

CHAPTER 9

Creating Persuasive Arguments

What lawyers sell is the art of advocacy, and their stock in trade consists of legal arguments. In hard cases, where the law is not self-evident, attorneys create arguments to explain the law to clients, to negotiate with other attorneys, and to persuade the courts. The Model Rules of Professional Conduct reminds us that “A lawyer should act with zeal in advocacy upon the client’s behalf,”¹⁸⁹ and that attorneys may make “a good faith argument for an extension, modification, or reversal of existing law.”¹⁹⁰ Arguing for favorable interpretations of the law is not only a professional service, it is an ethical obligation.

Judges, like attorneys, are also required to create legal arguments that seek to persuade. Not only must they evaluate the strengths and weaknesses of competing arguments, they must explain their rulings in a manner that will be accepted by the parties, by higher courts, and by society as a whole.¹⁹¹ Persuasive legal argument is as much an obligation of the judge as it is of the practitioner.¹⁹²

How does an attorney or a judge construct a persuasive brief or legal opinion? It is common to think of legal reasoning as consisting of a “chain” of arguments, logically connected one to the other, culminating in a definitive interpretation of the law. But there is a more accurate metaphor. Rather than conceiving of legal argumentation as a “chain,” persuasive legal argumentation is more accurately described as a “cable.” Professors Eskridge and Frickey draw this contrast between a cable and a chain:

A chain is no stronger than its weakest link, because if any of the singly connected links should break, so too will the chain. In contrast, a cable’s strength relies not on that of individual threads, but upon their cumulative strength as they are woven together. Legal arguments are often constructed as chains, but they tend to be more successful when they are cable-like.¹⁹³

What makes a legal argument resemble a cable rather than a chain? A legal argument that is a cable is one that weaves together the different types

of legal argument. A brief or a judicial opinion that cites text, intent, precedent, tradition, and policy, all tending toward a single interpretation of the law, is far more persuasive than one that utilizes a single type of argument. When every method of legal argument points to the same conclusion, it creates an impression of inevitability.

Chief Justice John Marshall achieved this effect in *Marbury v. Madison* by weaving a cable of arguments. One of the core holdings of the Court in *Marbury* is that the courts are both authorized and obligated to strike down laws that conflict with the Constitution, and Marshall invoked a variety of arguments to support that conclusion. First, Marshall made a number of intratextual arguments. From the general jurisdiction clause of Article III extending the power of the federal courts to “all cases arising under the constitution,”¹⁹⁴ Marshall concluded that the federal courts must give effect to the constitution.¹⁹⁵ From specific provisions prohibiting state taxes on exports,¹⁹⁶ ex post facto laws,¹⁹⁷ and convictions for treason based on the testimony of a single witness,¹⁹⁸ Marshall inferred that “the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.”¹⁹⁹ After observing that the constitution requires judges to take an oath to support the constitution,²⁰⁰ he concluded that it would be immoral if the constitution did not permit judges to enforce it.²⁰¹ Finally, he inferred the superiority of the constitution to mere statutes from the phrasing of the Supremacy Clause.²⁰²

In addition to these textual arguments Marshall proffered powerful policy and tradition arguments in support of the principle of judicial review. He observed that if statutes that are contrary to the constitution are binding law, “then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.” He added:

This doctrine would subvert the very foundation of all written constitutions.... That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.²⁰³

By interweaving textual, intent, tradition, and policy arguments, all pointing to the same conclusion, Marshall makes the court’s decision in *Marbury* seem inevitable. By drawing together these separate strands

Marshall created a powerful legal argument in support of the principle of judicial review.²⁰⁴ Marshall makes Marbury seem like an easy case.

Accordingly, the first rule to follow in creating persuasive legal arguments is to invoke more than one type of legal argument.²⁰⁵ Do not rest upon a single argument, such as a textual interpretation or the citation of a single case. It is more persuasive to weave together all of the different types of legal argument in support of an interpretation of the law.²⁰⁶ When the text of a legal rule, the intent of its drafters, judicial precedent, relevant tradition, and policy analysis all militate in favor of a single interpretation of the law, the reasoning seems airtight. Where all five types of legal argument yield the same answer, it would appear to be an easy case. In writing a brief or preparing for oral argument, effective advocates attempt to incorporate all five kinds of legal argument into their presentation. Each of the arguments serves different values—objectivity, popular sovereignty, consistency, societal coherence, and sensitivity to consequences—and each deserves to be considered.

