Emphasis*

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Persuasion requires not only clarity but also emphasis on critical points in your argument. One can create this emphasis through various methods.

(1) Repetition

One such method is repetition: To create emphasis, we can repeat words, phrases, and sounds.

(a) Repeating Words

Repeating words ordinarily impedes clarity or persuasion. But not always; purposeful repetition can enhance the effect of critical points.[1]

Purposeful repetition appeared in a certiorari petition challenging a large punitive-damage award based on a product's lethal potential:

> To say, as the court did here, that a manufacturer, to make a profit, marketed a product that "could kill people," simply

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1 *See* Catherine J. Cameron & Lance N. Long, *The Science behind the Art of Legal Writing* 83–84 (2015) (discussing studies showing that repetition promotes persuasion).

> begs the question as to reprehensibility. That is because *all* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs and utility.[2]

Repeating the adjective *all* permits the author to underscore the perceived fallacy of the court's rationale.

(b) Repeating Phrases (Anaphora and Epistrophe)

Repetition of phrases is ordinarily counterproductive because it dulls the reader's attentiveness, diluting the effect of the prose. As a result, repetition often signals sloppiness. But purposeful repetition of a phrase can sometimes do the opposite, allowing the reader to zoom in on what is different in the sentence.

(i) Anaphora

There lies the power of a rhetorical device, anaphora, which entails the repetition of a word or phrase to begin successive clauses. The repetition enhances recall.[3]

Authors have used this rhetorical device to bring the reader into the story. Charles Dickens employed this technique:

> *It was the* best of times, *it was the* worst of times, *it was the* age of wisdom, *it was the* age of foolishness, *it was the* epoch of belief, *it was the* epoch of incredulity, *it was the* season

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[2] Petition for a Writ of Certiorari at 14, *Ford Motor Co. v. Romo*, 538 U.S. 1028 (2003) (No. 02-1097) (Theodore J. Boutrous Jr. et al.), 2003 WL 21996438.

[3] *See* David C. Rubin, *Memory in Oral Traditions: The Cognitive Psychology of Epic, Ballads, and Counting-Out Rhymes* 305–06 (1995); *see also* Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 J. Legal Writing Inst. 65, 88 (2010) (stating that repetition in anaphora "works as a memory tool because the repetition of sound cues mental recall").

> of Light, *it was the* season of Darkness, *it was the* spring of hope, *it was the* winter of despair[.][4]

Orators have also made effective use of anaphora. For example, Winston Churchill used this device in a famous speech, underscoring the doggedness with which British forces would pursue their enemy:

> *We shall* not flag or fail. *We shall* go on to the end. *We shall* fight in France, *we shall* fight on the seas and oceans, *we shall* fight with growing confidence and growing strength in the air, *we shall* defend our island, whatever the cost may be, *we shall* fight on the beaches, *we shall* fight on the landing grounds, *we shall* fight in the fields and in the streets, *we shall* fight in the hills. *We shall* never surrender.[5]

So too can legal writers underscore certain points by repeating prefatory phrases, as Justice Gorsuch illustrates by repeatedly telling the reader to "put to the side" various stumbling blocks facing the plaintiffs:

> The problem with this line of argument is fundamental. *Put to the side* the question whether the savings clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. *Put to the side* the question of what it takes to qualify as a ground for "revocation" of a contract. *Put to the side* for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all of these questions, the saving clause still can't save their cause.

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[4] Charles Dickens, *A Tale of Two Cities* 1 (Huber Gray Buehler & Lawrence Mason eds., Macmillan Co. 1928) (emphasis added).

[5] Winston Churchill, *We Shall Fight on the Beaches*, Address to the British People after the "Miracle of Deliverance" at Dunkirk (June 4, 1940), *in* William Safire, *Lend Me Your Ears: Great Speeches in History* 150–51 (2004) (emphasis added).

