Crafting Responses to Counterarguments

Learning from the Swing-Vote Cases

Stacy Rogers Sharp*

When faced with a strong opposing argument, persuasive legal writers are sometimes tempted to shrink away from the argument,[1] combat it with a barrage of unfounded responses,[2] or, as a last resort, simply lodge ad hominem attacks at the adverse party.[3] The most difficult counterargument to respond to, naturally, arises in those truly close issues that a reasonable jurist could decide either way. And there may be no closer call than the key issue of a Supreme Court case that has been decided by a one-vote margin.

A look at the Court's 5–4 opinions from the 2011–2012 Term reflects that the Justices regularly, and explicitly, confront the strongest arguments against their positions. Because these opinions contain responses to the most challenging counterarguments, they illustrate specific rhetorical strategies to emulate in persuasive legal writing.[4] These model strategies are explained and illustrated in part I of this article. Part II of the article focuses on a different set of techniques, which can be found in the dissenting opinions of these same swing-vote cases. The tactics described in part II are better avoided—unless the persuasive writer, like the dissenting judge, has already accepted defeat.

***** Beck Center Faculty of Legal Research and Writing, University of Texas School of Law. I am grateful to Terri LeClerq for invaluable feedback during the planning and writing process. I also thank Lech Wilkiewicz for his research assistance.

1 *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.) (criticizing an advocate's "'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist'") (quoting *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987)).

2 *E.g. Nat. Conservancy v. Wilder Corp. of Del.*, 656 F.3d 646, 653 (7th Cir. 2011) (rejecting the defendant's baseless response to valid breach-of-contract claim and admonishing that "[b]luster and bombast are poor substitutes for evidence").

3 *Cruz v. Comm'r of Soc. Sec.*, 244 F. Appx. 475, 484 (3d Cir. 2007) (describing trial court's order striking an attorney's brief for being "'rife with ad hominem attacks'").

4 Ron Moss, *Rhetorical Stratagems in Judicial Opinions*, 2 Scribes J. Leg. Writing 103, 104 (1991) ("Judges have long known the power of language to persuade. They have used rhetorical devices to influence the law.").

I. Effective Techniques for Confronting Counterarguments in the Opinions

To persuade, the legal writer generally should "volunteer negative information and rebut it early, and . . . a direct and in-depth confrontation of negative information is generally more effective than an indirect and cursory treatment."[5] In nearly every persuasive document, then, the legal advocate will be faced with the challenge of confronting counterarguments. But, because "[v]ery little has been written about the construction and cognition of legal counter-analysis,"[6] there is a scarcity of specific advice for *how* to volunteer and rebut the counterarguments that should be confronted in a persuasive brief.[7]

The swing-vote Supreme Court opinions uniquely model responses to counterarguments, providing expert examples in an area that has thus far scarcely been analyzed. Although judicial opinions serve a different end than the legal advocate's writing, they have one critical similarity: they are persuasive documents by nature.[8] The Supreme Court Justices seek to persuade[9] the public and the parties,[10] the other branches of government,[11] and each other[12] through rhetorical devices that are, at

5 Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 Rutgers L. Rev. 381, 383; *see also id.* at 394 (contrasting nonrefutational treatment of opposing views with refutational messages, the latter of which "offer not only an acknowledgement of opposing views, but also a refutation of opposing arguments," and concluding that refutational messages are more effective); Lisa T. McElroy & Christine N. Coughlin, *The Other Side of the Story: Using Graphic Organizers to Counter the Counter-Analysis Quandary*, 39 U. Balt. L. Rev. 227, 230 (2010) ("[T]he logically strongest overall conclusion [will] 'critically evaluate arguments and counterarguments.' . . . Specifically, [counter-analysis] 'enhances the writer's credibility as an intelligent source of information.'").

6 McElroy & Coughlin, *supra* n. 5, at 227–28 ("This lack of literature should come as a surprise in light of the fact that effective lawyers require themselves, and are required by ethical rules, to consider both sides of the legal and factual story they seek to advance.").

7 This article analyzes the explicit introduction and rebuttal of counterarguments in the swing-vote opinions. It does not address how to implicitly rebut counterarguments by making the stronger affirmative argument on the same point as one made by an adversary.

8 Moss, *supra* n. 4, at 105 ("In the end, Supreme Court Justices and other judges make law only by persuading through reason and rhetoric.").

9 *Id.* ("The opinion must also persuade its audience that its rationale is sound and that the results are in the nation's best interests."); Robert A. Prentice, *Supreme Court Rhetoric,* 25 Ariz. L. Rev. 85, 89 (1983) ("The more difficult or controversial the case, the more significant the role of rhetoric in shaping the content of the opinion.").

10 Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* 28 (1992) (describing various audiences of justices as objects of persuasion and noting that two of the three purposes of published opinions are to satisfy the public's wish for justice and to give the losing party "the feeling that he has had his day in court").

11 Prentice, *supra* n. 9, at 85–86 ("Rhetoric is pivotal in inducing the cooperation and consent of those to whom [the Supreme Court's] rulings are addressed and upon those to whom it must turn for assistance in enforcing those rulings. . . . Convincing the nation of the wisdom of its decisions is necessary . . . .") (internal quotations omitted).

12 Yury Kapgan summarizes a survey of appellate court judges concluding that "'by far the most important audience is the opinion writer's colleagues; he may tailor his opinion to get their votes or simply to please them.'" Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia Love Him or Hate Him, Antonin Scalia Demands Attention*, 9 Leg. Writing 71, 98 (2003); *see* Lee Epstein & Jack Knight, *The Choices Justices Make* 95–107 (1998) (describing strategic opinion writing by and negotiations between Supreme Court Justices to reach consensus).

their essence, no different from those used by the advocates seeking relief.[13] Indeed, according to Robert A. Prentice, "Justices engage in persuasive strategies when they write opinions as surely as Presidents and Congressmen employ speechwriters."[14]

These opinions[15] model specific rhetorical strategies for persuading through "direct and in-depth" confrontation of the other side's arguments.

A. Inoculating against counterarguments

The first step in handling counterarguments is deciding whether to introduce the counterargument at all.[16] Kathy Stanchi contributes the seminal work on this topic. She explains the theory of inoculating against counterarguments accordingly:

> The theory of inoculation is based on the idea that advocates can make the recipient of a persuasive message "resistant" to opposing arguments, much like a vaccination makes a patient resistant to disease. In an inoculation message, the message recipient is exposed to a weakened version of arguments against the persuasive message, coupled with appropriate refutation of those opposing arguments. The theory is that introducing a "small dose" of a message contrary to the persuader's position makes the message recipient immune to attacks from the opposing side.[17]

The existing social-science research shows that inoculation tends to help the writer's side as long as (1) the information will actually be used by the adversary, and (2) the writer has a strong response.[18] The writers of the

13 Justice Cardozo described some of these ordinary but important rhetorical devices: "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of proverb and maxim." Benjamin N. Cardozo, *Law and Literature* 9 (1931), cited in Moss, *supra* n. 4, at 105 n. 9.

14 Prentice, *supra* n. 9, at 85; *see also* Moss, *supra* n. 4, at 105 ("Because they cannot coerce, courts must compel by the force of their opinions.").

15 I've examined all of the swing-vote authored opinions from the 2011–2012 Term to identify and catalogue techniques for this article. I excluded the only per curiam opinion that reaffirmed *Citizens United* and reversed the Montana statute limiting corporate political contributions. *See Am. Tradition P'ship, Inc., v. Bullock*, 132 S. Ct. 2490 (2012). That left fourteen cases for the forthcoming analysis: *Miller v. Ala.*, 132 S. Ct. 2455 (2012); *Dorsey v. U.S.*, 132 S. Ct. 2321 (2012); *Coleman v. Ct. of Apps. of Md.*, 132 S. Ct. 1327 (2012); *Williams v. Ill.*, 132 S. Ct. 2221 (2012); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012); *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012); *Hall v. U.S.*, 132 S. Ct. 1882 (2012); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *U.S. v. Home & Concrete Supply, LLC*, 132 S. Ct. 1836 (2012); *FAA v. Cooper*, 132 S. Ct. 1441 (2012); *Mo. v. Frye*, 132 S. Ct. 1399 (2012); and *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

16 Attorney advocates are bound by the rules of ethics to volunteer adverse authorities in the controlling jurisdiction that are directly adverse to the position of their client. *See e.g.* Model R. Prof. Conduct 3.3(a)(2) (2010). This article does not seek to explore the constraints of that requirement as it applies to the use of these techniques in brief writing.

17 Stanchi, *supra* n. 5, at 399–400; *see also* Helene S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing & Analysis in the Law* 469 (5th ed. 2008) (describing "strategic reasons" to acknowledge unfavorable law, such as adding to the writer's credibility and showing the strength of the argument by "go[ing] beneath the surface to rebut adverse authority").

18 Stanchi, *supra* n. 5, at 433; *see also* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 16 (2008) ("[A]nticipatory refutation has its perils. You don't want to refute (and thereby disclose) an argument that your opponent wouldn't otherwise think of.").

swing-vote opinions have the advantage of satisfying the first requirement, of course, because they exchange opinions during the writing process.[19] Beyond that, the process looks similar to one that an advocate would engage in. In the examples that follow, each Justice presented not just an opposing argument to be rebutted, but information that was unequivocally negative to the writer's position. This small dose of negative information sought to make the reader resistant to hearing the message for the first time in the dissenting opinion.

