The Promise of Parentheticals:

An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs

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I. Introduction

This article on current trends in briefing reports an empirical study of the use of parentheticals in federal appellate court briefs submitted between February 1, 2011, and July 31, 2011.[1] The study was designed to answer this question: How are parentheticals currently used for rhetorical purposes in appellate briefs to explain a synthesis of authorities? My hypothesis entering the study[2] was that parentheticals currently are used beyond a simple informational function in citation forms for four rhetorical purposes: (1) to quote and highlight portions of authorities ("quotation" function), (2) to explain and illustrate the principles induced from a synthesis of authorities ("explanatory synthesis" function), (3) to explain and illustrate the effect and operation of public policies underlying the law in multiple authorities ("public-policy synthesis" function), and (4) to explain and illustrate the narratives of success or failure among multiple cases in which the law was applied to produce a concrete outcome

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1 I collected a cross-sectional sample of fifty appellate briefs from each of four federal appellate courts—the United States Supreme Court and the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits—that were submitted during the time period of February 1, 2011, through July 31, 2011. For a comparison group, I also collected fifty reported cases from the United States Supreme Court issued between February 1, 2011 and July 31, 2011, during the October Term 2010 of the United States Supreme Court. From this last group, I reviewed 107 majority opinions, concurrences, and dissents to compare each of the nine justices' uses of parentheticals with the practitioners' uses.

2 *See* Michael D. Murray, Conference Presentation, *The Promise of (Parentheticals)*, (Palm Desert, Cal., June 1, 2012) (notes and presentation materials on file with the author).

("narrative synthesis" function). These uses of parentheticals were to be compared with other methods of communication of information about multiple authorities in legal analysis, specifically case-to-case analogical reasoning and footnoting.

The results of the study indicate that parentheticals are used regularly in federal appellate briefs for each of the four functions introduced above—quotation, explanatory synthesis, public-policy synthesis, and narrative synthesis—and that the latter two, more-particularized synthesis functions, which are subsets of the more general category of explanatory synthesis, are utilized at similar rates compared to each other. One of the more notable findings is that every category of parenthetical usage for synthesis is being used in briefs in each federal appellate court and in the United States Supreme Court at a significantly higher rate in terms of numbers of instances of usage than the alternative method of explanation, which is textual, case-to-case analogical reasoning. In comparison, the practice of footnoting in briefs also is thriving in each federal court of appeals and in the United States Supreme Court, and exceeds the rate of use of case-to-case analogical reasoning in each jurisdiction, but footnoting lags behind the use of parentheticals for quotation and explanatory synthesis in each jurisdiction.[3]

From the data, I draw the conclusion that parentheticals are regularly and frequently employed as a rhetorical device to explain the meaning and effect of multiple authorities, including the effect and operation of public policies underlying the law in multiple authorities and the narratives of success or failure among multiple cases in which the law was applied to produce a concrete outcome. In addition, parentheticals in explanatory synthesis are used to explain the lessons and principles that can be induced from multiple authorities at a greater rate than the alternative form of communication of case-to-case analogical reasoning. These findings sustain my hypothesis developed in the background section *infra* that parentheticals in synthesis are rhetorically advantageous as compared to textual, case-to-case analogical reasoning because of their flexibility and efficiency in communicating the lessons and principles induced from multiple, synthesized authorities and because they follow a mathematical and scientific model of open, demonstrative reasoning that furthers the persuasive potential of parentheticals as a rhetorical tool for legal discourse.

3 In the control group of Supreme Court cases, the rate of footnote usage exceeded the rate of use of parentheticals for synthesis but not the rate of use for quotation. In the Second Circuit, Ninth Circuit, and United States Supreme Court briefs, footnotes were used in briefs at a greater rate than the use of parentheticals for public-policy synthesis and for narrative synthesis, but at a lower rate than uses of parentheticals in briefs for both quotation and explanatory synthesis. Note, too, that footnoting sometimes overlapped the other uses when an advocate (or judge) would use a footnote to present an explanatory synthesis that used parentheticals, or used a footnote to perform case-to-case analogical reasoning.

Comparison of Uses Across All Jurisdictions

Court	Quotation	Explanatory Synthesis	Public-Policy Synthesis	Narrative Synthesis	Case-to-Case Analogical Reasoning	Footnotes
2nd Circuit Briefs	323	281	159	175	113	209
7th Circuit Briefs	335	237	139	146	94	85
9th Circuit Briefs	279	212	142	105	99	204
Supreme Court Briefs	845	623	294	326	453	440
Supreme Court Cases	723	474	306	139	86	582

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

II. Background[4]

This study applies a rhetorical lens to parentheticals in legal discourse. I do not study the routine use of parentheticals in citation forms, discussed in section II(A) below, but instead focus on the use of parentheticals to facilitate the communication of lessons induced from a synthesis of authorities. Within this study, I examine four rhetorical uses for parentheticals: (1) to quote or highlight the contents of authorities, (2) to communicate the lessons and principles induced from a synthesis of authorities, (3) to explain or demonstrate the operation of public policy within multiple authorities, and (4) to communicate narrative reasoning from the storylines of multiple authorities.

A. Parentheticals in citation forms

Parentheticals play an indispensable role in American legal citation form.[5] They are used to convey explanatory material about authorities including information about the court, the year, and additional information deemed to be important in understanding the weight or value of the authority. As explained in my earlier work,[6] parentheticals might

4 This Background section continues and builds on my recent research and scholarship on synthesis and legal rhetoric: Michael D. Murray, *For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning*, 38 U. Dayton L. Rev. ___ (forthcoming) [hereinafter Murray, *Parentheticals*] (available at http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=michael_murray); Michael D. Murray, *After the Great Recession: Law and Economics' Topics of Invention and Arrangement and Tropes of Style*, 58 Loy. L. Rev. ___ (forthcoming) [hereinafter Murray, *After the Great Recession*] (available at http://ssrn.com/abstract=2012963); Michael D. Murray, *Explanatory Synthesis and Rule Synthesis: A Comparative Civil Law and Common Law Analysis*, 83–84 Bahçeşehir Üniversitesi Hukuk Fakültesi-Kazancı Hukuk Dergisi 139 (2011) (available at http://ssrn.com/abstract=2012974) [hereinafter Murray, *Explanatory Synthesis and Rule Synthesis*]; Michael D. Murray, *The Great Recession and the Rhetorical Canons of Law and Economics*, 58 Loy. L. Rev. 615 (2012) [hereinafter Murray, *Great Recession*]; and Michael D. Murray, *Rule Synthesis and Explanatory Synthesis: A Socratic Dialogue Between IREAC and TREAT*, 8 Leg. Comm. & Rhetoric: JALWD 217 (2011) [hereinafter Murray, *Rule Synthesis and Explanatory Synthesis*].

5 *See generally* ALWD & Darby Dickerson, *ALWD Citation Manual* Rules 10.4(c), 12.6, 12.7, 12.10(e), 12.11(a), 12.11(c), 46.0–46.3, 47.5(b), 48.5 (4th ed., 2010); *The Bluebook: A Uniform System of Citation* 498 (Columbia Law Review Ass'n et al. eds.,19th ed., 2010) (index of usage of parentheticals in legal citation).

6 *See generally* Murray, *Parentheticals*, *supra* n. 4, at 5–6.

contain succinct references and bits of information to clarify, categorize, or identify the origin, role, placement, nature, or other characteristics of the authority preceding the parenthetical in a citation. Often this information serves to limit or bolster the effect of the authority by indicating that the authority is better or worse than it might appear at face value because of its source (e.g., a potentially controlling court in the proper hierarchy of judicial authority), or timing (e.g., an opinion limited in effect because it preceded a subsequent authority that further changed the law), or author (e.g., an opinion by a particularly distinguished jurist of the jurisdiction, or an opinion by the same judge before whom the present case appears), or aspects of the law (e.g., that an out-of-jurisdiction authority in fact applied the applicable law of the case at bar), or the subject matter (e.g., that the authority construed the exact same exculpatory clause that is to be construed in the case at bar) of the authority cited.[7] But beyond the simple clarification, categorization, and identification uses in citation forms, parentheticals are a rhetorical tool for communicating the lessons of syntheses of authorities in legal discourse.

B. The quotation function of parentheticals

The most common rhetorical use of parentheticals identified by the study is the use of parentheticals for quoting or highlighting the contents of authorities. In many instances, this use is straightforward: a parenthetical supports the citation and gives particular information quoted or summarized from the authority that is cited. There are many examples of the use of parentheticals for quotation in Supreme Court opinions and practitioner briefs. I offer two:

> **Example 1:**
> This conception of childhood led to great concern about influences on children. . . .*[S]ee also* B. Rush, A Plan for the Establishment of Public Schools (1786) (hereinafter Rush), in Rudolph 16 ("The vices of young people are generally learned from each other"); Webster, in Rudolph 58 ("[C]hildren, artless and unsuspecting, resign their hearts to any person whose manners are agreeable and whose conduct is respectable"). . . . *[S]ee also* S. Coontz, The Social Origins of Private Life 149–150 (1988) (noting that it was "considered dangerous to leave children to the supervision of servants or apprentices").[8]

7 *See id.* Parentheticals might also illustrate information to clarify, categorize, or identify the origin, role, placement, nature, or other characteristics of the authority, such as the following: Appellant v. Appellee, 123 F.3d 234, 235 (7th Cir. 2010) ("Appellant II") (en banc) (Posner, J.) (applying Indiana law) (construing *Allsnake* standard form exculpatory clause 101.A) (internal quotation omitted). *See id.*

8 *Brown v. Ent. Merchants Ass'n*, 131 S. Ct. 2729, 2754 (2011) (Thomas, J., dissenting).

