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Boogaart, R., Garssen, B. Jansen, H., Leeuwen, M. van, Pilgram, R. & Reuneker, A. (2024).
Proceedings of the Tenth Conference of the International Society for the Study of Argumentation.
Sic Sat: Amsterdam.

Rhetorical Questions as Argumentative Devices in U.S. Supreme Court Dissenting Opinions

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ABSTRACT: This paper analyzes rhetorical questions as argumentative devices in U.S. Supreme Court dissenting opinions from the October 2021 Term Year. The author creates a taxonomy based on question function. The author also notes that most guides to legal writing caution attorneys to avoid rhetorical questions in briefs, and this paper therefore examines why U.S. Justices, when arguing in dissent, frequently use a rhetorical device that is generally disparaged by legal writing experts.

KEYWORDS: argumentative devices, argumentative style, dissenting opinions, legal argumentation, rhetorical questions

1. INTRODUCTION

A rhetorical question, or *erotema*, is "a declarative statement posing as an interrogatory." (Black, 1992, p. 2). It "requires no answer other than the audience's agreement with the statement implied." (Fahnestock, 2011, p. 298) The context of a rhetorical question allows its audience to intuit an intended answer, and rhetorical questions thus make their points "obliquely rather than directly." (Smith, 2002, p. 248)

In the legal context, rhetorical questions have long been studied as argumentative devices in oral courtroom advocacy. (Teninbaum, 2011, pp. 485-519; Clason, 2010, pp. 89-93; Zillman & Cantor, 1974, pp. 228-36; Zillman, 1972, pp. 159-65) Yet similar studies in the context of written legal advocacy seem nonexistent. This gap may stem from the fact that legal writing experts in the United States have long disparaged, or at least discouraged, the use of rhetorical questions in written legal advocacy. For example, Diana Simon has explained that in her 25 years of teaching legal writing, she has "often told students who try to use rhetorical questions in a brief that 'you might not like the answer to your question'" and that "a declarative statement is a more concise and effective way to state a point." (Simon, 2021, p. 73) Two other legal writing professors have noted that in legal briefs, rhetorical questions "tend to fall flat" and can come across as "contrived and even manipulative." (Fordyce-Ruff & Dykstra, 2018, p. 51) A well-respected legal writing textbook puts it bluntly: "Avoid rhetorical questions" because they "usually irritate legal readers." (Ray & Ramsfield, 2018, p. 467) Even those who tolerate the use of rhetorical questions in written legal arguments tend to discourage their frequent inclusion. Bryan Garner, in the leading guide to legal usage, notes that rhetorical questions "quickly become tiresome if overused." (Garner, 1995, p. 771) Similarly, legal writing textbook author Michael Smith cautions law students and attorneys to use rhetorical questions, if at all, "with care" because "[a] legal advocate's job is to answer questions, not pose them." (Smith, 2002, p. 249)

Despite these cautionary words from experts, rhetorical questions do find their way into what some might consider the highest form of written legal argumentation in the United States: dissenting opinions authored by Supreme Court Justices. A dissenting opinion is, in fact, an argument. While a majority opinion of an apex court must, in some sense, persuade the public to maintain the court's legitimacy, a dissenting opinion actively argues to a future court "in the hope that the court will mend the error of its ways in a later case." (Brennan, 1986, p. 430) Indeed, a dissent may even successfully argue to a court in the present, as the Justices circulate their preliminary opinions among each other in draft form. Justice Ruth Bader Ginsburg once noted that occasionally "a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court" and that she once had the "heady experience" of writing a draft dissent for herself and one other Justice that eventually "became the opinion of the Court from which only three of [her] colleagues dissented." (Ginsburg, 2010, p. 4) Thus, to author a dissent is an inherently argumentative act. And, like all argumentative writers, authors of dissents "embed rhetorical, analytical, and writing choices" in their opinions in an attempt to persuade. (Keene, 2023, p. 2648)

The study reported in this paper seeks to uncover precisely how, and how frequently, the Justices of the 2021-22 United States Supreme Court chose to use rhetorical questions as argumentative devices in their dissenting opinions. After reporting quantitative data, this paper describes the author's functional taxonomy of these questions and then discusses why rhetorical questions appear so often in dissenting opinions, despite their disparagement by so many legal writing experts.