For example, in *Miller v. Alabama*, the Court concluded that a juvenile's life-without-parole sentence violates the Eighth Amendment's ban on cruel and unusual punishment. Existing precedent, in *Graham v. Florida*,[20] had held that such a sentence was unconstitutional if the juvenile committed crimes *other than* murder. The majority opinion therefore resolved to inoculate against the limiting language in this critical case:

> **To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm**. But none of what it said about children . . . is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.[21]

Another example of inoculation appeared at the opening of the rebuttal in *Dorsey v. U.S.*[22] In *Dorsey*, the Court held that newer, lower sentencing minimums applied to defendants who were sentenced after the statute's effective date but who committed the crime before the new minimums took effect.[23] The majority opinion's final point was dedicated to counterarguments, concluding that it had "found no strong countervailing consideration."[24] The Court then conceded the major premise of the last counterargument described: "**We also recognize that application**

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19 Epstein & Knight, *supra* n. 12, at 76–77 (describing suspected role of dissenting and concurring opinions as bargaining tools between Justices). Epstein and Knight also explain the role of the first majority-opinion draft as the basis for bargaining. *See id.* at 126–27.

20 130 S. Ct. 2011, 2027 (2010).

21 *Miller v. Ala.*, 132 S. Ct. at 2465 (citation omitted) (emphasis added).

22 132 S. Ct. at 2335.

23 *Id.*

24 *Id.*

of the new minimums to pre-Act offenders sentenced after August 3 will create a new set of disparities. But those disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences . . . ."[25]

Generally, writers are counseled to introduce adverse information later in the argument, once the reader has been loosely persuaded by favorable information.[26] The Swing Vote cases demonstrate, though, that when the adverse information is central enough to the argument, inoculation should come sooner—or readers may end up unpleasantly surprised when they happen upon the information after already having been convinced by the primary argument. In *Coleman v. Court of Appeals of Maryland*, the Court held that Congress could not abrogate state immunity by requiring the states to provide FMLA self-care leave to their employees. The key adverse authority threatening the majority's opinion was a 2003 case, *Hibbs*, holding that the FMLA could abrogate states' immunity by requiring states to provide *family-care* leave.[27] Justice Kennedy's majority opinion addressed the adverse case early—before the argument or even the summary of facts had begun. He devoted the entire third paragraph of the opinion to *Hibbs*. Any adverse effect of introducing the case early was mitigated by including in this introductory case illustration the reasoning from the case that would ultimately differentiate *Hibbs* from Coleman's facts.[28]

If the second criterion is not satisfied—in other words, if there is no strong response available, the justices tend to leave well enough alone. In *Cooper*, for example, the Court's majority opinion neglected rebutting the strongest (and opening) argument advanced by the dissent. The dissent opined that failure to compensate for emotional distress "cripples the core purpose" of the Privacy Act, since nearly all damage from invasion of privacy will be nonpecuniary. The majority opinion made no mention of

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25 *Id.* (emphasis added)

26 *E.g.* Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 98 (3d ed. 2010) ([A]ddressing negative authorities almost never means that you should begin your argument by addressing negative authorities."); Richard K. Neumann Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 315 (6th ed. 2009) ("[T]he most persuasive sequence is to present first the issues on which you are most likely to win; within issues, to make your strongest arguments first; and, within arguments, to make your strongest contentions and use your best authority first.").

27 *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

28 Justice Kennedy followed the common order of inoculation later in the opinion when addressing a more-typical adverse fact. One section of the opinion responded to Coleman's argument that the self-care leave provision was inseparable from the family-care leave provision, such that *Hibbs* controlled his case. The entire section of the opinion addressed whether Congress had tailored the provision appropriately because of the inseparability of the two provisions. But the fact that the inseparability of the two provisions was discussed in a subcommittee hearing did not appear until the last paragraph, and then only indirectly. *Coleman*, 132 S. Ct. at 1336; *see* Br. for Petr., *Coleman v. Ct. of Apps. of Md.*, 2011 WL 4427081 at *43 (Sept. 20, 2011) (No. 10-1016, 132 S. Ct. 1327 (2012)).

that argument, nor responded to it.[29] For the advocate, however, ignoring a strong counterargument is risky. Unlike the majority-opinion writer, an advocate may not be able to afford an avoidance strategy. But there are times when a counterargument is both invincible and tangential to the argument. The legal writer should honestly assess when a brief will be stronger for having avoided such a snare.

B. Identifying the counterargument for the reader

Once the writer decides to address a given counterargument, the argument must be identified in some form for the reader. But this identification need not adopt the adversary's vocabulary. The Supreme Court Justices have used two specific methods to identify counterarguments in the swing-vote opinions. Both of these approaches—damaging labels and metaphoric characterization of the counterargument—have served to pave the way for the substantive rebuttal by giving the reader an initial impression of the counterargument that favored the author.

1. Labeling the counterargument

An established[30] method for defeating an argument is to recharacterize the counterargument itself when identifying it so that the reader views it in a negative light before the rebuttal has even begun.[31] The Justices employed this technique routinely, in both majority and dissenting opinions, by applying damaging labels to the counterargument. Recharacterizing the counterargument can mean broadening the argument, making it narrower, or shifting the entire lens through which the counterargument is seen.[32] And, as will be described below, the dissenting opinions may even recharacterize the majority opinions in a way that verges on mockery.

An effective recharacterization may minimize the counterargument in size. For example, in the plurality opinion holding that the Confrontation Clause did not prohibit an expert witness's testimony regarding an outside

29 The tendency of courts to avoid the most important counterarguments has been noted, and criticized, before. Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendmen*t, 64 Temp. L. Rev. 629, 653 (1991) (describing common tendency of courts to avoid important and provocative arguments contrary to their ultimate decisions).

30 According to Kathryn Stanchi, legal persuasion commonly employs the technique of "framing" a counterargument, but the existing social-science research reflects a gap as to whether and to what extent the technique is effective. Stanchi, *supra* n. 5, at 431 (describing one study suggesting framing is not essential to the inoculation technique, but acknowledging weaknesses in study).

31 "Constructive characterization presents a fresh angle on a given set of facts, an angle that differs from one's opponent's. Destructive characterization is an attack technique focusing on the opponent's presentation and showing why the presentation is unworthy of credit." Laura E. Little, *Characterization and Legal Discourse*, 46 J. Leg. Educ. 372, 376 (1996).

32 *Id.* at 406 (citing Pierre Schlag & David Skover, *Tactics of Legal Reasoning* 39–43 (1986) ("(discussing movement among higher and lower levels of abstraction as an important legal argumentation device)").

expert report, Justice Alito reframed the dissent's argument to effectively "shrink" it: "The principal argument advanced to show a Confrontation Clause violation concerns **the phrase** that [the expert] used when she referred to the DNA profile . . . ."[33] After quoting the testimony, Justice Alito again summarized the adverse argument that "the **italicized phrase** violated petitioner's confrontation right because [the expert] lacked personal knowledge . . . ."[34]

Naturally, the dissenting opinion made no mention of "a phrase," nor did the dissent isolate the italicized testimony at all. But, through the plurality's summary, the dissent's argument was recast. The dissent's *actual* argument concerned expert testimony that was pivotal in ultimately identifying the defendant as the felon. But by describing the counterargument as based on a single "phrase," the majority had shrunk the counterargument to a concept so slight that the rebuttal would easily overcome it.

Another approach is to label the counterargument in a way that strips it of importance. Through an effective reframing, the majority opinion in *Salazar* discounted one key counterargument before even beginning its rebuttal. The key statutory conflict in *Salazar* was that the statute failed to appropriate enough funds to pay each individual contractor for the tribes, though it required payment in full for all contracted services.[35] When introducing the Government's argument on this point, the Court characterized the counterargument by labeling it a mere "**frustration**" with the Court's statutory interpretation—not as a critical deficiency arising from two conflicting statutory provisions.[36] The counterargument lost credibility at the moment Justice Sotomayor devalued the argument with a careful choice of labels.

Labeling can alter the character of a counterargument so completely that it loses its substance. In analyzing the Affordable Care Act opinion, the Court in *NFIB v. Sebelius* faced deciding whether the Commerce Clause could grant Congress authority to require all individuals to purchase health insurance. Justice Ginsburg's concurring opinion reasoned that the Commerce Clause reached the activity in part because "Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket)."[37] Indeed, she observed,

33 *Williams*, 132 S. Ct. at 2235–36 (emphasis added).

34 *Id.* at 2236 (emphasis added).

35 132 S. Ct. at 2195.

36 *Id.* (emphasis added)

37 132 S. Ct. at 2620 (Ginsburg, J., concurring).

"[v]irtually every person ["99.5%"] residing in the United States, sooner or later, will visit a . . . health-care professional."[38] The Chief Justice's opinion rejecting this argument reframed it in more ethereal terms: "The proposition that Congress may dictate the conduct of an individual today because of **prophesied future activity** finds no support in our precedent."[39]

Surely few grounds could be more flimsy than "prophesy" as the basis for a legal argument. The reader is left skeptical that Justice Ginsburg receives divine messages regarding medical care. The concurrence's statistics and analysis were thus slighted. And the counterargument is stripped of its import through a careful (and concise) relabeling.

