

# Themes for Persuasive Arguments

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Developing a persuasive argument depends on telling a cohesive story about the law, the facts, and the conclusion that the court should adopt. Developing a theme is one way in which attorneys create a cohesive, compelling narrative for the court.<sup>1</sup> This chapter explains what a theme is, the purpose of having a theme, how to develop a theme, and how to integrate that theme into your argument.

## I. The Purpose of a Theme

A “theme” is some unifying idea that quickly and simply explains why the court should rule in your client’s favor. A brief to the court—whether at the trial level or on appeal—will usually address multiple claims. Each of those claims is, in turn, supported by a series of distinct legal arguments. A theme links the law and facts in those otherwise distinct legal arguments in a way that justifies the end that your client seeks.

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1. Although many people use “theory of the case” and “theme” interchangeably, they are a bit different. The theory of the case is your comprehensive plan for convincing the judge or the jury to rule in your client’s favor. You develop your theory of the case when preparing for trial. See John Korzen, *Make Your Argument: Succeeding in Moot Court and Mock Trial* 153 (2010); Thomas A. Mauet, *Trials: Strategy, Skills, and the New Powers of Persuasion* 8 (2d ed. 2009) (“[T]he theory of the case . . . is simply each party’s version of what really happened.”). Your theme is a quick and simple explanation or summation of the overarching theory of the case.

A coherent theme counter-balances a problem that can arise when trying to tell a compelling legal story. A compelling legal story must account for all the relevant facts and law. A compelling legal story is, therefore, detailed and often lengthy. Keeping track of those details can be difficult. A theme can help the judge organize and make sense of the details within your story by providing a bottom line to which all those details connect.

One well-known theme comes from the trial of the legendary football star and actor O.J. Simpson: “If it [the glove] doesn’t fit, you must acquit.” That single, catchy sentence explained the crux of O.J. Simpson’s argument. Simpson was accused of killing his estranged wife and a local restaurant server at her home. Part of the evidence against him included a bloody glove found on Simpson’s estate, and a matching glove found at the crime scene. In a surprising move, prosecutors had Simpson try on the exhibit during trial, but the glove did not fit. From that event, the defense latched on to a winning theme of the case, and Simpson was later acquitted of murder.

More often, legal themes are not nearly as catchy as the one presented to the jury in the O.J. Simpson trial. In fact, many scholars warn against the use of a catchy theme because it can alienate the judge and undermine your credibility.<sup>2</sup> Thus, in developing a theme for your argument, be careful not to undermine your credibility by choosing a theme that is too simplistic or that sacrifices substance for flash.

## II. Developing a Theme

Lawyers will look for a theme in one of three places: in the procedural legal standard, in a policy underlying the law, or in a social good or value that is at stake. Thus, as you develop a theme, look closely at those three areas.

### A. Based on Procedural Law

Judges examine legal issues within their procedural posture. For that reason, your theme will most often be based on the legal standard for the issue before the court. For example, if you are opposing a motion for summary judgment, you will likely build a theme around the standard for denying a motion for summary judgment, as in Table 6-A. If you want to overturn a jury verdict, you would build a theme around that standard, as in Table 6-B. Both themes emphasize the applicable standard, which often is more compelling to the court than the catchy O.J. Simpson theme.

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2. See Korzen, *supra* note 1, at 40-43.

**Table 6-A • Developing a theme to oppose a motion for summary judgment**

<b>The case</b>	You want to argue that summary judgment should not be granted.
<b>Legal standard</b>	Summary judgment may be granted only if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
<b>Theme</b>	There <i>is</i> a “material issue of fact” and, therefore, summary judgment is inappropriate.
<b>Technique</b>	As frequently as possible (1) state that a genuine issue of fact exists and that the fact is material, and (2) prove the dispute by pointing to contradictory factual assertions and prove that the factual dispute is material by explaining the relationship between the fact and the legal standard. Thus, the summary judgment standard becomes the touchstone to which you will return because it governs how the court will decide the issue.

