



ESSAY

The Dreaded Parenthetical

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Published: December 2021

1. Introduction

I'm writing this short essay on explanatory parentheticals in legal briefs. I'm embarrassed to admit it, but, yes, I'm offering gratuitous moralizing on parentheticals. I refer here to parentheticals that appear after a citation, as in *Tortoise v. Hare*, 123 F.3d 456 (5th Cir. 2018) (holding that rabbits are faster but dumber than turtles).

I want to say why I'm writing this essay. For the last decade, I've written many briefs more collaboratively than I had earlier in my career—typically, with law students in clinics. As I've attempted to teach litigation advocacy, I've reflected on the overuse and misuse of parentheticals. At times, I see an almost obsessive, reflexive use of them, and, as I'll explain, they can get in the way of persuasion.

Moreover, some brief readers—including some judges—report that they do not read parentheticals or skim them quickly. If that's true, then brief writers

* The author thanks Erin Carroll and Nicholas Fuenzalida for super editing suggestions.

should be concerned about using parentheticals in the body of a brief—as opposed to in footnotes—that are intended to be read and understood *while the brief is being read* (as opposed to later use for in-chambers research or opinion writing).

Before the critique, I'll acknowledge, for the sake of discussion, that explanatory parentheticals can be useful. We lawyers are trained to assimilate them as we read, so they don't get in the way or get lost as much for lawyer readers as they would for non-lawyer readers. For instance, they can efficiently explain why a not-right-on-point authority is sufficiently analogous to lend support, where a longer, ordinary-prose explanation might be unnecessary or diversionary. Even a string of citations with explanatory parentheticals may be helpful to set out a typology or simply to identify examples of something to drive home a key point. Similarly, a parenthetical can be used to prove up your citation—often a quote from the relevant authority within the parenthetical does the trick on this score—because the bare citation, while fair and accurate, is not authoritative enough or believable enough standing alone.

My thesis, then, is that parentheticals are overused. Their overuse can get in the way of easy, efficient, pleasurable reading, and, in the end, can undermine the persuasive power of a brief. I'll now discuss the four biggest concerns with parentheticals: the four that are likely to undermine persuasion, brevity, clarity, and readability.

2. The Big Four

First, over and over again, I see briefs with parentheticals that repeat what the writer just said, either word-for-word or close to it, like this:

The Easter Bunny plays no role in the enforcement of the Voting Rights Act. *See Peter Rabbit v. Bugs Bunny*, 222 F.3d 222 (8th Cir. 2011) (“the Easter Bunny has no role in enforcing the Voting Rights Act”).

This kind of parenthetical is almost always useless; it slows down the reader, drawing her eyes inside the parenthetical and then back out for no reason. Using a parenthetical of this sort may annoy the reader. The remedy here (of course) is just to ditch the parenthetical. If the parenthetical contains a quote that is particularly useful, then use it in ordinary prose, but, still, ditch the parenthetical. (For what it's worth, in the example above, I'd prefer using the quoted material because it is shorn of the nominalization “enforcement.”)

Here's an example of how you might get words out of a parenthetical and into the brief's ordinary prose. A little while back, I was sent a draft Supreme Court brief that said this:

This Court has explained that in cases not involving the transfer of power from one Article III court to another, most statutory limitations periods are nonjurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 n.9 (2017) ("In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another," this Court has "made plain that most [statutory] time bars are nonjurisdictional.")

This version slims down the writing and better accommodates the reader:

"In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another," this Court has "made plain that most statutory time bars are nonjurisdictional." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 n.9 (2017).

Of course, if you don't like some or all of the quoted material, don't use it. But, in any event, don't use a parenthetical to repeat yourself.

Second, and perhaps most importantly, information gets put in parentheticals that would work better—often much better—in the brief's ordinary, non-parenthetical prose. Sometimes the thought within the parenthetical is just better than what appears outside of it. Other times, that thought is a variant, or a point of emphasis, that underscores your basic point. Why in the world should you bury that good stuff in a parenthetical, where it might be missed or skimmed or, at a minimum, alter the reader's pace and the flow of your argument for no good reason? Why not incorporate it into the brief's ordinary prose? That is, let that prose drive the brief's substantive points, and do not delegate that work to parentheticals.