Second, one should carefully consider the order in which the arguments are presented. The list of the types of legal arguments from text to policy analysis presents a natural progression from objective statements of what the law is to subjective judgments as to its proper interpretation. Text is relatively definite evidence of what the law is, while policy arguments are relatively subjective. However, in any particular case one might decide to lead with another type of argument. For example, it may be that in one case precedent is determinative of the outcome, or that in another the intent of the drafters is both incontrovertible and conclusive.

Third, it is critical to keep in mind that law is not a science. Legal reasoning is not deductive, but rhetorical.²⁰⁷ The goal of legal argument is not to describe a true state of affairs, but to persuade others to adopt your view of what the law is.²⁰⁸ Legal argument is not an act of discovery, but is rather a demonstration or a dramatic production. Drama is based on conflict, and a persuasive legal argument both acknowledges the conflict and presents your side of the conflict to the listener in a compelling way. The goal of legal argument is to persuade the listener, whether it is a client, another attorney, or a court, to resolve the conflict in the manner you suggest.

Finally, you must scrutinize all of the legal arguments for weak points. Your opponent's arguments must be examined to determine how they can

be attacked, and your own arguments must be examined so that you can anticipate your opponent's attacks. In hard cases the legal arguments are susceptible to both "intra-type" and "cross-type" attacks, which are described in the following chapters.

189. Model Rules of Professional Conduct, Rule 1.3, Comment [1].

190. *Id.*, Rule 3.1. The lawyer's zeal, however, must be tempered by the obligation not to "knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...." *Id.*, Rule 3.3(a)(3).

191. A number of legal scholars have commented on the obligation of judges to explain their decisions. H.L.A. Hart identified three "judicial virtues" that are the hallmark of an "acceptable" judicial opinion:

impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice.

Hart, *The Concept of Law*, *supra* note 20, at 205.

M.B.W. Sinclair agrees that purely intuitive reasons are not acceptable as judicial reasoning:

Although, "I decide thus-and-so because: this is how I was brought up; my horizons dictate so; my education, religion, and socialization force me to it; my breakfast didn't agree with me" may describe judicial motivation in some cases, they are not acceptable as justifications in opinions.

M.B.W. Sinclair, *Statutory Reasoning*, 46 *Drake L. Rev.* 299, 331 (1997).

Benjamin Cardozo explained how society's acceptance of judicial decisions depends upon the judgment of lawyers: "Only experts may be able to gauge the quality of [the judge's] work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith." Cardozo, *The Nature of the Judicial Process*, *supra* note 1, at 35.

192. The obligation to produce judicial opinions "expos[es] judicial decisions to the discipline of reason and judicial reasoning to the judgment of the world." Robert W. Bennett, *Objectivity in Constitutional Law*, 132 *U. Pa. L. Rev.* 445, 479 (1984).

193. Eskridge & Frickey, *Practical Reasoning*, *supra* note 2, at 351.

194. "The judicial power of the United States is extended to all cases arising under the constitution." Art. III, sec. 2, cl. 1.

195. "Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into?" 5 U.S. 137, 179.

196. Art. I, sec. 9, cl. 5.

197. Art. I, sec. 9, cl. 3.

198. Art. III, sec. 3, cl. 1.

199. 5 U.S. 137, 179–180.

200. “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution....” Art. VI, cl. 3.

201. “Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!” 5 U.S. 137, 180.

202. “It is also not entirely unworthy of observation, that in declaring what shall be supreme law of the land, the constitution is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.” *Id.*

203. *Id.* at 178.

204. In describing Marshall’s opinion in *Marbury*, Akhil Amar notes:

Missing from this mosaic, interestingly, is precedent. Although Marshall could have invoked various judicial decisions in support of his analysis of judicial review—prior state court invocations of state constitutions against state legislatures, a famous circuit court ruling striking down a federal statute, an earlier Supreme Court case invalidating a state statute on Supremacy Clause grounds—he does not.

Akhil Amar, *Foreward: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 32 (2000).