Example 2:

A verdict for plaintiff will be vacated and the action will be dismissed absent expert medical testimony "causally linking the defendants' negligence with the alleged injuries suffered . . . ." *Prete v. Rafla-Demetrious*, 224 A.D.2d 674, 638 N.Y.S.2d 700 (2d Dep't 1996) (Malpractice action based upon failure to confirm a tumor diagnosis and in rendering unnecessary radiotherapy; "without expert testimony the jury would have to engage in impermissible speculation to decide which alleged symptom was attributed to the radiotherapy and which alleged symptom was attributable to [the patient's] cancer and to the strokes he suffered").[9]

My theory regarding the popularity of the practice of parenthetical quotation is that parentheticals are viewed as rhetorically advantageous because they allow succinct but elegantly detailed supporting information to be provided after each authority.[10] Parentheticals are not bound by grammatical conventions so that only the necessary and sufficient information need be put before the reader. With brackets and ellipses (both shown in the second example *supra*), the information can be distilled to the minimum words required to communicate the point. This results in discourse that is attractive in an elegant, succinct format that is reader-friendly in its conservation of space and the time required for the consumption of the discourse, and persuasive for providing open, demonstrative support of the analysis or argument rather than relying on trust or other indicia of the ethos of the author, if such indicia are present.[11]

As will be seen in several examples in the sections below, the quotation function also can be employed with other rhetorical uses of parentheticals to support and illustrate principles induced from a synthesis of authorities, to explain the operation of public policy within multiple authorities, or to draw out specific quotations from or summaries of the storylines of multiple authorities in the narrative synthesis function.

C. Parentheticals in rule synthesis and explanatory synthesis

In legal analysis, there are two methods of synthesis of authorities,[12] rule synthesis and explanatory synthesis. Rule synthesis refers to the use of

9 Br. of Defs.–Appellees Gilbert S. Lederman, M.D. and Gilbert Lederman, M.D., P.C., *Gotlin v. Lederman, M.D.*, 2011 WL 3436228 at *37 (Nos. 10-3244-cv(L), 10-3919(CON), 483 Fed. Appx. 583 (2nd Cir. 2012)).

10 *See* Murray, *Parentheticals*, *supra* n. 4, at 18. *See also* Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 168–69.

11 *See generally* Murray, *Great Recession and Rhetorical Canons of Law and Economics*, *supra* n. 4, at 121–31; Murray, *Parentheticals*, *supra* n. 4, at 18.

12 I specifically am referring to "authorities" and not simply to "cases," because synthesis properly induces definitional rules, interpretive rules, and principles about the proper interpretation and application of the law from primary and

multiple authorities for the purpose of determining what is the prevailing law—the prevailing legal rule—on an issue.[13] Explanatory synthesis refers to the analysis of multiple authorities for the purpose of demonstrating or advocating how the law should be interpreted and applied in the present circumstances based on principles induced from examples of how the law has been interpreted and applied in past circumstances.[14]

Rule synthesis combines multiple authorities to produce the rules that govern an issue. As explained above,[15] these rules are further broken down into definitional rules—those that define the elements, factors, or requirements of the law that govern the issue—and interpretive rules, that provide guidance or requirements for the proper interpretation and application of the definitional rules. Often these rules are found in multiple sources, thus providing the need for synthesis. A fairly succinct and straightforward example of rule synthesis concerning the rules of fair use in copyright cases was provided by the United States Supreme Court in *Campbell v. Acuff-Rose Music*:[16]

> [**Definitional Rule:**] The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial

secondary authorities—constitutions, statutes, administrative law, cases, and scholarly commentary. A definitional rule defines a legal rule or legal standard providing the terms, elements, or requirements of the rule or standard. Michael D. Murray & Christy H. DeSanctis, *Legal Writing and Analysis* chs. 4, 5 (2009). For example, in United States copyright law, the rule defining parody as a form of comment and criticism under 18 U.S.C. § 107 (2006) is a definitional rule, *see Campbell v. Acuff Rose Music*, 510 U.S. 569, 579 (1994), as is the definition of "parody" as the use of some elements of a prior author's work to create a new one that, at least in part, comments on or criticizes the original author's work. *Id.* at 580. An interpretive rule is a rule issued by a court or provided in another primary legal authority (constitution, statute, or administrative rule or regulation) that instructs attorneys and judges on the proper interpretation and application of a definitional rule. Murray & DeSanctis, *supra* n. 12, at chs. 4, 5. For example, the rules that the United States copyright fair use factors of 17 U.S.C. § 107 are to be weighed together in a case-by-case analysis in light of the purposes of copyright law where no one factor predominates over the other factors, and commercial usage is simply one factor to be weighed with the others and is not a dispositive factor, all are interpretive rules created by the United States Supreme Court that instruct the lower courts and the copyright bar as to how the copyright fair use factors are to be interpreted and applied. *See Campbell*, 510 U.S. at 577–78, 584–85.

13 Rule synthesis is an inductive synthesis of authorities—including, but not limited to, judicial opinions—found to be on point and controlling of a legal question in order to accurately determine and state the prevailing rule of law that governs the issue. *See e.g.* Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 226–29; Murray & DeSanctis, *supra* n. 12, at chs. 2, 5, 6; Michael D. Murray & Christy H. DeSanctis, *Advanced Legal Writing and Oral Advocacy* app. A (2009); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* chs. 10–13 (5th ed., 2005); Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* chs. 4, 6, 9 (3d ed., 2007); Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, *Writing and Analysis in the Law* ch. 2(IV), ch. 5(III) (4th ed., 2003); Terrill Pollman, *Building A Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887, 909–10 (2002).

14 Explanatory synthesis is a qualitative method of analysis of legal authorities, especially precedent cases, and a method of legal rhetoric that uses induction to formulate from multiple authorities the principles concerning how a legal test or legal standard is to be interpreted and applied. For background on explanatory synthesis, see Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 234–40; Murray & DeSanctis, *supra* n. 12, at ch. 6; Murray & DeSanctis, *supra* n. 12, at app. A.

15 *Supra* n. 13.

16 510 U.S. 569, 578–79 (1994). Aside from labeling the two sets of synthesized rules, definitional and interpretive, I have retained the citation forms and textual constructions of the original.

> nature or is for nonprofit educational purposes." [17 U.S.C.] § 107(1). **[Interpretive Rules:]** This factor draws on Justice Story's formulation, "the nature and objects of the selections made." *Folsom v. Marsh*, *supra*, at 348. The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news-reporting, and the like, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, *Folsom v. Marsh*, *supra*, at 348; accord, *Harper & Row*, *supra*, 471 U.S., at 562, 105 S.Ct., at 2231 ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, *Sony*, *supra*, 464 U.S., at 455, n. 40, 104 S.Ct., at 795, n. 40, [footnote 11][17] the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, *e.g.*, *Sony*, *supra*, at 478–480, 104 S.Ct., at 807–808 (Blackmun, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[18]

The purpose of this rule synthesis discussion is to define rules. Accordingly, the rhetorical strength of the discussion is hinged on the strength of the authorities and that they predominantly are controlling authorities rather than that the rules appear in a particular order or structure. The Supreme Court's discussion is free flowing, starting with the controlling statutory authority, and moving through the subsequent authorities that have modified the definitional rule by providing interpretive rules for the application and implementation of the definitional rule.

Explanatory synthesis does not define the rule, it illustrates the operation of the rule. It is not enough to state that rule synthesis is performed in the rule section of the discussion and explanatory synthesis in the explanation section. In terms of contemporary legal rhetoric, explanatory synthesis is a method of analysis and advocacy that constructs knowledge and understanding of the role of precedents on the legal issue, persuading the audience as to the correctness or superiority of the

17 Footnote 11 states, "The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution." *Id.* at 579 n. 11.

18 *Id.* at 578–79.

attorney's knowledge and understanding of how the law works, and seeking to motivate the audience to act in the rhetorical situation of the discourse.[19] Explanatory synthesis relies on the structure of mathematical–scientific induction within a familiar deductive syllogistic structure, and on the open, demonstrative, and falsifiable analysis of multiple authorities both to create knowledge and understanding and for persuasive advocacy.[20] Parentheticals are crucial to the structure, because they allow open demonstration of the material drawn from multiple authorities cited in a string cite to support the proposition induced from the authorities.

The structure of an explanatory synthesis has three parts:

Principle—citations—parentheticals.[21]

Each synthesis has one principle supported by multiple citations to authorities, and each citation has a parenthetical that explains in as few words as possible the facts and circumstances and outcome of the case relevant to the application of the rule that illustrates the principle induced from the authorities. Thus the complete structure is the following:

> **Interpretive Principle induced from Authorities 1, 2, and 3—Citation to Authority 1** (details concerning the application of the rule or public policy in Authority 1 that illustrate the Interpretive Principle); **Citation to Authority 2** (details concerning the application of the rule or public policy in Authority 2 that illustrate the Interpretive Principle); **Citation to Authority 3** (details concerning the application of the rule or public policy in Authority 3 that illustrate the Interpretive Principle); **and so on.**[22]

The examples of explanatory synthesis I have excerpted are from two judicial opinions and two appellate briefs:

19 Murray, *Parentheticals*, *supra* n. 4, at 10; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 140.

20 Murray, *Parentheticals*, *supra* n. 4, at 10; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 142.

21 *See* Murray, *Parentheticals*, *supra* n. 4, at 10–11. Each part is necessary: the principle stated is the product of the induction. It reveals the interpretive principle concerning how the rules are to be interpreted and applied based on the case examples cited in the synthesis. The citations are necessary to show that the principle is supported by multiple authorities. And the parentheticals explain the details of facts, policy, holding, and outcome of the rule application that are necessary to explain how each case example supports the interpretive principle stated in the synthesis. All of the parts must be stated openly because this is demonstrative reasoning, open to examination and refutation, and thus highly persuasive if it is not rebutted. *See id.* at 10 & 10 n.23; Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 157; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 221. *See also* Murray & DeSanctis, *supra* n. 12, at ch. 6.

22 *See* Murray & DeSanctis, *supra* n. 12, at ch. 6; Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 157.

