *supra* note 78.

[82] *See* Michael Clancy, *Justices Allow CityNorth Tax Deal to Stand*, ARIZ. REPUBLIC, Jan. 26, 2010, at A1.

[83] *See* Turken v. Gordon, 224 P.3d 158, 160 (Ariz. 2010) (en banc); Clancy, *supra* note 82.

[84] *See Turken*, 224 P.3d at 160; Clancy, *supra* note 82.

[85] *See* Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160, 1162 (Ariz. 2014); Craig Harris, *State Cuts to Pension Raises Are Tossed Out*, ARIZ. REPUBLIC, Feb. 21, 2014, at A1.

[86] *See Fields*, 320 P.3d at 1163, 1167–68; Craig Harris, *Court's Pension Ruling Could Cost Arizona Taxpayers Millions*, ARIZ. REPUBLIC (Feb. 20, 2014), https://www.azcentral.com/story/news/local/arizona-investigations/2016/11/14/arizona-supreme-court-ruling-public-safety-pension-trust-refunds/93805222/.

[87] Mary Jo Pitzl, *Schools Win Key Funding Decision*, ARIZ. REPUBLIC, Sept. 27, 2013, at A1.

[88] Cave Creek Unified Sch. Dist. v. Ducey, 308 P.3d 1152 (Ariz. 2013).

[89] *See id.* at 1154, 1158–59, Pitzl, *supra* note 87.

[90] *See Fields*, 320 P.3d at 1168; *Cave Creek*, 308 P.3d at 1159; Turken v. Gordon, 224 P.3d 158, 160 (Ariz. 2010) (en banc).

coverage.[91] One of the four other cases, the elections case *Arizona Citizens Clean Elections Commission v. Brain*, was released on the same day as the landmark United States Supreme Court elections case *McCutcheon v. Federal Election Commission*,[92] which became the lead story in the following day's newspaper.[93] In general, elections cases often receive early attention in the newspaper, where the initial results are reported on the front page, while the formal opinion released after the election receives little to no attention.[94] Criminal cases during the Berch court did not receive newspaper coverage, except death penalty cases, which were all decided unanimously.[95] None of these made the front page and supports the theory that death penalty cases are not necessarily salient.[96]

Using the newspaper metric, case salience for the Berch court era is 1.66%, compared to the 1.46% percent of salient cases nationally in the Vining and Wilhelm study of state supreme court cases from 1995–1998 (which found 0% of Arizona cases salient).[97] However, when examining total next-day news coverage, case salience rises to 13.2% for all Berch court cases and 33.3% for cases with dissenting opinions, suggesting that dissenting opinions are more likely to receive some press coverage, although not necessarily front-page coverage.[98]

2. Westlaw Citations Metric

A comparison of Westlaw citations between cases with dissenting opinions and those without did not conclude that divided opinions are

[91] *See* Yvonne Wingett Sanchez, *Pot Metabolite Can't Be Basis of DUI*, ARIZ. REPUBLIC, Apr. 23, 2014, at A10; Pitzl, *supra* note 80.

[92] McCutcheon v. Fed. Elections Comm'n, 527 U.S. 185 (2014).

[93] *See* Mary Jo. Pitzl, *Court: No Cap on Campaign Donations*, ARIZ. REPUBLIC, Apr. 3, 2014, at A1.

[94] See *Save Our Vote, Opposing C-03-2012 v. Bennett*, 291 P.3d 342 (Ariz. 2013), and Mary Jo Pitzl, *Top-Two Primary to Be on Fall Ballot*, ARIZ. REPUBLIC, Sept. 7, 2012, at A1, for an example where the newspaper reported the case on the front page in its early stages in 2012, but it did not continue to report the results of the case on the front page when the opinion was published in 2013.

[95] *See* State v. Naranjo, 321 P.3d 398, 403, 415 (Ariz. 2014); State v. Forde, 315 P.3d 1200, 1209, 1234 (Ariz. 2014); State v. Miller, 316 P.3d 1219, 1224, 1234–35 (Ariz. 2013); State v. Glassel, 312 P.3d 1119, 1119, 1121 (Ariz. 2013); State v. Grell, 291 P.3d 350, 351, 357 (Ariz. 2013) (en banc); State v. Hausner, 280 P.3d 604, 611, 632 (Ariz. 2012) (en banc); State v. Dixon, 250 P.3d 1174, 1177, 1185 (Ariz. 2011) (en banc); State v. Lynch, 234 P.3d 595, 600, 611 (Ariz. 2010) (en banc); State v. Gunches, 234 P.3d 590, 591, 595 (Ariz. 2010) (en banc); Morrow, *supra* note 78.

[96] *See* Vining & Wilhelm, *supra* note 19, at 564, 568; Morrow, *supra* note 78.

[97] *See* Vining & Wilhelm, *supra* note 19, at 563–64; Morrow, *supra* note 78.

[98] *See* Morrow, *supra* note 78.

more salient. The marijuana DUI case, *Montgomery v. Harris*, received the most citations of all cases with a dissent at 126 citations compared to the average of 110 citations for all cases of the Berch court.[99] The average case that included a dissenting opinion received mere sixty-six citations, suggesting that dissenting cases are less frequently cited or referenced as precedent.[100] The three most cited cases of the Berch court were all decided unanimously and covered subjects such as a new standard for motions for acquittal in criminal cases,[101] the economic loss doctrine,[102] and protection of tattoos as free speech.[103]

Comparing the newspaper and citation metrics, there was no statistical significance between cases cited on the front page compared to any other page in the paper. Cases with front-page newspaper coverage received an average of 109 citations while cases with any newspaper coverage received an average of 119 citations, meaning that cases on the front page of the newspaper are cited less often then cases covered in the interior pages.[104] The most cited case that also received coverage in the next day's newspaper was the tattoo free speech case with 630 citations,[105] followed by a capital case involving a female murderer with only 296 citations.[106] This provides little evidence that newspaper editors are able to determine which cases will set the greatest precedent or attract future legal scholarly interest.