A space-saving way to negatively label a counterargument is to assign a critical adjective to the argument before beginning the rebuttal itself. For example, in the case holding that certain tax liabilities were not dischargeable in Chapter 12 bankruptcy,[40] the majority opinion authored by Justice Sotomayor followed a description of a counterargument with a conclusion that "the dissent's **novel** reading contravenes ample authority . . . ."[41] A similar approach appears in *Williams v. U.S.*, in which the dissent complained that "Justice Thomas's **unique** method of defining testimonial statements fares no better."[42] This version has an identical construct but a stronger tone. Because the adjective "unique" typically carries a positive connotation, the label carries more than a hint of sarcasm.[43]

This tactic can be accomplished as above, by simply applying the label without qualification, or by being more explicit. The Justices sometimes label a counterargument conspicuously by adding an introductory clause cautioning that a rhetorical label is impending. "**In effect**," the Court qualified in *NFIB v. Sebelius*, "[the opposing Justices] contend that . . . the law must be struck down because Congress used the wrong labels."[44] Here again, the Court admitted to altering the vocabulary used by the adverse party.

38 *Id.* at 2610.

39 *Id.* at 2590 (Roberts, J.) (emphasis added).

40 Chapter 12 governs bankruptcy for family farmers and fishermen. *See* 11 U.S.C. § 109(f) (2012).

41 *Hall*, 132 S. Ct. at 1891 n. 6 (emphasis added).

42 132 S. Ct. at 2275–76 (Kagan, J., dissenting) (emphasis added).

43 A more specific critique appeared in *Christopher v. SmithKline Beecham, Corp.*, a case holding that pharmaceutical representatives are not entitled to minimum-wage protection because they are outside salesmen under the FLSA. There, Justice Alito devoted a full paragraph to summarizing one of the salesmen's counterarguments and concluded with the following rebuttal: "This **formalistic** argument is inconsistent with the realistic approach that the outside salesman exemption is meant to reflect." 132 S. Ct. at 2173 (emphasis added).

44 132 S. Ct. at 2597 (emphasis added). Another example from *NFIB v. Sebelius* occurred when the Court, after establishing the rule that the Commerce Clause is not a license to regulate an individual "from the cradle to the grave," described the counterargument that "the individual mandate can be sustained as **a sort of** exception to this rule, because health insurance is a unique product." *Id.* at 2591 (emphasis added). The reader here knows that the counterargument has been altered from its original form, which enhances the credibility of the author.

Whether the recharacterization arrives quietly or with a warning, the approach will not succeed if the label stretches the opposing party's position to the point of inaccuracy. But apart from this limit, this approach's success depends only on the creativity of the writer in finding a new framework to view the counterargument—one that minimizes the argument's size, weight, or character and lowers the threshold for the rebuttal to come.

Dissenting opinions occasionally take the label approach farther than an advocate may feel comfortable doing. Justice Scalia's use of the technique in *Missouri v. Frye* verged on finger pointing when he critiqued the Court's decision not to reach specific issues he identified. The majority had reasoned that the "case presents neither the necessity nor the occasion" to settle these issues.[45] The case, Justice Scalia opined, "does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. **It will not do simply to announce that they will be solved in the sweet by-and-by**."[46] The dissent colorfully relabeled the majority's position, and in doing so accused the majority of shirking its responsibility to resolve critical consequences flowing from its decision.

Dissenting Justices occasionally attached labels to a counterargument that were crafted to expose or ridicule the opposing side. Justice Breyer criticized the majority for using a "'most they are able to do test'"[47] and Justice Scalia mocked Justice Ginsburg's concurring opinion in *NFIB v. Sebelius* for "treat[ing] the Constitution as though it [has a] . . . whatever-it-takes-to-solve-a-national-problem power."[48] This form of name calling—labeling the counterargument to attribute it with absurdity—is a tactic that makes the dissenter's opinion more memorable but is a bit too cheeky for an advocate's persuasive writing.

2. Illustrating a counterargument's weakness through metaphor

Characterizing a counterargument using metaphor is powerful because it persuades by assigning the counterargument a tangible (negative) imagery that prejudices the reader against the argument. A benefit of metaphoric legal writing, according to David Mellinkoff, is that it "may fix a reason shortly and sharply, making it not only rememberable but memorable."[49] By fixing negative imagery for the counterargument in the reader's mind before rebutting the counterargument itself, the writer secures a favorable

45 *Frye*, 132 S. Ct. at 1408.

46 *Id.* at 1413 (Scalia, J., dissenting) (emphasis added).

47 *Christopher*, 132 S. Ct. at 2179 (Breyer, J., dissenting).

48 132 S. Ct. at 2650 (Scalia, J., dissenting).

49 David Mellinkoff, *The Language of the Law* 440 (1963). Most scholarship concerning metaphors in judicial opinions concentrates on metaphors to illustrate the governing legal rule of a case. *See e.g.* Bosmajian, *supra* n. 10, at chs. 3–9 (analyzing the "marketplace of ideas," the "wall of separation," the "chilling effect," and other judicial metaphors). Here, I am describing metaphors specifically used to illustrate problems with an adversary's *counterarguments*.

viewpoint that will tend to convince the reader about the detailed rebuttal to come.[50] Metaphors are especially effective because they work subconsciously. As Michael Frost has explained, they "have a visceral, emotional impact in part because they originated in the world of the senses; in one sense, their effects are as physiological as they are logical."[51]

The Court used this tool in two sister cases holding that the accused were entitled to effective assistance of counsel during the plea-bargaining stage of a criminal case. The State had pointed out that there was no right to receive a plea offer in the first place; and the accused still has the well-settled right to a fair trial even when his attorney inadequately represents him in the pretrial stages.[52] In each opinion, the Court characterized the State's argument using a metaphor. In one, the Court responded that "it is insufficient simply to point to the guarantee of a fair trial as a **backstop that inoculates any errors** in the pretrial process."[53] In the second, the Court reasoned that the State's "position that a fair trial **wipes clean** ineffective assistance during plea bargaining also ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[54]

The two metaphors serve an important rhetorical role by making the deficiencies of the State's counterargument starker. They, in the words of James E. Murray, "uncovered, created, metaphorized new understanding of the" argument.[55] Any claim that a trial (accounting for only three to six percent of convictions)[56] could remedy an inadequate plea-bargaining process seems ludicrous when illustrated in such unavoidable language. Because criminal cases are nearly always resolved through plea bargaining, surely neither a backstop nor cleansing process is enough to reverse the

50 The potency of metaphor as a persuasive device has been recognized as both effective and dangerous. On the one hand, metaphor has the "power to shatter and reconstruct our realities." Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053, 1053 (1989). But "a metaphor cannot possibly capture the true meaning of, and all the dimensions and nuances implicated by, an abstract legal concept." Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 Mercer L. Rev. 919, 923 (2007). "'Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.'" *Id.* (quoting *Berkey v. Third Ave. Ry.,* 155 N.E. 58, 61 (N.Y. 1926).

51 Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 Leg. Writing 113, 137 (1996) (summarizing scholars' analyses of metaphor in persuasive legal writing using cognitive psychology theories); *see also* James E. Murray, *Understanding Law as Metaphor*, 34 J. Leg. Educ. 714, 729 (1984) ("The future of metaphorical thought is to realize the all pervasive power it commands over life. It is a force to be reckoned with, but as yet we do not understand it. The most we can ask for is to realize its dominance over the languaging of law and our very thought process itself.").

52 Br. for Petr., *Mo. v. Frye*, 2011 WL 1593613 at *27 (Apr. 15, 2011) (123 S. Ct. 1399) ("But there is no constitutional right to a plea bargain . . . . '[T]he Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial.'") (ellipses omitted).

53 *Frye*, 132 S. Ct. at 1407 (emphasis added).

54 *Lafler*, 132 S. Ct. at 1381 (emphasis added).

55 Murray, *supra* n. 51, at 718; *see also id.* at 723 ("Law is not insulated from life and so too the judicial opinion with all its logic is imaginative, metaphorical, and poetic.").

56 *Frye*, 132 S. Ct. at 1407.

prejudice against an accused who is deprived of effective assistance during that stage of the case.

A less central metaphor appears in the majority's opinion in *Hall v. U.S.* when the Court rejected a counterargument because the "**position threatens ripple effects beyond this individual case . . . that we need not invite**."[57] The poetry of metaphor in these contexts enable the Court to "connect [the] argument by rhetoric to the imagination" of the reader.[58] And the imagination will extend its effect on the reader even where reason's effect may end. Here, the metaphor allows the reader to get carried away with the threatening presence of such a "rippling," spreading counterargument.

In dissenting opinions, the Justices used metaphors to secure or "fix"[59] a negative image of the majority's position. In *Douglas*, the Court analyzed whether the Supremacy Clause created a private cause of action when California's cuts to health-care payments conflicted with the federally mandated Medicaid payments. The Court remanded the case for the Ninth Circuit to consider in light of intervening federal agency action.[60] But the dissent would have liked the Court to reach the conclusion that the Supremacy Clause does not under these circumstances supply a cause of action at all. It complained that "the majority cites no precedent for a cause of action that **fades away** once a federal agency has acted."[61] The metaphorical wizardry described by Chief Justice Roberts' opinion thus cast grave doubt on the basis for the majority's constitutional interpretation.

A subtle metaphor appears in Justice Sotomayor's dissent in *Cooper*, which held that the Privacy Act excludes damages for emotional distress in suits against the government. She described the majority's position:

> The majority . . . concedes that its interpretation is not compelled by the plain text of the statute . . . . And it candidly acknowledges that a contrary reading is not "inconceivable." Yet . . . the majority contends that the canon of sovereign immunity requires [its] interpretation . . . .[62]

57 132 S. Ct. at 1893 (emphasis added).