Example 1:

> [A] candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries. *See, e.g.*, *Green Party of Conn.*, 616 F.3d, at 242 (matching funds impose "a substantial burden on the exercise of First Amendment rights" (internal quotation marks omitted)); *McComish v. Bennett*, 611 F.3d, at 524 (matching funds create "potential chilling effects" and "impose some First Amendment burden"); *Scott v. Roberts*, 612 F.3d 1279, 1290 (C.A.11 2010) ("we think it is obvious that the [matching funds] subsidy imposes a burden on [privately financed] candidates"); *id.*, at 1291 ("we know of no court that doubts that a [matching funds] subsidy like the one at issue here burdens" the speech of privately financed candidates); see also *Day v. Holahan*, 34 F.3d 1356, 1360 (C.A.8 1994) (it is "clear" that matching funds provisions infringe on "protected speech because of the chilling effect" they have "on the political speech of the person or group making the [triggering] expenditure" (cited in *Davis*, *supra*, at 739, 128 S. Ct. 2759)).[23]

Example 1 is an explanatory synthesis that illustrates the operation of a single legal proposition: that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries. Multiple sources are marshaled that support the proposition, but the author does not merely provide a string of bare citations to the supporting authorities. Bare citations might be very persuasive to the audience if the sources cited all are primary, controlling authorities or if the audience already is very familiar with all of the authorities cited. Bare citations also might be sufficient for propositions that are relatively simple, straightforward, and uncontroversial, or which are somewhat minor in importance to the argument. But in these and in many other circumstances common to legal analysis and advocacy, the addition of explanatory parentheticals provides additional information and support to help readers who are unfamiliar with the authorities cited, or who might skip over the citations, especially if they are to noncontrolling authorities, but are persuaded to give them consideration because of the additional explanatory information provided in parentheticals.

Parentheticals inform the reader of how the authorities support or illustrate the proposition in combination, not just individually. A string of bare citations must be taken at face value as individual authorities, but when an author provides a parenthetical behind each citation, the author can guide the reader through the synthesis of the multiple authorities.

23 *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823–24 (2011) (Roberts, C.J., majority op.) (bracketing as in original; signals italicized to accord with ALWD conventions).

This guidance is often critical to the author's purpose for the discourse and to the reader's understanding and appreciation of the discussion. The author is demonstrating to the reader the level of analysis performed by the author, and potentially saving the reader from having to follow up on a string of bare citations to find the facts or policies or other information concerning the proper interpretation and application of the rules that exist within the cited authorities.[24] Parentheticals allow the author to provide supporting information which may be both necessary and sufficient to achieving the author's logos or pathos purposes in inducing the proposition from the supporting authorities, all in reader-friendly approach that also is likely to bolster the author's ethos-reception with the reader.

Example 2:

Numerous courts outside Illinois have applied adverse domination tolling with respect to receiver/trustee/conservator claims against third parties regardless of whether the plaintiff states a civil conspiracy claim against the third parties. *See, e.g.*, *Rajala v. Gardner*, Nos. 09-2482-EFM, 10-2243-EFM, 2011 WL 453432, *5–*8 (D. Kan. Feb. 4, 2011) (adverse domination tolling applied to bankruptcy trustee claims against non-directors because it wasn't until wrongdoing directors were removed that claims became "reasonably ascertainable"); *Warfield v. Carnie*, No. 3:04-cv-633-R, 2007 WL 1112591, *15–*17 (N.D. Tex. Apr. 13, 2007) (adverse domination tolling applied to receiver's claims because it would have been impossible for the plaintiffs to have asserted such claims while controlled by the "perpetrators of the Ponzi scheme"); *Quilling v. Cristell*, No. Civ. A. 304CV252, 2006 WL 316981, *6 (W.D.N.C. Feb. 9, 2006) (adverse domination tolling applied to receiver's claims against non-director defendant in connection with a Ponzi scheme because "so long as a corporation remains under the control of wrongdoers, it cannot be expected to take action to vindicate the harms and injustices perpetrated by the wrongdoers").[25]

Example 2 demonstrates the potential of explanatory synthesis for a discussion of out-of-jurisdiction authorities. Citation to noncontrolling authorities is unlikely to catch the eye of a reader in a favorable manner,

24 I say, "potentially," because some readers will never take the author's word for anything the author states about a legal authority. Seeing is believing for these readers. Nevertheless, the explanatory synthesis method using parentheticals demonstrates the combination of and relationships between authorities both visually and substantively. Therefore, the method is extremely reader-friendly, which might bolster the ethos-reception of the author, and it is logically persuasive through its use of open, demonstrative reasoning, which might bolster the logos-reception of the author. Within the discourse, values, policies, and narratives may be explored in explanatory syntheses that might bolster the pathos-reception of the author, too.

25 Br. and Short App. of Plaintiff–Appellant Indep. Trust Corp., *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 2011 WL 3283774 at *25–26 (No. 11-2108, 665 F.3d 930, 7th Cir. 2012).

but the addition of the parentheticals allows the author to explain the reason for the citation to these authorities and the relevant content from the synthesized authorities that illustrates the proposition stated. In this example, it is working of the public policies behind the cited authorities that makes them relevant to the discussion. The use of parentheticals for public-policy synthesis, a subset of explanatory synthesis, is discussed further in section II(C)(1) below.

Example 3:

We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work. See *Davis*, 246 F.3d at 174 (use of plaintiff's eyewear in a clothing advertisement not transformative because it was "worn as eye jewelry in the manner it was made to be worn"); *Castle Rock Entm't*, 150 F.3d at 142–43 (quiz book called the "*Seinfeld* Aptitude Test" not transformative when its purpose was "to repackage [the television show] *Seinfeld* to entertain *Seinfeld* viewers"); *Ringgold v. Black Entm't Television, Inc.* 126 F.3d 70, 79 (2d Cir.1997) (copy of plaintiff's painting used as decoration for a television program's set not transformative because it was used for "the same decorative purpose" as the original).[26]

Example 3 uses parentheticals in an explanatory synthesis of authorities for a different purpose from the first two examples. Here, the parentheticals illustrate the failed storylines of each authority cited (failed, because each case failed to establish a fair use of the copyrighted original material in the case). The three failed storylines may then be analogized to or distinguished from a party's storyline. Example 3, therefore, can be categorized in the subset of explanatory synthesis referred to as narrative synthesis as discussed in section II(C)(2) below.

Example 4:

Plaintiffs waived their On-Call Policy claims by failing to include them in a single motion for notice. *See* Plaintiffs' ER, at 101:26–28; Plaintiffs' Brief, at pgs. 3–4. As a result, those claims have been dismissed on their merits. *See e.g.*, *Ficken v. Golden*, 696 F. Supp. 2d 21, 33–34 (D.D.C. 2010) (holding *res judicata* barred re-filing of claims in prior action that were dismissed due to plaintiffs' failure to comply with order directing them to provide a more definite statement); *Mendoza v. Block*, 27 F.3d 1357, 1363 (9th Cir. 1994) (affirming dismissal of claims that were deemed waived); *Sidhu v. Flecto Co., Inc.*, 279 F.3d 896, 900 (9th Cir. 2002) (prior suit dismissed as untimely was a final judgment on the merits for *res*

26 *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (bracketing as in original; footnote omitted).

judicata); *Marin v. Hew, Health Care Financing*, 769 F.2d 590 (9th Cir. 1985) (denial of leave to file second amended complaint based on statutory time bar was a final judgment on the merits for *res judicata*).[27]

With Example 4, we return to the basic, but versatile use of explanatory synthesis to present a principle concerning the proper interpretation and application of a rule induced from multiple authorities applying the rule. The author of the brief uses parentheticals to provide the information from each authority that demonstrates how the authority illustrates the principle.

Explanatory synthesis, as distinguished from rule synthesis, is a separate process of induction of principles of interpretation and application concerning the rules governing a legal issue. All of the examples above follow the method and structure of explanatory synthesis because they each demonstrate an induction from samples—which in many instances will be case law—representing specific situations with concrete facts and in which the legal rules have been applied to produce a concrete outcome. The analytical and rhetorical value of the synthesis to guide and persuade the disposition of the present case is based largely on the fact that that guiding principles are drawn from multiple samples of dispositions of similar cases[28] based on the common principles of law and policy that unite the different cases.[29] The principles induced in the scientific, inductive process do not necessarily have the conclusive effect of binding, mandatory authority from a higher court, but they are persuasive and reliable because they use an open, demonstrative, falsifiable method to present the principles of how the law should be interpreted and applied in a given situation based on the induction of these principles from multiple situations in the past.[30]

27 Answering Br. of Defs.–Appellees, *Riggio v. Serv. Corp. Int'l*, 2011 WL 3436909 at *10 (No. 11-15696, 476 Fed. Appx., 2012).

28 The numeric advantage of explanatory synthesis is combined with the scientific and mathematical structure of the analysis that presents its reasoning in an open, demonstrative format for examination and potential refutation of the components of the analysis. It is this openness and potential for examination and rebuttal that produces the persuasive element of falsifiability in explanatory synthesis. When a synthesis is not rebutted by an opponent or other participant in the case, it stands as highly reliable and persuasive. *See* Murray, *After the Great Recession*, *supra* n. 4, at 26–27, 39–40; Murray, *Parentheticals*, *supra* n. 4, at 15–19.

29 Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 147–48.

30 *Id.* at 148. Explanatory synthesis informs the major premise of the deductive, syllogistic structure of the discourse through induction of principles concerning how the rules should be interpreted and applied. The process of induction finds a general proposition to be true because of its relationship to a number of other specific propositions that are known to be true. A certain genus of situations with identifiable characteristics can be defined from a synthesis of known situations

1. Parentheticals in public-policy synthesis

One subset of explanatory synthesis of authorities that I have identified and tracked in the data set is the use of parentheticals to illustrate principles concerning the operation of public policy in multiple authorities.[31] Parentheticals can play a crucial, rhetorical role in public-policy synthesis by providing the information that ties the multiple authorities cited together and demonstrating both the nature of the policies and the lessons that might be drawn from application of the policies in each of the authorities.