This is not to say that cases that received newspaper coverage are not salient, but their impact may not be measured by citations. For example*, Cave Creek Unified School Distict v. Ducey*, led to a ballot initiative to change school funding in Arizona, which narrowly passed in 2016.[107] A federal judge then found that the new funding proposal is unconstitutional under the state's Enabling Act.[108] Arizona then

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[99] *See id.*

[100] *See id.*

[101] *See* State v. West, 250 P.3d 1188, 1189 (Ariz. 2011) (en banc); Morrow, *supra* note 78 (1,052 citations).

[102] *See* Flagstaff Affordable Hous. L.P. v. Design All., Inc., 223 P.3d 664, 665 (Ariz. 2010) (en banc); Morrow, *supra* note 78 (690 citations).

[103] *See* Coleman v. City of Mesa, 284 P.3d 863, 866 (Ariz. 2012); Morrow, *supra* note 78 (630 citations).

[104] *See* Morrow, *supra* note 78.

[105] *See* Nelson, *supra* note 80; Morrow, *supra* note 78.

[106] *See* State v. Forde, 315 P.3d 1200, 1209 (Ariz. 2014); Morrow, *supra* note 78.

[107] *See* Alia Beard Rau & Rob O'Dell, *Prop. 123 Ekes Out a Win. Now What?*, ARIZ. REPUBLIC (May 19, 2016), https://www.azcentral.com/story/news/politics/arizona-education/2016/05/19/arizona-proposition-123-passes/84347312.

[108] *See* Pierce v. Ducey, No. CV-16-01538-PHX-NVW, 2018 U.S. Dist Lexis 49426, at *38, *56 (D. Ariz. Mar. 26, 2018) (reaching its decision without citing *Cave Creek Unified Sch. Dist.*

received the required congressional approval for the funding change, but questions remain if the approval is retroactive, leaving $344 million disputed.[109] All of which resulted from a case with a below average number of citations, but front-page newspaper coverage.

IV. THE DISSENTING OPINIONS

The six decisions of the Berch court with dissenting opinions included two criminal cases and four civil cases.[110] Arizona was a party in every case.[111] The United States Supreme Court denied certiorari in one case.[112] Justice Pelander authored one dissent and joined one;[113] Justice Bales authored two dissents;[114] Justice Timmer authored one;[115] Justice Hurwitz authored one and joined one;[116] Chief Justice Berch joined one;[117] and Justice Brutinel authored one.[118] Two decisions consisted of a "conservative majority," while one case constituted a "liberal majority."[119]

A. State v. Regenold

A sentence imposed after a contested probation revocation is not entered "pursuant to a plea agreement."[120] In *State v. Regenold*, Christopher Regenold pled guilty to one count of luring a minor for sexual exploitation with a sentencing recommendation of five to

v. Ducey).

[109] *See* Ryan Randazzo, *DeWit: Arizona Education Funding Plan a 'Burning, Heaping Mess' After Judge's Ruling*, ARIZ. REPUBLIC (Mar. 27, 2018), https://www.azcentral.com/story/news/politics/arizona-education/2018/03/27/dewit-takes-parting-shot-ducey-prop-123-before-leaving-arizona/462470002.

[110] *See* State *ex rel*. Montgomery v. Harris, 346 P.3d 984, 985 (Ariz. 2014); Ariz. Citizens Clean Elections Commn. v. Brain, 322 P.3d 139, 140 (Ariz. 2014); Estate of Braden v. State, 266 P.3d 349, 350 (Ariz. 2011) (en banc); Adams v. Comm'n on Appellate Court Appointments, 254 P.3d 367, 369 (Ariz. 2011) (en banc); State v. Styers, 254 P.3d 1132, 1133 (Ariz. 2011); State v. Regenold, 249 P.3d 337, 337 (Ariz. 2010) (en banc).

[111] *See Harris*, 346 P.3d 984; *Brain*, 322 P.3d 139; *Estate of Braden*, 266 P.3d 349; *Adams*, 254 P.3d 367; *Styers*, 254 P.3d 1132; *Regenold*, 249 P.3d 337.

[112] *Styers*, 254 P.3d 1132, *cert. denied*, 565 U.S. 994 (2011).

[113] *See Adams*, 254 P.3d at 379 (Bruitnel, J., dissenting in part); *Regenold*, 249 P.3d at 339 (Pelander, J., dissenting).

[114] *See Brain*, 322 P.3d at 145 (Bales, V.C.J., dissenting); *Estate of Braden*, 266 P.3d at 354 (Bales, J., dissenting).

[115] *See Harris*, 346 P.3d at 990 (Timmer, J., dissenting).

[116] *See Estate of Braden*, 266 P.3d at 358 (Bales, J., dissenting); *Styers*, 254 P.3d at 1136 (Hurwitz, V.C.J., dissenting).

[117] *See Brain*, 322 P.3d at 145 (Bales, V.C.J., dissenting).