58 Murray, *supra* n. 51, at 730 (explaining importance of metaphor in legal argument because of the reality that the "attorney must attempt to establish his argument as the stronger, not the truer. To achieve this end, the lawyer does not necessarily argue purely logically[;] instead, he argues rhetorically."); *see also* Prentice, *supra* n. 9, at 87 ("Ultimately, it will matter little that a decision is 'right' in a technical legal sense if those reading the opinion are not convinced that it is 'right,' or at least acceptable.")

59 Mellinkoff, *supra* n. 49, at 440.

60 132 S. Ct. at 1210–11.

61 *Id.* at 1215 (Roberts, J., dissenting) (emphasis added).

62 132 S. Ct. at 1456 (Sotomayor, J., dissenting).

She then responded: "The canon simply **cannot bear the weight** the majority ascribes it."[63] The dissenting opinion thus recharacterized concessions made by the majority, bringing forth tangible imagery that dramatized those concessions in the reader's mind. A fragile canon was depicted as holding up a massive load of now-worthless tort suits.

So, too, did the dissent characterize the plurality's counterargument in the case involving FMLA self-care leave, when Justice Ginsburg complained that "[t]he plurality offers no legitimate ground to **dilute the force of the Act**."[64] If she had accused the plurality of **misinterpreting the FMLA to give fewer rights to employees,** a reader could disagree—perhaps, one might reason, the FMLA *should* provide fewer rights. But the reasonable reader feels uncomfortable at the "dilution" of a federal statute. The statute suddenly changed in appearance, consistency, or texture in the reader's subconscious mind.[65] Indeed, as Aristotle described, the words have "set an event before their eyes [so that the reader may] see the thing occurring now, not hear of it as in the future."[66] Given the metaphor's ability to give an "effect of activity,"[67] the reader may now even feel threatened by the Act's dilution that has been described. Thus, again, a counterargument was undermined by a metaphor.

Similes, the metaphor's sister literary device, were described by Aristotle as "less pleasing."[68] As compared to the metaphor, similes are "longer, using more words[;] you do not learn the same thing so rapidly from it," which may render them less "lively" for the reader.[69] A majority of the Court used this lesser device in a section devoted to rebuttal of adverse statutory-construction arguments. The opinion, authored by Justice Breyer, declared that relying on "this solitary word change in a different subsection is like hoping that a new batboy will change the outcome of the World Series."[70] A simile like this one may bring humor, but it lacks the powerful impact of a metaphor. Rather than subconsciously identifying

63 *Id.*

64 *Coleman*, 132 S. Ct at 1349 (Ginsburg, J., dissenting) (emphasis added).

65 Similarly, Justice Scalia denounced the majority's remedy to a criminal defendant's ineffective assistance of counsel, asking, "why not skip the **reoffer-and-reacceptance minuet** and simply leave it to the discretion of the state trial court what the remedy shall be?" *Lafler*, 132 S. Ct. at 1396–97 (Scalia, J, dissenting) (emphasis added). The metaphor serves to denigrate the majority's remedy as a meaningless, fanciful façade.

66 Lane Cooper, ed., *Rhetoric of Aristotle*, 207–11 (1932) (describing how to craft metaphors to secure "liveliness" in writing and to "put[] things directly before the eyes of the audience").

67 *Id.* at 211.

68 *Id.* at 207 (quoted in Frost, *supra* n. 51, at 122–23). Such a simile breathes life into legal persuasive writing, but it here amounts to no more than a "decorative embellishment." Frost, *supra* n. 51, at 122.

69 *Aristotle*, *supra* n. 66, at 207.

70 *Home & Concrete Supply, LLC*, 132 S. Ct. at 1842.

the counterargument with negative imagery, it prompts the reader to become aware of the analogical work being done.[71] The batboy does not come alive "before the [reader's] eyes," but depicts nothing more significant than a fantasy character that the reader "hear[s] of [] as in the future"[72]

C. Announcing the rebuttal

The most common technique that appeared in the swing-vote cases is what I will call "announcing the rebuttal" to a counterargument. In this technique, the Justice first describes the counterargument in detail, using one or more full sentences. Next, the Justice begins a separate sentence that announces that the opinion is shifting to the rebuttal—before developing the rebuttal itself. This announcement plays the critical role of isolating the rebuttal from the counterargument.

The rebuttal may be announced in one of two ways. The Justices' first tactic for announcing the rebuttal is to follow the counterargument with a new sentence beginning with "but," which abruptly signals the shift from the adverse-argument summary to the rebuttal. This tactic is most often used when the rebuttal itself can be contained within a couple of sentences. In the second tactic, the Justices follow the counterargument with a single, short sentence that announces that the counterargument is incorrect, then move on with a series of sentences that contain the rebuttal itself. An effective announcement of the rebuttal creates a rhetorical divide between the counterargument, which is set up to fail, and the responsive rebuttal, which is correct. The technique prevents the writer's "correct" rebuttal from being associated in the reader's mind with the counterargument itself.

The "but" signal to announce the approaching rebuttal appears across the opinions as the most common tactic for responding to counterarguments. Although some lawyers may have been trained to avoid beginning a sentence with a coordinating conjunction,[73] and a plethora of

71 Martin Montgomery et al., *Ways of Reading: Advanced Reading Skills for Students of English Literature* 151 (2d ed. 2000) ("Simile . . . draws attention . . . between two terms . . . whereas in metaphor the link . . . is implied."). Psychologists have sought to understand why metaphors seem to be interpreted more "vividly" than similes. In one example, participants in a study drew out "many more non-literal, superordinate" traits from the object being compared than the "literal, basic-level" traits drawn from the otherwise identical simile. Sam Glucksberg & Catrinel Haught, *On the Relation Between Metaphor and Simile: When Comparison Fails*, 21 Mind & Language 360, 364–65 (2006) (explaining results of study in which participants interpreted metaphors or similes that compared "ideas" to "diamonds").

72 *Aristotle*, *supra* n. 66, at 207.

73 *The New Fowler's Modern English Usage* 52 (R.W. Burchfield ed., 3d ed. 1996) ("There is a persistent belief that it is improper to begin a sentence with *And*, but this prohibition has been cheerfully ignored by standard authors from Anglo-Saxon times onwards.").

Internet sources still prohibit the practice today in formal writing,[74] the Justices relish the technique of beginning a sentence with "but" to draw attention to the contrast between the counterargument and the approaching rebuttal.[75] A detailed description of the counterargument followed by this short opening word creates a sudden and powerful tone change.[76]

This technique is the one used most often by the Justices and appears in both majority and dissenting opinions.[77] For example, in *NFIB v. Sebelius*, Justice Roberts thoroughly developed the counterargument concerning Congress's commerce-clause power to justify the individual mandate to buy health insurance—before swiftly knocking the argument down:

> The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a

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74 Grammerly Handbook, *Starting a Sentence with a Conjunction*, http://www.grammarly.com/handbook/grammar/conjunctions/7/starting-a-sentence-with-a-conjunction/ (advising against beginning a sentence with "and" or "but" in formal writing) (accessed Mar. 13, 2013); Lynn Gaertner-Johnston, Business Writing Blog, *Can "And" or "But" Start a Sentence?* http://www.businesswritingblog.com/business_writing/2005/11/ but_its_okay_an.html (Nov. 28, 2005) (recommending against beginning with "but" in formal writing and suggesting substitution of "however," but explaining the usage is proper in informal writing); Dictionary.com, *Can I begin a sentence with a conjunction?* http://dictionary.reference.com/help/faq/language/g31.html ("In formal writing, it is best to avoid beginning any sentence with a conjunction.") (accessed Mar. 13, 2013); Steven P. Wickstrom, *Prepositions*, http://www.spwickstrom.com/ prepositions/ (characterizing the rule of never beginning with "but" as no more than a "suggestion" but advising that "it is safer" to follow the suggestion) (accessed Mar. 13, 2013). Other Internet sources recognize that a rule against opening with "but" is merely a "myth." *See e.g.* Grammarist, *Conjunctions to start sentences*, http://grammarist.com/grammar/conjunctions-to-start-sentences/ ("As with many long-standing English myths, there are people who feel strongly about this one.") (Feb. 19, 2010); George Dorrill, *"Don't Begin Sentences with But" Is a Writing Myth*, http://www.nwp.org/cs/public/print/resource/457 (Fall 2012) (describing the rule against beginning with "but" as a "hoary . . . discredited belief" that is contradicted unanimously by writing experts).

75 The practice of opening with "but" is accepted and noncontroversial in legal-writing circles. *See e.g.* Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 10.47(a) (2d ed. 2006) ("When appropriate, use a coordinating conjunction to begin a sentence to emphasize contrast (but, yet) . . . .").

76 As one author artfully described,

> If you are trying for an effect which comes from having built up a small pile of pleasant possibilities which you then want to push over as quickly as possible, dashing the reader's hopes that he is going to get out of a nasty situation as easily as you have intentionally led him to believe, you have got to use the word ""but"" and it is usually more effective if you begin the sentence with it. "But love is tricky" means one thing, and "However, love is tricky" means another—or at least gives the reader a different sensation. "However" indicates a philosophical sigh; "but" presents an insuperable obstacle.

Ben Yagoda, *When You Catch an Adjective, Kill It* 122–23 (2007) (quoting St. Clair McKelway) (describing the "impassioned defense" that a writer for *The New Yorker* gave in response to revision of his sentences opening with "but").