> It can't because the saving clause recognizes only defenses that apply to "any" contract.[6]

Chief Justice Roberts also used this technique for emphasis in *Williams-Yulee v. Florida Bar*.[7] There the Court addressed the constitutionality of a canon prohibiting judicial candidates from soliciting campaign contributions.[8] Chief Justice Roberts upheld the canon and Justice Kennedy dissented, characterizing the canon as a "gag," "state censorship," and deadening of public debate.[9] To rebut this characterization, Chief Justice Roberts used anaphora to underscore what judicial candidates could continue to do in their campaigns:

> By any measure, [the canon] restricts a narrow slice of speech. A reader of Justice KENNEDY's dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving "state censorship" that "locks the First Amendment out," imposes a "gag" on candidates, and inflicts "dead weight" on a "silenced" public debate. But in reality, [the canon] leaves judicial candidates free to discuss any issue with any person at any time. *Candidates can* write letters, give speeches, and put up billboards. *They can* contact potential supporters in person, on the phone, or on line. *They can* promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." *They can*, however, direct their campaign committees to do so. Whatever else may be said of the [c]anon, it is surely not a "wildly disproportionate restriction upon speech."[10]

Anaphora supplies an effective tool to create emphasis. The tool draws its value from the focus on a repetitive word or phrase.

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6 *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal citations omitted).

7 135 S. Ct. 1656 (2015).

8 *Id.* at 1663.

9 *Id.* at 1683–84 (Kennedy, J., dissenting).

10 *Id.* at 1670 (internal citations omitted) (emphasis added).

(ii) Epistrophe

A similar rhetorical device, epistrophe, involves repetition of phrases at the end of a sentence. In the Gettysburg Address, Abraham Lincoln used epistrophe when referring to a "government of the people, by the people, for the people."[11]

This device can also create emphasis in legal writing, as Chief Justice Roberts showed: "If such a shoe exists, the parties have not *pointed to it*, there is no evidence that Already has *dreamt of it*, and we cannot *conceive of it*."[12]

Epistrophe is also sprinkled throughout stirring oratory, like this passage of Winston Churchill's:

> We strove long, too long, for peace, and suffered thereby; but from the moment when we gave our guarantee that we would not stand by idly and see Poland trampled down by Nazi violence, *we have never looked back, never flagged, never doubted, never flinched.*[13]

(c) Repeating Sounds (Alliteration)

Emphasis can sometimes appear through alliteration, the repetition of certain consonants. When the repetition is natural and infrequent,[14] it can enliven the prose and enhance recall.[15]

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[11] Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* William Safire, *Lend Me Your Ears: Great Speeches in History* 60 (2004).

[12] *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 94 (2013) (emphasis added).

[13] Winston Churchill, *We Expect No Reward and We Will Accept No Compromise*, Speech Receiving the Freedom of the City of London (June 30, 1943), *in Never Give In! The Best of Winston Churchill's Speeches* 355 (Winston S. Churchill ed., 2003) (emphasis added).

[14] *See* Constance Hale, *Sin and Syntax* 236 (1999) (stating that alliteration should sound natural and be used sparingly).

[15] *See* Rachel M. Atchley, *Memory for Poetry: More Than Meaning?*, 4 Int'l J. Cognitive Linguistics 35, 36 (2013) ("[P]rominent sound patterns are more likely to be remembered, as in rhyme or alliteration.").

Oliver Wendell Holmes Jr. used alliteration in his famous quotation: "The *l*ife of the *l*aw has not been *l*ogic: it has been experience."[16] After the three uses of the *L* sound, Holmes quits the alliteration, surprising the reader with what he wants to emphasize: the role of experience.

Justice Brandeis used alliteration, along with a three-word sentence, to emphasize a point: "*C*rime is *c*ontagious."[17]

Judge Easterbrook also used alliteration to underscore a point in *Stevens v. Tillman*.[18] There a school principal alleged defamation based on statements calling him a "racist."[19] Judge Easterbrook rejected this allegation, adding that overuse of the term *racist* had robbed the word of its meaning.[20] To deepen the impact and memorability of his point, Judge Easterbrook sprinkled alliteration with the *L* sound throughout a key paragraph:

> *L*anguage is subject to *l*evelling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared "segregation now, segregation forever", everyone knew what a "racist" was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So *l*ong as any part of the old meaning *l*ingers, there is a tendency to invoke the word for its impact rather than to convey a precise image. We may regret that the *l*anguage is *l*osing the meaning of a word, especially when there is no ready substitute. But we serve in a court of

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[16] Oliver Wendell Holmes Jr., *The Common Law* 1 (Little, Brown & Co. 1923) (1881) (emphasis added).

[17] *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (emphasis added).

[18] 855 F.2d 394 (7th Cir. 1988).

[19] *Id.* at 395.

[20] *Id.* at 402.