Public-policy discussions or arguments typically are employed to reinforce a direct legal argument. Legal arguments rarely are able to be stated as syllogistic proof[32]—conclusion "C" absolutely and irrefutably follows from major premise "A" and minor premise "B." Instead, an enthymeme is stated[33]—what has been described in modern argument theory as argumentation that takes into account the indeterminacy of language and states an argument of probabilities.[34]

("species" of situations, or "precedents") that all share these characteristics. *See* Christof Rapp, *The Stanford Encyclopedia of Philosophy*, *Aristotle's Rhetoric* §§ 5(C), 7.4, http://plato.stanford.edu/archives/sum2002/entries/aristotle-rhetoric/ (last modified May 2, 2002). Legal method in the United States nearly uniformly promotes the use of a deductive syllogistic (or enthymatic) form for the presentation of legal analysis in writing. A logical, demonstrative presentation lends credibility and persuasiveness to the discourse and reasoning. In rhetorical terms, the use of a deductive syllogistic structure such as IRAC, IREAC, TREAT, and others, is a firmly established expectation if not a requirement of discourse within the legal writing discourse community. *See generally* Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489 (2002); Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. Leg. Educ. 157, 164–77 (1997).

31 Public-policy synthesis is a subset of explanatory synthesis. In the coding of the data set, every instance of explanatory synthesis was recorded. Then, certain instances within the explanatory synthesis set were also coded as instances of public-policy synthesis.

32 Mathematical and scientific forms match the structure for legal discourse and rhetoric derived from the classical tradition, in which there are two permitted logical structures for an argument, the deductive and the inductive. Aristotle, *Rhetoric* bk. I, ch. 1, 1355a (W. Rhys Roberts trans., 1965) (available at http://rhetoric.eserver.org/aristotle/rhet1-1.html); Marcus Tullius Cicero, *De Inventione* 93, 104 (H.M. Hubbell trans., 1949); 2 Marius Fabius Quintilian, *Institutio Oratoria* bk. V.X.1-11, V.XI.2-9, V.XIV.1-35, at 203-07, 271-77, 349-69 (H.E. Butler trans., 1921).

33 The forms for effective legal discourse, as opposed to mathematical, scientific proof, were the deductive, syllogistic rhetorical form known as an enthymeme, and the inductive rhetorical form known as an example or paradigm argument. Aristotle, *supra* n. 32, at Book I, ch. 2, 1356b. *See also* George A. Kennedy, *Aristotle On Rhetoric: A Theory of Civic Discourse* 40, 40 n. 49 (1991). Aristotle believed the enthymeme to be the superior of the two forms. Aristotle, *supra* n. 32, at Book I, ch. 1, 1355a, & Book I, ch. 2, 1356b.

34 *See* Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* chs. 2–3, 6–7 (2002); Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., 1969); Stephen Toulmin et al., *An Introduction to Reasoning* (2d ed., 1984); Frans H. Van Eemeren et al., *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments* (1996). In the legal arena, this theory accepts the fact that the advocate has a client whose facts and legal situation are not necessarily the best possible circumstances for a person legally to be involved in; nevertheless, the advocate must offer the most reasonable, probable, and compelling argument in support of his or her client's position that can be raised in the situation, with the hope that the decision-maker will find the argument more reasonable and compelling than the opponent's arguments. Murray, *After the Great Recession*, *supra* n. 4, at 20, 20 n. 42; Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ALWD 129, 139 (2006) (citing Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. Leg Educ. 566, 567 (1994)).

As in the sections above, I have drawn examples of parenthetical usage for public-policy synthesis from a Supreme Court opinion and from practitioners' appellate briefs:

Example 1:

Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving "single or occasional acts" occurring or having their impact within the forum State. As a rule in these cases, this Court has inquired whether there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). See, *e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (Oklahoma court may not exercise personal jurisdiction "over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma"); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (franchisor headquartered in Florida may maintain breach-of-contract action in Florida against Michigan franchisees, where agreement contemplated on-going interactions between franchisees and franchisor's headquarters); *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 105, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (Taiwanese tire manufacturer settled product liability action brought in California and sought indemnification there from Japanese valve assembly manufacturer; Japanese company's "mere awareness . . . that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" held insufficient to permit California court's adjudication of Taiwanese company's cross-complaint); *id*., at 109, 107 S. Ct. 1026 (opinion of O'Connor, J.); *id*., at 116–117, 107 S. Ct. 1026 (Brennan, J., concurring in part and concurring in judgment). See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 628 (1988) (in the wake of *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role").

In only two decisions postdating *International Shoe*, discussed *infra*, at 2855–2857, has this Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952) (general jurisdiction appro-

> priately exercised over Philippine corporation sued in Ohio, where the company's affairs were overseen during World War II); and *Helicopteros*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (helicopter owned by Colombian corporation crashed in Peru; survivors of U.S. citizens who died in the crash, the Court held, could not maintain wrongful-death actions against the Colombian corporation in Texas, for the corporation's helicopter purchases and purchase-linked activity in Texas were insufficient to subject it to Texas court's general jurisdiction).[35]

The Supreme Court's discussion of the public policy behind its general and specific personal-jurisdiction jurisprudence draws from multiple authorities, both primary and secondary. The Court uses explanatory synthesis specifically to illustrate how the policy works in different factual scenarios. Parentheticals provide the supporting information from each case that illustrates the operation of the policy. The Court's discussion focuses on the public policy behind the personal-jurisdiction law, and the parentheticals allow the Court to illustrate the operation of that policy using as many or as few words as are deemed necessary for the illustration. Thus, this discussion fits the subcategory of explanatory synthesis employed to illustrate the proper interpretation and application of the public policy.

> **Example 2:**
> Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires consideration and weighing of evidence from both sides and which usually cannot be made on demurrer. *Gerber*, 552 F.3d at 938–39 (emphasis added); see also *Committee on Children's Television*, 35 Cal. 3d 197 (finding demurrer inappropriate in a case where parents alleged deceptive advertising of sugar cereals); *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) ("the district court . . . dismissed the claims . . . because it concluded that 'plaintiffs have failed, however, to draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries.' . . . This, however, is the sort of information that is appropriately the subject of discovery, rather than what is required to satisfy the limited pleading requirements"); *Hitt v. Arizona Beverage Co. LLC*, case no. 08-cv-0809, 2009 U.S. Dist. LEXIS 16871 (S.D. Cal. 2009) ("courts . . . have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer"); *Von Koenig v. Snapple Bev. Corp.*, case no. 2:09-cv-00606 FCD, 2010 U.S. Dist. LEXIS 55987 (E.D. Cal. May 7, 2010) (denying motion to dismiss claims premised on

35 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011) (Ginsburg, J., majority op.) (bracketing as in original; spacing in internal citations modified to accord with ALWD convention).

"all-natural" representations); Jernow v. Wendy's Int'l, Inc. 07-cv-3971 LTS, 2007 U.S. Dist. LEXIS 85104, at *3–4 (S.D.N.Y. 2007) (denying motion to dismiss where consumer protection claims were premised on representation that food contains 0 grams of trans fat).[36]

Example 2 illustrates the policy behind the application of the demurrer rule by providing multiple authorities that demonstrate how that policy is carried out. Parentheticals allow the content of the illustration to be presented immediately after the citation in a concise and direct manner. Multiple authorities carrying out the public policy behind the law can be cited along with their illustrative details in just a few lines of text. These details would take much longer to present if each case was discussed individually in several sentences or paragraphs of text.

Example 3:

When determining the willfulness of a default, the Second Circuit has clearly held that carelessness and negligence do not constitute willfulness for the purpose of a default judgment. See *American Alliance Insurance Co.*, 92 F.3d at 61 (refusing to find willfulness in the default judgment context where defendant's failure to answer was due to a filing clerk's error in misplacing the complaint); *Sims v. West*, 2005 WL 2241066 at *2 (W.D.N.Y.2005) (refusing to find willfulness where defendant failed to answer the complaint because of a mistaken assumption that he was represented by the New York State Attorney General's office); *Jones v. Herbert*, 2004 WL 3267285 at *2 (W.D.N.Y.2004) ("The Second Circuit looks for bad faith or for at least something more than mere negligence before rejecting a claim of excusable neglect based on an attorney's or a litigant's error.").[37]

Example 4:

Because spending conditions that have been accepted by state governments are federal law, they bind third parties in the same manner as other federal legislation. See *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973) (funds derived from Social Security disability benefits are immune from state debt-collection processes by reason of the Supremacy Clause, even though the funds are in private hands); *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 257–58 (1985) (state statute imposing restrictions on the way local governments may spend funds received from the federal government

36 Appellant's Opening Br., *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 2011 WL 3436898 at *28–29 (No. 11-15263, 475 Fed. Appx. 113, 9th Cir. 2012) (bracketing as in original; emphasis omitted).

37 Br. for the Appellant, *Beckles v. City of New York*, 2011 WL 3663374 at *9 (No. 11-1226-CV, 492 Fed. Appx. 181, 2d Cir. 2012 .

> under the Payment in Lieu of Taxes Act was invalid under the Supremacy Clause); *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 359 (2000) (because railway crossing signs were "installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's [tort] claim").[38]

Examples 3 and 4 are very similar to Example 2. In Example 3, the author seeks to persuade the audience that the policy behind the default judgment rule only permits a finding of willfulness when there is evidence of intentional bad faith conduct beyond negligence or carelessness by one of the players in the process. In Example 4, the author seeks to persuade the audience concerning the policy behind the treatment of spending conditions as federal obligations binding on third parties. Parentheticals allow the illustrations of multiple authorities to be presented in a very concise discussion. In this manner, the proposition concerning the public policy behind the law is supported by a significant number of cases, and the illustrative points of each case are presented in parentheticals so that the reader does not have to investigate the sources in order to understand how they illustrate the proposition.