[118] *See Adams*, 254 P.3d at 376 (Brutinel, J., dissenting in part).

[119] *See Brain*, 322 P.3d at 145 (Bales, V.C.J., dissenting); *Estate of Braden*, 266 P.3d at 354, 358 (Bales, J., dissenting); *Adams*, 254 P.3d at 376, 379 (Brutinel, J., dissenting in part).

[120] *See* State v. Regenold, 249 P.3d 337, 338 (Ariz. 2010) (en banc).

fifteen years.[121] The judge suspended imposition of the sentence and placed Regenold on lifetime probation.[122] A year later, the State revoked Regenold's probation, and a judge sentenced him to six-and-one-half years in prison, Regenold appealed.[123] Arizona Revised Statutes ("ARS") section 13-4033(B) provides that a defendant "may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation."[124]

In a 4-1 opinion by Chief Justice Berch, a majority of the court held that a defendant who pleads guilty can appeal the sentence after an alleged probation violation.[125] The court reasoned that the statute only precludes an appeal from an "admitted [] probation violation."[126] The court further reasoned that a punishment imposed after a probation revocation would not exist but for the defendant's violation of probation.[127] Finally, the court identified strong policy reasons for allowing the appeal of the sentence: otherwise a defendant would be required to conduct parallel proceedings, namely, appealing the revocation or probation and filing a petition for post-conviction relief to contest the resulting sentence.[128]

Justice Pelander dissented, concluding that the more reasonable and logical interpretation of Section 13-4033(B) precludes Regenold's appeal because "he is appealing from a sentence 'entered pursuant to a plea agreement.'"[129] "Because the plea wholly controlled the court's sentence, the sentence was a direct (albeit deferred) consequence of the plea agreement."[130] Therefore, since the appeal challenged the sentence, and the sentence was controlled by the plea agreement, the appeal should be precluded by the plea agreement.[131] Finally, while Justice Pelander conceded the majority's policy concerns about parallel proceedings, he found it was unwarranted because Regenold did not challenge the revocation of probation in his appeal.[132]

In Justice Pelander's first dissenting opinion, he began a pattern of siding against criminal defendants.[133] However, the dissenting

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121 *See id.* at 337–38.
122 *See id.* at 338.
123 *See id.*
124 ARIZ. REV. STAT. ANN. § 13-4033(B) (2019).
125 *See Regenold*, 249 P.3d at 337.
126 *Id.* at 338.
127 *See id.*
128 *See id.* at 339.
129 *Id.* (Pelander, J., dissenting).
130 *Id.* at 340.
131 *See id.*
132 *See id.* at 341.
133 *See, e.g.*, State v. Havatone, 389 P.3d 1251, 1260 (2017) (Pelander, V.C.J., dissenting)

opinion aligns closer with the court's generally strong adherence to the text of the statute.[134] The voting pattern of the case also reflects the ideological breakdown of the justices with a liberal/moderate majority and the more conservative Pelander dissenting.[135] However, the case has a low citation count and did not receive next-day coverage in the *Arizona Republic*.[136]

B. State v. Styers

The 1989 murder of Christopher Milke created a hefty amount of case law.[137] James Styers, one of the accomplices to the murder, was sentenced to death in 1993.[138] Styers received partial habeas relief,[139] and the Ninth Circuit concluded that the Arizona Supreme Court violated Styers's constitutional rights by holding that his post traumatic stress disorder (PTSD) did not qualify as mitigating evidence.[140] The Ninth Circuit then "remand[ed] with instructions to grant the writ with respect to Styers's sentence unless the state, within a reasonable period of time, either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law."[141]

In a 4-1 opinion written by Chief Justice Berch, the Arizona Supreme Court reasoned that new rules of criminal procedure (like the rule announced in *Ring v. Arizona*)[142] only apply retroactively to non-final cases pending on direct review.[143] Direct review of Styers's case concluded when the United States Supreme Court denied certiorari in 1994.[144] After receiving the case back from the Ninth

(dissenting from the grant of a motion to suppress evidence of a DUI); State v. Holle, 379 P.3d 197, 198–99, 205–06 (Ariz. 2016), *cert. denied*, 137 S. Ct. 1446 (2017) (upholding a statute that may criminalize diaper changing in divided opinion authored by Justice Pelander).

[134] *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, 326 (2012).

[135] Justice Ryan was also in the majority. *See Regenold*, 249 P.3d at 339.

[136] *See* Morrow, *supra* note 78 (25 citations).

[137] *See* Milke v. Ryan, 711 F.3d 998, 1000–01 (9th Cir. 2013); Scott v. Schriro, 567 F.3d 573, 76–78 (9th Cir. 2009); State v. Milke, 865 P.2d 779, 781 (Ariz. 1993); State v. Scott, 865 P.2d 792, 794–95 (Ariz. 1993); Milke v. Mroz, 339 P.3d 659, 662 (Ariz. Ct. App. 2014).

[138] *See* State v. Styers, 865 P.2d 765, 769 (Ariz. 1993).

[139] *See* Styers v. Schriro, 547 F.3d 1026, 1035–36 (9th Cir. 2008).

[140] *See id.* at 1035.

[141] *Id.* at 1036.

[142] *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment requires a jury, not a judge, to find the aggravating factors necessary for the death penalty).

[143] *See* State v. Styers, 254 P.3d 1132, 1133 (Ariz. 2011) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)); *see also* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

[144] *See* Styers v. Arizona, 513 U.S 855, 855 (1994).