77 For examples of this technique in majority opinions, see *Williams*, 132 S. Ct. at 2238–39 (Alito, J.); *Salazar*, 132 S. Ct. at 2193 (Sotomayor, J.); *Dorsey*, 132 S. Ct. at 2341 (Breyer, J.); *NFIB*, 132 S. Ct. at 2590 (Roberts, J.); *Christopher*, 132 S. Ct. at 2168, 2172 n. 22, 2174 (Alito, J.). For examples of dissenting opinions using the construct, see *Christopher*, 132 S. Ct. at 2179 (Breyer, J., dissenting); *Douglas*, 132 S. Ct. at 1214 (Roberts J., dissenting); *Miller*, 132 S. Ct. at 2478 (Roberts, J., dissenting); *Miller* 132 S. Ct. at 2483–84 (Thomas, J., dissenting); *Dorsey*, 132 S. Ct. at 2342 (Scalia, J., dissenting) ("The Court's last argument is that continuing to apply the prior mandatory minimums to pre-enactment offenders would lead to anomalous, disproportionate sentencing results. It is true enough, as the Court notes, . . . that applying the prior mandatory minimums in tandem with the new Guidelines provisions . . . leads to a series of 'cliffs' at the mandatory minimum thresholds. **But this does not establish that Congress clearly meant the new mandatory minimums to apply to pre-enactment offenders**.") (emphasis added).

> substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," . . . .
>
> Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. **But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.**[78]

Another example is found in the opinion concerning the dischargeability of certain income-tax liabilities in Chapter 12 bankruptcy. After several sentences detailing the counterargument,[79] the majority responded, "**But that too strains the text beyond what it can bear**."[80] The full rebuttal followed. This structure can be repeated multiple times to create a powerful rhythm: first, describe the counterargument; then, begin the next sentence with "But" and commence the rebuttal in the following sentences. In the section of the opinion devoted to addressing counterarguments, Justice Sotomayor employed this pattern eight times within ten paragraphs.[81]

The Justices' second approach for isolating the rebuttal is to follow the counterargument with a short, separate sentence announcing the counterargument's rejection. Justice Alito used this approach in *Williams*, the criminal case in which a plurality of the Court held that the expert's testimony about an outside report did not violate the Confrontation Clause. Justice Alito first quoted at length from a secondary source relied upon by the dissent. He immediately responded: "**This discussion is flawed.** It overlooks the fact that there was no jury in this case, and as we have explained, ..."[82] Similarly, in *Salazar,* the Court held that the federal government was required to pay the aggregate amount of funds due to

78 *NFIB*, 132 S. Ct. at 2585–86 (emphasis added).

79 A legal advocate cannot always afford one hundred words for summarizing a counterargument. But the lesson can be applied on a lesser scale in a brief: develop the counterargument sufficiently to set up the response, and at sufficient length to create a change in pace.

80 *Hall*, 132 S. Ct. at 1891 (Sotomayor, J.).

81 *Id.* at 1892–93.

82 132 S. Ct. at 2241 n.11 (emphasis added). Justice Kagan also used this approach in *Miller*, the case involving mandatory life-without-parole sentences for juveniles. After describing the opposing argument concerning *Harmelin*, the Court's existing precedent refusing to find mandatory life-without-parole sentences unconstitutional, the following paragraph began: "**We think that argument myopic.** *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders." *Id.* at 2470 (emphasis added).

tribe contractors who performed work for the federal government, even when the government had not appropriated sufficient amounts to pay each individual contractor.[83] Justice Sotomayor's majority opinion first elaborated upon the counterarguments involving the key precedent, and then succinctly announced the rebuttal:

> The Government primarily seeks to distinguish this case . . . on the ground that Congress here appropriated "not to exceed" a given amount . . . , thereby imposing an express cap on the total funds available. The Government argues, on this basis, that [precedent cases] involved "contracts made against the backdrop of unrestricted, lump-sum appropriations," while this case does not.
>
> **That premise, however, is inaccurate**.[84]

Other bold and concise "announcement" sentences used in the term's majority or dissenting opinions were the following:

- "This is makeweight." (Justice Scalia);[85]
- "The analogy is inapt." (Justice Ginsburg);[86]
- "That contention is puzzling." (Justice Sotomayor);[87]
- "We do not accept this argument." (Justice Breyer);[88]
- "This concern is unfounded." (Justice Ginsburg);[89]
- "Petitioner's concern is misplaced." (Justice Kennedy);[90]
- "That is not so." (Justice Scalia);[91]
- "Therein lies the problem." (Justice Breyer);[92] and even
- "Been there, done that." (Justice Kagan).[93]

Both approaches are dependent upon a tone change. The detailed description of the counterargument must stand in sharp contrast to the short, critical sentence that follows it. The shorter and simpler the sentence is, the better. It is nearly impossible to find fault in a sentence as simple as "That is not so," while the detailed rebuttal will eventually reveal some weakness.[94]

83 132 S. Ct. at 2196.

84 *Id.* at 2191 (emphasis added).

85 *Dorsey*, 132 S. Ct. at 2343 (Scalia, J., dissenting).

86 *NFIB*, 132 S. Ct. at 2619 (Ginsburg, J., concurring).

87 *Salazar*, 132 S. Ct. at 2193.

88 *Home & Concrete Supply, LLC*, 132 S. Ct. at 1843. This sentence followed more than 300 words devoted to a summary of the counterargument. *Id.* at 1842–43.

89 *NFIB*, 132 S. Ct. at 2623 (Ginsburg, J., concurring).

90 *Lafler*, 132 S. Ct. at 1389.

91 *Id.* at 1395 (Scalia, J., dissenting).

92 *Hall*, 132 S. Ct. at 1897 (Breyer, J., dissenting).

93 *Williams*, 132 S. Ct. at 2275 (Kagan, J., dissenting).

94 There are plenty of reasons to write the shortest possible sentence under these (and most) circumstances. Among them:

> In the toils of excess words, the sharpest minds lose their bearings, unable to concentrate on what is essential, and so to be insisted upon, and what trifling or worthless, to be bargained away graciously. The more he writes the greater opportunity also the draftsman gives to those who are able to misunderstand—or at least to interpret.

Mellinkoff, *supra* n. 49, at 402.

The technique of smoothly and meticulously propping up the counterargument before isolating the rebuttal works effectively in part because it gives credence to the ultimate position taken. It assures the reader that the writer has thoroughly analyzed the counterargument and its supporting adverse authority before discovering the devastating weakness in that opposing position.[95] And, without a powerful announcement of the rebuttal, the writer communicates ambivalence by simply communicating two alternative and opposing arguments: the counterargument and the writer's response to it.[96] The short "announcement" sentence lends the rhetorical force to the response instead of to the opening counterargument.

D. Ending on a high note—or on a weak counterargument

It is well-settled that a persuasive document should begin and end with its primary affirmative arguments, phrased offensively in favor of the writer's position.[97] Explicit rebuttal of counterarguments should be buried in the middle, where they will receive less attention and so that the writer can make both a strong first impression and conclude with its best, offensive points.[98] The majority opinions frequently structured their arguments according to this traditional model by initially setting forth the author's elaboration of the existing law—independent of references to the opposing side's analysis of those rules—before addressing counterar-

95 To communicate a thorough look at the counterargument, the "But" technique also is frequently employed after directly quoting from the counterargument. *See e.g. Home & Concrete Supply, LLC*, 132 S. Ct. at 1851 (Kennedy, J., dissenting).

96 The danger of presenting an argument alongside a similarly constructed counterargument is demonstrated in a federal trial-level motions brief: "Defendant attempts to strike down Plaintiff's use of [a] website as 'unauthenticated hearsay.' However, the fact of the matter is, Plaintiff did not look to any other source other than Defendant['s] own website, and Defendant should be held responsible and accountable for the information it posts on its own website." Pl.'s Response to Def.'s Reply, *Robles v. USA Truck, Inc.*, 2009 WL 4028321 (S.D. Tex. Feb. 11, 2009) (No. 5:08-cv-122). Without an announcement sentence or sharp change of pace, the counterargument appears as equally viable as the primary argument.

97 Shapo, Walter & Fajans, *supra* n. 17, at 468 ("[P]otential weaknesses in your theory of the case should not be discussed at the beginning of an issue or subissue or at the end of such a discussion. Deal with them in the middle of the argument concerning that point. The reader will tend to remember the beginning and ending of a section more than the middle."); Scalia & Garner, *supra* n. 18, at 15 ("It's an age-old rule of advocacy that the first to argue must refute in the middle, not at the beginning or at the end."); William H. Putman, *Legal Analysis and Writing* 362 (3d ed. 2009) ("When interpreting and applying a rule of law, always introduce your arguments first, address the counterarguments, then present your response."); Beazley, *supra* n. 26, at 224 ("To exploit the reader's peak attention at the beginning of the argument section, begin with your best point").

98Putman, *supra* n. 97, at 340 ("By following the counterargument with a response or rebuttal that sums up your position . . . [the counterargument] is buried in the middle of the argument where its significance is downplayed and it is de-emphasized."); Scalia & Garner, *supra* n. 18, at 15 ("Refuting first puts you in a defensive posture; refuting last leaves the audience focused on your opponent's arguments rather than your own.").