> *l*aw rather than *l*anguage and cannot insist that speakers cling to older meanings.[21]

David Boies, Theodore Olson, and Theodore Boutrous Jr. also used alliteration to highlight the harm to gay couples' inability to marry: "Each day Plaintiffs' rights to marry are denied is a day that can never be returned to them — a *wr*ong that can never be *r*emedied."[22]

Alliteration also drives many memorable speeches, such as Winston Churchill's. For example, Churchill addressed the House of Commons, seeking a vote of confidence: "It has been suggested that we should have a three *d*ays' *D*ebate of this kind in which the Government would no *d*oubt be lustily belaboured by some who have lighter burdens to carry, and that at the end we should separate without a *D*ivision."[23]

But alliteration can sometimes appear contrived or distracting. The key is to use alliteration sparingly and only when you want to draw the reader to a specific idea.

Alliteration exists in many forms.

For example, consonance is the use of the same consonant sound at the end of nearby words. An example: "He en*d*eavored to avoi*d* the hea*d* of the clan." Justice Thomas used consonance to focus on the broad sweep of a precedent, *Dewsnup*: "If litigants' differing positions demonstrate ambiguity, it is hard to imagine how any provision of the Code — or any other statute — would *escape Dewsnup*'s broad *sweep*."[24]

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[21] *Id.* (emphasis added).

[22] Brief in Opposition at 34, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144) (David Boies, Theodore B. Olson & Theodore Boutrous Jr.) (emphasis added).

[23] Winston Churchill, *I Demand a Vote of Confidence*, Debate in the House of Commons (Jan. 27, 1942), *in Never Give In! The Best of Winston Churchill's Speeches* 325 (Winston S. Churchill ed., 2003) (emphasis added).

[24] *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring) (emphasis added).

Internal alliteration consists of repetitive consonant sounds in the middle of words. Justice Jackson used internal alliteration through the repetitive *t* sound: "That aliens remain vulnerable to expulsion after long residence is a prac*t*ice that bristles with severi*t*ies."[25]

Bracket alliteration is when two words start and end with the same consonant sound. Justice Gorsuch used bracket alliteration in the opening of his first majority opinion as a justice on the Supreme Court. There Justice Gorsuch addressed whether the Fair Debt Collection Practices Act covers creditors trying to collect their own debts.[26] To begin, Justice Gorsuch used bracket alliteration to explain the origin of the statute:

> *D*isruptive *d*innertime calls, *d*ownrigh*t* *d*ecei*t*, and more besides drew Congress's eye to the debt collection industry. From that scrutiny emerged the Fair Debt Collection Practices Act, a statute that authorizes private lawsuits and weighty fines designed to deter wayward collection practices.[27]

Thesis alliteration is when the alliteration falls on unstressed syllables. Theodore Roosevelt used thesis alliteration, highlighting certain attributes of admirable men: "We admire the man who embodies victorious effort; the man who never wrongs his neighbor, who is prompt to help a friend, but who has those viri*l*e qua*l*ities necessary to win the stern strife of actua*l* life."[28] Justice Sotomayor also used thesis alliteration to underscore her concerns with solitary confinement: "The pain caused was invis*ible* and

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[25] *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (emphasis added).

[26] *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720 (2017).

[27] *Id.* (emphasis added).

[28] Theodore Roosevelt, *The Strenuous Life*, Speech (Apr. 10, 1899), *in* William Safire, *Lend Me Your Ears: Great Speeches in History* 539 (2004) (emphasis added).

inaud*ible*, such that 'slumbering humanity' was 'not roused up' to put a stop to it."[29]

Suspended alliteration exists when the writer repeats the same sounds in two words but in the opposite sequence. Justice Stevens used suspended alliteration to close this sentence: "The Reconstruction Congress would have been startled, I think, to learn that § 1985(3) protected freed slaves and their supporters from Klan violence not covered by the Thirteenth Amendment only if the Klan members spared local African-Americans and abolitionists thei*r wr*ath."[30]

Sentences often create impact by combining these alliterative forms. Here, for example, the brief-writers defended an order invalidating a state law: "The district court also found that the sex-based restriction embodied in [the state law] is based on, and *in*extricably *in*tertwined with, outdat*ed* and unfound*ed* stereotypes about the roles that men and women should play in societ*y* and in the famil*y*."[31]

(2) Placement Within the Sentence

Emphasis can be created without repetition. One way is to italicize, but this easy technique is often overused. Repeatedly using italics may be distracting[32] and insulting to the reader.