Circuit in 2011, the court reexamined Styers's case on independent review, not direct review.[145] Therefore, Styers's case was final when the *Ring* case was decided and did not apply retroactively. During its independent review, the court acknowledged Styers's PTSD as mitigating but gave it little weight and affirmed the death sentence.[146]

In his dissent, Justice Hurwitz emphasized that the Ninth Circuit's reversal ordered the writ to be granted, "unless the State corrected a purported 'constitutional error' committed during [the court's] direct review" of the case.[147] Justice Hurwitz reasoned that the "do-over [under] [t]he statute mandating independent review of death sentences[148] applies to direct review, not to post-conviction proceedings."[149] Because the court's independent review is a direct review of the death sentence, Hurwitz concluded that Styers should receive a new jury trial on aggravating factors.[150] Although Justices Bales and Hurwitz are both considered the most liberal justices on the Bonica and Woodruff score, they did not always vote in unison,[151] and Bales joined the majority opinion to affirm the death sentence.[152]

Afterwards, the Supreme Court denied certiorari,[153] and the Ninth Circuit maintained the decision on habeas review.[154] Habeas proceedings on the case continue.[155] A similar issue is pending in the case *McKinney v. Ryan*,[156] where the Ninth Circuit is again sending the case back to the Arizona Supreme Court to correct the constitutional error in a death sentence.[157] While *Styers* has few citing references and did not receive newspaper coverage, it is likely

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145 *See Styers*, 254 P.3d at 1133–34.

146 *See id.* at 1136.

147 *Id.* (Hurwitz, V.C.J., dissenting) (quoting Styers v. Schriro, 547 F.3d 1026, 1036 (9th Cir. 2008)).

148 *See* ARIZ. REV. STAT. ANN. § 13-755 (2019).

149 *Styers*, 254 P.3d at 1137 (Hurwitz, V.C.J., dissenting) (internal quotation marks omitted).

150 *See id.*

151 *See* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 348 (Ariz. 2008) (en banc) (Hurwitz, J., concurring in part and dissenting in part); *In re* King, 136 P.3d 878, 886 (Ariz. 2006) (en banc) (Hurwitz, J., dissenting); Bonica, *supra* note 43.

152 State v. Styers, 254 P.3d 1132, 1136 (Ariz. 2011).

153 Styers v. Arizona, 565 U.S. 994, 994 (2011).

154 Styers v. Ryan, 811 F.3d 292, 299 (9th Cir. 2015).

155 *See* Styers v. Ryan, No. CV-12-02332-PHX-JAT, 2017 U.S. Dist. LEXIS 135724, at *1–2 (D. Ariz. Aug. 24, 2017), *appeal filed*, No. 17-17356 (9th Cir. Nov. 21, 2017).

156 McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 39 (2016).

157 *See Ryan*, 813 F.3d at 827 ("We remand [to the Arizona Supreme Court] with instructions to grant the writ with respect to McKinney's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a lesser sentence consistent with law.").

that the case sets future precedent both for defining retroactivity,[158] and the use of PTSD as mitigation in death penalty cases.[159]

C. Adams v. Commission on Appellate Court Appointments

Arizona's Constitution provides for an Independent Redistricting Commission ("Commission") to draw boundaries for congressional and legislative elections.[160] The state constitution also provides that no one who holds "public office" may serve on the commission.[161] For the 2012 redistricting, two of the applicants for the commission reported that they served as directors for irrigation districts.[162] One of the applicants, former Dean of the Arizona State University College of Law, Paul Bender, served as a judge for two Indian tribes.[163] Members of the state legislature sued the commission to declare the three applicants ineligible because they held other public office.[164] Chief Justice Berch, who chaired the Commission on Appellate Court Appointments, was a defendant in the suit and recused herself.[165] Former Justice Ryan sat by designation.[166] The court unanimously concluded that irrigation district directors hold public office and therefore are disqualified from serving on the commission.[167]

In a 3-2 decision, Justice Bales, writing for the majority, held that the position of tribal judge is not a "public office" for purposes of the commission.[168] The majority reasoned that Arizona's laws "generally do not include tribes within the meaning of the word 'public.'"[169] Neither the court, nor counsel at oral argument, could identify any instance in Arizona law where the word "public" was interpreted to refer to Indian tribes.[170] The court found "no reason to

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158 *See* Justin F. Marceau, *Arizona's Ring Cycle*, 44 ARIZ. ST. L.J. 1061, 1073 n.61 (2012) ("[*Styers*] tested the boundaries of finality for purposes of retroactivity.").

159 *See Case Law Developments*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 721, 756 (2011).

160 *See* ARIZ. CONST. art. IV, pt. 2, § 1(3).

161 *Id.*

162 Adams v. Comm'n on Appellate Court Appointments, 254 P.3d 367, 370 (Ariz. 2011) (en banc); *see also* ARIZ. CONST. art. XIII, § 7 ("Irrigation districts are political subdivisions of the state.").

163 *Adams*, 254 P.3d at 370; *Paul Bender*, ARIZ. ST. UNIV., https://isearch.asu.edu/profile/274462 (last visited Apr. 20, 2019).

164 *Adams*, 254 P.3d at 370.

165 *Id.* at 367; Stephen Lemons, *Russell Pearce Sues in Bid to Rig Redistricting*, PHX. NEW TIMES (Dec. 30, 2010), http://www.phoenixnewtimes.com/content/printView/6503189.