205. “[T]he most satisfying opinions deploy a multiplicity of modes.” Bobbitt, *Reflections, supra* note 22, at 1937. “Whether ultimately correct, the opinion in *Griffin*, by its strategy of cumulative assessment and weighing of factors potentially relevant to interpretation, seems more persuasive than would any foundationalist avenue to the same result.” Eskridge and Frickey, *Practical Reasoning, supra* note 2, at 349.

206. For example, Professor Paul Wangerin suggests that law students should follow this “recipe” for learning to write legal arguments:

I. Introduction

II. Facts

III. Applicable Statutes Support the Stated Answer

IV. A Large Body of Case Law Also Supports the Stated Answer

V. The Decision in a Factually Similar Case Lends Additional Support

VI. A Consistent Underlying Policy Is Reflected in All of the Cases and Statutes Previously Discussed

VII. Finally, This Underlying Policy Shows That Apparently Contradictory Cases Support the Stated Answer

VIII. Conclusion

Paul T. Wangerin, *Skills Training in “Legal Analysis”*: A Systematic Approach, 40 U. Miami L. Rev. 409, 473 (1986).

207. See Linda Levine & Kurt Saunders, *Thinking Like a Rhetor*, 43 J. Legal Educ. 108 (1993) (suggesting that legal education should incorporate training in classical rhetorical techniques).

208. “[L]egal reasoning entails a practice of argumentation. The reasons given for the conclusions reached are to be measured by their persuasiveness, not by reference to some

established true state of affairs.” Donald H.J. Hermann, *Legal Reasoning as Argumentation*, 12 N. Ky. L. Rev. 467, 507 (1985).

CHAPTER 10

How to Attack Legal Arguments

There are two basic approaches to attacking legal arguments: there are *intra-type* and *cross-type* attacks.²⁰⁹

Because each type of legal argument has a different structure and is based upon different evidence of what the law is, each type of argument has characteristic strengths and weaknesses, and may be attacked in characteristic ways. An attack upon a constituent element of a legal argument, or the assertion of another argument of the same type, is an *intra-type* attack.

In contrast, *cross-type* attacks are comparisons between different types of legal arguments. A cross-type attack asserts that the opponent's legal argument is overcome by a competing legal argument of a different type.

The difference between an *intra-type* and a *cross-type* attack is illustrated by the following example. Suppose that one attorney has asserted a legal argument based upon precedent. An opposing attorney could mount an *intra-type* attack by challenging the authoritativeness or applicability of the cited case. In addition, the opposing attorney could mount a *cross-type* attack by asserting that the weight of the precedent is subordinated to a competing policy.

It is vital for an attorney to be familiar with both *intra-type* and *cross-type* attacks because the persuasiveness of a legal argument depends on its ability to withstand both kinds of attacks. There are 26 *intra-type* attacks and two *cross-type* attacks listed below.

INTRA-TYPE ATTACKS

I. ATTACKS ON TEXTUAL ARGUMENTS

A. ATTACKS ON ARGUMENTS BASED UPON PLAIN MEANING

1. The Text Is Ambiguous
2. The Text Has a Different Plain Meaning

B. ATTACKS ON THE CANONS OF CONSTRUCTION

3. The Canon of Construction Does Not Apply
4. A Conflicting Canon of Construction Applies

C. ATTACKS ON INTRATEXTUAL ARGUMENTS

5. There is a Conflicting Intratextual Inference Drawn From the Same Text

6. There is a Conflicting Intratextual Inference Drawn From Different Text

II. ATTACKS ON INTENT ARGUMENTS

7. The Intent Was Different
8. The Evidence of Intent Is Not Sufficient
9. The Framers of the Law Did Not Anticipate Current Events
10. The Person Whose Intent Was Proven Did Not Count

III. ATTACKS ON PRECEDENT ARGUMENTS

11. The Court's Opinion Was Not Holding But Rather Obiter Dictum
12. The Opinion Did Not Command a Majority of the Court
13. The Opinion Was Not Issued By a Controlling Authority
14. The Case Is Distinguishable Because of Dissimilar Facts
15. The Case is Distinguishable For Policy Reasons
16. There Are Two Conflicting Lines of Authority
17. The Case Has Been Overruled
18. The Case Should Be Overruled

IV. ATTACKS ON TRADITION ARGUMENTS

19. No Such Tradition Exists
20. There Have Been Competing Traditions
21. A New Tradition Is Emerging

V. ATTACKS ON POLICY ARGUMENTS

22. The Factual Prediction Is Not Accurate
23. The Policy Is Not One of the Purposes of the Law
24. The Policy is Not Sufficiently Strong
25. The Policy Is Not Served In This Case
26. The Policy Is Outweighed by a Competing Policy

CROSS-TYPE ATTACKS

27. Foundational Attacks

28. Relational Attacks

Chapters 11 through 15 discuss the 26 intra-type attacks on legal arguments, and Chapters 16 through 22 cover the two kinds of cross-type attacks.