99 For example, counterarguments were presented and rebutted in the third of four organizational parts in *Salazar*, 132 S. Ct. at 2191–95; *Williams*, 132 S. Ct. at 2235–41; and *Miller*, 132 S. Ct. at 2469–75. In *Missouri v. Frye*, the majority presented

guments.[99] The Justices placed a premium on the opening sections of their opinions, consistently devoting it to the affirmative arguments. But some were willing to break from tradition by placing the rebuttal points at the end of the opinion, with only a conclusion paragraph to leave the offensive position fresh in the reader's mind.[100]

A finer point of organization relates to ordering of the rebuttal itself—and is exemplified in the Supreme Court's opinions. When addressing counterarguments, the swing-vote opinions tend to end by refuting the weakest argument.[101] This organization appeared in the Court's plurality opinion validating strip searches for an arrestee placed in jail following a traffic stop.[102] The opinion's first three sections provided background and then presented the Court's affirmative arguments applying favorable precedent.[103] Then came the rebuttal, which began with a summary of the two key counterarguments and devoted six paragraphs to an elaborate response.[104] But the next (and penultimate) section of the opinion ended with one more counterargument: The *amici* had "raise[d] concerns about instances of officers engaging in intentional humiliation and other abusive practices," the Court explained.[105] The response was swift and obvious: "These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here."[106] Having swept this last feeble point aside, the Court briefly summarized its conclusion in the last and final section of the opinion.[107] Saving the weakest adverse point for last was a way to end strong.

and rebutted counterarguments in the middle third of the opinion. 132 S. Ct. at 1406–08. And in *Dorsey v. U.S.*, the Court addressed the counteranalysis as the last in six enumerated points, right before a final section that "add[ed] one final point." 132 S. Ct. at 2335.

100 *E.g. Hall*, 132 S. Ct. at 1891–93 (Sotomayor, J.). There were two issues addressed in *Christopher*, 132 S. Ct. at 2176. Justice Alito's majority opinion addressed the counterarguments for each issue immediately prior to a short conclusion paragraph on that issue. *See id.* at 2169–70, 2173–74.

101 *E.g. Dorsey*, 132 S. Ct. at 2331–35 (concluding rebuttal by responding to weak counterargument that new minimum sentences would create a disparity between criminal defendants based on whether they were sentenced before or after the statute's effective date); *Coleman*, 132 S. Ct. at 1342 (Ginsburg, J., dissenting). In the final sentence of the rebuttal negating the majority's hyperbolic statement, Justice Ginsburg concluded "In view of [the outlined FMLA] history, it is impossible to conclude that 'nothing in particular about self-care leave . . . connects it to gender discrimination.'" *Id.*

102 *Florence*, 132 S. Ct. at 1523.

103 *Id.* at 1513–20.

104 *Id.* at 1520–22.

105 *Id.* at 1523.

106 *Id.*

107 *Id.*

E. Concentrating the fire

As a District Judge for the Western District of Texas puts it, advocates should "shoot with a rifle, not a shotgun," when rebutting the other side's arguments.[108] A strong rebuttal identifies one or two fundamental problems with the counterargument instead of peppering the counterargument with criticisms of its multiple minor weaknesses. No matter how complex or how convincing a counterargument, the rebuttal points should be chosen carefully, stated concisely, and structured so that the rebuttal at least *sounds* simple.

In the split-vote opinions, the Justices confronted the counterarguments with a rifle, not a shotgun. By concentrating the rebuttal into one unified theme, they avoided assuming a defensive or desperate tone. After summarizing the counterargument, the Justices expressed the simplicity of the coming rebuttal with the following example openings:

- "**The defect in this argument** is that under Illinois law . . . it is clear that the putatively offending phrase . . . was not admissible for the purpose of proving the truth of the matter asserted."[109]
- "That interpretation, **which is inconsistent with ordinary principles of Government contracting law**, is improbable."[110]
- **"This argument is flawed because** it suggests that *proven* mental and emotional distress does not count as general damages."[111]
- **"The fatal flaw** in the Government's contrary argument is that it overlooks the *reason why Brand X* held that a 'prior judicial construction,' unless reflecting an 'unambiguous' statute, does not trump a different agency construction of that statute."[112]

No matter how nuanced or complicated the coming rebuttal, these openings reflect certitude through simplicity. The rebuttal may actually be quite complex—in some of the above examples the rebuttal spanned two or more paragraphs.[113] But by focusing the rebuttal around one theme, the opening suggests the counterargument is weak enough to be taken in just one shot.

108 The Honorable Lee Yeakel of the Western District of Texas, Austin Division, has been known to counsel advocates to "shoot with a rifle, not a shotgun," when drafting responsive motion briefs.

109 *Williams*, 132 S. Ct. at 2236 (emphasis added).

110 *Salazar*, 132 S. Ct. at 2192 (emphasis added).

111 *Cooper*, 132 S. Ct. at 1454 (boldface emphasis added).

112 *Home & Concrete Supply, LLC*, 132 S. Ct. at 1843 (boldface emphasis added).

113 *E.g. Williams*, 132 S. Ct. at 2236–38; *Home & Concrete Supply, LLC*, 132 S. Ct. at 1843.

II. From the Dissenting Opinions: Tactics to Avoid

The first section of this article provides model strategies for responding to counterarguments. Those examples were drawn from both majority and dissenting opinions—often "[t]he very best opinions, and in particular dissenting opinions, contain splendid legal and moral arguments phrased in powerful rhetoric."[114] A dissent is forward-looking. And the writing must bear a forceful impact if it is to change the law in the future, which is why the "voice is pitched to a key that will carry through the years."[115]

But as Eileen Kavanaugh has cautioned,

> While writing a dissent opens the door to the judge's impassioned views, when that passion goes too far, it can result in a level of personal involvement that pushes toward the subjective, ultimately undermining the effectiveness of an otherwise powerful piece of judicial writing. . . . [J]udges should not let "anger, satire, provocation, scorn, sarcasm, ridicule, or disrespect for either of the parties or of other decisions or their authors" creep into their opinions.[116]

The dissenting opinions reflect both power and danger sounding from these impassioned voices. The tactics that follow reflect the unbridled style that is a hallmark of a dissenting opinion—but that go beyond what an advocate should comfortably employ in his or her own writing.

A. Sarcasm

There is more "personality" in dissenting opinions, according to famed dissenter Justice Scalia, "[p]artly because they can be more the expression of the man or woman who writes them."[117] And it is in this colorful writing style that sarcasm directed toward the majority[118] appeared in the Justices' writing this term. No reputable writing guide

114 Moss, *supra* n. 4, at 104.

115 Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 Scribes J. Leg. Writing 125, 127 (1990) (citing B. Cardozo, *Law and Literature*, in *Law and Literature and Other Essays and Addresses* 29, 35–36 (1931)).

116 Eileen Kavanagh, *Robert Traver As Justice Voelker—the Novelist As Judge*, 10 Scribes J. Leg. Writing 91, 98 (2006).

117 Justice Antonin Scalia, 13 Scribes J. Leg. Writing 51, 64–65 (2010) ("[I]n a majority opinion, you have to often take out portions or phrases that other people don't want to include. . . . And it's easier to have personality when you're writing for yourself. Somebody can join your dissent if they want to, but you're not obliged as you are when you're writing the majority opinion to come up with something that everybody can go along with."); *see also* Kavanagh, *supra* n. 116, at 97 ("Dissents are the embodiment of judicial individuality . . . .") (quoting Yuri Kapgan, *supra* n. 12, at 104–05).

118 Susan K. Rushing has noted that "Sarcasm in the dissent usually aims at the majority, not at the parties." Rushing, *supra* n. 115, at 139.

would recommend a legal advocate's use of sarcasm to rebut an adversary's argument,[119] but the dissenting opinions often do not share that traditional aversion.

The harshest sarcastic retorts in the swing-vote dissents began by quoting the counterargument. The quote provided the backdrop for the coming criticism and had an unavoidable impact because of the dissent's use of the majority's very own words. An example appears in *Frye*'s dissenting opinion involving ineffective assistance of counsel in plea bargains. "The Court says," the dissent began, "'[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences.' Assuredly it can, just as it can be assumed that the sun rises in the west; but I know of no basis for the assumption."[120] This pattern has the ring of mockery, as in the dissenting opinion for the sister case. There, the dissent quoted the majority's assurance and added its own commentary—for a scathing effect: "'Principles elaborated over time in decisions of state and federal courts, and in statutes and rules' will (in the Court's rosy view) sort all that out."[121]

A gentler version of this technique appeared in the dissenting opinion in *Salazar*. That opinion criticized the word choice of the majority, which concluded that one provision in a statute merely "underscore[d]" a general "ordinary" contracting principle, rather than "alter[ing] the Government's legal obligation."[122] The dissent responded: "There is, however, no reason to suppose that Congress enacted the provision simply to confirm this

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119 *E.g.* Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 224 (2d ed. 2003) ("One tone is unacceptable, however: sarcasm."); Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* 343 (2001) ("Anything in the nature of sarcasm or bitterness is . . . improper and should be avoided."); Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right & Getting It Written* 268 (2d ed. 1993) (explaining sarcasm should not be used in legal writing because it is inappropriate and too easily taken literally); *Mruz v. Caring, Inc.*, 107 F. Supp. 2d 596, 613 (D.N.J. 2000), *rev'd*, 166 F. Supp. 2d 61 (D.N.J. 2001). This admonition usually applies to judicial writing as well. Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 Geo. J. Leg. Ethics 237 (2008) ("Sarcasm, a form of ridicule, also has no place in opinion writing."). But Adalberto Jordan presents two opposing views on sarcasm in judicial opinions. He quotes from Joyce J. George, *Judicial Opinion Writing Handbook* 7 (1981), which cautions that "[s]arcasm should never be used, and humor should be avoided;" and from Frank E. Cooper, *Effective Legal Writing* 36 (1953), which qualifies that "Judges can sometimes make good use of sarcasm. It can be highly persuasive, in the hands of a master." Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. Miami L. Rev. 693, 699 (1987). One admirer of Justice Scalia's writing also disagrees with the conventional wisdom to avoid sarcasm. He opines,

> Where Scalia chides his colleagues in sarcastic fashion and metaphoric monologue, a lay person might question whether a squabbling Court decides the case on personal rather than legal grounds. But for most cases, the fact that a nonlegal audience would even ask this question indicates that the language has succeeded, at least, in riveting their attention.