166 *See Adams*, 254 P.3d at 376.

167 *Id.* at 371; *id.* at 376 (Brutinel, J., dissenting in part).

168 *Id.* at 376 (majority opinion); *id.* at 379 (Brutinel, J., dissenting in part).

169 *Id.* at 374 (majority opinion).

170 *Id.* at 375.

question . . . that Bender . . . could serve impartially and uphold public confidence in the integrity of the process."[171]

In their dissent, Justice Brutinel, joined by Justice Pelander, argued that a "straightforward reading" of the relevant constitutional provisions presented an "unambiguous intent to . . . curtail the influence of the politically entrenched and politically ambitious."[172] He reasoned that the "most logical reading of constitutional language affords a broad meaning to broad words unless expressly narrowed, not a narrow meaning unless expressly broadened."[173] Rather than looking at other Arizona statutes, the dissent wrote that "a perusal of legal and general dictionary definitions confirms that 'public office' includes the office of any government and is not limited to a specific type of sovereign."[174]

Although it has a low citation count, the case did receive next-day coverage in the *Arizona Republic*.[175] The case is another example of Justice Ryan providing a swing vote and siding with the court's more liberal justices. The case also supports a theory that Justices Brutinel and Pelander are less "receptive to arguments about borrowed or similar statutes."[176] Their dissent "declined to look at any other constitutional provision or statute," reasoning that "the provision was not ambiguous at all."[177]

There is speculation that the case resulted from a personal feud by state Senate President Russell Pearce against Bender,[178] and that Bender would be too liberal on the commission.[179] Controversy also derived from his career "in the Nixon administration . . . defending the First Amendment rights of pornographers."[180] The partisan divide in the court's opinion is also especially apparent with the court's most conservative justices opposing the appointment of a

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171 *Id.*

172 *Id.* at 376 (Brutinel, J., dissenting in part).

173 *Id.* at 378–79.

174 *Id.* at 377 (citing Brewer v. Burns, 213 P.3d 671, 676–77 (Ariz. 2009) (en banc)).

175 *See* Pitzl, *supra* note 80.

176 Norris, *supra* note 134, at 322.

177 *Id.* at 323.

178 *See* Stephen Lemons, *Russell Pearce Wants to Rig Redistricting (Surprise, Surprise)*, PHX. NEW TIMES (Dec. 28, 2010), http://www.phoenixnewtimes.com/news/russell-pearce-wants-to-rig-redistricting-surprise-surprise-6498897.

179 *See* Evan Wyloge, *Critics Say Partisan Fights Take New Shape in 'Independent' Redistricting*, ARIZ. CAPITAL TIMES (Mar. 15, 2011), https://azcapitoltimes.com/news/2011/03/15/critics-say-partisan-fight-takes-new-shape-in-independent-redistricting.

180 Mark B. Evans, *Sen. Schapira Picks Fourth Arizona Redistricting Commission Member*, TUCSON CITIZEN (Feb. 15, 2011), https://web.archive.org/web/20150331063423/http://tucsoncitizen.com/mark-evans/2011/02/15/sen-schapira-picks-fourth-arizona-redistricting-commission-member/.

liberal to the commission.[181] The independent position on the commission eventually went to Colleen Mathis, who was subsequently impeached the following year by the Arizona Senate, and soon after restored by a later Arizona Supreme Court decision.[182]

D. Estate of Braden v. State

For the want of an Oxford comma, Arizona is immune from suit over its services to developmentally disabled adults.[183] In *Estate of Braden v. State*, the court held that the Adult Protective Services Act ("APSA") does not subject the state to an action for damages in a wrongful death suit under that statute.[184] APSA provides for civil and criminal damages against those who harm vulnerable adults.[185] The statute allows for suits against persons or enterprises, with "enterprise" defined as "any corporation, partnership, association, labor union or other legal entity."[186] While the state is not a person, corporation, partnership, association, or labor union, "the state is thought of as a 'legal entity.'"[187] The legislature removed a comma from between "labor union" and "other legal entity" in 2009.[188]

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[181] *See* Adams v. Comm'n on Appellate Court Appointments, 254 P.3d 367, 379 (Ariz. 2011) (en banc) (Brutinel, J., dissenting in part); *cf.* United States. v. Leviton, 193 F.2d 848, 865 (2d Cir. 1951) (Frank, J., dissenting) ("[I]t is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant.").

[182] *See Commissioners*, ARIZ. INDEP. COMMISSION, https://www.azredistricting.org/About-IRC/Commissioners.asp (last visited Apr. 20, 2019); Alex Isenstadt, *Collen Mathis's Revenge*, POLITICO (Dec. 20, 2011), https://www.politico.com/blogs/david-catanese/2011/12/colleen-mathiss-revenge-108259. Then-Governor Jan Brewer and Secretary of State Ken Bennett, concerned that the proposed redistricting would favor Democrats, sent a letter to Mathis alleging "substantial neglect of duty [and] gross misconduct in office" and asked Mathis for her response. Ariz. Indep. Redistricting Comm'n. v. Brewer, 275 P.3d 1267, 1269–70 (Ariz. 2012) (en banc); *see* Marc Lacey, *Arizona Senate, at Governor's Urging, Ousts Chief of Redistricting Panel*, N.Y. TIMES (Nov. 2, 2011), https://www.nytimes.com/2011/11/03/us/arizona-republicans-oust-colleen-mathis-head-of-redistricting-panel.html. Five days later, Secretary of State Ken Bennett, as Acting Governor while Brewer was out of state, sent a letter to Mathis notifying her of her removal, then called a special session of the Legislature (which lasted one hour and fifty minutes), where the Senate voted twenty-one to six for removal. *See id.* The Arizona Supreme Court held that the Governor's stated grounds for removing Mathis did not constitute substantial neglect of duty or gross misconduct in office. *See Brewer*, 275 P.3d at 1278.