**Table 6-B • Developing a theme to overturn a jury verdict**

<b>The case</b>	You want to argue that the court should overturn a jury’s verdict.
<b>Legal standard</b>	A judgment of acquittal must be entered for any offense for which the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29. Evidence must be viewed in the light most favorable to the winning party. <i>United States v. Augustine</i> , 663 F.3d 367, 373 (8th Cir. 2011).
<b>Theme</b>	Even considering the evidence in the light most favorable to the winning party, the evidence does not support the verdict.
<b>Technique</b>	In the conclusion for every element, and as frequently as otherwise possible, (1) state that the evidence does not support the element, and (2) prove the evidence does not support the element by bringing forward all the evidence put forward by the winning party and explaining why it cannot support the element. Thus, the standard for a judgment of acquittal becomes the touchstone to which you will return.

## B. Based on Substantive Law and Its Underlying Policy

Themes may also arise out of the substantive law and the policies, or reasons, for that law. Take, for example, the case *Oregon v. Ashcroft*.<sup>3</sup> In that case, the State of Oregon passed a statute that permitted physician-assisted suicide. The U.S. Attorney General then issued an interpretive regulation that would allow the federal government to revoke the license of any physician who dispensed a controlled substance sufficient for a person to commit suicide under the state statute. If that interpretive regulation went into effect, it would prevent all physician-assisted suicides in Oregon. Thus, the State of Oregon sought to enjoin the United States Attorney General from enforcing his interpretive regulation.

Table 6-C shows how the U.S. Attorney General might approach the argument for a motion to dismiss, and Table 6-D shows how the State of Oregon might approach its brief in response.<sup>4</sup> As you can see, the U.S. Attorney General can emphasize his statutory authority to regulate controlled substances, and the State of Oregon can emphasize a State's authority to regulate medical practice. Note that, although both perspectives are valid, they emphasize different laws and the reasons for those laws.

## C. Based on a Social Good or Value

Themes can also relate to an important social goal or shared, core value. Themes can emphasize that a decision will promote (or undermine) an ideal, such as fairness, justice, individual autonomy, individual responsibility for damages caused, or the public's health, safety, or welfare. Themes can also emphasize core values about our legal or political system, such as efficiency in the administration of justice, separation of powers between branches, or the appropriate allocation of authority between states and the federal government.<sup>5</sup>

For example, advocates in the *Bush v. Gore* litigation developed themes that focused on core values about our political and legal system. In *Bush v. Gore*, the candidates for President of the United States disputed which candidate had earned Florida's electoral votes in the 2000 general election. Before the United States Supreme Court, the legal questions were whether the Florida Supreme Court's decision was consistent with certain federal statutes and the Federal Constitution. Although the legal questions fo-

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3. 192 F. Supp. 2d 1077 (D. Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *aff'd*, *Gonzales v. Oregon*, 543 U.S. 1145 (2005).

4. Tables 6-C and 6-D are based on Brief for Appellants, 368 F.3d 1118 (9th Cir. 2004) (No. 02-35587), and Appellee's Brief of the State of Oregon, 368 F.3d 1118 (9th Cir. 2004) (No. 02-35587), respectively.

5. Ellie Margolis, *Teaching Students to Make Effective Policy Arguments in Appellate Briefs*, 9 Perspectives 73, 75 (Winter 2001).

**Table 6-C • Developing a theme for a motion to dismiss based on the substantive law**

<b>The case</b>	The State of Oregon passed a statute that permitted physician-assisted suicide. Citing his authority under the Controlled Substances Act, the U.S. Attorney General issued an interpretive regulation that would allow the U.S. Attorney General to revoke the licenses of physicians who prescribed drugs sufficient for an individual to commit suicide under the state statute. Among other things, the interpretive regulation stated that, “assisting suicide is not a ‘legitimate medical purpose’ within the meaning of [the Controlled Substances Act and its regulations].” 66 Fed. Reg. 56,607-02 (Nov. 9, 2001). The state and several private parties filed a complaint that sought to enjoin the Attorney General from enforcing that interpretive regulation. You are an Assistant U.S. Attorney seeking to dismiss that complaint.
<b>Legal standard</b>	Under the Controlled Substances Act, “[a] prescription for a controlled substance . . . must be issued for a legitimate medical purpose.” 21 C.F.R. § 1306.04 (2015). The Attorney General has the authority to promulgate “rules and regulations . . . relating to the registration and . . . distribution and dispensing of controlled substances.” <i>Id.</i> § 801.
<b>Theme</b>	The Controlled Substances Act permits the distribution of controlled substances for only a “legitimate medical purpose” and assisted suicide is not a “legitimate medical purpose.”
<b>Technique</b>	In the brief, emphasize the everyday and historical understanding of “medicine” as “healing” and that Congress delegated to the Attorney General authority to regulate controlled substances. In this case, the U.S. Attorney General properly used that authority.