209. The terms “intra-type” and “cross-type,” suggested by Elizabeth Reilly, correspond to the terms “intramodal” and “cross-modal” proposed by Professors Balkin and Levinson. J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 Tex. L. Rev. 1771, 1796 (1994).

CHAPTER 11

Intra-Type Attacks on Textual Arguments

When a lawyer argues that the language of the law means one thing, an opposing lawyer is likely to respond that the authors of the law meant something else. This typical response to a textual argument sets up a conflict between text and intent, and because it involves a conflict between two different types of arguments, it is an example of a *cross-type* argument that will be discussed in Chapters 16 to 22. In contrast, in this chapter and the four that follow I describe the most common *intra-type* attacks. These are arguments that either challenge one of the constituent elements of a legal argument, or that respond to an argument of one type with another argument of the same type.

A. Intra-Type Attacks on Plain Meaning Arguments

There are two ways to attack an argument that interprets the law based upon the plain meaning of the text: first, one may argue that the text is ambiguous; second, one may argue that the text has a different plain meaning.

1. The Text Is Ambiguous

The most common intra-type attack on a plain meaning argument is to assert that the meaning of the text under consideration is not in fact “plain,” but rather that the text is ambiguous. In *McCulloch v. Maryland*,²¹⁰ the State of Maryland argued that the word “necessary” in the Necessary and Proper Clause meant “indispensable,”²¹¹ and that therefore the Congress had authority to adopt only those measures that were indispensable to carrying out their duties. Justice Marshall responded by observing that human language is inherently ambiguous, and he identified the ambiguity inherent to the word “necessary:”

Is it true, that this is the sense in which the word necessary is always used?...Such is the character of human language, that no word conveys

to the mind, in all situations, one single definite idea....[The word necessary] has not a fixed character peculiar to itself. It admits of all degrees of comparison....A thing may be necessary, very necessary, or indispensably necessary.²¹²

The distinction between “plain” and “ambiguous” statutory text is critical in any case where there is a presumption about the meaning of legal text, because these presumptions apply only if the text is ambiguous. As one federal court said, “[A] rule of construction is apposite only when Congress has blown an uncertain trumpet....”²¹³ For example, the “rule of lenity” requiring the strict construction of criminal statutes only applies if the statute is ambiguous.²¹⁴ Similarly, an administrative agency’s construction of a statute is presumptively valid only in cases where the statute is ambiguous. This presumption, known as the *Chevron* doctrine,²¹⁵ is one of the core principles of administrative law. If a court finds that the meaning of a statute is unambiguous, then the administrative agency must follow the interpretation laid down by the court. In a series of administrative law cases, the justices of the Supreme Court have disagreed about whether or not the meaning of statutory terms such as “modify” or “stationary source” is plain or ambiguous, and accordingly they disagree about whether or not the agency’s interpretation of those terms is presumptively valid.²¹⁶

Another case illustrating the importance of the distinction between “plain” and “ambiguous” statutory language arose under the Freedom of Information Act (FOIA). Under the FOIA, if the government wants to withhold information that a citizen has requested, the government has the burden of proving that the information is covered by an exemption to the law. In *John Doe Agency v. John Doe Corp.*,²¹⁷ the issue was whether records which had been originally assembled for other purposes and later included as part of a criminal investigation report were “compiled for law enforcement purposes” within the meaning of an exemption to the FOIA and therefore not discoverable. Exemptions to the FOIA are supposed to be “narrowly construed” in order to promote openness in government. In interpreting this provision of the statute, however, the majority found that the exemption was not ambiguous. The majority held: “The plain words contain no requirement that compilation be effected at a specific time.”²¹⁸ Accordingly, the Court denied the request for production of the documents. In contrast, Justice Scalia in dissent concluded that the preferable meaning

of the term “compiled” is “originally compiled” and that the records in question were therefore not “compiled for law enforcement purposes.” He added that because the exemption was at least ambiguous, it should therefore be interpreted narrowly. Justice Scalia stated: “But even if the meaning of ‘compiled’ I suggest is not necessarily the preferable one, it is unquestionably a reasonable one; and that creates an ambiguity; and our doctrine of ‘narrowly construing’ FOIA exemptions requires that ambiguity to be resolved in favor of defendants.”²¹⁹