[183] *See* Estate of Braden v. State, 266 P.3d 349, 352 (Ariz. 2011) (en banc); *see also* O'Connor v. Oakhurst Dairy, 851 F.3d 69, 70 (1st Cir. 2017) ("For want of a comma, we have this case."); Megan E. Boyd & Adam Lamparello, *Legal Writing for the "Real World": A Practical Guide to Success*, 46 J. MARSHALL L. REV. 487, 526, 527, 527 n.78 (2013) (listing cases decided by lack of oxford comma, including *Estate of Branden, v. State*).

[184] *See Estate of Braden*, 266 P.3d at 351, 354.

[185] *See id.* at 351.

[186] ARIZ. REV. STAT. ANN. § 46-455(Q) (2019).

[187] *Estate of Braden*, 266 P.3d at 352.

[188] *See* 2009 Ariz. Sess. Laws 119 (codified as amendment at ARIZ. REV. STAT. ANN. § 46-455 (2019)).

In a 3-2 opinion written by Justice Brutinel, the majority reasoned that the absence of a comma after the phrase "labor union" makes a difference.[189] Disregarding the state's legislative drafting manual,[190] the court concluded that "other legal entity" is not a catch-all category, instead, it relates to legal entities like labor unions, which the state is not.[191] The majority further reasoned that if the legislature had intended to include a cause of action against the state it would have done so expressly, as it has done in other state statutes, which include the term "legal entity."[192]

In their dissent, Justices Bales and Hurwitz argue that the "absence of a comma sheds no light on the meaning of 'legal entity.'"[193] The dissent reasons that the *Arizona Bill Drafting Manual* directs legislative drafters not to use the serial comma.[194] Finally, the dissent points out that the decision to remove the comma from the statute was not substantive but a "technical and conforming change[]."[195] The relevant legislation provided no hint that it intended to narrow the government's liability, and the court "should not infer that the legislature 'hide[s] elephants in mouseholes,' much less in the deletion of a comma."[196]

Estate of Braden represents one of the rare split cases in Arizona in which the court divides between Republican and Democratic justices, with the two dissenters representing the court's two most liberal justices on the Bonica Ideology Scale.[197] The case also exemplifies stereotypical voting patterns for liberal justices, who tend to favor plaintiffs in tort lawsuits,[198] and conservative justices, who tend to support sovereign immunity.[199] While the core result of the case is that "[l]egislative drafters and practitioners are left

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

190 *See* ARIZ. LEGISLATIVE COUNCIL, THE ARIZ. LEGISLATURE BILL DRAFTING MANUAL 2011-2012 § 5.10 (2011–2012).

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

192 *Id.*

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

194 *See id.* at 355–56.

195 *Id.* at 356.

196 *Id.* (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

197 *See* Bonica, *supra* note 43; *cf.* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1866 (2015) ("[B]oth dissenting and majority opinions claiming consistency with the same language canon.").

198 *See* Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 456–57 (1999) (concluding that the California Supreme Court was measurably more pro-plaintiff with Democratic appointed justices).

199 *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 446 (2002) ("[S]overeign immunity are part of a conservative judicial philosophy.").

uncertain about how to treat the Arizona [Bill Drafting] Manual,"[200] it is also another reminder to always use an Oxford comma.[201] The case received no newspaper coverage and average citations.[202]

E. Arizona Citizens Clean Elections Commission v. Brain

In 1998, Arizona voters passed the Clean Elections Act[203] and created a system that funds candidates who chose to forego large private contributions in favor of public funds.[204] The Act limited the amount that a nonparticipating candidate could fundraise, limiting them to only 80% of the contribution limits set forth in a previous voter initiative, A.R.S. section 16-905.[205] Also passed in 1998 was the Voter Protection Act ("VPA"),[206] a constitutional amendment that prevents the state legislature from amending voter initiatives without a three-fourths majority and only in furtherance of their stated purposes; making the Clean Elections Act nearly unamendable without another voter referendum.[207] Rather than amend the Clean Elections Act, in 2013, the legislature raised the contribution limits in A.R.S. section 16-905, increased campaign contribution limits, eliminated restrictions on the aggregate contributions, and eliminated restrictions on the amount of money individuals can contribute to political committees that give money to candidates.[208] The Citizens Clean Elections Commission sued the Arizona Secretary of State, arguing that increase in campaign contribution limits violated the VPA.[209]

In a 3-2 opinion by Justice Timmer, the majority held that instead of limiting contributions to the 1998 amount, the "voters intended to prescribe a formula to calculate campaign contribution limits for

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[200] Tamara Herrera, *Getting the Arizona Courts and Arizona Legislature on the Same (Drafting) Page*, 47 ARIZ. ST. L.J. 367, 369 (2015).

[201] *See* Boyd & Lamparello, s*upra* note 183, at 526. It is also possible that this is a grammar based opinion rather than an ideological decision. Justice Berch worked as the legal writing instructor at the Arizona State University Law School from 1986 until 1991. *See Rebecca White Berch*, *supra* note 4.

[202] *See* Morrow, *supra* note 78 (137 citations).