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[29] *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting the denial of certiorari) (mem.) (emphasis added) (quoting Charles Dickens, *American Notes for General Circulation* 147 (John S. Whitley & Arnold Goldman eds., 1972)).

[30] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 338 (1993) (emphasis altered).

[31] Brief in Opposition at 29–30, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144) (David Boies, Theodore B. Olson & Theodore Boutrous Jr.) (emphasis added).

[32] *See* Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. Ass'n

The emphasis can come more subtly and effectively. One way is to put the key information in parts of the sentence that naturally draw the reader's attention. Attention usually increases as the reader advances into the sentence, with the reader spending more time on words appearing later in the sentence,[33] particularly the words just before the period.[34] So the most emphatic part of virtually any sentence is the ending,[35] where the reader's focus typically sharpens.[36] We should thus generally try to use the end of a sentence for what we want to emphasize.[37]

The most forceful speechwriters use this technique to great effect. For example, consider Winston Churchill's speech designed to inspire Britons to take up arms against Germany. After

Legal Writing Directors 108, 118 (2004) ("Normally, . . . the use of italics slows reading time up to 4.5% in a five-minute reading span.").

[33] *See* Victor Kuperman et al., *The Effect of Word Position on Eye-Movements in Sentence and Paragraph Reading*, 63 Q.J. Experimental Psychol. 1838, 1839 (2010) (stating "that inspection times are relatively short in the beginning of a single-line sentence or a line of text on the multiline screen, and that reading times increase as the eyes move further into the sentence or line").

[34] *See* Nick Moore, *What's the Point? The Role of Punctuation in Realizing Information Structure in Written English*, Functional Linguistics, vol. 3, at 15 (May 26, 2016) (stating that "[t]he eye typically saccades to points preceding the punctuation unit" and citing studies that "record a significantly lengthened fixation in places immediately preceding punctuation units").

[35] Margaret M. Bryant & Janet Rankin Aiken, *The Psychology of English* 172 (1940).

[36] *See* Masako Hirotani, Lyn Frazier & Keith Rayner, *Punctuation and Intonation Effects on Clause & Sentence Wrap-Up: Evidence from Eye Movements*, 54 J. Memory & Language 425, 430 (2006) ("The results . . . indicated that readers paused longer on sentence final words than when the same words were comma marked clause final.").

[37] *See* David L. Carroll, *A Manual of Writer's Tricks* 63 (2d ed. 2000) ("Make your sentences rise to a climax: let them reveal their most significant information at the end."); Nick Moore, *What's the Point? The Role of Punctuation in Realizing Information Structure in Written English*, Functional Linguistics, vol. 3, at 16 (May 26, 2016) ("[T]he visibly-distinct position prior to a punctuation mark seems to be a 'natural' position to place the prominent, or newsworthy item in a written information unit.").

setting out the danger to Britain, Churchill used dramatic language where the drama created the greatest impact in his sentences:

> I say to the House as I said to ministers who have joined this government, *I have nothing to offer but blood, toil, tears, and sweat*. We have before us *an ordeal of the most grievous kind*. We have before us many, many *months of struggle and suffering*.[38]

This technique is also employed by skilled brief-writers. George Conway III demonstrated this technique when arguing to the Supreme Court that Rule 10b-5 does not apply beyond U.S. borders.[39]

Mr. Conway's client was an Australian firm. So in his introduction, he painstakingly ended virtually every clause with the fact that the defendant was Australian and would be subject to the procedures and laws of a U.S. court:

> The Australian petitioners would have a United States District Court entertain such a massive lawsuit *here*, in the *United States*, under *United States law*, and under *United States class action procedures*, even though the bank's stock, called "ordinary shares," was issued in *Australia* by an *Australian corporation headquartered in Australia*; on *Australian and other foreign exchanges*, and *not* in the *United States*; even though the disclosures alleged to have been false were prepared and disseminated in *Australia by Australians to Australians*, and were filed with *Australian* securities regulators and with the *Australian* Stock Exchange, *pursuant to Australian laws and rules*; even though the Australian petitioners suffered their claimed losses entirely *in Australia*, as the alleged result of their (fraud-on-the-market) reliance on

[38] Winston Churchill, Address before Parliament (May 13, 1940), *in* William Safire, *Lend Me Your Ears: Great Speeches in History* 145 (2004) (emphasis added).

[39] Brief for Respondents at 19–21, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (No. 08-1191) (2010) (George T. Conway III et al.).