Yury Kapgan, *supra* n. 12, at 102 (footnote omitted).

120 *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting) (citation omitted).

121 *Lafler*, 132 S. Ct. at 1397 (Scalia, J, dissenting).

122 *Salazar*, 132 S. Ct. at 2193.

123 *Id.* at 2197 (Roberts, J., dissenting) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

'ordinary' rule. We generally try to avoid reading statutes to be so 'insignificant.'"[123]

The dissenting opinion in *Williams*, this term's case interpreting the Confrontation Clause, quoted selective pieces of the majority's reasoning in order to sarcastically agree with it. In that case, involving the admission of statements by an expert witness regarding outside expert reports, the dissent sought to show that, when a witness repeats out-of-court information as the basis for a conclusion ("basis evidence"), the basis evidence *is* offered for the truth of the matter, contrary to the majority's conclusion. Justice Kagan recounted that,

> [a]ccording to the plurality, basis evidence supports the "credibility of the expert's opinion" by showing that he has relied on . . . sound "factual premises." **Quite right.** And that process involves assessing such premises' truth. If they are, as the majority puts it, "unsupported by other evidence in the record" or otherwise baseless, they will not "allay [a factfinder's fears]" about an "expert's reasoning." **I could not have said it any better.**[124]

A couple of the sarcastic examples in the dissenting swing-vote opinions involve no more than a word. With this one word, the counterargument is disparaged, as in *NFIB v. Sebelius*'s dissent of Justice Ginsburg's "exposition of the **wonderful** things the Federal Government has achieved through exercise of its assigned powers . . . ." The joint dissent continued that the "relevant history is not that Congress has achieved **wide and wonderful** results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce."[125] The two adjectives here serve to patronize the legal arguments developed by the concurring opinion. And through one noun, the joint dissent applied sarcasm to another counterargument, denouncing a term used by the Government because it "suggests the **existence of a creature never hitherto seen in the United States Reports**: A penalty for constitutional purposes that is *also* a tax for constitutional purposes."[126] This unappealing "creature" clearly was unwelcome in the eyes of the dissent.

The dissenting opinion in *Williams v. U.S.* described a parade-of-horribles scenario to counter the plurality's arguments, and then followed it with a sarcastic retort:

124 *Williams*, 132 S. Ct. at 2269 n. 1 (Kagan, J., dissenting) (emphasis added).

125 *NFIB*, 132 S. Ct. at 2649 (2012) (joint dissent) (emphasis added).

126 *Id.* at 2650–51 (emphasis added).

> But under the plurality's approach, the prosecutor could choose the analyst-witness of his dreams . . . offer her as an expert . . . and have her provide testimony identical to the best the actual tester might have given . . . . [T]he State could sneak [the evidence] in through the back [door]. **What a neat trick—but really, what a way to run a criminal justice system.** No wonder five Justices reject it.[127]

In the same opinion, Justice Kagan defended her argument against the plurality's criticism of it then responded, "But once again, the plurality must be reading someone else's opinion." In these examples, the passion for the writer's position comes through all too clearly. But, if used by a legal advocate, this tone would be dangerous when attacking an adversary, and might even cause the reader to question the substantive strength of the advocate's primary arguments.[128] The safer approach is to follow the many legal-writing experts who advise against sarcasm.

B. "Cheap" tools for emphasis

It is a common refrain in legal-writing guides that typographical emphasis tools like italics should be used sparingly.[129] Punctuation like em dashes can also be used to call attention to the material within the dashes[130]—but, again, are recommended as only an occasional emphatic device.[131] The dissenting Justices of the Court, however, do not tend to follow this advice when responding to counterarguments. Although all opinions occasionally use these typographical tools for emphasis, my

127 *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting) (emphasis added).

128 Schmedemann & Kunz, *supra* n. 119, at 224 ("[T]he court may wonder whether you are resorting to sarcasm because your arguments are not strong enough to stand on their own merit.")

129 Matthew Butterick, *Typography for Lawyers* 85 (2010) (recommending use of bold and italics for emphasis "as little as possible"); Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 118 (2004) (explaining that cueing devices like italics are important but retard speed and recommending against their use for an entire passage); Beazley, *supra* n. 26, at 240 ("[A]s with many writing techniques, too little is better than too much. . . . Too-frequent use of emphatic techniques . . . can slow the reader's progress too much.").

130 Garner, *supra* n. 75, at § 1.49 (describing the em dash as a "forceful and conspicuous" tool that "highlights" material).

131 Richard K. Neumann Jr. & Sheila Simon, *Legal Writing* 164 (2d ed. 2011) ("[A]n occasional dash or italicized word or phrase might help make a point, but not often."); Beazley, *supra* n. 26, at 236 ("To avoid making your writing sound too casual, don't overuse the dash . . . .").

132 For example, seven uses of italics and one use of em dashes appear in Justice Breyer's response to a single counterargument that spans only three paragraphs in *Hall*, 132 S. Ct. at 1901–02 (Breyer, J., dissenting). Justice Scalia responded to counterarguments by using italics eight times and em-dashes twice within three paragraphs—with much of that appearing in one sentence. *Dorsey*, 132 S. Ct. at 2341–42 (Scalia, J., dissenting) ("But *most* is not *all*, and it would have been entirely sensible for Congress to worry that *some* post-Act offenders—offenders clearly subject to the new mandatory minimums—would nonetheless be sentenced under outdated Guidelines if the Guidelines were not revised in short order.").

survey of the opinions reflects that dissenting Justices use them far more often than their winning counterparts.[132]

Despite the universal advice to avoid intensifiers in legal writing,[133] dissenting judges use more intensifiers; "as things become less clear, judges tend to use 'clearly' and 'obviously' more often."[134] The dissenting opinions of the Court's swing-vote cases have followed this pattern in responding to counterarguments: They pepper criticisms of the Court's opinion with the typical intensifiers like "certainly" and "plainly" and add a diverse selection that includes more-dramatic choices like "unquestionably," "utterly," "extraordinarily," "very clear," "in anyway," and "abundantly."[135] These words send a dual message, as articulated by Timothy P. O'Neill:

> When a judicial opinion—especially a U.S. Supreme Court majority opinion in a five-to-four case—is couched in completely unequivocal language, its message to the other side is: "You're wrong. And, by the way, you are stupid and perhaps dishonest, too."[136]

In an advocate's persuasive writing,[137] overuse of these emphatic tools will interfere with the goal of persuasion and could even send the wrong message to the chosen audience.

C. Asking unanswered questions

In *Miller v. Alabama*, the Court's decision rejecting life-without-parole sentences for juveniles, Justice Alito's dissenting opinion criticized the Court's approach to interpreting the Eighth Amendment's ban on

133 Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—Or Is It?*, 45 Idaho L. Rev. 171, 172 n. 3 (2008) (citing e.g. Bradley G. Clary & Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* 102 (2d ed. 2006) ("Let nouns and verbs do most of your talking, not adjectives and adverbs. Particularly avoid exaggeration through conclusory modifiers such as 'clearly,' 'plainly,' 'very,' 'obviously,' 'outrageous,' 'unconscionable,' and the like."); Linda H. Edwards, *Legal Writing and Analysis* 283 (2d ed. 2011) ("Because generations of writers have overused words like 'clearly' or 'very,' these and other common intensifiers have become virtually meaningless. As a matter of fact, they have begun to develop a connotation exactly opposite their original meaning.")).

134 Long, *supra* n. 133, at 172.

135 Lance Long has identified the trend of higher usage of intensifiers in Supreme Court dissenting opinions and hypothesized that dissenting justices "subconsciously sabotage their respective briefs or opinions by adopting 'poor' writing styles." Lance N. Long, *Teach Your Students to Write Like Losers*, poster presentation available at http://www.law.suffolk.edu/academic/jd/lps/LWI/ (accessed Mar. 14, 2013).

136 Timothy P. O'Neill, *Law and "The Argumentative Theory,"* 90 Or. L. Rev. 837, 848 (2012) ("This dynamic is reminiscent of the old joke about the doctor telling the patient, 'I have some bad news. You have six months to live.' When the patient responds, 'I'd like a second opinion,' the doctor says, 'OK, I think you're ugly, too.'").

137 Judge Richard Posner's observations suggest that majority opinions sometimes suffer the same malady. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827, 890 (1988) ("Most judicial opinions . . . , consistent with the logical form, imply that even the very toughest case has a right and a wrong answer and only a fool would doubt that the author of the opinion had hit on the right one.").