Rhetorically, the use of parentheticals bolsters the credibility of a public policy argument made in conjunction with an argument of probabilities because the supporting facts, policy, and details of the application of the law are open for examination and potentially for rebuttal—this is the rhetorical concept of falsifiability that makes open, demonstrative reasoning so persuasive in analysis or advocacy.[39] If the openly demonstrated analysis is not refuted, it is held to be conclusive when the premises are capable of conclusive determination; in other words, the proof is absolute when both premises are absolutely and necessarily true, as in a true syllogism. When the premises are not susceptible to conclusive determination, as in most instances of legal analysis where the facts and the law are not susceptible to absolute certainty of determination, the syllogistic structure still is held to be highly persuasive because the premises are openly demonstrated and exposed to examination and refutation both as to the probability and accuracy of the statement of the premises and the probability and reliability of the conclusion drawn from

38 Br. for the U.S. as Amicus Curiae in Support of Appellant, *Chi. Trib. Co. v. Bd. of Trustees of the U. of Ill.*, 2011 WL 3283768 at *8–9 (No. 11-2066, 680 F.3d 1001, 2012). This example is offered to demonstrate the method although this particular brief will be excluded from the data set because it is an amicus brief.

39 *See* Murray, *After the Great Recession*, *supra* n. 4, at 26–27, 39–40.

the premises.[40] Parentheticals allow the supporting details to be stated openly in a clear, succinct format.[41]

2. Parentheticals in narrative synthesis

The second subset of explanatory synthesis tracked in the data set is the use of parentheticals for the exposition of the storylines of success and failure and the lessons to be synthesized from the storylines of multiple narratives in precedent cases applying the law. The analogical and rhetorical use of precedent cases as a source of narrative forms and "stories" in the law is well recognized in American legal method.[42] Precedent cases contain a story, and multiple precedents can contain the same storyline or directly related and analogous storylines. In American legal method, an attorney often relates her client's situation to one or more of the precedent storylines if the outcome of the stories in the precedents is favorable to the client; by the same token, an attorney will attempt to tell a new story of the client to distinguish one or more precedent cases whose stories do not support a favorable disposition of the client's case.[43]

Parentheticals may be used to demonstrate and illustrate successful and unsuccessful narratives (the storylines of "winners" and "losers") under the applicable rules and standards of the case at hand.[44] Examples are as follows:

40 Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 226; Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 170.

41 Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 169–70; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 226.

42 *See e.g.* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259, 266–69, 307 (2009); Douglas M. Coulson, *Legal Writing and Disciplinary Knowledge-Building: A Comparative Study*, 6 J. ALWD 160, 167–68, 195–97 (2009); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001); Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 220–21.

43 Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 148–49. This discussion merely scratches the surface of the theory and practice of the story-telling movement and narrative reasoning discipline in legal analysis, but for further reading, I offer the following sources: Amsterdam & Bruner, *supra* n. 34, at 113–14; David Ray Papke, *Narrative and the Legal Discourse: A Reader in Storytelling and the Law* (1991); Jane B. Baron & Julia Epstein, *Is Law Narrative?* 45 Buff. L. Rev. 141 (1997); Berger, *supra* n. 42; Jerome Bruner, *Life as Narrative*, 71 Soc. Research 691, 692 (2004); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7 (1996); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807 (1993); Foley & Robbins, *supra* n. 42; J. Christopher Rideout, *So What's in a Name: A Rhetorical Reading of Washington's Sexually Violent Predator's Act*, 15 U. Puget Sound L. Rev. 781 (1992); Ruth Anne Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 Leg. Writing 3 (2008); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 Seattle U. L. Rev. 767 (2006); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 Vt. L. Rev. 681, 717 (1994); James Boyd White, *Reading Law and Reading Literature: Law as Language*, in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 77–106 (1985).

44 Narrative synthesis is a subset of explanatory synthesis. In the coding of the data set, every instance of explanatory synthesis was recorded. Then, certain instances within the explanatory synthesis set were also coded as instances of narrative synthesis.

Example 1:

In light of differences among state courts (and some federal courts) on the applicability of a "right to counsel" in civil contempt proceedings enforcing child support orders, we granted the writ. Compare, *e.g.*, *Pasqua v. Council*, 186 N.J. 127, 141–146, 892 A.2d 663, 671–674 (2006); *Black v. Division of Child Support Enforcement*, 686 A.2d 164, 167–168 (Del.1996); *Mead v. Batchlor*, 435 Mich. 480, 488–505, 460 N.W.2d 493, 496–504 (1990); *Ridgway v. Baker*, 720 F.2d 1409, 1413–1415 (C.A.5 1983) (all finding a federal constitutional right to counsel for indigents facing imprisonment in a child support civil contempt proceeding), with *Rodriguez v. Eighth Judicial Dist. Ct., County of Clark*, 120 Nev. 798, 808–813, 102 P.3d 41, 48–51 (2004) (no right to counsel in civil contempt hearing for nonsupport, except in "rarest of cases"); *Andrews v. Walton*, 428 So.2d 663, 666 (Fla.1983) ("no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support"). Compare also *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (C.A.9 1972) (*per curiam*) (general right to counsel in civil contempt proceedings), with *Duval v. Duval*, 114 N.H. 422, 425–427, 322 A.2d 1, 3–4 (1974) (no general right, but counsel may be required on case-by-case basis).[45]

Narrative synthesis using parentheticals is not the only method of narrative reasoning that is employed in legal discourse. In a case or legal brief, the author must use fact sections to craft a compelling story of the party's situation that will resonate with the storylines of precedent cases. Narrative synthesis carries the ball in the discussion or argument section (specifically, as part of the explanation section). The application section then must drive home the point—that the story of the party has a particular ending and legal outcome based on its relationship to the combined storylines of prior cases. Example 1 here shows that parentheticals can be used in the explanation section of a legal discussion or argument to demonstrate lessons learned from multiple narratives that have been adjudicated under the law. The parentheticals are not particularly lengthy, but each one introduces a narrative in which the right to counsel will or will not be recognized in a civil contempt proceeding.

Example 2:

Because Appellant did not request a hearing before the Sheriff's Office on his request for GML §207-c benefits, or institute grievance procedures to protest the charging of his sick leave pending the determination of his §207-c request (A130 ¶97), he waived whatever due process

45 *Turner v. Rogers*, 131 S. Ct. 2507, 2514 (2011) (Breyer, J., majority op.).

> rights he now attempts to assert in his proposed amended complaint. *Sandoval v. City of Boulder*, 388 F.3d 1312, 1329 (10th Cir 2004) ("[plaintiff] has waived any argument that she was denied due process by failing to request the hearing to which she now claims she was entitled"); *Kirkland v. S. Vain Valley Sch. Dist*, 464 F.3d 1182, 1195 (10th Cir 2006) ("Although [plaintiff] could have immediately filed a grievance challenging his suspension, he chose not to do so. In light of that, he cannot now allege that the [defendants] deprived him of post-suspension due process"); *Pitts v. Board of Educ.*, 869 F.2d 555, 557 (10th Cir 1989)("By waiving his hearing, [plaintiff] deprived the [employer] of the opportunity to provide him with due process"); *Lee v. Regents of University of California*, 221 Fed. Appx. 711, 714 (10th Cir 2007) (summary order) (waiver "because [plaintiff] he never requested a [*Loudermill*] post-termination hearing"); *Hagen v. Dept. of Defense*, 87 Fed. Appx. 738, 740 (Fed Cir 2004) (summary order) (due process claim held waived because plaintiff "did not bring the alleged due process error to the [Board's] attention"); *Tenorio v. Sandoval County Bd.*, 77 F.3d 493 (10th Cir 1996) (summary order), 1996 WL 77039 (plaintiff waived any due process hearing claims based on *Loudermill*, because he never requested a hearing).[46]

Example 2 illustrates the narratives of plaintiffs who waived due process claims for failing to request a hearing. Again, each parenthetical is fairly short and succinct. The rhetorical power comes from the ability of the author to present such a large number of narratives on this point, each of which has the same storyline and outcome. Parentheticals allow the story of each case to be told rather than simply making a very general statement supported by a string of bare citations. It is persuasive discourse because the same story is told time and time again, and each time with the same legal outcome.

Example 3:

> [A]ll courts that have addressed the issue have held that "[w]hen a member earns frequent flyer miles by flying on [an airline] or by doing business with [the airline's] affiliates, a contractual relationship is formed which vests the frequent flyer with the right to earn specific travel awards." *Wolens v. American Airlines, Inc.*, 157 Ill. 2d 466, 473 (Ill. 1993) ("*Wolens I*"), *rev'd on other grounds*, 646 N.E.2d 1218 (1995); *Cf. TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 687–89 (9th Cir. 1990) (frequent flyer coupon is a contractual "right to receive a ticket upon redemption of the coupon"); *American Airlines,*

46 Br. for Defs.–Appellees, *Zembiec v. County of Monroe*, 2011 WL 3436290 at *48–49 (No. 11-777-CV, 468 Fed.Appx. 39, 2d Cir. 2012) (bracketing as in original; spacing in internal citations modified to accord with ALWD convention).