Thus, if the meaning of legal text is unambiguous, the text will be interpreted according to its plain meaning. On the other hand, if legal text is susceptible to more than one meaning, it may be interpreted according to a presumption created by a canon of construction or by substantive law.

2. The Text Has a Different Plain Meaning

The second type of intra-type response to a plain meaning argument is to contend that the plain meaning of the text is different from what is asserted by the opponent. For example, in *Smith v. United States*,²²⁰ the defendant had bartered a gun in exchange for narcotics, and was charged with violating a federal statute that made it unlawful to “use” a firearm during the commission of a drug trafficking offense.²²¹ The majority held that the statute unambiguously applied to the facts of the case and affirmed the defendant’s conviction.²²² In contrast, the dissent concluded that the “ordinary meaning” of the statutory language required that the firearm be used “as a weapon.”²²³

B. Intra-Type Attacks on the Canons of Construction

The two kinds of intra-type attacks against arguments based upon canons of construction are either that the canon does not apply to the case under consideration, or that there is a competing canon that applies.

3. The Canon of Construction Does Not Apply

As noted above, one situation where canons of construction are inapplicable is where the meaning of the text is plain. Thus, a common way to attack the applicability of a canon of construction is to assert that the text is unambiguous. In *United States v. Krizek*,²²⁴ for example, the D.C. Circuit

Court of Appeals stated that “the rule of lenity is invoked only when the statutory language is ambiguous.”²²⁵ But there are other ways to attack the applicability of a canon of construction. The rule of lenity only applies to penal statutes, and is accordingly not usually invoked in civil cases.²²⁶ Another canon, “remedial statutes are to be liberally construed,” does not apply unless the statute in question is remedial. In objecting to the use of this canon of construction, Justice Scalia remarked that “there is not the slightest agreement on what its subject—the phrase ‘remedial statutes’—consists of.”²²⁷

4. A Conflicting Canon of Construction Applies

The legal realists regarded the textual methods of interpretation with skepticism. In particular, they believed that the canons of construction could be manipulated to generate a variety of different textual interpretations. Karl Llewellyn, a leading realist, assembled a list of fifty-six canons of statutory construction, and suggested that for each and every canon of construction there is an equal and opposite canon.²²⁸ For example, the substantive canon “remedial statutes are to be liberally construed,” conflicts with another substantive canon, “statutes in derogation of the common law are to be strictly construed.” In what must be a typical situation, how are we to interpret a remedial statute that alters the common law? Another example of “competing canons” is the conflict between *expressio unius est exclusio alterius* (the negative implication) and *ejusdem generis* (extension by analogy to similar cases). This conflict is easy to illustrate. Suppose that there is a sign outside a restaurant that says, “Dogs Allowed.” May I bring in my cat? The canon *expressio unius* would suggest that the mention of dogs implicitly negates the inclusion of cats, while a variant of the canon *ejusdem generis* suggests cats *are* allowed because the rule should be extended to other housepets. Contemporary legal scholars differ on the question of whether the canons of construction are useful guides for decisionmaking or whether, as Llewellyn implied, they are simply conclusory.²²⁹

C. Intra-Type Attacks on Intratextual Arguments

Intra-type attacks on intratextual arguments also take two forms. One may argue that there is a conflicting inference that may be drawn from the same text, or that there is a conflicting inference that may be drawn from other text in the same document.