> prices *on that Australian exchange*; and, finally, despite the fact that *Australia* has its own comprehensive scheme of securities regulations that provides ample mechanisms, including opt-out class actions, for *redressing securities fraud in Australia*.[40]

The ending of a sentence is not the only place that readers look for emphasis; they also look for emphasis in the primary (independent) clause in a complex sentence. A complex sentence contains both an independent clause and a subordinate (dependent) clause. "Although she had only a tenth-grade education [subordinate clause], she skyrocketed to fame and wealth [primary clause]." In this sentence, the reader intuitively puts greater emphasis on the primary clause ("she skyrocketed to fame and wealth") than on the subordinate clause ("although she had only a tenth-grade education"). But suppose that you want to emphasize the individual's lack of formal education. To create that emphasis, reverse the order of the primary and subordinate clauses: "She skyrocketed to fame and riches [primary clause], although she had only a tenth-grade education [subordinate clause]."

You can also shift emphasis within a sentence by stressing one clause over another. For example, take these three facts:

1. A young attorney had her first trial.
2. The young attorney had terrible facts.
3. The young attorney won.

If you combine these facts in a compound sentence, the reader will usually expect both clauses to hold equivalent weight: "*A young attorney tried her first case with terrible facts*, and *she won*." If you want the reader to focus on her victory, change the sentence to a complex sentence, which contains a dependent clause and an independent clause. In this kind of sentence, the reader ordinarily focuses instinctively on the independent

[40] *Id.* at 2 (emphasis altered).

clause:[41] "Although her first trial involved terrible facts, *she won*." The independent clause supplies the natural point of emphasis.

(3) Placement in the Paragraph

Consider also where you put key points in the paragraph. Within most paragraphs, the reader's attention is naturally drawn to the end. This tendency allows you to pack your punch by unloading emphatic points at the end of the paragraph.

Chief Justice Roberts used this technique at the end of two consecutive paragraphs in *Shelby County v. Holder*:

> By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin*, 557 U.S., at 204, 129 S. Ct. 2504. As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.*, at 203, 129 S. Ct. 2504. *The coverage formula met that test in 1965, but no longer does so.*
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> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H.R.Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, *e.g.*, *Katzenbach*,

[41] *See* George D. Gopen, *The Sense of Structure: Writing from the Reader's Perspective* 52 (2004) ("Readers emphasize the 'main' clause (an independent clause) because they expect it to contain the main thought.").

> *supra*, at 313, 329–330, 86 S. Ct. 803. *There is no longer such a disparity*.[42]

(4) Use of Punctuation

To emphasize particular points, legal writers can create emphasis by combining placement of information with particular types of punctuation. For example, a colon or em dash signals to the reader that the upcoming information will be particularly important.

An experienced appellate advocate, E. Joshua Rosenkranz, used a colon to underscore his point in *In re Magnesium Corp. of America*.[43] There Mr. Rosenkranz was representing a defendant socked with a verdict of over $200 million for fraudulent transfers.[44] On appeal, Mr. Rosenkranz challenged the verdict, arguing that the verdict could not be squared with the jury's finding that the defendant was solvent when making the transfers.[45] To Mr. Rosenkranz, the key fact consisted of the jury's finding that his client had been solvent when making the transfers. So he highlighted this fact by putting the jury's finding after a colon:

> The verdict in this case is inexplicable. Literally. Neither the district court nor Plaintiff ever ventured an explanation for how the jury could have legally reached a verdict yielding over $200 million in liability even though it rejected the key element of Plaintiff's claims.
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> This case boiled down to one question: Were two now-bankrupt subsidiaries solvent when they paid dividends to their parent company, Renco Group? If they were, those

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[42] *Shelby Cnty. v. Holder*, 570 U.S. 529, 550–51 (2013) (Roberts, C.J.) (emphasis added).

[43] Page Proof Brief for Defendants-Appellants the Renco Group and Ira Rennert at 1–2, *In re Magnesium Corp. of Am.*, 682 F. App'x 24 (2d Cir. 2017) (Nos. 15-2691(L), 15-2962(XAP) & 15-2971 (CON)).

[44] *Id.* at 1, 6.

[45] *Id.* at 1–4.

