



## ARTICLE

# Pondering Parentheticals: Problems and Possibilities<sup>1</sup>

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One of the most interesting, and arguably important, parts of a legal citation is any accompanying explanatory parenthetical. Most legal writing professors teach students how to write explanatory parentheticals but rarely how to read them. An explanatory parenthetical follows a citation, appears within parentheses, and conveys additional information about the authority. It typically begins with a present participle (an “-ing” word such as “holding” or “noting”).<sup>2</sup> In a relatively small amount of space, a parenthetical explains a case’s relevance and thus carries with it a certain authority.

Crafting parentheticals requires the writer to read and understand the authorities on which they are based, and thus, the writer who uses them may enhance their credibility with their audience.<sup>3</sup> Legal writers use parentheticals, just as they do in-text rule explanations, to explain the law persuasively. Consequently, because parentheticals carry some amount of weight, it is crucial

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<sup>1</sup> The authors thank Owen Jackson for his research and feedback.

<sup>2</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.5(a)(i), at 65 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).

<sup>3</sup> Eric P. Voight, *Explanatory Parentheticals Can Pack a Persuasive Punch*, 45 MCGEORGE L. REV. 269, 275–76 (2013).

that they are crafted accurately. On a related note, when parentheticals appear within judicial opinions, there is some question whether they are holding, dicta, or something else.

This article focuses on parenthetical literacy. It discusses the purpose of teaching students how to read and analyze judicial parentheticals while also addressing certain challenges in doing so. The article ends with a few classroom ideas on how to teach students how to read, analyze, and write explanatory parentheticals.

## 1. PARENTHETICAL LITERACY

While teaching students how to write citations has been the traditional focus in law schools, Alexa Chew in her article, "Citation Literacy," advocates for a different approach.<sup>4</sup> Students should be taught to read citations before writing them.<sup>5</sup> Rather than having students focus on a list of conventions and proper formatting, which decontextualizes citations, students should be taught the important information they can glean from reading them.<sup>6</sup> Students should learn that citations contain encoded information, like the weight of authority, and are themselves "reasons" that support the claims in a text.<sup>7</sup>

Taking this a step further, teaching students how to read citations should include teaching them how to read explanatory parentheticals. Parentheticals, after all, are the most "communicative" part of a citation. Students should be taught to consider whether a parenthetical they are reading accurately explains the aspect of the case that is being discussed. In addition, students should be encouraged to think about whether the words within an explanatory parenthetical are holding, dicta, or something else.

## 2. READING JUDICIAL PARENTHETICALS

Explanatory parentheticals in judicial opinions, like parentheticals in legal briefs, can support the writer's explanation of the law or help demonstrate the

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<sup>4</sup> Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869, 876 (2018).

<sup>5</sup> *Id.* at 907. Chew has also noted, "Reading citation in another writer's document, such as a brief or judicial opinion, allows you to incorporate the information from the citation into your understanding of the prose of the sentence that the citation supports. Reading citation also allows you to assess the weight of authorities that the writer is using to support her analysis." Alexa Chew & Katie Rose Guest Pryal, *THE COMPLETE LEGAL WRITER* 379 (2d ed. 2020).

<sup>6</sup> Chew, *Citation Literacy*, *supra* note 3, at 905.

<sup>7</sup> *Id.* at 872-73.

significance of the authority cited.<sup>8</sup> They can do this by providing specific examples of how a rule has been previously applied or by explaining factors, exceptions, or underlying policy considerations for the rules.<sup>9</sup> In the application, parentheticals can be used to show additional legal support for the court's holding. Effective judicial parentheticals will add to the reader's understanding of the relevant rules and the impact of those rules on the particular case. They will often make the rule explanation or the application clearer and more concise because the textual sentences are focused on the most crucial information while the parenthetical provides additional support.

At the same time, the use of explanatory parentheticals in judicial opinions can cause confusion or potentially undermine the writer's intent. It is not always clear to a reader what the explanation in the parenthetical is—holding, dicta, or something else.<sup>10</sup> If parentheticals are part of the holding, advocates and other courts should feel free to rely on their precedential value.<sup>11</sup> If, however, explanatory parentheticals are dicta, it is unclear how persuasive they should be.<sup>12</sup> If explanatory parentheticals are “something else,” such as valuable reasoning supporting the holding, but not the holding itself, that would be helpful to know as well.<sup>13</sup> Readers may only get definitive answers to these questions when they

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<sup>8</sup> THE BLUEBOOK, *supra* note 2, R. 1.5(a), at 65.