Recently, I reviewed a draft brief that said this (with the citations and a few words altered to disguise the case):

Under the circumstances just described, it would be unreasonable to expect a layperson—much less one proceeding pro se in her second language—to extract from the applicable legal authorities the preferred venue for filing her claim. *See Beefcake v. Attorney General*, 438 F.3d 444 (4th Cir. 2007) (observing that Section 455 does not indicate which adjudicator should receive motion for reconsideration

and that the agency's regulations purportedly designed to "fill this lacuna" are not "a model of clarity").

If we assume, as the drafter apparently did, that (1) *Beefcake v. Attorney General* supports the drafter's position, and (2) the dispute involves the meaning of Section 455 and its regulations, using the parenthetical is a mistake in my view. Why stop the reader and require her to fish around a bit for the material in the parenthetical? How about this instead:

Under the circumstances just described, it would be unreasonable to expect a layperson—much less one proceeding pro se in her second language—to extract from the applicable legal authorities the preferred venue for filing her claim. As the Fourth Circuit has observed, Section 455 nowhere indicates which adjudicator should receive a motion for reconsideration, and the agency's regulations purportedly designed to "fill this lacuna" are not "a model of clarity." *Beefcake v. Attorney General*, 438 F.3d 444 (4th Cir. 2007).

Although there might be a better way of converting the parenthetical into ordinary prose, my point is not that the prose chosen in this example is perfect, but that using the parenthetical at all diminishes the likelihood for persuasion because it requires the reader to search for material that you want the reader to know. Including the material in the brief's ordinary prose means it will get read—and read smoothly and efficiently, without hesitation.

Third, try to avoid parentheticals, and particularly strings of them, in the middle of a paragraph in the body of a brief. (The considerations are different when these kind of parentheticals are placed in a footnote.) When this happens, you are not only forcing the reader to absorb what you—the brief writer—has to say but demanding that the reader search for one or more parentheticals after the citation and, only after that, pick up the rest of the thought as the paragraph moves ahead and ends.

That's not a good thing. In English grammar, a paragraph generally expresses an integrated idea. Why interrupt the transmission of that idea with a search-and-understand mission? At the least, then, try to come up with a sensible way to get the parenthetical-laden citation(s) to the end of the paragraph. That way, the reader will have your idea in mind before she wades through the parenthetical. (Better yet, come up with a way to employ the techniques discussed above and ditch these kinds of parentheticals.)

Fourth, if you are going to use parentheticals, make them understandable. It's true that your reader may skip over them, but a parenthetical should not be

treated as a short-cut or a throw-away. That doesn't mean they must always be full sentences. A series of citations in a footnote proving up a point or showing that a bunch of authority supports your position, in which the parenthetical says "same" or "same under state law" or "similar," is just fine. Lawyers are trained to pick up some pithy signals instantly. Even a fairly long, but truncated parenthetical can occasionally work well if it is crafted with care and attention to the reader's needs. But too often parentheticals eliminate articles or truncate verbal phrases, requiring the reader to stop and figure things out. I don't know where the tradition of watered-down, non-grammatical parenthetical-speak came from, but it's not good.

Whenever there's doubt about whether a parenthetical's syntax will adequately convey your meaning, add a few words to ensure that the parenthetical—if you need it at all—is understandable. So, for example, prefer "(observing that both Hamilton's view and the nineteenth-century traditional theory of Austro-Hungarian federalism are valid)" over "(Hamilton's view and nineteenth-century traditional theory of Austro-Hungarian federalism valid)". On this point, there are fewer hard-to-understand, truncated parentheticals these days than there used to be, but still I read too many contorted parentheticals that require me to stop and reconstruct, while I lose the writer's train of thought.

3. Conclusion

To sum up: Don't use parentheticals to drive the substance of your brief. Use the brief's ordinary prose to do that. If in a draft of, say, a 30-page brief, I have more than two or three of them in the body of the brief to support significant points, it's likely that I'm not making those points as directly and understandably as I could. That's a signal that revision is needed.

Don't use parentheticals to repeat what you've just said or to say something that easily can be taken out of the parenthetical and placed in ordinary text. And if there's a good reason to use a parenthetical, try to place it at the end of a paragraph where it won't interrupt the reader's understanding of your ideas. And, finally, within a parenthetical, prefer ordinary English, so the reader knows immediately what you're talking about.