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Supreme Court Splits . . . on Grammar and Writing Style

By Jill Barton

On most matters of writing, U.S. Supreme Court Justices achieve unanimity. Their opinions consistently follow long-established style and grammar rules, not trendy changes in language. Grammarians' latest fears, like using the singular pronoun *they*,¹ eliminating the period,² and adding hashtags and words like *mic drop*,³ have little chance of surfacing in a Supreme Court opinion.

But on subtler matters of style, unanimity among the Justices is as sporadic as in their decisions. What's a legal writer to do when the Justices differ on whether to drop a fragment into a paragraph for emphasis, what conjunctions are acceptable, and how to write possessives? Writers everywhere grapple with style or grammar questions, whether they are writing an e-mail to a colleague or a brief to the U.S. Supreme Court. Views on the proper approach are not consistent, even at the highest Court.

On three points of style in particular — how to use conjunctions, possessives, and fragments — the Court is split on whether to follow traditional or more modern rules. This find-

¹ Ben Zimmer, "*They*," *the Singular Pronoun, Gets Popular*, Wall Street J. (Apr. 10, 2015), <http://www.wsj.com/articles/can-they-be-accepted-as-a-singular-pronoun-1428686651>.

² Dan Bilefsky, *Period. Full Stop. Point. Whatever It's Called, It's Going Out of Style*, N.Y. Times (June 9, 2016), http://www.nytimes.com/2016/06/10/world/europe/period-full-stop-point-whatever-its-called-millennials-arent-using-it.html?_r=1.

³ See American Dialect Society, *2015 Word of the Year Is Singular "They"* (Jan. 8, 2016), <http://www.american-dialect.org/2015-word-of-the-year-is-singular-they>.

ing is based on a review of every signed opinion, concurrence, and dissent from the 2014 and 2015 terms. The examples on the next pages — culled from opinions displaying distinct writing styles — are classified as the majority or minority approach, and may offer some tips for your next writing project.

Fragments Are Not Forgettable

If sentence fragments were bad for writing, we wouldn't have famous opening lines in literature like "One dollar and eighty-seven cents. That was all."⁴ And "Lolita, light of my life, fire of my loins. My sin, my soul."⁵

If sentence fragments were bad for legal writing, we wouldn't have "Pure applesauce."⁶ And the favorite of crime-noir fans: "North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak."⁷

Sentence fragments are rare in judicial opinions. Seventh Circuit Judge Richard Posner writes that short sentences and fragments can "lower" the writing's tone, making it more conversational.⁸ But he calls for a balance and writes that eliminating all brevity could impart a tone that's too rigid.⁹

The Justices are split on whether writers should drop a sentence fragment into their writing for emphasis. Justices Samuel Alito, Stephen Breyer, Anthony Kennedy, and Clarence Thomas follow the conservative approach; none of these four used a fragment in any of their opinions or dissents over two terms. The other five Justices — Chief Justice John Roberts and Jus-

⁴ O. Henry, *The Gift of the Magi* 1 (Country Life Press 1949).

⁵ Vladimir Nabokov, *Lolita* 9 (Knopf 1992).

⁶ *King v. Burwell*, 135 S. Ct. 2480, 2502 (2015) (Scalia, J., dissenting).

⁷ *Pennsylvania v. Dunlap*, 555 U.S. 964, 964 (2008) (Roberts, C.J., dissenting).

⁸ Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1420, 1427 (1995).

⁹ *Id.*

tices Ruth Bader Ginsburg, Elena Kagan, Antonin Scalia,¹⁰ and Sonia Sotomayor — use them, but rarely.