2. METHODOLOGY

To assess rhetorical question usage, I surveyed in early 2023 all the cases from the October 2021 Term of the United States Supreme Court, the most recently completed term. United States Supreme Court terms run from October to the following October, so the October 2021 Term ended in October 2022. I gathered all the Court's opinions from this term from the Court's official website at www.supremecourt.gov/opinions/slipopinion/21.

I then looked at each case to determine whether one or more dissenting opinions had been published in relation to it. For this purpose, I decided to count as dissenting opinions those in which a Justice concurred in part and dissented in part with the majority. I chose to be inclusive in this way because such opinions, insofar as they argue in part against the majority's decision, would likely feature the same rhetorical characteristics as a full dissent. I did not count any other type of opinions, such as majority opinions or full concurrences, as dissents.

Within my dataset of Supreme Court cases that included dissenting opinions, I then determined which dissenting opinions contained one or more "argumentative" rhetorical questions (ARQs). I defined an ARQ as an explicit question (i.e., punctuated with a question mark) that furthers the persuasive force of the dissenting argument. The dissenting author may or may not have followed the ARQ with an explicit response, but, in either case, the reader must have been able to know or anticipate the author's intended response to the question.

I specifically did *not* count as ARQs several categories of explicit questions. First, I did not count the actual legal question presented by the litigants to the Court. Second, I did not count what legal writing textbook author Michael Smith has called "transitional rhetorical questions," which are those that a writer uses "simply to set up an ensuing discussion." (Smith, 2002, p. 247) These questions are used merely as organizational device to introduce the dissenting author's own thoughts. An example of a merely transitional rhetorical question comes from Justice Stephen Breyer's dissent in *Cummings v. Premier Rehab Keller*, where Justice Breyer finishes Part II of his dissent with a list of contract claims supporting emotional distress damages and begins Part III by writing "Does breach of a promise not to discriminate fall into this category? I should think so," before explaining his reasons for that answer in the remainder of Part III. (slip op. at p. 6 of Breyer's dissent) Third, I did not count as ARQs any genuine hypothetical questions springing from the majority's decision. In common law nations such as the United States, jurists frequently reason by analogy and use hypothetical, often specifically detailed, sets of facts to consider the likely boundaries of a given legal rule. This practice of hypothesizing is one more of reasoning than of direct argumentation, at least when the hypothetical question is genuine—that is, when the poser of the question has no particular response to it in mind. Thus, I decided that genuine hypothetical questions were not ARQs.

With the above parameters in mind, I then counted the number of ARQs in every dissenting opinion and divided that total by the total number of dissents to reach an average-ARQ-per-dissent figure. I also calculated an average-ARQ-per-dissent figure for each Justice.

Next, having determined which dissenting opinions from which cases contained at least one ARQ, I set about studying those cases so as to fully understand the legal issues about which the opinion-authors were writing. This studying entailed reading the majority opinions and any additional opinions (such as concurrences or additional but non-ARQ-containing dissents) along with the ARQ-containing dissent in each case. It also entailed, when necessary, familiarizing myself with additional legal authorities, such as the statute or regulation being interpreted in a given case, or precedential opinions cited in a given case, or secondary sources that explained unfamiliar areas of law. These efforts enabled me to appreciate the legal context of each dissenting argument and better understand the specific function of each ARQ.

As a final step, I sorted all the ARQs into functional categories to develop a taxonomy of ARQ usage, and I totalled the number of ARQs in each category to determine the most and least common purposes for which the Justices were using ARQs.

3. RESULTS AND DISCUSSION

3.1 Frequency of ARQ usage

The Supreme Court issued decisions in 66 cases in the October 2021 Term, and 42 of those cases generated at least one dissenting opinion. (Recall that "dissenting opinion" here includes an opinion dissenting in part.). More specifically, those 42 cases generated 51 such opinions. The number of dissenting opinions exceeds the number of cases because

Justices who differ with the majority's decision for differing reasons may choose to write their own, separate, dissents within the same case.