> dividends — paid in the mid-1990s — were not fraudulent transfers and Plaintiff, the bankruptcy trustee, cannot claw them back 20 years later.
>
> *The jury answered the question resoundingly: Solvent.* Ten jurors unanimously declared it 27 times in response to special interrogatories about fraudulent transfer under federal law. That finding was supported by the overwhelming evidence that, at the time of the challenged payments, the subsidiaries were highly profitable, well capitalized, and never missed a bill payment. Two investment banks verified it based on intensive financial reviews; sophisticated institutional investors believed it, demonstrating confidence with their checkbooks. The subsidiaries went bankrupt because of cataclysmic market changes in 2000, years after the challenged dividends.[46]

Many tools can create emphasis. Some of these tools are italics, short sentences, and packing the punch at the end of a sentence. In addition, however, the writer can create emphasis with punctuation like colons and em dashes.

(5) Inversion of Sentences

To emphasize particular points, consider surprising the reader by inverting the ordinary sequence of a sentence. The ordinary sequence is a subject, verb, and direct object or subject complement. Because this sequence is common, most readers will intensify their focus when the sentence pattern is unexpected.

To create a different pattern, consider inverting some sentences. These sentences put the direct object or subject complement before the subject and verb. For example, a sentence with a common sequence (subject, verb, and direct object) is "*I do not like his attitude*." Inverting the sentence (direct object, subject, verb) would result in "*His attitude I do not like*." This type of

[46] *Id.* at 1–2 (emphasis added).

sentence refocuses on the start of the sentence because the reader does not expect the sentence to start this way. Sparing use of inverted sentences may provide an effective device to create emphasis.

President Franklin D. Roosevelt used this device, inverting two consecutive sentences as he tried to muster domestic support for the war effort: "Never before have we been called upon for such a prodigious effort. Never before have we had so little time in which to do so much."[47]

Justice Benjamin Cardozo often used inverted sentences to vary the rhythm of his opinions and refocus the emphasis on the beginning. For example, in *Howard v. City of Buffalo*, then-Judge Cardozo discussed the absurdity of various options to remedy encroachments onto a waterway.[48] He emphasized the absurdity with an inverted sentence:

> One of the plaintiff's witnesses, Col. Symons, an engineer of wide experience, when asked what, other than deepening the channel, could be done to remedy the overflow at Abbott road, said that there was nothing to do except to destroy the improvements along the banks of the river, and that, he conceded, would be an absurdity. *An absurdity, of course, it would be*, for the decrees of a court of equity are framed in reason and justice. But from the recognition of the absurdity, a lesson may be drawn.[49]

Justice Brandeis also used an inverted sentence to brandish his point when dissenting in *Olmstead v. United States*.[50] There Justice Brandeis argued that the Supreme Court should have overturned a conviction based on governmental wiretaps.[51] Building

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[47] Franklin D. Roosevelt, Fireside Chat on the Progress of the War (Feb. 23, 1942), *in Great Speeches* 125 (John Grafton ed. 1999).

[48] 105 N.E. 426, 432–33 (N.Y. 1914).

[49] *Id.* at 432 (Cardozo, J.) (emphasis added).

[50] 277 U.S. 438 (1928).

[51] *Id.* at 471–85 (Brandeis, J., dissenting).

to a crescendo, Brandeis closed with an inverted sentence to create emphasis:

> Decency, security, and liberty alike demand that the government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. *Against that pernicious doctrine this court should resolutely set its face*.[52]

When creating emphasis, consider how sentences are commonly formed. Varying the sentence pattern can heighten the impact. You can vary the sentence pattern by inverting the ordinary sequence of the subject, verb, and direct object or subject complement.

(6) Antonomasia

Antonomasia is the substitution of a term for a commonly used word. For example, rather than call someone a genius, you might call the individual an Einstein. Or you might say that the right to effective assistance of counsel does not require a Clarence Darrow. Calling the person Einstein or Clarence Darrow surprises the reader, showcasing the quality associated with that person like an avatar.

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[52] *Id.* at 485 (Brandeis, J., dissenting) (emphasis added).

Judge Easterbrook used this technique in *United States v. Mikos*: "Just as a defendant who relies on counsel at public expense must accept a competent lawyer, *rather than Clarence Darrow*, so a defendant who relies on public funds for expert assistance must be satisfied with a competent expert."[53]

(7) Metaphor and Simile

A metaphor is a figure of speech in which something is called by the name of something else. A simile compares two things, using words of comparison (e.g., *like* or *as*). When used sparingly, metaphors and similes can crystallize key points and make them easier for the reader to understand and remember.[54]

Accomplished orators have long used metaphors and similes to crystallize key points and create natural points of emphasis. For example, William Jennings Bryan used a simile to create a vivid, memorable image:

> Behold a republic gradually but surely becoming the supreme moral factor in the world's progress and the accepted arbiter of the world's disputes — a republic whose history, like the path of the just, "is *as the shining light* that shineth more and more unto the perfect day."[55]

An effective metaphor appears in Neal Katyal's brief in *Michigan v. Bay Mills Indian Community*.[56] There an issue involved

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[53] 539 F.3d 706, 712 (7th Cir. 2008) (Easterbrook, J.) (internal citations omitted) (emphasis added).