Justice Kagan appears to employ sentence fragments more than her colleagues. Here are two lively examples, each leading a paragraph on the same page, in the majority opinion in *Kimble v. Marvel Entertainment*:

- “Maybe. Or, then again, maybe not.”
- “Truth be told, if forced to decide that issue, we would not know where or how to start. Which is one good reason why that is not our job.”¹¹

Chief Justice Roberts fit his signature fragment — “So too here” — twice in a 2016 opinion.¹² Here is one of those fragments, with context that shows how he varies his writing with long and short sentences. The first two sentences have about 30 words each:

The Federal Circuit had adopted a two-part test for determining when a case qualified as exceptional, requiring that the claim asserted be both objectively baseless and brought in subjective bad faith. We rejected that test on the ground that a case presenting “subjective bad faith” alone could “sufficiently set itself apart from mine-run cases to warrant a fee award.” *So too here*.¹³

Legal-writing guru Ross Guberman highlighted the same fragment in Roberts’s 2003 brief in *Alaska v. EPA*, which Guberman dissected to show why Justice Ginsburg and others called Rob-

¹⁰ This article studied opinions from the 2014–2015 and 2015–2016 terms, including those of Justice Scalia, whose last opinion was published January 20, 2016 — 24 days before his death on February 13, 2016.

¹¹ *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2406, 2414 (2015).

¹² *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1922, 1927 (2016).

¹³ *Id.* at 1932–33 (citations omitted) (emphasis added). The other reference read: “So too here: A patent infringer’s subjective willfulness, whether intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.” *Id.* at 1927.

erts the best advocate to come before the Court.¹⁴ Using these clipped phrases is one of the “Roberts-esque ways to spice up your writing.”¹⁵

Justice Scalia was well known for spicing up his writing with fragments. His injections of incomplete sentences have been so creative that he likely could not have used them twice. But other jurists are mimicking his style. Since Justice Scalia introduced “Pure applesauce” in 2015, at least seven admiring lower-court judges have quoted the phrase.¹⁶ Scalia fit two additional zingers in that *King* dissent. He chided, “Surely not.”¹⁷ And he questioned reproachfully, “It is bad enough for a court to cross out ‘by the State’ once. But seven times?”¹⁸

Sentence fragments can take a few different forms. They might lack a main subject or a verb or both, like this pair from Justices Ginsburg and Sotomayor:

- “THE CHIEF JUSTICE’s dissent asserts that our decision transfers authority from the federal courts and ‘hands it to the plaintiff.’ *Quite the contrary.*”¹⁹
- “But regulated entities are not without recourse in such situations. *Quite the opposite.*”²⁰

Or sentence fragments might be a subordinate clause,²¹ like Justice Kagan’s “Which is one good reason why that is not our

¹⁴ Ross Guberman, *Five Ways to Write Like John Roberts* (Mar. 2010), <http://www.legalwritingpro.com/articles/john-roberts.pdf>.

¹⁵ *Id.*

¹⁶ See, e.g., *Anton Realty, LLC v. Fifth Third Bank*, No. 115CV00199RLYTAB, 2015 WL 8675188, at *6 (S.D. Ind. Dec. 11, 2015).

¹⁷ 135 S. Ct. at 2501 (Scalia, J., dissenting).

¹⁸ *Id.* at 2499.

¹⁹ *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (citations omitted) (emphasis added).

²⁰ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 2010 (2015) (emphasis added).

²¹ Gerald Lebovits, *Do’s, Don’ts, and Maybes: Legal Writing Grammar — Part I*, 79 N.Y. St. B.J. 77 (Nov.–Dec. 2007).

job.”²² They can also contain an incomplete thought, like an answer to a question, as in Justice Scalia’s “Surely not.”

Often fragments denote a mistake rather than a literary choice.²³ Grammar teachers regularly mark incomplete sentences as errors because they know that many writers, especially those learning the craft, can’t distinguish a complete sentence from an incomplete one.²⁴ But good legal writers know that fragments can inject a page with flair — and not just a “bit of interpretive jiggy-pokery.”²⁵

Short Conjunctions Take a Leading Role

Starting off sentences with short, punchy conjunctions is standard writing practice among Supreme Court Justices. All the Justices sprinkle their opinions with sentences that open with *and*, *but*, and *yet*. Take, for example, Justice Kagan’s quip in a 2015 opinion: “But Marvel must have been pleased to learn of it.”²⁶ She sandwiched the line between two other sentences in the paragraph that begin with punchy transitions: “And then” and “So.”²⁷ Her writing flows. Bryan Garner, known as the dean of legal-writing specialists, defends the practice of using conjunctions to start sentences, noting that it’s anything but “stylistically slipshod.”²⁸

²² *Kimble*, 135 S. Ct. at 2414.