cused on the intersection of federal and state laws and the Florida Supreme Court’s interpretation of those laws, the parties developed themes that focused on what was at stake in the litigation. As illustrated in Table 6-E, George W. Bush argued that, if the Florida Supreme Court’s decision stood, the rule of law would be ignored and “electoral chaos” would ensue. By contrast, and as illustrated in Table 6-F, Albert Gore focused on the “legitimacy of public power” and “respecting the intent of the electorate.”<sup>6</sup>

6. Table 6-E is based on Brief for Petitioner, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949). Table 6-F is based on Brief of Respondent Albert Gore, Jr., *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (emphasis in the original).

**Table 6-D • Developing a theme opposing the motion to dismiss based on the substantive law**

<b>The case</b>	Same scenario as in Table 6-C, but you are an Assistant Attorney General for the State of Oregon, and you are arguing against the motion to dismiss and in favor of an injunction.
<b>Legal standard</b>	The clear statement doctrine: When “Congress intends to alter the ‘usual constitutional balance between the States and Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” <i>Will v. Mich. Dept. of State Police</i> , 491 U.S. 58, 65 (1989) (quoting <i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234, 242 (1985)). Historically, states have retained the authority to regulate the practice of medicine.
<b>Theme</b>	The U.S. Attorney General’s interpretive regulation is an unwarranted federal intrusion into the sovereign interests of Oregon, the medical practice of its physicians, and end-of-life decisions.
<b>Technique</b>	In the motion, emphasize the state’s historical right to regulate medical practice and that, in enacting the Controlled Substances Act, Congress meant to regulate drug trafficking, not medical practice. Thus, the U.S. Attorney General overreached his authority under the Controlled Substances Act.

## D. Based on Undisputed Law, Facts, or Values

Whatever the inspiration for your theme may be, remember that it must be consistent with the law and facts relevant to the argument. In fact, to the extent that you can incorporate facts or concepts that are not in dispute, your theme is more likely to be accepted. For example, in Tables 6-A and 6-B, which illustrated themes based on a procedural legal standard, no one can dispute the standard for summary judgment or overturning a jury verdict. Similarly, in Tables 6-C and 6-D the themes were based on the substantive law—the Controlled Substance Act and the clear statement doctrine, respectively. The themes in Tables 6-E and 6-F rely on core values that everyone would agree are “good” values—the importance of following the rule of law and that, in an election, every vote should count. In each case, the theme is founded on a law or principle that is not in dispute.

## III. When to Develop a Theme

Attorneys develop their themes at different times. Many attorneys begin to think about a theme as part of their theory of the case at the beginning. It develops as they get to know their client and research the