[54] *See* Sam Glucksberg, *The Psycholinguistics of Metaphor*, 7 Trends Cognitive Sci. 92, 92 (2003) ("Metaphor comprehension can be as easy as literal, and it is not optional.").

[55] William Jennings Bryan, *Imperialism*, Speech Delivered by Mr. Bryan in Response to the Committee Appointed to Notify Him of His Nomination to the Presidency (Aug. 8, 1900), *in Under Other Flags: Travels, Lectures, Speeches* 339 (Woodruff-Collins Printing Co. 1904) (emphasis added).

[56] Brief for Respondent at 47, 572 U.S. 782 (2014) (No. 12-515).

tribal immunity, and Mr. Katyal argued that his adversaries had incorrectly attributed tribal immunity to an accidental reference in a 1919 opinion.[57] His adversaries had relied on *Kiowa Tribe of Oklahoma v. Manufacturing Technology*.[58] Mr. Katyal attacked this characterization of *Kiowa*, pointing to its actual holding.[59] One sensible option was to simply state that the adversaries had overlooked *Kiowa*'s holding. But to deepen the impact of this point, Mr. Katyal used a metaphor.

Choosing the metaphor was the next step. Mr. Katyal chose a metaphor based on how a plant emerges from a seed.[60] The metaphor would facilitate understanding because of its familiarity.[61] Was the seed planted in 1919 with an offhand Supreme Court passage, or was the seed planted far earlier? Mr. Katyal offered his explanation, blending the metaphor into his own analysis of the origins of tribal immunity:

> That argument [by the petitioners] glosses over the actual holding in *Kiowa*. The Court categorically reaffirmed the doctrine of tribal immunity — and ruled for the tribe — notwithstanding its questions about the doctrine's origins. If [the petitioner] were correct that the Court could freely revisit settled law, *Kiowa*'s holding might have been different. And in any event, the premise of [the petitioner's] argument is wrong. Tribal sovereign immunity did not suddenly *blossom* in 1940 from an *inadvertent seed planted* in 1919. The doctrine was first judicially recognized in the

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[57] *Id.*

[58] 523 U.S. 751, 756–57 (1998).

[59] Brief for Respondent at 47, *Bay Mills Indian Cmty.*, 572 U.S. 782 (No. 12-515).

[60] *Id.*

[61] See Sam Glucksberg, *The Psycholinguistics of Metaphor*, 7 *Trends Cognitive Sci.* 92, 92–93 (2003) (stating that an idiom's figurative meaning is processed more quickly than the literal meaning when the figurative meaning is more common).

> late nineteenth century, *and its roots extend far deeper than even that*.[62]

Metaphors and similes often deepen impact by allowing the reader to visualize the point. The impact is easy to see in some of Justice Holmes's speeches and writings, where he created vivid images. For example, Holmes masterfully combined metaphors and a simile in his speech at Harvard Law School:

> The Professors of [Harvard Law School] have said to themselves more definitely than ever before, We will not be contented to send forth students with *nothing but a rag-bag* full of general principles — *a throng* of glittering generalities, like a *swarm of little bodiless cherubs fluttering at the top of one of Corregio's pictures*.[63]

(8) Aphorism

Aphorisms are pithy observations reflecting a broader truth. Because aphorisms inevitably stand out, they focus readers and ease recall.

Chief Justice Roberts demonstrated the use of an aphorism in *Buck v. Davis*.[64] There he condemned an expert witness's consideration of the defendant's race as a factor that increases the risk of recidivism.[65] In condemning the testimony, Chief Justice Roberts rebutted the district court's characterization of the racial reference as *de minimis*:

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[62] Brief for Respondent at 47, *Bay Mills Indian Cmty.*, 572 U.S. 782 (No. 12-515) (internal citation omitted) (emphasis added).