²³ Bryan A. Garner, *Garner’s Modern English Usage* 501 (3d ed. 2016).

²⁴ *Id.*

²⁵ *King*, 135 S. Ct. at 2500 (Scalia, J., dissenting).

²⁶ *Kimble*, 135 S. Ct. at 2406.

²⁷ *Id.*

²⁸ See Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 56, 126 (3d ed. 2011) (defending the use of conjunctions to start sentences and noting that it is common among good writers).

The Most Conversational Sentence-Starter: So

Still, the myth that writers should avoid using these blue-collar conjunctions to start sentences persists.²⁹ When it comes to one conjunction in particular — *so* — the writing myth is more than myth. *New York Times* columnist Anand Giridharadas, for example, argues that *so* should be shunned — that it's akin to using *well*, *um*, and *like*.³⁰ Indeed, speakers who add *so* at the start of a sentence or in the middle of a speech often use the word out of habit or to create a pause. The two-letter word can indicate a verbal tic as much as it can point to a transition or a connection as a coordinating conjunction. Other critics have said that *so* is a crutch that writers use to puff up their language and that it undermines their credibility.³¹

Eight out of nine Justices, however, lend credence to the conversational sentence-starter. All but Justice Breyer used *so* to start at least one sentence in the 2014 and 2015 terms. The word is versatile and common. National Public Radio calculated that it used the word 237 times in a single week in 2014.³² In defense of the frequent use, NPR's linguist contributor, Geoff Nunberg, said that the little conjunction can accomplish a lot. He noted that it "is a conversational workhorse" that introduces new ideas, shows the connection between cause and result, and sets up jokes.³³

Justice Ginsburg, for instance, recently wrote, conversationally: "So yes, we have affirmed, Congress may indeed direct

²⁹ George Dorrell, "Don't Begin Sentences with But" Is a Writing Myth, 24 Q. 23 (Fall 2002).

³⁰ Anand Giridharadas, *Follow My Logic? A Connective Word Takes the Lead*, N.Y. Times (May 21, 2010), http://www.nytimes.com/2010/05/22/us/22iht-currents.html?_r=0.

³¹ *Id.*

³² Geoff Nunberg, *So What's the Big Deal with Starting a Sentence with "So,"* NPR (Sept. 3, 2015), <http://www.npr.org/2015/09/03/432732859/so-whats-the-big-deal-with-starting-a-sentence-with-so>.

³³ *Id.*

courts to apply newly enacted, outcome-altering legislation in pending civil cases.”³⁴ Justice Kagan also used *so* at the start of two sentences in the more recent *Voisine v. United States*:

- “So in linking §922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct”; and
- “So in the 35 jurisdictions like Maine, petitioners’ reading risks allowing domestic abusers of all mental states to evade §922(g)(9)’s firearms ban.”³⁵

Nearing the minority view, Justice Clarence Thomas reserved *so* to lead just one sentence in a concurrence over two terms. It did little to relax his formal style: “So the civil in rem forfeiture tradition tracks the tainted-untainted line.”³⁶ He has also used the word to begin sentences in other ways.³⁷

The *Since* vs. *Because* Debate

All the Justices shun what once seemed to be a tradition of using *since* instead of *because* to start sentences. The practice, Garner writes, could stem from grammar teachers who told students not to start sentences with *because* to keep them from writing sentence fragments.³⁸ But while all the Justices open sentences with *because*, some shy away from switching it up with *since* at any point in a sentence. That could be because of the

³⁴ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 (2016).