Inc. v. American Coupon Exchange, Inc., 721 F. Supp. 61, 63 (S.D.N.Y. 1989) (airline's complaint alleged existence of contract between it and frequent flyer members to support claim of aiding and abetting fraud against defendants); *Simon*, 2010 U.S. Dist. LEXIS 10278, at *11 ("[The Continental frequent flyer program] is a bilateral contract where the Plaintiffs 'accepted' the 'offer' by enrolling in the OnePass program.").[47]

Example 4:

Numerous cases establish that the communications sent by the defendants to Felland in Wisconsin through e-mail or regular mail are not "acts or omissions" within the state by the defendants. *See, e.g., Coté v. Wadel*, 796 F.2d 981, 984 (7th Cir. 1986) (letters and telephone calls between Michigan attorney and Wisconsin resident do not constitute local act or omission); *Tavoulareas v. Comnas*, 720 F.2d 192 (D.C. Cir. 1983), cited with approval in *Dietrich v. Wisconsin Patients Comp. Fund*, 169 Wis. 2d 471, 480, 485 N.W.2d 614 (Ct. App. 1992). See also *Pavlic v. Woodrum*, 169 Wis. 2d 585, 595, 486 N.W.2d 533 (Ct. App. 1992) (letters sent to Wisconsin did not constitute acts or omissions in Wisconsin); *Jefferson Electric, Inc. v. Torres*, 2009 U.S. Dist. LEXIS 115304 (E.D. Wis. 12-10-2009) ("Neither the receipt of communications within Wisconsin from a remote defendant, nor the sending of communications from Wisconsin to a remote defendant, constitute acts or omissions within this state by that defendant."); *Lincoln v. Seawright*, 104 Wis. 2d 4, 310 N.W.2d 596, 599 (1981) (wiring money into Wisconsin and telephone calls from out of state into Wisconsin are not acts or omissions within the state).[48]

Examples 3 and 4 are typical examples of the use of narrative synthesis in appellate briefs. As noted above, the use of narrative synthesis in the discussion or argument section of the brief follows a careful exposition of the client's own narrative in the introduction and fact sections of the brief, and precedes the application of the synthesized principles induced from the storylines of multiple precedents to make an argument concerning the outcome and disposition of the client's story in the application section of the brief.

Narrative synthesis performs an open demonstration of the analysis of the storylines of multiple authorities as an incentive to the reader. The reader is invited to avoid the cost of delving into such a large number of authorities because the work of the analysis has been performed openly,

47 Br. of Appellants, *Sateriale v. R.J. Reynolds Tobacco Co.*, 2011 WL 3436956 at *32–33 (No. 11-55057, 697 F.3d 777, 9th Cir. 2012) (footnote omitted).

48 Br. of Defendants–Appellees Patrick Clifton, Clifton Meridian, LLC, and CM La Perla De Peñasco, S. De R. L. De C.V., *Felland v. Clifton*, 2011 WL 3283745 at *23–24 (No. 11-1839, 682 F.3d 665, 7th Cir. 2012).

subject to examination and refutation. Opaque or unsubstantiated reasoning, overworking or stretching an analogy to a precedent that is not closely aligned to the client's narrative and rhetorical situation, imposes a cost on the reader who must take the time to unpack the analogy, evaluate whether it is analogous, and still might have to invest the time to compare the analogy to other controlling authorities that also are on point.[49]

D. Comparing parentheticals in synthesis to case-to-case analogical reasoning and footnoting

The two main alternatives to parentheticals in legal discourse are footnotes and textual analogical explanations. Based on the results of this study, all of these devices are used regularly in legal writing. It is possible to use footnotes or a string of paragraphs of text to quote the contents or explain the effect of multiple authorities. Analogical reasoning is essential in a common-law system defined by precedent, and the textual, one-to-one comparison of the client's legal situation or narrative to the situation or storyline of a single precedent follows a familiar methodology of analogical reasoning: if the situation and storyline of the client's case is the same as the situation and storyline of the precedent, the ending of the story (the outcome and disposition) should also be the same in both cases. The question is, is the use of case-to-case analogical reasoning through textual explanation or footnoting rhetorically superior to the use of parentheticals for explanatory, analogical, and narrative reasoning?

Parentheticals have several distinct advantages over textual case-by-case presentations or footnoting to explain the analysis, public policies, or related storylines of authorities so as to predict or advocate for certain interpretations and applications of the law in legal discourse.[50] Parentheticals are key to the rhetorical power of explanatory synthesis, and its subsets of public-policy synthesis and narrative synthesis, because they allow succinct but elegantly detailed supporting information to be provided after each authority.[51] Parentheticals are not bound by grammatical conventions so that only the necessary and sufficient information need be put before the reader. This results in discourse that is attractive in an elegant, succinct format that is reader-friendly in its conservation of space and the time required for the consumption of the discourse, and

49 Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 169. *See* Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 241–42.

50 Authors have described parentheticals as a necessary component of legal discourse. *E.g.* Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. Det. Mercy L. Rev. 147, 170, 176 (2010); Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed*, 48 Duke L.J. 1043, 1076–79 (1999).

51 *See* Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 168–69.

persuasive for providing open, demonstrative support of rather than relying on trust or other indicia of the ethos of the author, if such indicia are present.[52]

Case-to-case analogical reasoning requires at least one and more often several paragraphs of text to explain and illustrate the storyline of a single authority. If multiple authorities are to be explained, the author must devote a page or more of text to the process of analogizing to or distinguishing the authorities. Authors necessarily will be pressured by page limits and audience attention span to limit the numbers of authorities that will be examined or explained to advocate their analysis of the situation.[53]

Explanatory synthesis, because of the elegance and efficiency of parentheticals compared to direct case-to-case analogical reasoning, does not put all of the rhetorical eggs in one or two baskets by relying on the principles of interpretation and application that can be learned from only one or two precedents. It can present a series of interpretive principles to address many different audiences and situations, and support the principles with a larger number of authorities.[54] As shown in the examples above, many authorities might be synthesized on a single page of text to substantiate and apply a greater number of interpretive principles so as to make a more persuasive discourse. Parentheticals also allow for the demonstration of patterns of narratives and storylines found in more than one authority so as to appeal to the values and preferences of the modern, rational audience, and do so in an elegant, time- and space-saving format. The typical legal audience is prone to the same biases and heuristics as any audience of decision-makers, and explanatory synthesis creates opportunities to anticipate and target audience biases or shortcuts.

In theory, footnotes should not be an attractive substitute for either parentheticals in synthesis or textual, case-to-case analogical reasoning. Outside of scholarly legal writing in journals and law reviews, footnotes are not recommended as a method for the presentation and analysis of legal authority.[55] Often in litigation contexts, local rules limit the use of

52 Explanatory synthesis is rhetorically advantageous under the newest school of contemporary legal rhetoric—law and economics. The rhetorical canons of contemporary law and economics apply four *topoi* of invention and arrangement and four style tropes to legal discourse: the primacy of the forms of analysis of mathematics and science, the concept of law as a system of incentives and costs, the rhetorical theory of efficiency, and the rhetorical lessons of contemporary rational-choice theory. *See* Murray, *Great Recession*, *supra* n. 4.

53 This statement is borne out by the data. The average number of authorities used in each instance of explanatory synthesis exceeds the average number of authorities used in each instance of case-to-case analogical reasoning. *See infra* pt. IV(C).

54 Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* n. 4, at 169. *See* Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* n. 4, at 241–42.

55 *See generally* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. Leg. Educ. 65 (2010).

footnotes for substantive presentation and analysis of authority.[56] And footnotes are far easier to skip than parentheticals because they are placed at the bottom of the page away from the very principles they illustrate and support. Nevertheless, the results of the study are that footnotes are used regularly by courts and practitioners for explanatory synthesis and for textual, case-to-case analogical reasoning, as well as for quotation, textual public-policy reasoning, parenthetical public-policy synthesis, textual narrative reasoning, and parenthetical narrative synthesis. The only significant pattern to note is that the use of footnotes trails the use of parentheticals for quotation and explanatory synthesis but generally exceeds the use of parentheticals in public policy and narrative synthesis, and exceeds the instances of case-to-case analogical reasoning. Courts and practitioners may enjoy a little variety in their methods of discourse, but they have not wholesale turned to footnotes as a replacement for textual or parenthetical methods of communication.

III. Methodology

I collected a cross-sectional sample of fifty appellate briefs filed in each of four federal appellate courts—the United States Supreme Court and the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits—that were submitted during the time period of February 1, 2011, through July 31, 2011 (during the October Term 2010 of the United States Supreme Court).

In order to compare like-for-like scenarios briefed in the data set, I controlled for the following variables:

Jurisdiction:	federal[57]
General law:	civil, not criminal[58]
Document type:	opening briefs or principal briefs of parties, but not reply briefs, supplemental briefs, amicus briefs, or other miscellaneous briefs
Document length:	no brief under four pages in length was considered
Contents:	only briefs that cited multiple authorities were considered

56 *E.g.* D.C. Cir. R. 28, 32.1; 3d Cir. R. 32.2(a); 8th Cir. Internal Operating P. III(I)(3).

57 Federal question and diversity jurisdiction cases were represented in the data set.

58 Several of the briefs arose from trial-level criminal prosecutions, but the issues briefed in the appellate courts were constitutional, evidentiary, or procedural issues.

Thus, a common search was run in each of the following Westlaw databases: CTA2-BRIEF (to collect briefs filed in the United States Court of Appeals for the Second Circuit), CTA7-BRIEF (to collect briefs filed in the United States Court of Appeals for the Seventh Circuit), CTA9-BRIEF (to collect briefs filed in the United States Court of Appeals for the Ninth Circuit), and SCT-BRIEF (to collect briefs filed in the United States Supreme Court).

The common search was as follows:
date(after 2/1/2011) & date(before 7/31/2011) & dt(opening appellant appellee) & dn(cv) % dt(reply)[59]

From the search results, I collected the first fifty briefs that were not excluded from consideration by my controls.

As a comparison data set, I also collected fifty judicial opinions from the United States Supreme Court issued between February 1, 2011, and July 31, 2011. In my collection I retained briefs or judicial opinions that cited authority of any kind. For controls, I excluded Supreme Court opinions granting or denying certiorari or opinions adjudicating motions before the high court, as well as any opinion under one page in length or any opinion that did not cite authority.[60]

The qualitative examination of the data set was to discover the uses of parentheticals for quotation,[61] explanatory synthesis,[62] public-policy synthesis,[63] and narrative synthesis,[64] as compared to uses of case-to-case

59 The search string "date(after 2/1/2011) & date(before 7/31/2011) & dt(opening appellant appellee) & dn(cv) % dt(reply)" means briefs dated between February 1, 2011, and July 31, 2011, (based on the Date field), that are opening or principal briefs of parties (based on the Document Type field), in civil cases (based on the Docket Number field), but are not reply briefs (based on the Document Type field). I took the first-listed (i.e., the latest submitted) fifty briefs in each jurisdiction that met the control criteria. In the Seventh and Ninth Circuits' briefs databases, the term al(cv civ) was substituted for dn(cv) because the docket numbering system in that circuit lacks a CR - CIV designation. The search "date(after 2/1/2011) & date(before 7/31/2011) & dt(opening petitioner respondent) % dt(amici amicus amica supplemental reply petition opposition)" was run in the SCT-BRIEF-ALL database to capture only principal briefs of each party. There was no control for criminal law vs. civil law in the field limitations for the Supreme Court briefs database, therefore, non-constitutional criminal law appeals were manually sorted out of the data set.