As for ARQs, 25 of the 51 dissenting opinions, or 49.02%, contained at least one ARQ. The average number of ARQs per dissenting opinion was 1.667, as shown in Table 1 below. Thus, almost half of the dissenting opinions featured one or more ARQs, with an average of more than one per opinion.

Cases with dissents in 2021 Term	*No. of dissents*	*Dissents with ARQs*	*Avg. no. of ARQs per dissent*
42 of 66	51	25 (49.02%)	1.667

Table 1: Frequency of ARQ inclusion in dissenting opinions

Further, only one Justice, Clarence Thomas, did not author any dissenting opinions in the October 2021 Term. The other eight Justices all used ARQs at least occasionally in their dissents. Among the eight, the average number of ARQs per dissenting opinion ranged from 0.5 (Roberts and Barrett) to 5.557 (Kagan) as shown in Table 2 below.

Justice	*Total ARQs in 2021 Term*	*Avg. ARQs per dissenting opinion in 2021 Term*
Alito	4	1
Barrett	1	0.5
Breyer	40	5
Gorsuch	17	2.125
Kagan	39	5.57
Kavanaugh	2	1
Roberts	1	0.5
Sotomayor	26	2.167
Thomas	0	0

Table 2: Frequency of ARQ use by dissenting Justice

3.2 Functional Taxonomy of ARQs

The ARQs included in the dataset of dissenting opinions tended to sort themselves into several functional categories, which I developed into the following taxonomy of six types.

3.2.1 The Directly Challenging ARQ

The first and most common type is the Directly Challenging ARQ. A dissenting author deploys this type of ARQ by first reciting some part of the majority's reasoning and then immediately inserting an ARQ to comment negatively upon it. The implied answer to a Directly Challenging ARQ is almost always in the negative.

An ARQ from Justice Brett Kavanaugh's dissent in *Concepcion v. U.S.* exemplifies this type. The issue in that case stemmed from historic unequal sentencing as between defendants convicted of crimes involving crack cocaine on the one hand and defendants convicted of crimes involving standard cocaine on the other. The former group were much

more likely to be people of color, and the law prior to 2010 called for longer sentences for crack-related crimes than for crimes involving standard cocaine. The Fair Sentencing Act of 2010 remedied the situation by mandating equivalent sentencing from that point onward, but it did not address the situation of people who had previously been sentenced unequally and were already serving longer prison terms. A subsequent statute, the First Step Act of 2018, addressed that situation by allowing courts to reduce the sentences of prisoners sentenced before 2010, and to do so "as if" the Fair Sentencing Act had been in effect when the prisoners had committed their offenses. Mr. Concepcion had been sentenced prior to 2010 for crack-related crimes committed in 2007, and he sought a sentence reduction under the First Step Act. Complicating his request was his argument that the court, in deciding whether and how to resentence him, should consider evidence of his rehabilitation while in prison as well as 2016 changes to general sentencing guidelines that favored him.

The five-Justice *Concepcion* majority decided in his favor, holding that in deciding whether and how to modify a pre-2010 sentence under the First Step Act, a judge may consider facts and law that did not exist at the time of the prisoner's original offense. Justice Sonia Sotomayor's majority opinion emphasized the breadth of discretion that the statute had always afforded to judges in matters of sentencing. Justice Kavanaugh authored a dissent that three of his colleagues joined. In it, he summarized the majority's reasoning but then noted a distinction between original sentencing proceedings, in which judges have indeed had broad discretion to consider facts and law, and specialized sentence- modification proceedings under the First Step Act, in which, Kavanaugh argued, judges were required by the "as if" language to consider only the facts and the sentencing guidelines as they stood at the time of the prisoner's offense. Kavanaugh then explained how the majority's holding would play out:

> [A] crack-cocaine offender such as Concepcion who was sentenced before August 3, 2010, may now obtain the benefit of the non-retroactive 2016 change to the [sentencing] guideline. But a crack-cocaine offender who was sentenced from August 3, 2010, to July 31, 2016, will not be able to obtain the benefit of the non-retroactive 2016 change to the [sentencing] guideline. What sense does that make?