³⁵ *Voisine v. United States*, 136 S. Ct. 2272, 2280, 2284 (2016).

³⁶ *Luis v. United States*, 136 S. Ct. 1083, 1100 (2016) (Thomas, J., concurring).

³⁷ In Justice Thomas’s dissent in *Teva Pharmaceuticals USA, Inc. v. Sandoz Inc.*, he started two sentences with *so*, but its use was not as a conjunction: “So understood, the distinction the Court drew pertains more to an emerging rule of administrative deference than to a definitive classification of judicial determinations.” And “So damaging is this unpredictability that we identified uniformity as an ‘independent’ reason justifying our allocation of claim construction to the court.” 135 S. Ct. 831, 850, 851 (2015).

³⁸ Garner, *Garner’s Dictionary of Legal Usage* at 867.

precise difference in meaning: *since* usually marks a temporal relationship, while *because* marks a causal one.

Justices Ginsburg, Kagan, and Sotomayor avoid using *since* to show anything but a temporal relationship. Justice Ginsburg used *since* only twice in her opinions of the 2014 and 2015 terms, and both references show time as opposed to cause. Here's one example: "Since December 2011, Mellouli has been engaged to be married to a U.S. citizen."³⁹

Though all the Justices use *since*, they do so rarely. In the Court's last three opinions of the 2015–2016 term, the word *since* appears in only one: the lengthy *Whole Woman's Health v. Hellerstedt* opinion, which struck down Texas abortion restrictions.⁴⁰ In that 107-page opinion, the word *because* appears 54 times, but *since* gets only 9 mentions.⁴¹ Nearly all the references to *since* describe timing, as opposed to cause. The only reference where *since* means *because* is in a quotation of a Justice Scalia opinion: "[T]he comment 'must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court.'"⁴²

The distinction between *since* and *because* typically matters only when confusion would result. Consider a sentence like this: "Since the meeting occurred, the client had second thoughts about testifying." The reader isn't sure whether this *since* means that the client had second thoughts because of the meeting or from the time that the meeting occurred.⁴³ That dif-

³⁹ *Mellouli v. Lynch*, 135 S. Ct. 1980, 1985 (2015).

⁴⁰ *Whole Woman's Health v. Hellerstedt*, 36 S. Ct. 2292 (2016).

⁴¹ *Id.* at 2301–43.

⁴² *Id.* at 2339 (Alito, J., dissenting) (quoting *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring)).

⁴³ Patricia O'Connor, *Woe Is I: The Grammarphobe's Guide to Better English in Plain English* 189–90 (Riverhead 2d ed. 2010).

ference warrants a precise choice, Patricia O'Connor explains in her book *Woe Is I*.⁴⁴

In the next example, Justice Kennedy uses *since* to show timing: "Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together."⁴⁵ And here, he uses *since* to mean *because*, also with no possibility of confusion: "Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained."⁴⁶

Besides Justice Kennedy, five other Justices use *since* interchangeably with *because*, representing a solid majority. And the results make for more conversational sentences, like this one from Justice Thomas: "Since Luis cannot afford the legal team she desires, and because there is no indication that she will receive inadequate representation as a result, she does not have a cognizable Sixth Amendment complaint."⁴⁷ That approach follows the authorities on writing. Garner writes that for modern writers, using *since* to mean *because* is nearly as common as using it to mean "from the time that."⁴⁸ Writing is more conversational today, so using *since* to begin sentences makes sense.

Take Your Pick on Possessives

The Justices have long disagreed on whether a singular word ending in *s* should get a lone apostrophe or an apostrophe-plus-*s* to indicate the possessive.⁴⁹ This split is most evident with a

⁴⁴ *Id.*

⁴⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

⁴⁶ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210 (2016).

⁴⁷ *Luis v. United States*, 136 S. Ct. 1083, 1110 (2016).

⁴⁸ Garner, *Garner's Dictionary of Legal Usage* at 80.