[63] Oliver Wendell Holmes Jr., *The Use of Law Schools*, Speech before Students at Harvard Law School (1886), *in* Richard A. Posner, *Law and Literature* 359 (3d ed. 2009) (emphasis added).

[64] 137 S. Ct. 759 (2017).

[65] *Id.* at 775–77.

> There were only "two references to race in [the expert witness's] testimony" — one during direct examination, the other on cross. But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupied in the record.[66]

With this explanation, the Chief Justice closed with an aphorism, crystallizing a key point to create an enduring image: "Some toxins can be deadly in small doses."[67]

Justice Kagan also used an aphorism when rebutting the majority's characterization of an issue in *American Express Co. v. Italian Colors Restaurant*.[68] There Justice Kagan argued that the majority had miscast the issue as one involving the suitability of class certification:

> The Court today mistakes what this case is about. *To a hammer, everything looks like a nail.* And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled. So the Court does not consider that [the petitioner's] agreement bars not just class actions, but "other forms of cost-sharing . . . that could provide effective vindication."[69]

Both aphorisms pack the argument into a concise sentence, evoking a memorable image that is easy to recall and readily tied to the writer's key point.

Aphorisms can create durable images for points of special emphasis.

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[66] *Id.* at 777 (internal citation omitted).

[67] *Id.*

[68] 570 U.S. 228, 252–53 (2013) (Kagan, J., dissenting).

[69] *Id.* (Kagan, J., dissenting) (internal citation omitted) (emphasis added).

(9) Literature and Art

Literary and artistic references are common but rarely effective because they usually shed little light on the writer's point.[70]

But references to literature and art can sometimes create lasting images, enhancing recall of an especially telling point. The effect, however, is possible only if the reader is familiar with the literary passage or artwork. So confine yourself to references that the reader can be expected to understand. If the reference crosses this threshold, be sure it fits.

This was the case in *Glick v. Edwards*, where the court considered the need for judges to decide whether to recuse when their neutrality has been questioned.[71] There the question arose because the plaintiff had elsewhere sued the federal district court.[72] The court applied "the rule of necessity," holding that the district court could hear the case because otherwise every possible judge would be disqualified.[73] The court opened its discussion with a fable underscoring the occasional need to judge oneself:

> An old fable tells tale of a Pope, who, convinced of his own grave sin, called on his cardinals to judge him. "No, Your Holiness!" they replied. "We cannot sit in judgment over you. You must be your own judge." And so, faced with the necessity his soul be judged, the Pope judged himself. He confessed his sin and abdicated the Holy See. He is now commemorated as a saint.[74]

Readers will understand the fable even if it was unfamiliar. And they will surely understand the relevance as the court

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[70] *See* The Modern Library, *The Rhetoric and the Poetics of Aristotle* 168 (W. Rhys Roberts trans., 1954) ("[A] writer must disguise his art and give the impression of speaking naturally and not artificially.").

[71] 803 F.3d 505 (9th Cir. 2015).

[72] *Id.* at 507.

[73] *Id.* at 509–10.

[74] *Id.* at 506.

explains the need for the district court to consider its own neutrality because of the absence of a ready substitute, just as there was no substitute for the Pope. The fable allows the court to unobtrusively make its point without drawing unnecessary attention to the fable itself.

Allusion to literature and art can also evoke imagery, easing recall for the reader. Chief Justice Roberts demonstrated this technique in *Williams-Yulee v. Florida Bar*.[75] There the Court upheld the constitutionality of a state's ban on judicial candidates' requests for campaign contributions.[76]

The principal dissent had focused on the necessity of judicial accountability through the state's system of electing judges.[77] Criticizing this focus, Chief Justice Roberts evoked the image of a famous painting to deride the dissent's lofty defense of judicial elections:

> The principal dissent could be right that the decision to adopt judicial elections "probably springs," at least in part, from a desire to make judges more accountable to the public, although the history on this matter is more complicated. In any event, it is a long way from general notions of judicial accountability to the principal dissent's view, *which evokes nothing so much as Delacroix's painting of Liberty leading a determined band of citoyens*, this time against a robed aristocracy scurrying to shore up the ramparts of the judicial castle through disingenuous ethical rules.[78]

Do not overuse references to literature or art. But they can sometimes serve as an effective device to emphasize a particular point.

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[75] 135 S. Ct. 1656 (2015).

[76] *Id.* at 1673.

[77] *See id.* at 1681–82 (Scalia, J., dissenting).

[78] *Id.* at 1672 (internal citations omitted) (emphasis added).