138 *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (quoted in *Miller*, 132 S. Ct. at 2487 (Alito, J., dissenting)).

cruel and unusual punishment, which requires analysis of the "evolving standards of decency that mark the progress of a maturing society."[138] Alito alluded to weaknesses in this subjective approach and, finally, asked in a parenthetical,

> Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, aren't elected representatives more likely than unaccountable judges to reflect changing societal standards?[139]

The dissenting judge can afford the risks of leaving questions unanswered, letting the reader close the opinion charged with concern and uncertainty over the future of, in the above example, the Eighth Amendment. However, in a persuasive brief, such a tactic could backfire[140] and is especially risky if the question hints at sarcasm or melodrama.[141] Justice Breyer's use of the rhetorical question sounded disdainful in his dissenting opinion countering the Court's holding that pharmaceutical representatives are exempt from FLSA protection because they are outside salesmen. He outlined the representatives' process of working with physicians to convince them to prescribe their assigned drugs. The next paragraph opened, "Where in this process does the detailer *sell* the product? At most he obtains from the doctor a 'nonbinding commitment' to advise his patients to take the drug . . . ."[142]

The engaging tone evoked through some rhetorical questions is well-suited for a jury argument,[143] but the writer must balance the risk of including such questions in a brief with the chance they will insult the court through an overtly emotional appeal.[144] Ross Guberman contends

139 *Miller*, 132 S. Ct. at 2487 (Alito, J., dissenting).

140 *Robert Batey, Parker v. Levy: A Primer in Judicial Persuasion*, 49 J. Leg. Educ. 97, 122 (1999) (criticizing a dissenting judge's series of rhetorical questions as "neither particularly concise nor particularly eloquent "); *e.g.* Bryan J. Pattison, *Writing to Persuade*, Utah B.J. 10, 14 (Mar./Apr. 2011) (available at http://webster.utahbar.org/barjournal/2011/03/writing_to_persuade.html#more ("Judges are not persuaded by the use of inflammatory language or rhetorical questions.") (quoting U.S. Magistrate Judge Paul Warner).

141 Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* 190–91 (2011) (recommending rhetorical questions despite risk of a "sarcastic and scathing" effect); *see* Charles C. Tucker, *Book Review*, 40 Colo. Law. 79 (Sept. 2011) (reviewing *Point Made*) (questioning the "punch and bite" recommended in Guberman's approach).

142 *Christopher*, 132 S. Ct. at 2176 (Breyer, J., dissenting).

143 Gabriel H. Teninbaum, *Who Cares?*, 3 Drexel L. Rev. 485 (2011) (defending effectiveness of rhetorical questions in oral arguments before a jury).

144 Scalia & Garner, *supra* n. 18, at 32 (warning against risk of insulting an appellate judge by arguing using an emotional appeal as though arguing to an "impressionable juror").

145 Guberman, *supra* n. 141, at 190–91 (explaining the author's "about-face" regarding rhetorical questions in briefs, having been converted from his previous position that they were "pompous, if not offensive").

that rhetorical questions *can* be used powerfully in briefs if used carefully.[145] The best rhetorical questions "put the court on the defensive, suggesting that unless the court can answer the rhetorical question posed, the judge has no choice but to find for the writer's client[.]"[146] But an unanswered legal question should, of course, never be used as a substitute for legal analysis of the question posed.[147]

D. Disparaging the adverse document itself

Punching holes in an adversary's process or logic can be effective when sparingly used,[148] but an undue focus on the argument itself detracts from the substance of the two opposing arguments—and risks carrying the tone of an ad hominem attack.[149] The dissenting opinions devote proportionally more time to disparaging the counterarguments themselves. The dissent in the term's Confrontation Clause case suggested a lack of forthrightness when it criticized the plurality for "wrap[ping] itself in th[e] holding" of the state supreme court that had previously faced the issue.[150] The accusations piled up in that opinion—the paragraph began by accusing the "plurality's primary argument . . . [of] tr[ying] to exploit a limit to the Confrontation Clause recognized in *Crawford*."[151] Later, it used a cliché metaphor to criticize the plurality for rejecting settled law that, "disconnected the Confrontation Clause inquiry from state evidence law .

146 *Id.* at 192 (quoting from rhetorical briefs posed by top advocates in briefs).

147 One court sanctioned an attorney for, in part, the use of rhetorical questions in lieu of legal analysis: "The use of unsupported insults and rhetorical questions neither persuades nor impresses this Court, especially when it fails to accompany any kind of legal argument or discussion of relevant case law." *Kowalski v. Scott*, No. Civ. A. 02-7197, 2004 WL 1240658 at *10 n. 6 (E.D. Pa. May 26, 2004), cited in Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-Mail Professionally*, 71 Md. L. Rev. Endnotes 1, 5 n. 24 (2011).

148 A very specific critique of the adverse analysis can be powerful. The majority of the Court in *Hall v. U.S.* pointedly criticized the dissent's "inverted analysis" of the bankruptcy statutes. 132 S. Ct. at 1893. It accused the dissent of starting with shaky legislative history to prove the purpose for a statutory exception to a provision. "It then reasons backward from there," the majority continued, to reach the meaning of the provision itself. *Id.* By identifying a specific analytical weakness and evoking effective imagery of the dissent's backward movement, the Court avoids the stinging tone of an ad hominem attack on the adverse party.

149 Legal-writing experts seem to be in agreement that ad hominem attacks are counter-productive. *See e.g.* Christen Civiletto Carey, *Full Disclosure: The New Lawyer's Must-Read Career Guide* 168 (2d ed. 2001) ("[A]void personally attacking opposing counsel and focus on her client's legal or factual position."); Charles R. Calleros, *Legal Method and Writing* 370 (6th ed. 2011) ("Avoid personal attacks on opposing counsel. . . . Thus, you may safely characterize the opposing counsel's argument as internally inconsistent, but you should not comment that he is unable to write a coherent brief."); Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 Scribes J. Leg. Writing, 19, 24 (1992) ("Omit irrelevances, slang, sarcasm, and personal attacks. These serve only to weaken the brief. Ad hominem attacks are particularly distasteful to appellate judges."); Gerald Lebovits, *Do's, Don'ts, and Maybes: Legal Writing Don'ts—Part I*, N.Y. St. B.J. 44, 51 (July/Aug. 2007) ("Condescending language, personal attacks, and sarcasm have no place in legal writing. Attacking others won't advance your reasoning. This behavior, possibly sanctionable, distracts readers and leaves them wondering whether your substantive arguments are weak.").

150 *Williams*, 132 S. Ct. at 2268 (Kagan, J., dissenting).

151 *Id.*

152 *Id.* at 2272 (Kagan, J., dissenting).

. . . So the plurality's state-law-first approach would be an about-face."[152] Finally, it described a rule set forth by the plurality and retorted that "Where that test comes from is anyone's guess."[153]

In the dissenting or concurring opinions, the attacks aimed at the opposing opinions were frequent and direct. The *Frye* dissent accused the majority of "mechanically appl[ying] an outcome-based test,"[154] and of settling on a rule requiring a "process of retrospective crystal-ball gazing posing as legal analysis."[155] The *Lafler* dissent called the Court's remedy "quite absurd,"[156] and the *Dorsey* dissent renounced the "mischief of the Court's opinion."[157]

The dissenting and concurring opinions in *NFIB v. Sebelius* were even more scathing: "The Court's disposition, invented and atextual as it is," the joint dissent jabbed, "does not even have the merit of avoiding constitutional difficulties."[158] The dissent criticized one counterargument for containing only the "flimsiest of indications to the contrary,"[159] another for being "feeble,"[160] and yet another for being "quite illogical."[161] Justice Ginsberg's concurring opinion accused the counteranalysis of containing "specious logic,"[162] applying a "crabbed reading" of the Commerce Clause,[163] and making "scant sense."[164]

The winning opinions, in contrast, rarely reciprocated. In fact, a compliment to the other side's analysis seemed to help smooth the way for the attack to come, as in *Frye*'s majority opinion written by Justice Kennedy. Following a summary of the counterarguments, he segued into his rebuttal: "The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality."[165] This polite nod to the counterargument lent the coming criticism credibility and balance.

Conclusion

The swing-vote opinions model a number of specific techniques, both substantive and rhetorical, for responding to counterarguments. The opinions reflect that the Supreme Court Justices do generally explicitly

153 *Id.* at 2273.

154 132 S. Ct. at 1412 (Scalia, J., dissenting).

155 *Id.* at 1413.

156 132 S. Ct. at 1392.

157 132 S. Ct. at 2344 (Scalia, J., dissenting).

158 *Id.* at 2676 (joint dissent).

159 *Id.* at 2654.

160 *Id.*

161 *Id.* at 2655.

162 *Id.* at 2625.

163 *Id.* at 2609.

164 *Id.*

165 132 S. Ct. at 1407.

take on even these—arguably the most challenging of counterarguments—in detail. The Justices fully inoculate against the most threatening counterarguments, but they do so strategically. First, the Justices lay the groundwork for the rebuttal by introducing counterarguments with damaging labels. They frame the counterarguments effectively by likening the counterarguments to tangible negative imagery through metaphors. The opinions set apart the rebuttal by manipulating sentence structure and word choice to effect a favorable tone change. Finally, the Justices organize their rebuttals strategically: concluding with the weakest counterarguments and narrowing each rebuttal to one theme, making the response both more organized and more powerful.

The dissenting opinions serve largely as a positive model for the handling of counterarguments; however, they also reflect a collection of tactics that should be adopted with caution by a legal advocate. The color and passion in a dissenting opinion may render it unique and memorable. But those very features would render a rebuttal risky as a written offering to the bench.