(slip op. at pp. 3-4 of Kavanaugh's dissent) Of course, the implied answer is that the majority's holding makes no sense at all. Indeed, the Directly Challenging ARQ is a particularly pointed type. Its undercurrent seems to say, "The majority's logic is seriously flawed."

3.2.2 The Gap-Identifying ARQ

As its label suggests, the Gap-Identifying ARQ, which is usually phrased as a "why" or "what" question, addresses what the dissenter perceives as a specific gap in the majority's reasoning. An example comes from Justice Stephen Breyer's dissent in *Shoop v. Twyford*. That case concerned a lower court's order granting an Ohio prisoner's request that the State of Ohio transport the prisoner to a hospital for medical testing. The prisoner had requested the testing because he hoped it would reveal that he had suffered from a neurological defect when he committed the violent crimes of which he had been convicted. If brain testing were to show such a defect, that test result, if admissible, could support the prisoner's request for habeas relief. The State of Ohio appealed the transport order, arguing that the

federal district court had no authority under the All Writs Act to issue an order for the purpose of allowing a prisoner to search for evidence when the prisoner has failed to show that such evidence would be admissible in connection with his claim for relief. A five- Justice majority held that the order had been properly appealed by the State of Ohio and that the district court had lacked authority under the All Writs Act to issue the transportation order.

Justice Breyer authored a dissenting opinion in which he argued that the nature of the transportation order prevented it from being immediately appealable in the first place. Ordinarily, appellate courts may hear appeals only from final orders—that is, from orders that terminate litigation at the lower-court level. A party subject to a non-final order must normally wait until the litigation terminates at the lower-court level before filing an appeal to challenge that order. Thus, the many discovery-related orders that district courts issue as the parties invoke the discovery process to gather evidence are not immediately appealable. Justice Breyer likened the transportation order in *Shoop* to a non-appealable discovery order. In doing so, he questioned the majority's grounds for distinguishing the two:

> The Court suggests that the transportation order here is not a mere discovery order because it "require[es] a State to take a convicted felon outside a prison's walls." [citation omitted] The Court says doing so "creates public safety risks and burdens on the State that cannot be remedied after final judgment." [citation omitted] But what exactly are those risks?

(slip op. at pp. 5-6 of Breyer's dissent) Like many Gap-Identifying ARQs, Breyer's starts with a "But," which tends to emphasize the sudden appearance of a stumbling block in the majority's logic. The ARQ thus emphasizes that the majority has indeed failed to identify any specific "public safety risks" at all.

3.2.3 The Dramatically Introducing ARQ

A dissenting author uses this type of ARQ to introduce his or her recitation of the majority's reasoning, but the ARQ is not merely transitional. Instead, it criticizes the reasoning it introduces. A good example comes from another Breyer dissent, this one from *New York State Rifle and Pistol Association v. Bruen*, in which the majority held unconstitutional a statutory requirement that an individual show "proper cause" before being permitted to obtain a license allowing him or her to carry a concealed firearm outside the home. The first sentence of Part III.A of Justice Breyer's dissent begins with the following ARQ:

> How does the Court justify striking down New York's law without first considering how it actually works on the ground and what purpose it serves?

(slip. op. at p. of Breyer's dissent) Of course, this is a loaded question and not just a segue. The implied answer is that the Court cannot justify doing so.

3.2.4 The Analogizing ARQ

The dissenting author deploys the Analogizing ARQ by hypothesizing a scenario that is arguably analogous to the case before the Court. The author then poses an issue-question

about the scenario that has a more obvious answer than does the actual question presented to the Court for decision.

Justice Brett Kavanaugh posed an Analogizing ARQ in *Becerra v. Empire Health Foundation*. That case concerned the interpretation of a statute governing adjustments of reimbursements from Medicare to hospitals that treat disproportionate numbers of low-income patients. At issue, in part, was whether patients who qualified for Medicare but whose actual hospital expenses were not paid by Medicare counted as being "entitled to" Medicare Part A benefits for purposes of the statute. While the Court's syllabus used over 250 words to describe the highly technical issue, Justice Kavanaugh's dissenting opinion posed what he viewed as an analogous question in under sixty words and answered it in three:

> Suppose that a college says that your academic record entitles you to a scholarship for next year if your family's income is under $60,000, unless you have received another scholarship. And suppose that your family's income is under $60,000, but you have received another scholarship. Are you still entitled to the first scholarship? Of course not. So too here.