[203] *See* ARIZ. REV. STAT. ANN. § 16-951 (1998); *see What We Do*, ARIZ. CLEAN ELECTIONS, https://www.azcleanelections.gov/what-we-do (last visited Apr. 20, 2019).

[204] *See* ARIZ. REV. STAT. ANN. § 16-951(A).

[205] *See* ARIZ. REV. STAT. ANN. § 16-941(B) (1998).

[206] *See Voter Protection Act*, ARIZ. ADVOC. NETWORK, https://www.azadvocacy.org/voter_protection_act (last visited Apr. 20, 2019).

[207] *See* ARIZ. CONST. art. IV, pt. 1, § 1(6)(C).

[208] *See* 2013 Ariz. Sess. Laws 98.

[209] Ariz. Citizens Clean Election Comm'n v. Brain, 322 P.3d 139, 141 (Ariz. 2014).

nonparticipating candidates."[210] One effect of the Clean Elections Act, as stated on the ballot, was to "reduc[e] . . . contribution limits by 20% for non-participating candidates."[211] The court reasoned that if the voters had intended to fix the contribution limits, "they could have . . . done so by specifying dollar amounts."[212]

Justices Bales and Berch dissented, arguing that limiting spending to 1998 levels followed "the intent of the voters, who plainly sought to reduce the impact of large campaign contributions in Arizona elections."[213] The dissenters further reasoned that the majority's interpretation allowed the legislature to increase the "individual contribution limits . . . by more than 400 percent for statewide candidates . . . and more than 900 percent for legislative candidates."[214] Finally, since "[p]ublic funding allotments under the [Clean Elections Act] are not tied to the contribution limits . . . public funding . . . become[s] less appealing as it becomes easier for candidates to receive large private contributions."[215] Scholars argue that the court in *Brain* effectively dissolved the Arizona Clean Elections scheme by driving candidates away from public funding to seek private contributions.[216]

In November 2012, Republican Justice Timmer replaced Democratic Justice Hurwitz on the state supreme court, shifting the court from an even political distribution to a solidly conservative majority.[217] Chief Justice Berch's position changed from the most moderate Justice on the court to one of the more liberal.[218] This is demonstrated by the breakdown in *Brain*, where the two most 'liberal' justices on the court sided against the three most conservative on the Bonica and Woodruff scale.[219] Chief Justice Berch would join Justice Bales in dissent again in the 2015 case *Guerra v. State*.[220] *Brain* received no newspaper coverage and below

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[210] *Id.* at 140, 145.

[211] *Id.* at 144.

[212] *Id.* at 142.

[213] *Id.* at 146 (Bales, V.C.J.., dissenting).

[214] *Id.*

[215] *Id.* at 148.

[216] *See* Michael Pernick, *Making Arizona Free Enterprise Kick the Bucket: A New Path Forward for Public Financing*, 40 N.Y.U. REV. L. & SOC. CHANGE 467, 490–91 (2016); Ryan Pont & Bradley R. Pollock, Note, *Last Rites for Clean Elections*, 56 ARIZ. L. REV. 1243, 1256 (2014).

[217] Fischer, *supra* note 42.

[218] *See* Bonica, *supra* note 43. For example, in *Brain*, Justice Berch, a Republican, joined Vice Chief Justices Bales, a Democrat, dissenting. *See Brain*, 322 P.3d at 145.

[219] *See Brain*, 322 P.3d at 145; Bonica, *supra* note 43.

[220] *See* Guerra v. State, 348 P.3d 423, 428 (Ariz. 2015).

average citations.[221]

F. State ex rel. Montgomery v. Harris

For those who smoke marijuana and drive in Arizona, the mere presence of metabolites is not sufficient to prove driving while impaired.[222] In *State ex rel. Montgomery v. Harris*, the Arizona Supreme Court distinguished between marijuana metabolites that cause impairments (Hydroxy–THC) with metabolites that do not cause impairment (Carboxy–THC).[223] A.R.S. section 28-1381(A)(3) makes it unlawful for a driver to be in actual physical control of a vehicle if there is "any drug defined in section 13-3401 or its metabolite in the person's body."[224] The state argued for a strict reading of the statute that would criminalize even trace elements of a non-impairing substance detected years after ingestion.[225] The defendant argued that the phrase "its metabolite," as a singular phrase, means only the singular, primary, metabolite.[226]

The court, in a 4-1 opinion by Justice Brutinel, rejected both arguments, instead determining that the phrase "its metabolite" does not include the non-impairing metabolite Carboxy–THC.[227] The court reasoned that the state's literal meaning of the statute would lead to absurd results that could not have been the intention of "persons with ordinary intelligence and discretion."[228] The court further reasoned that the state's interpretation would criminalize otherwise legal conduct after Arizona legalized medical marijuana in 2010.[229] The court also rejected the defendant's argument that the phrase "its metabolite" means only the primary metabolite, holding that the phrase is ambiguous.[230] The court concluded that "[d]rivers cannot be convicted [under the statute] based merely on the presence

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[221] *See* Morrow, *supra* note 78 (60 citations).

[222] State *ex rel.* Montgomery v. Harris, 346 P.3d 984, 990 (Ariz. 2014).

[223] *Id.* at 990, 990 n.4.