<sup>9</sup> See generally, Michael D. Murray, *The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs*, 10 LEGAL COMM. & RHETORIC: JALWD 229, 231 (2013) (assessing four rhetorical uses for parentheticals in appellate briefs: “(1) to quote or highlight the contents of authorities, (2) to communicate the lessons and principles induced from a synthesis of authorities, (3) to explain or demonstrate the operation of public policy within multiple authorities, and (4) to communicate narrative reasoning from the storylines of multiple authorities”).

<sup>10</sup> For example, in *New York v. Khouri (In re Khouri)*, 397 B.R. 111, 121 n.15 (Bankr. D. Minn. 2008), the State relied on parentheticals from a previous decision to support its argument. Even though some of the parentheticals could be read to support the State's position, the court concluded that the explanations were “better treated as surplusage.” *Id.*

<sup>11</sup> See *In re A.P.*, 760 N.W.2d 210 (Iowa Ct. App. 2008) (relying, in part, on an explanatory parenthetical in an Iowa Supreme Court decision to determine which statute applied).

<sup>12</sup> For example, in the Fifth Circuit case *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019), the judges could not agree on the persuasive impact of a parenthetical found in a U.S. Supreme Court decision. The majority acknowledged the parenthetical was dicta but explained “the Supreme Court's view confirms our conclusion.” *Id.* at 146 n.34. The dissent, on the other hand, explained that the “dictum was a mere explanatory parenthetical in a citation to the proceedings below.” *Id.* at 186 (Willett, J., dissenting). When writing a concurring opinion after a hearing *en banc*, Judge Willett called the parenthetical “an insult to dicta.” *Thomas v. Reeves*, 961 F.3d 800, 823 n.82 (5th Cir. 2020) (Willette, J., concurring).

<sup>13</sup> See *Thomas*, 961 F.3d at 823 n.82.

rely on the explanation to their detriment in their own filings to the court.<sup>14</sup> Given the uncertainty around the weight of parentheticals, this is an area that deserves further attention.<sup>15</sup> Indeed, the lack of clarity about the role of explanatory parentheticals and their persuasive impact makes reading them, and teaching students how to read them, challenging.

### 3. LEARNING TO WRITE PARENTHETICALS

After learning how to read parentheticals, students should learn how to write them. A well-written parenthetical will support the explanation of the law. As Ruth Bader Ginsburg once noted, a “first rate brief” will “furnish[] parenthetical explanations to show the relevance of the citation.”<sup>16</sup> Learning how to write parentheticals can enhance several areas of law students’ legal writing skills: researching, using mandatory and persuasive authorities, synthesizing and applying rules, writing clearly and concisely, and citing accurately.<sup>17</sup> And writing parentheticals “forces students to be succinct and more strategic.”<sup>18</sup> Accordingly, training students how to carefully craft parentheticals connects with the overall teaching goals of clarity and conciseness in legal writing courses. Indeed, in a first-year legal writing course, dedicating a class (or at least a portion of a class) to parentheticals can help students further develop the skills necessary for effective advocacy.

### 4. PARENTHETICAL TEACHING IDEAS<sup>19</sup>

Below are three short, in-class teaching ideas that can help students read, analyze, and write explanatory parentheticals.

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<sup>14</sup> See *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 344 (Ill. 2008) (explaining that its previous “mere citation” to another case by way of a “see also” signal and a parenthetical could not be read as a court’s adoption of a new rule).

<sup>15</sup> The authors are writing another article that addresses judicial use of explanatory parentheticals. A more thoughtful approach to parenthetical usage in judicial opinions would allow legal writing professors to better teach students about the weight of this critical component of legal citation.

<sup>16</sup> Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999).

<sup>17</sup> Laurie A. Lewis, *The Stellar Parenthetical Illustration: A Tool to Open Doors in a Tight Job Market*, 19 No. 1 PERSPS. 35, 35 (Fall 2010).