**Table 6-E • Developing a theme that focuses on a policy or social value that is at stake**

<b>The case</b>	After a close general election in 2000, the Florida Supreme Court ordered a statewide manual recount of all votes. Petitioner argued that ordering such a recount violated federal law. Specifically, the petitioner argued that ordering a statewide recount violated the U.S. Constitution's guarantee to equal protection because each county had different recount procedures and, therefore, votes might be counted differently in different counties. In addition, the petitioner argued that in ordering the recount, the Florida Supreme Court established procedures that differed from those legislatively authorized, and in so doing the Florida Supreme Court inappropriately exercised legislative power.
<b>Theme</b>	"This case is the quintessential illustration of what will inevitably occur in a close election where the rules for tabulating ballots and resolving controversies are thrown aside after the election and replaced with judicially created <i>ad hoc</i> and <i>post hoc</i> remedies . . . The Florida Supreme Court has not only violated the Constitution and federal law, it has created a regime virtually guaranteed to incite controversy, suspicion, and lack of confidence not only in the process but in the result that such a process would produce."
<b>Technique</b>	<p>Petitioner returns to this theme throughout the brief. A few examples are provided below.</p> <p><b>Statement of the case:</b> "The thirty-three days since the election have been characterized by widespread turmoil resulting from selective, arbitrary, changing, and standardless manual recounts."</p> <p><b>Argument:</b> "The decision below therefore ushers in a regime that cannot possibly be supported by any reasonable reading of the contest statute or any other provision of the Florida Election Code. The authority to count votes, entrusted by the Legislature to county officials subject to limited judicial review, has now been seized by the state judiciary . . ."</p> <p><b>Argument:</b> "The Florida Supreme Court's decision is a recipe for electoral chaos. The court below has not only condoned a regime of arbitrary, selective and standardless manual recounts, but it has created a new series of unequal after-the-fact standards. This unfair, new process cannot be squared with the Constitution."</p>

Petitioner's theme suggests that the decision of the Florida Supreme Court to order manual recounts violates the rule of law and, if upheld, will undermine confidence in federal elections and in the government.

**Table 6-F • Developing a theme that focuses on a policy or social value that is at stake**

<b>The case</b>	Same case as in Table 6-E, above. Respondent argues that the Florida Supreme Court has properly exercised judicial review of Florida election law.
<b>Theme</b>	“This case raises the most fundamental questions about the legitimacy of political power in our democracy. In this case, the Court will decide whether the Electors for President of the United States, and thus the President of the United States himself, will be chosen by ascertaining the actual outcome of the popular vote in Florida in the election of November 7, 2000, or whether the President will instead be chosen without counting all the ballots lawfully cast in that state.”
<b>Technique</b>	<p><b>Introduction:</b> “The question is whether this Court may properly override Florida’s own state-law process for determining the rightful winner of its electoral votes in this Presidential election. Such intervention would run an impermissible risk of tainting the result of the election in Florida — and thereby the nation. For this Court has long championed the fundamental right of all who are qualified to cast their votes “and to have their votes counted.”</p> <p><b>Argument:</b> The Florida Supreme Court’s order does nothing more than place the voters whose votes were not tabulated by the machine on the same footing as those whose votes were so tabulated. In the end, all voters are treated equally: Ballots that reflect their intent are counted.</p> <p><b>Argument:</b> “[P]etitioners would have the Court abruptly end the counting altogether and <i>toss out lawfully cast ballots that have been, and are now being, counted</i>. That is an absurd and unprecedented response . . . , and one that surely is not required by the U.S. Constitution.”</p> <p><b>Argument:</b> “The only due process right even arguably implicated by this case is the right of voters to have their ballots counted . . . .”</p>

To create a theme, the respondent steps back from technical arguments about whether the Florida Supreme Court’s order is consistent with federal law to remind the court that the value at stake is respect for the intent of the voters.

facts and law surrounding the case. Often, though, a theme does not fully emerge until they have researched the law and developed their arguments. At that point, the attorney has a full grasp of the law and facts. Also at that point, the attorney can take a step back to reflect on the argument and develop a cohesive theme consistent with the theory of the case.

Do not worry too much if a theme is not immediately evident. Often when you begin working on an argument, you will not know what the



theme will be. As you continue to write and think about a case, the key legal or moral principle will likely reveal itself. You may not see a theme early on, but one may emerge after you have started organizing your arguments or developing the strengths and weaknesses of your case. As you wrestle with your case's legal and factual minutiae, if you find yourself saying, "What's *really* going on here is ..." you have likely found your theme. Once a theme has emerged—be it a legal standard or something more "catchy"—you can go back and make sure you have integrated the theme into the structure of your legal argument.

### Practice Points



- Develop a theme that is consistent with both the law and your facts and reminds the court why you win.
- Lawyers often develop themes from examining the procedural legal standard, a policy underlying the substantive law, or a social value that is at stake.
- When developing a theme, remember that the court is more likely to accept your theme to the extent that you can incorporate facts or concepts that are not in dispute.
- Continue to develop and refine your theme as you write.