(slip op. at p. 3 of Kavanaugh's dissent) The Analogizing ARQ thus likens the majority's decision on the actual issue to a simple, obvious error.

3.2.5 The Impracticality-Identifying ARQ

This type of ARQ normally begins with "how" and emphasizes the dissenter's argument that the majority's decision is unworkable in practice. In common-law jurisdictions such as the United States, appellate court decisions create precedential rules that lower courts must follow. A frequent argument an attorney may raise on appeal, therefore, is that the opponent's proposed outcome would create an unworkable or inequitable rule going forward.

While rare in the dataset, the Impracticality-Identifying ARQ did make two appearances, both in Justice Sonia Sotomayor's dissent in *Kennedy v. Bremerton School District*. That widely publicized case pitted the constitutional mandate that the government not impose religion on citizens (the Establishment Clause of the U.S. Constitution) against an individual's constitutional rights to speak freely and to practice his or her chosen religion freely (the Free Speech and Free Exercise Clauses of the U.S. Constitution).

Kennedy arose from the activity of a coach of American football in a public high school. The coach, a Christian, had a practice of situating himself in the middle of the football field at the conclusion of each game and inviting others, including the student players, to join him in Christian prayer. Typically, most of the players would kneel around him, although some later stated, according to their parents, that they did so only because they did not wish to be separated from their teammates.

After being warned by the public school district that this practice violated the Establishment Clause and being instructed to cease engaging in it, the coach continued his midfield postgame prayer three more times, but without expressly inviting others to join him on those three occasions. As they had on the prior occasions, a group of students kneeled around him and joined in the prayer. The school district then suspended the coach, who sued the district, arguing that the invitation-free prayers had not violated the

Establishment Clause but that his suspension had in fact violated his own free speech and free exercise rights.

The majority held in favor of the coach, and its opinion focused only on the last three occasions of prayer, which had occurred after the warning and had served as the basis of the coach's suspension. In holding that the invitation-free prayers had not violated the Establishment Clause, the majority expressly abandoned precedent holding that a government actor's endorsement of a particular religion represented a violation. In dissent, Justice Sotomayor noted that the final three occasions of prayer could not be divorced from the context of the prior occasions, which had led players to view every occasion as part of a coach-led prayer circle that the coach wished them to join. She also took issue with the majority's replacement of the endorsement test for Establishment Clause violations with an ill-defined test based in eighteenth-century history and tradition:

> For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else?

(slip op. at p. 30 of Sotomayor's dissent). Here, the ARQs emphasize that the majority opinion not only applies to the coach's dispute with the school district but also will apply to future, factually nuanced, scenarios that school administrators will need to resolve on the fly within increasingly vague legal parameters.

3.2.6 The Implicitly Ad-Hominem ARQ

Usage of this type of ARQ was confined to one case, *Dobbs v. Jackson Women's Health Organization*, which received unprecedented public attention and abolished the federal constitutional right to receive an abortion. Indeed, this type of ARQ may well prove to be unique not just to *Dobbs* but to the Court's 2021 Term, if and when other terms are similarly studied.

The sharp split among the Justices in *Dobbs* resulted in a majority opinion by Justice Samuel Alito in which four other Justices joined, a concurring opinion by Chief Justice John Roberts, and a rare three-author dissenting opinion by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. The five-Justice majority overruled *Roe v. Wade*, the 1973 Supreme Court case that recognized a limited right to receive an abortion based in the Fourteenth Amendment to the U.S. Constitution, and *Planned Parenthood v. Casey*, the 1992 Supreme Court case that upheld *Roe*. The majority opinion in *Dobbs* noted that while the requirements for the Court to overrule its own precedent are stringent and such decisions are rare, the Court had done so before.