<sup>18</sup> Amy H. Soled, *Another Tool (the Case Parenthetical) for Teaching Legal Analysis*, 32 SECOND DRAFT 24, 24 (Fall 2019).

<sup>19</sup> At Mitchell Hamline School of Law, we tend to focus on explanatory parentheticals in the spring semester when students are moving beyond basic citation and learning persuasive writing. However, the first exercise is meant for the fall semester when students are first learning to read and draft citations.

#### *4.1. TEACHING STUDENTS HOW TO READ PARENTHETICALS*

The first parenthetical-teaching idea is designed to help students understand the impact of both citations and explanatory parentheticals on a rule-explanation paragraph. Students are first given a rule paragraph that is new to them and does not contain citations or parentheticals. Students are asked to read the paragraph so they can better understand the rule. Students then meet in small groups to discuss what they understand about the rule before the professor debriefs the full class.

Next, students are given the same paragraph with citations, but no explanatory parentheticals. Students are, again, asked to read the paragraph and meet with their small groups. In the small groups, they answer three questions before discussing with the full class. First, “did you engage with the citations, or did you skip over them?” Unless students are specifically directed to engage with or read the citations, some students will simply skip over them on the second read-though. If students skipped over them, they should reread the paragraph and pay attention to the citations. Second, “what new information did you learn about the rule from the citations?” Third, “has your understanding of the rule changed?”

Finally, students are asked to read the same paragraph, which this time contains both citations and explanatory parentheticals. In their small groups, students answer several questions. First, “how did you engage with the parentheticals—how did they affect your reading of the paragraph?” Second, “what new information did you learn about the rule from the parentheticals?” Third, “why do you think the author chose to include the information in parentheticals instead of the text of the paragraph?” Fourth, “has your understanding of the rule changed?” The professor will then lead the class in a discussion about how citations and explanatory parentheticals impact a reader’s understanding of the rules.

#### *4.2. TEACHING STUDENTS HOW TO ANALYZE PARENTHETICALS*

The second parenthetical-teaching idea focuses on teaching students how to analyze parentheticals. The professor gives students a short case and also four parentheticals that discuss the case’s holding in different ways. Students read the case and then review the four parentheticals, considering the accuracy of each one. Students vote on which parenthetical is best. The professor could then lead a class discussion by posing some questions: (1) why was the “best” parenthetical the most accurate; (2) which parenthetical was the least accurate and why; (3) how did

the construction of the four parentheticals and choice of present participles affect your judgment as to the strengths or weaknesses of each?

In preparing for this exercise, in addition to finding a short case, the professor must draft four different parentheticals expressing the case's holding. The goal would be to write one excellent parenthetical and three parentheticals that are weaker because of impreciseness or inaccuracy.

### **4.3. TEACHING STUDENTS HOW TO WRITE PARENTHETICALS**

The third parenthetical-teaching idea involves training students how to write parentheticals. For this exercise, the professor will again provide a short case to the students. After reading the case, the students should be divided into three groups. Depending on which group they are assigned, students must individually draft a parenthetical that discusses one of the following about the case: (1) the holding, (2) the reasoning, or (3) the facts. Students must begin their parenthetical with the words "holding," "reasoning," or "noting." After students have drafted their parentheticals, they share them with the others in their group. As a group, they choose the "best" parenthetical in terms of accuracy and then present it to the class as a whole.<sup>20</sup> The professor then leads the whole class in a discussion about the characteristics that made these well-crafted parentheticals.

## **5. CONCLUSION**

While general citation literacy is foundational for law students and lawyers, the next step is explanatory parenthetical literacy. Law students must learn how to read and write parentheticals because they can enhance conciseness and clarity in legal writing and are expected in written advocacy. An important nuance of learning how to use parentheticals involves learning how to interpret parentheticals used in judicial opinions. Moreover, because of the present lack of clarity regarding the weight of judicial parentheticals, future lawyers, and even current advocates, would benefit from a better understanding as to whether they are holding, dicta, or something else.

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<sup>20</sup> This exercise can be adapted for teaching persuasive writing. Students could be asked to draft a parenthetical for both accuracy and persuasion.