⁴⁹ See, e.g., Ross Guberman, *Feeling Possessive?*, <http://www.legalwritingpro.com/articles/C15-feeling-possessive.php>.

word like *Congress*. Chief Justice Roberts and Justices Alito, Kagan, and Scalia add an extra *s* to show the possessive of *Congress* as *Congress's*. The slim majority — Justices Breyer, Ginsburg, Kennedy, Sotomayor, and Thomas — leave off the extra *s*.

Justice Alito demonstrates the Court's split view on how to write the possessive of *Congress* in *Taylor v. United States*.⁵⁰ In the same paragraph, he adds an *s* to the possessive for *Congress*, and then quotes an older opinion where Justice John Paul Stevens did the opposite:

In *Raich*, the Court addressed *Congress's* authority to regulate the marijuana market. The Court reaffirmed "*Congress'* power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."⁵¹

The minority on the possessives rule — Chief Justice Roberts and Justices Alito, Kagan, and Scalia⁵² — follows a practice that Garner and most other authorities advocate: add an apostrophe and an *s* to the end of the singular form of a noun, regardless of how the word ends.⁵³

Justice Kagan demonstrates how to follow this rule on a single page in *Michigan v. EPA*. She adds an extra *s* to the possessive of *Congress* and to the possessive of *process* — both singular nouns.⁵⁴ (She leaves it off the possessive form of *plants* because the word is plural.)⁵⁵

⁵⁰ *Taylor v. United States*, 136 S. Ct. 2074 (2016).

⁵¹ *Id.* at 2080 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17, (2005)) (emphasis added).

⁵² Scalia's approach has been described as more nuanced, following the practice of the *New York Times*, where, for example, he cuts the extra *s* if you would not pronounce it, as in "Justice Stevens' contention." Guberman, *Feeling Possessive?*, <http://www.legalwritingpro.com/articles/C15-feeling-possessive.php>.

⁵³ Bryan A. Garner, *The Elements of Legal Style* 20 (2d ed. 2002).

⁵⁴ *Michigan v. EPA*, 135 S. Ct. 2699, 2714, 2714–15 (2015) (Kagan, J., dissenting) (emphasis added).

⁵⁵ *Id.* at 2709–10.

At the outset, EPA determined that regulating plants' emissions of hazardous air pollutants is "appropriate and necessary" given the harm they cause, and explained that it would take costs into account in developing suitable emissions standards. . . . Indeed, EPA could not have measured costs at the *process's* initial stage with any accuracy.⁵⁶

Justice Thomas, representing the majority's simplified approach, leaves the *s* off the possessive of *Congress* twice.⁵⁷

If the minority approach seems confusing, consider that the rules on possessives can get even more muddled. *The Chicago Manual of Style*, for instance, gives other exceptions for leaving off the extra *s* on possessives. For example, when the name of a single organization is in a plural form ending in *s* (e.g., General Motors), the possessive is formed by adding an apostrophe only.⁵⁸ The same thing goes for words for which the singular form of the noun ending in *s* is the same as the plural. (For grammar lovers, this rule applies to uninflected plurals like *economics* and *species*.) So you end up with the following: "politics' true meaning" and "the United States' role in international law,"⁵⁹ but "Dickens's novels"⁶⁰ and "a bass's stripes."⁶¹

Writers who'd prefer not to wrestle with these seemingly conflicting rules are in good company — with a majority of the Court. But authorities have not caught up. Garner, *The Chicago Manual of Style*, Strunk & White's *The Elements of Style*, H.W. Fowler's *A Dictionary of Modern English Usage*, and *Woe Is I*, among others, support the Court's minority approach on possessives. *The Associated Press Stylebook*, chided as holding "little sway" in legal-writing circles, is one of few sources that support the space-saving practice of skipping the additional *s*

⁵⁶ *Id.* (emphasis added).

⁵⁷ *E.P.A.*, 135 S. Ct. at 2712–13 (Thomas, J., concurring).