The dissenters noted that prior cases in which the Court had overruled itself had involved specific, legally sound, reasons for reversal that had resulted in unanimous, or near-unanimous decisions, unlike *Dobbs*. The dissent quoted from the *Casey* plurality opinion, which had been jointly authored in 1992 by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter. The quotation explained that to overrule *Roe* based upon nothing more than an intervening change in the Court's membership would do

"lasting injury to this Court and the system of law which it is our abiding mission to serve." (slip op. at p. 60 of Breyer-Sotomayor-Kagan dissent, quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 864) The *Dobbs* dissenting opinion then continued, stating that

> [t]he Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

(slip op. at p. 60 of Breyer-Sotomayor-Kagan dissent) The above ARQs draw an implicit contrast between the five Justices who joined in the *Dobbs* majority opinion on the one hand and Justices O'Connor, Kennedy, and Souter on the other. The implicit message is that the members of the *Dobbs* majority are not judges of wisdom but instead are judges of ideological purity who are harming the Court, the country, and the rule of law.

3.2.7 Frequency of ARQ Usage by Functional Type

The first three types of ARQs above far outnumbered the three remaining types, as Table 3 below illustrates.

Functional Category	*Number of appearances in dataset*
Directly Challenging	37
Gap-Identifying	21
Dramatically Introducing	17
Analogizing	4
Implicitly Ad-Hominem	3
Impracticality-Identifying	2

Table 3: Frequency of ARQ usage by functional category

4. SPECULATION ON THE FREQUENT DEPLOYMENT OF A DISPARAGED DEVICE

Two reasons may account for the dissenting Justices' use of ARQs, despite the warnings from experts in legal writing. First, the writer-audience relation inherent in a dissenting opinion differs from the one inherent in an attorney's brief. An attorney writes a brief hoping to persuade a judge, who holds the power in this dynamic. The attorney thus has inferior status in relation to the judge. On the other hand, a dissenting Justice writes to the public and to future Supreme Courts, whom the Justice likely views as equals. A recent study of rhetorical questions found that their use was rarer when a person with inferior status addressed a superior. The study author noted that because such questions impose a viewpoint on the audience, they may seem "inappropriate, if not disrespectful" when posed by an inferior. (Spago, 2020, p. 79) This difference may mean that the legal writing experts' cautions regarding rhetorical questions represent sound advice for attorneys writing briefs but are irrelevant for Justices writing dissenting opinions.

Second, the norms governing written legal rhetoric may simply be changing. Indeed, legal writing expert Ross Guberman has recently noted that he has "done an about- face" from his original view that the use of rhetorical questions in legal writing were "pompous, if not offensive," and now believes that careful advocates can use them "to great effect." (Guberman, 2011, p. 191) While most attorneys may worry about the consequences of striking out in a new rhetorical direction that may irritate some readers, the Justices risk less in doing so and may simply represent a vanguard.

5. CONCLUSION

This study has revealed that the 2021-22 United States Supreme Court Justices deployed rhetorical questions as argumentative devices with a surprising frequency, given that legal writing experts have generally disparaged the use of such questions in written legal argumentation. Each of the eight Justices who authored dissents in the October 2021 Term used argumentative rhetorical questions (ARQs) at least occasionally, and the average dissent contained 1.667 such questions.

These argumentative rhetorical questions were used most often to directly challenge the logical coherence of the majority's reasoning. Other uses included identifying specific gaps in that reasoning, analogizing the majority's decision to a simple and obvious error, and noting the impracticality of the majority's holding.

Two reasons may account for the dissenting Justice's use of ARQs, despite the cautions of experts in legal writing. First, the rhetorical situations of judicial opinions and of briefs may differ in a way that makes the expert advice sound for attorneys but irrelevant for judges. Second, the norms for both genres may simply be changing, and the Justices, whose positions leave them less vulnerable to negative consequences from ARQ usage, are simply at the vanguard of a trend.

Future research ideally could include one or more similar studies of ARQ frequency in Justices' dissenting opinions from prior terms, perhaps from 20 or 30 or 50 years earlier, to determine whether the use of ARQs has increased over time. Such studies could also trace whether, or how, the specific functions of ARQs in dissenting opinions have changed over time.

ACKNOWLEDGEMENTS: The author thanks the University of South Carolina for supporting her attendance at the ISSA 2023 Conference, at which she presented a preliminary version of this paper. She also thanks the ISSA attendees for their helpful questions and comments.

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