60 This search was simpler: I collected all of the reported opinions in the SCT database from "date(after 2/1/2011) & date(before 7/31/2011)" and sorted them according to my controls and took the first-listed (i.e., the latest reported) fifty cases that met the criteria.

61 Use of parentheticals to quote or highlight portions of authorities.

62 Use of parentheticals to explain the effect of synthesized authorities within a string citation. The definition of "explanatory synthesis" includes the two subsets of "public-policy synthesis" and "narrative synthesis," each of which represents a particular kind of rhetorical synthesis of multiple authorities. Therefore, in the data set, every instance coded as "public-policy synthesis" or "narrative synthesis" was also coded as "explanatory synthesis."

63 Use of parentheticals to explain the operation of public policy in a synthesis of multiple authorities within a string citation.

64 Use of parentheticals to demonstrate the narratives of success or failure under the law in a synthesis of multiple authorities within a string citation.

analogical reasoning[65] or footnoting.[66] Only substantive uses of parentheticals were recorded. Uses of parentheticals in citation forms, for references to the docket sheet, record, or appendix in the appeal, or for providing simple factual information or factual clarification were not collected.

IV. Report of Results

The tables and charts below report the results of the analysis of the data set of fifty briefs from each of three United States Courts of Appeals and the United States Supreme Court, and fifty reported opinions of the United States Supreme Court. The chart reports the individual instances of the use of parentheticals for four distinct rhetorical purposes: quoting or highlighting the language or contents of a single authority, explaining the lessons induced from synthesized authorities on the law, explaining the operation of the public policies implicated in multiple cases, or demonstrating the narratives of success or failure in multiple cases adjudicated under the law. It further reports the instances of the use of alternative methods of explanation of multiple authorities, namely case-to-case analogical reasoning and footnoting. The results from the analysis of fifty briefs from each jurisdiction are compared to the results from fifty United States Supreme Court cases representing a total of one hundred seven separate opinions from the nine justices of the court:

All Uses Across All Jurisdictions

Court	Quotation	Explanatory Synthesis	Public-Policy Synthesis	Narrative Synthesis	Case-to-Case Analogical Reasoning	Footnotes
2nd Circuit Briefs	323	281	159	175	113	209
7th Circuit Briefs	335	237	139	146	94	85
9th Circuit Briefs	279	212	142	105	99	204
Supreme Court Briefs	845	623	294	326	453	440
Supreme Court Cases	723	474	306	139	86	582

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

65 Use of multiple, individual paragraphs of text to explain or distinguish an authority or multiple authorities through analogical reasoning.

66 Use of footnotes for any rhetorical, legal discussion purpose, including quotation, explanatory synthesis, public-policy synthesis, narrative synthesis, case-to-case analogical reasoning, or general legal analysis. The uses of footnotes for communicating or clarifying simple factual information or for references to the factual or procedural record in the case were not collected.

A. Parentheticals are overwhelmingly accepted as a rhetorical device in each jurisdiction.

The most important finding of the study, which confirms my hypothesis, is that parentheticals are overwhelmingly accepted as a rhetorical device in each jurisdiction studied. They are regularly and frequently used by practitioners in their briefs and by judges in their opinions. They are used at greater rates than the competing rhetorical devices for analysis of multiple authorities, case-to-case analogical reasoning and footnoting.

Use for quotation and highlighting the contents of authorities is by far the most common use. This result is consistent with the observation that usage of parentheticals for quotation is highly versatile. The author can choose exactly what text or information to highlight, and with the parentheticals' freedom from grammatical conventions, the author can present no more and no less text and information than is necessary. Quotation uses were noted with citations to single authorities and in the midst of string cites of multiple authorities.

B. Explanatory synthesis is the most frequently used form of analogical comparison of multiple authorities in each jurisdiction.

Explanatory synthesis has become the most frequently used form of analogical comparison of multiple authorities in each jurisdiction studied. Practitioners and judges use parentheticals for explanatory synthesis of multiple authorities at significantly higher rates than textual, case-to-case analogical reasoning, and practitioners use it at higher rates than footnoting. This confirms my hypothesis that legal authors recognize the rhetorical power and advantages of explanatory synthesis using multiple authorities supported by parentheticals over alternative methods of explanation of synthesized authorities. Case-to-case analogical reasoning is a well-recognized and widely-accepted form of analogical comparison of authorities, but it appears that the current trend in brief writing and decision writing is to make use of the rhetorical advantages of explanatory synthesis that allow an author to explain the lessons learned from multiple authorities in a succinct but elegantly detailed format that is more concise and reader-friendly than spelling out these lessons in multiple paragraphs of text.

C. The average number of authorities used in explanatory synthesis exceeds the average number of authorities used in case-to-case analogical reasoning in each jurisdiction.

The total number of authorities synthesized or analogized to in the data set, and the average number of authorities included in each instance of explanatory synthesis or case-to-case analogy are as follows:

Court	Instances of Explanatory Synthesis	Total Number of Authorities Used in Explanatory Sytnthesis	Instances of Case-to-Case Analogical Reasoning	Total Number of Case-to-Case Analogical Reasoning	Aveage Number of Authorites Used per Synthesis	Average Number of Authorities Used per Case-to-Case Analogy
2nd Circuit Briefs	281	830	113	298	3.0	2.6
7th Circuit Briefs	237	680	94	255	2.9	2.7
9th Circuit Briefs	212	676	99	241	3.2	2.4
Supreme Court Briefs	623	2,030	153	466	3.3	3.0
Supreme Court Cases	474	1,453	86	201	3.1	2.3

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

The average number of authorities used in each explanatory synthesis is very close to or, in several jurisdictions, slightly over 3.0. The average number of authorities used in each case-to-case analogy across all jurisdictions is closer to 2.5. The greater number of authorities employed per synthesis was predicted because of the efficiency of space and wording achieved by the use of parentheticals in explanatory synthesis and its subsets of public-policy synthesis and narrative synthesis. Although the averages—3.0 vs. 2.5—are not striking in and of themselves, it is important to note that the rate of use of explanatory synthesis far exceeds the rate of use of case-to-case analogical reasoning in each jurisdiction. In the three courts of appeals, the instances of use of explanatory synthesis more than double the instances of case-to-case analogies. In the United States Supreme Court briefs, the number of instances was 4 times as many, and in United States Supreme Court cases, the number was 5.5 times as many. Therefore, the total number of authorities analyzed in syntheses far exceeded the total number of authorities analyzed in case-to-case analogies across all jurisdictions (see chart on next page).

The total number of authorities must be compared in context. The local rules of each court of the appeals studied—the Second Circuit, the Seventh Circuit, and Ninth Circuit—each conform to the page limits in Fed. R. App. P. 32(a)(7) allowing a maximum of 14,000 words per brief. The local rules for United States Supreme Court briefs allow 15,000 words. (Note, too, that the control group of Supreme Court cases had no

Total Number of Cases Analyzed

Court	Number of Cases Used in Explantory Synthesis	Number of Cases Used in Case-to-Case Analogical Reasoning
2nd Circuit Briefs	830	298
7th Circuit Briefs	680	255
9th Circuit Briefs	676	241
Supreme Court Briefs	2,030	466
Supreme Court Cases	1,453	201

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

page limitations of any kind). This study took a random cross-section of fifty briefs from each jurisdiction, and not every brief in the data set maxed out on its page limits. Nevertheless, the Supreme Court briefs and cases had the opportunity to incorporate more pages, and my unrecorded, anecdotal observations were that the selected briefs and cases from the Supreme Court were, on average, longer than the briefs selected from the three courts of appeals.

D. Three is a magic number for authorities (but should it be?).

The number 3.0 winds up as the average number of authorities used per synthesis, but even this deserves some further examination. I did not predict that the number would be as small as 3.0 given that parentheticals are such an elegant and efficient method of explaining and illustrating the effect of multiple authorities. It would seem that parentheticals would provide an opportunity and incentive to use more than three authorities to support a rhetorical proposition in legal discourse. The law of averages may have obscured the actual rhetorical potential of explanatory synthesis using parentheticals as compared to case-to-case analogical reasoning. With each device, there were instances of only two authorities being compared, and in many case-to-case analogies, only one case was employed for comparison, but in many other instances more than three authorities were used. The flexibility of explanatory synthesis, which allows as many and as few words as are needed to be used in each parenthetical without regard to grammatical conventions, allowed some syntheses in briefs and cases to contain more than 10 authorities, and it was not unusual to see syntheses of more than 15 authorities. No single case-to-case analogical exercise exceeded ten cases. In the end, the rhetorical advantages of parentheticals are the best explanation for why explanatory synthesis is used at greater rates and to analyze greater numbers of cases than case-to-case analogical reasoning.