⁵⁸ *The Chicago Manual of Style* § 7.19 (16th ed. 2010).

⁵⁹ *Id.*

⁶⁰ *Id.* § 7.16.

⁶¹ *Id.* § 7.15.

on all possessives.⁶² Prognosticators, however, foresee a simpler world — one in which apostrophes can uniformly stand alone.⁶³

Conclusion

Nearly a century ago, Justice Oliver Wendell Holmes tried to write in an opinion that changes to a statute would “stop rat holes” in it. Chief Justice William Howard Taft wanted none of that colloquial style. His criticism prompted Justice Holmes to retort that dull legal writing would continue unless the judiciary abandoned the belief that it must stick to “solemn fluffy speech, as, when I grew up, everybody wore black frock coats and black cravats.”⁶⁴

The days of arguing over whether a conversational style is fitting for the Court are over. This review of the Court’s writing style shows that the Justices lean toward writing in a more liberal, modern fashion. They regularly splash their opinions with sentence fragments, drop the traditional extra *s* from possessives, start sentences with the conversational conjunction *so*, and swap *since* for *because*.

A solid minority still adheres to more traditional rules. A split 5–4 Court comes out narrowly in favor of using sentence fragments and leaving an extra *s* off possessives. The Justices rule 6–3 in favor of using *since* when they mean *because*. But they rule a decisive 8–1 in favor of starting sentences with *so*. All these style choices reflect a willingness to leave old-fashioned conventions behind and adapt to a more evolving view of language.

⁶² See, e.g., Guberman, *Feeling Possessive?*, <http://www.legalwritingpro.com/articles/C15-feeling-possessive.php>.

⁶³ See, e.g., Joe Essid, *Possessives’ Apostrophes: Oh, What a Mess*, Richmond Writing (Sept. 9, 2014), <https://blog.richmond.edu/writing/2014/09/09/plural-possessives-oh-what-a-mess/>.

⁶⁴ Garner, *Garner’s Dictionary of Legal Usage* at 174 (quoting 2 *Holmes–Pollock Letters* 132 (M. Howe ed., 1941)).

None of the Justices made the more liberal choice on all four points of style discussed here. A slim majority — Justices Ginsburg, Kennedy, Scalia, Sotomayor, and Thomas — took the liberal route on three points. The other Justices came out with choices evenly divided between the conservative and liberal writing styles.

From the conservative side of the Court, Justice Scalia comes out as among the most liberal in these results. His flamboyant style makes that finding unsurprising. Tributes following his death lauded his writing panache and zingers, like “Pure applesauce,” with some calling him the Court’s “best” writer.⁶⁵ But other writers on the Court rival Justice Scalia in crafting creative and compelling reads. Chief Justice Roberts has been recognized throughout his career for his writing prowess, and his opinions today are conversational and spirited.⁶⁶ Justice Kagan’s gifted and casual style also often draws accolades.⁶⁷ Their words are provocative in a way that reflects a modern way of speaking and writing. So too does this review of the Court’s writing style. The study reflects a Court inclined to avoid dull, old-fashioned writing that’s at all reminiscent of an era of black frock coats and cravats.

⁶⁵ Jeet Heer, *Antonin Scalia Is the Supreme Court’s Greatest Writer*, New Republic (June 26, 2016), <https://newrepublic.com/article/122167/antonin-scalia-supreme-courts-greatest-writer>; see, e.g., Ken McIntyre, *The Wit and Wisdom of Scalia: Nine Zingers*, Newsweek (Feb. 14, 2016), <http://www.newsweek.com/wit-wisdom-antonin-scalia-426548>.

⁶⁶ Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 Ind. L.J. 31–32 (2008).

⁶⁷ See, e.g., Ross Guberman, *The Supreme Writer on the Court: The Case for Kagan*, The Volokh Conspiracy (July 9, 2013), <http://volokh.com/2013/07/09/the-supreme-writer-on-the-court-the-case-for-kagan/>.