[224] ARIZ. REV. STAT. ANN. § 28-1381(A)(3) (2019). Marijuana (or Cannabis) is a proscribed drug listed in ARIZ. REV. STAT. ANN. § 13–3401(4) (2019). A ballot measure to legalize Marijuana in 2016 failed with only 48.68% of the vote. *See Arizona Marijuana Legalization, Proposition 205 (2016)*, BALLOTPEDIA, https://ballotpedia.org/Arizona_Marijuana_Legalization, _Proposition_205_(2016) (last visited Apr. 21, 2019); *Ballot Measure Races*, ARIZ. SECRETARY ST., http://results.arizona.vote/2016/General/n1591/Results-State.html#ballots (last updated Nov. 21, 2016).

[225] *Harris*, 346 P.3d at 987–88.

[226] *Id.* at 987.

[227] *See id.* at 989–90, 990 n.4.

[228] *Id.* at 988 (quoting State v. Estrada, 34 P.3d 356, 360 (Ariz. 2001) (en banc)).

[229] *Id.* at 988.

[230] *Id.* at 987, 989–90.

of a non-impairing metabolite that may reflect the prior usage of marijuana."[231]

Justice Timmer dissented, arguing that the majority contradicted the plain meaning of the statute that creates a zero-tolerance policy for drug metabolites in the body of anyone driving.[232] She argued that while there were examples of conditions when the zero-tolerance ban could be unconstitutional as applied, that was not the situation in the case.[233]

With the decision in *Harris*, Arizona became the first state to narrow its apparent zero-tolerance approach to marijuana metabolites.[234] The following year, the court unanimously clarified that the statute only included "impairing metabolites in their bodies but who may or may not be impaired."[235] Justice Timmer's dissent was cited persuasively by the Iowa Supreme Court when they held that operating while intoxicated included non-impairing metabolites of marijuana.[236] Later, the Arizona legislature attempted to overturn the decision, proposing legislation that would have explicitly prohibited the presence of active or inactive marijuana metabolites in drivers.[237] Marijuana is a topic that maintains a lot of public interest; a separate marijuana case received limited coverage in the *New York Times*.[238] The case is the most cited split decision of the Berch court that also received next day news coverage in the *Arizona Republic*.[239]

CONCLUSION

Cases during the Berch court that contained dissenting opinions are not salient under either the newspaper or citation metrics. These

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[231] *Id.* at 990.

[232] *See id.* at 990 (Timmer, J., dissenting); *see also* J. MICHAEL WALSH, A STATE-BY-STATE ANALYSIS OF LAWS DEALING WITH DRIVING UNDER THE INFLUENCE OF DRUGS 4 (2009) (identifying Arizona, Delaware, Georgia, Indiana, Minnesota, Pennsylvania, and Utah as states with a "zero tolerance" approach).

[233] *Harris*, 346 P.3d at 991 (Timmer, J., dissenting).

[234] *See* Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 888 n.137 (2017).

[235] Dobson v. McClennen, 361 P.3d 374, 377 (Ariz. 2015).

[236] *See* State v. Childs, 898 N.W.2d 177, 184–85, 187 (Iowa 2017) (quoting *Harris*, 346 P.3d at 990 (Timmer, J., dissenting)).

[237] *See* Ray Stern, *Sonny Borrelli's DUI Bill Targets Medical-Cannabis Users with "Inactive" Metabolites*, PHX. NEW TIMES (Jan. 28, 2015), http://www.phoenixnewtimes.com/news/sonny-borrellis-dui-bill-targets-medical-cannabis-users-with-inactive-metabolites-6644340.

[238] *See* State v. Hardesty, 214 P.3d 1004, 1010 (Ariz. 2009); Associated Press, *supra* note 63.

[239] *See* Sanchez, *supra* note 91; Morrow, *supra* note 78 (126 citations).

cases are cited less often than other cases of the Berch court and are not more likely to appear on the front page of the following day's *Arizona Republic*.[240] However, they are more likely than unanimous decisions to receive any form of next-day newspaper coverage.[241] The results reject the hypothesis that cases with dissenting opinions are more salient. There does appears to be some ideological division in cases divided 3-2, although the court's unanimity is remarkable given its ideological transition during the Berch court

Before Justice McGregor's retirement in 2009, Democrats held a majority of the court's seats with an average Bonica and Woodruff score of -.076.[242] After the replacement of McGregor with Justice Pelander, Justice Berch began her term as Chief Justice presiding over a moderate supreme court with an average Bonica and Woodruff score of .036.[243] However, by the end of Chief Justice Berch's term, the court shifted to a more conservative score of .37, with only a lone Democrat remaining on the court.[244] Remarkably, during this transition, Chief Justice Berch commanded unanimity in all but a handful of cases.[245] The appointment of Goldwater Institute attorney Clint Bolick in 2014 and the expansion of the court to seven members in 2016 have strained this institutional cordiality.[246] The evidence so far suggests that the court under Chief Justice Bales will mark the return of the Arizona Supreme Court to the traditional dissent level of the 1990s.

[240] *See* Morrow, *supra* note 78.

[241] *See id.*

[242] *See* Bonica, *supra* note 43.

[243] *See id.* The court was possibly even more moderate then indicated; considering that Justice Ryan often voted with the court's most liberal justices despite his conservative Bonica and Woodruff score. *See supra* notes 48–49 and accompanying text.

[244] *See* Bonica, *supra* note 43.

[245] *See supra* note 9 and accompanying text.

[246] "Only changes in intracourt norms . . . or changes in personnel that produced a clash between politically or philosophically divided blocs of judges," can explain variations in dissent rates over time. Friedman et al., *supra* note 11, at 791.