E. Do not write the epitaph for case-to-case analogical reasoning just yet.

The main purpose of this study was to examine briefing practices in general and the uses of parentheticals in briefs in particular. The study proved that parentheticals in syntheses are used constantly and at greater rates than case-to-case analogical reasoning and footnoting. But case-to-case analogical reasoning still is used regularly, as is footnoting. In fact, the study proved that the overwhelming number of briefs out of each sample set of fifty used *both* explanatory synthesis and case-to-case analogical reasoning at least once in the brief:

Overlapping Uses of Rhetorical Methods
(Number of Briefs or Cases Our of a Set of 50)

Court	Briefs Using Both Synthesis and Case-to-Case Analogical Reasoning	Briefs Using Only Synthesis	Briefs Using Only Case-to-Case Analogical Reasoning	Briefs Using Neither Synthesis and Case-to-Case Analogical Reasoning
2nd Circuit Briefs	40	4	3	3
7th Circuit Briefs	39	3	6	2
9th Circuit Briefs	36	8	4	2
Supreme Court Briefs	44	5	1	0
Supreme Court Cases	41	8	1	0

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

Case-to-case analogical reasoning has its place in legal rhetoric. Sometimes the importance of an individual authority or its complexity require the exposition of the facts, details about the application of the law or the public policy of the area, and the reasons why the case is particularly dispositive of or distinguishable from the present situation in more than a few words or a short phrase that comfortably fit within a parenthetical. In these instances, the most proper rhetorical tool for the situation is to devote several paragraphs or even pages of text to the job of analogizing to or distinguishing a single authority or a small group of important authorities.

Some commentators on this article have suggested that parentheticals may be disfavored because they break up the flow of the discourse. It is true that anything that is not a sentence of text in the argument section, such as citations themselves or the parentheticals that may follow them, might interrupt the words of the discourse. Nevertheless, many parentheticals contain complete phrases or sentences that might continue the flow of the discussion rather than break the flow. It is difficult to resolve

whether a significant number of readers might find parentheticals distracting or not, but what is clear is that the data indicate that practitioners and judges believe that the rhetorical advantages of parentheticals outweigh any disadvantages, and they use them at much greater rates than alternatives methods of explaining multiple authorities.

Synthesis is used more often than case-to-case analogical reasoning, but not exclusively. Explanatory synthesis using parentheticals is as flexible as it is efficient in its use of space and in time required from the attention span of the reader. Large and small propositions of the analysis may be supported by synthesis, and parentheticals afford the author great flexibility in how much information is required to explain or illustrate the point. But complex cases that appear to be on all fours with the client's case cannot always be dealt with in a few choice words.[67] It is a basic lesson of rhetoric and most other pursuits to use the right tool for the job, and in cases of highly important and highly complex authorities, often case-to-case analogical reasoning using several paragraphs of text per authority is the right tool for the rhetorical situation.

F. The bottom line on footnotes

Footnotes remain very popular in United States Supreme Court opinions and in United States Supreme Court briefs, and they are frequently used in Second Circuit and Ninth Circuit briefs.

The Bottom Line on Footnotes

Court	Quotation	Explanatory Synthesis	Case-to-Case Analogical Reasoning	Footnotes
2nd Circuit Briefs	323	281	113	209
7th Circuit Briefs	335	237	94	85
9th Circuit Briefs	279	212	99	204
Supreme Court Briefs	845	623	153	440
Supreme Court Cases	723	474	56	582

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

I have little to offer in the way of explanation of this practice. In some ways, footnotes allow the most flexibility of use and content—they are used for factual explanation, textual analysis, or a side comment on the facts, or law, or public policy; sometimes they are used for quotation of

67 The study counted numbers of instances of usage of rhetorical devices. It did not and could not account for why authors used one form of analogical reasoning in place of another.

authorities or syntheses of authorities; and sometimes they are used for a small-scale case-to-case analogical exercise. The below-the-line function of footnotes has an obvious effect on the reader—many will skip footnotes in briefs or pay them much less attention than the rest of the text. But for the author of the brief, perhaps this is the exact rhetorical message that she or he wishes to communicate: this note is not critical, not the most important thing I am saying on this page, but it is useful, helpful. For those readers who are looking for additional commentary, explanation, or support on the point that is footnoted, the author is making it available to the reader. A footnote is a whisper, quite the opposite of shouting through bolding or allcaps. But sometimes a whisper attracts a lot of attention from a reader or listener.

G. Further breakdown of the use of parentheticals in synthesis by justices of the Supreme Court

I have broken down the usage of the methods of synthesis and quotation within the United States Supreme Court opinions, and further broken the usage down per justice. The data are susceptible of being broken out in several different ways. I was most interested to examine the patterns of usage (or nonusage) among the various justices. Along the way, I noted that some justices favor certain devices (quotation, parenthetical explanatory synthesis, or footnoting) much more than other devices:

Comparative Use of Four Parenthetical Types

Justice	Explanatory Quoting	Synthesis	Policy	Narrative
Alito	70	41	29	15
Breyer	103	78	54	26
Ginsburg	79	37	22	15
Kagan	54	37	24	13
Kennedy	50	32	22	12
Roberts	61	29	21	11
Scalia	15	8	7	3
Sotomayor	158	87	71	20
Thomas	128	90	47	18

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

There is a predictable pattern to the use of rhetorical devices: the justices used quotation more than explanatory synthesis, and each used public-policy synthesis more than narrative synthesis. Between justices, there were significantly varying rates of usage of explanatory synthesis employing parentheticals:

Use of Explanatory Synthesis: All Justices

Alito	Breyer	Ginsburg	Kagan	Kennedy	Roberts	Scalia	Sotomayor	Thomas
41	78	37	37	32	29	8	87	90

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

Part of this varying usage results from the justices' preferences for parentheticals in general: Justice Scalia engaged in a great deal of synthesis of authorities; he simply did not use parentheticals when he did so. As noted in the first chart of this section, Justice Scalia avoids parentheticals for quotation, synthesis, or any purpose.

Use of Parentheticals for Policy and Narrative

Justice	Policy	Narrative
Alito	29	15
Breyer	54	26
Ginsburg	22	15
Kagan	24	13
Kennedy	22	12
Roberts	21	11
Scalia	7	3
Sotomayor	71	20
Thomas	47	18

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

The justices employ public-policy synthesis at greater rates than narrative synthesis. This might be explained by the nature of the Supreme Court: it must resolve cases of great importance that carry significant public-policy implications. Thus, it has greater reason to discuss public policy in its opinions than to discuss the storylines of cases. The nature of a judicial opinion is explanation and justification of a decision, while the nature of an appellate brief is advocacy. In advocacy, practitioners have a greater need to demonstrate the successful narratives of prior cases, and distinguish their client from the unsuccessful narratives, and the greater rates of use of parentheticals in narrative synthesis might be explained by this fact (see chart on next page).

Justices are all over the map on footnotes. Justices Sotomayor, Thomas, Alito, Ginsburg, and Scalia are particularly fond of footnotes, while Justice Kennedy avoids footnotes at all cost, and Justice Breyer did not use a single footnote in any of his opinions from the fifty cases sampled in the study. Once again, I have little to offer in the way of expla-

nation of the popularity of footnotes. They are flexible, and they are frequently used.

Comparison Use of Footnotes versus Explanatory Synthesis

Justice	Footnotes	Explantory Synthesis
Alito	86	41
Breyer	0	78
Ginsburg	89	37
Kagan	67	37
Kennedy	12	32
Roberts	42	29
Scalia	66	8
Sotomayor	134	87
Thomas	101	90

(See Parenthetical Usage Charts, available at http://www.alwd.org/lc&r.html, for this data graphically illustrated.)

IV. Conclusion

The study proves that parentheticals are used regularly in federal appellate briefs for each of the four functions introduced above—quotation, explanatory synthesis, public policy-synthesis, and narrative synthesis. Every category of parenthetical usage for synthesis is being used in briefs in each federal appellate court at a greater rate than the alternative of case-to-case analogical reasoning. From the data, I draw the conclusion that parentheticals are regularly employed as a rhetorical device to explain the meaning and effect of multiple authorities, and to convey and illustrate the more specific functions of the effect and operation of public policies underlying the law in multiple authorities and the narratives of success or failure among multiple cases in which the law was applied to produce a concrete outcome.

Case-to-case analogical reasoning is by no means disappearing as a method of analysis of multiple authorities. The analysis of complex cases that appear to be on all fours with the client's case cannot always be accomplished in a few choice words. It is a basic lesson of rhetoric and most other pursuits to use the right tool for the job, and in cases of highly important and highly complex authorities, often case-to-case analogical reasoning using several paragraphs of text per authority is the right tool for the rhetorical situation. The vast majority of briefs from each jurisdiction used both explanatory synthesis and case-to-case analogical reasoning at least once in each brief.

Explanatory synthesis, however, is used more often. Large and small propositions of the analysis may be supported by synthesis, and parentheticals afford the author great flexibility in how much information is required to explain or illustrate the point, making explanatory synthesis as flexible as it is efficient in its use of space and in time required from the attention-span of the reader. A much greater number of authorities can be analyzed in the same space by using explanatory synthesis over case-to-case analogical reasoning. Authors show their appreciation of the advantages of explanatory synthesis by using explanatory synthesis much more often and using it to analyze a much greater number of cases than were analyzed through case-to-case analogical reasoning.

The rate of footnoting in briefs is the most unexpected finding of the study. I certainly did not predict that footnotes would be employed at greater rates than case-to-case analogical reasoning. Footnotes are highly flexible. They are used for many purposes—factual explanation, textual analysis, side commentary, quotation, syntheses of authorities, or for a small-scale case-to-case analogical exercise. It appears that authors are enjoying the opportunity to whisper a few points in support of their arguments through footnotes rather than constantly speaking the support through normal text.

The study proves that parentheticals are regularly and frequently employed as a rhetorical device to explain the meaning and effect of multiple authorities, including the effect and operation of public policies underlying the law in multiple authorities and the narratives of success or failure among multiple cases in which the law was applied to produce a concrete outcome. In addition, parentheticals in explanatory synthesis are used to explain the lessons and principles that can be induced from multiple authorities at a greater rate than the alternative form of communication of case-to-case analogical reasoning. These findings sustain my hypothesis that parentheticals in synthesis are rhetorically advantageous as compared to textual, case-to-case analogical reasoning because of their flexibility and efficiency in communicating the lessons and principles induced from multiple, synthesized authorities, and because they follow a mathematical and scientific model of open, demonstrative reasoning that furthers the persuasive potential of parentheticals as a rhetorical tool for legal discourse.