5. There Is a Conflicting Intratextual Inference Drawn from the Same Text

In *Barron v. Baltimore*,²³⁰ the Supreme Court was called upon to decide whether the Just Compensation Clause of the Fifth Amendment was applicable against the States. The language of the Fifth Amendment appears to be universal, declaring “nor shall private property be taken for public use, without just compensation.” It does not state whether it is binding on the federal government, on the states, or on both. In *Barron* the Supreme Court noted that Art. I, sec. 10 of the original Constitution expressly stated that “No state shall” enter into treaties, coin money, or pass any ex post facto laws. From this the Court concluded that, “[Had] the framers of [the] amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.”²³¹ On the other hand, one could argue that the quoted language of Art. I, sec. 10 is evidence that the Constitution of the United States was binding upon the States as well as the federal government, and that therefore in the absence of limiting language the provisions of the Fifth Amendment were equally binding upon the states.

6. There Is a Conflicting Intratextual Inference Drawn from Different Text

As discussed in the previous paragraph, in *Barron v. Baltimore* Justice Marshall drew an inference from the language of Art. I, sec. 10 of the Constitution that the Fifth Amendment was applicable solely against the federal government, and not against the states. However, the noted contemporary scholar William Rawle drew the opposite inference from different language in the Constitution. In his 1829 treatise on the Constitution, Rawle pointed to the language of the First Amendment, which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press....” Rawle observed that, in contrast to the First Amendment, the remaining provisions of the Bill of Rights are not by their terms limited to Congress, and he concluded that the other Amendments are alike applicable to the States as to the national government:

The preceding article [the First Amendment] expressly refers to the powers of congress alone, but some of those which follow are to be more generally construed, and considered as applying to the state legislatures as well as that of the Union. The important principles contained in them are now incorporated by adoption into the instrument itself; they form parts of the declared rights of the people, of which neither the state power nor those of the Union can ever deprive them.²³²

In summary, each type of textual argument may be challenged in characteristic ways. One may attack the persuasiveness or applicability of the interpretive textual technique, or invoke a competing textual interpretation.

210. 17 U.S. 316 (1819).

211. *Id.* at 413.

212. *Id.*

213. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 793 (1st Cir. 1996).

214. *Smith v. United States*, 508 U.S. 223 (1993). “The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, “[A]fter ‘seiz[ing] every thing from which aid can be derived’” the Court is ‘left with an ambiguous statute.’” *Id.* at 239.

215. The doctrine was announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh. den.* 468 U.S. 1227 (1984).

216. *Chevron* interpreted the term “major stationary source” from the Clean Air Act. The issue was whether the Environmental Protection Agency had the authority to redefine major stationary sources using the plantwide “bubble concept,” or whether it was required to consider each emitting device as a separate stationary source. In *M.C.I. Telecommunications Corp v. American Telephone and Telegraph Co.*, 512 U.S. 218 (1994), the Court considered whether the F.C.C. had the authority to authorize a long distance carrier to not file a rate tariff, pursuant to its authority under the Federal Communications Act to “modify any requirement” under the Act. The *M.C.I.* case is discussed in detail in Chapter 3.

217. 493 U.S. 146 (1989).

218. *Id.* at 153.

219. *Id.* at 164.

220. 508 U.S. 223 (1993).

221. 18 U.S.C. 924(c)(1).

222. 508 U.S. 223, 239. Because it found the statute to be unambiguous, the majority declined to apply the “rule of lenity.” *Id.*

223. *Id.* at 242. Eric Lasky identified the *Smith* case as containing an example of competing “plain meaning” interpretations in *Perplexing Problems with Plain Meaning*, 27 Hofstra L. Rev. 891 (1999).

224. 111 F.3d 934 (D.C.Cir. 1997).

225. *Id.* at 942.

226. *Id.*

227. Scalia, *Canards*, *supra* note 51, at 583.

228. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

229. Edward Rubin agrees with Llewellyn, and states that in the modern administrative state, where statutes are “a mechanism for allocating resources and deploying force,” the canons of construction are “increasingly irrelevant.” Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 Vand. L. Rev. 579, 579–580 ((1992).

Kent Greenawalt argues that although the textual canons “are not nearly as opposed to one another as has sometimes been claimed....reliance on canons is too uneven to provide much assurance about the way particular language will be interpreted if its apparent meaning is unclear.” Greenawalt, 20 Questions, *supra* note 31, at 211.

Other recent scholarly works on this subject include Richard Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805–817 (1983); and Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992).

230. 32 U.S. 243 (1833).

231. *Id.* at 250.

232. William Rawle, *A View of the Constitution of the United States of America* 124–125 (1970).

CHAPTER 12

Intra-Type Attacks on Intent Arguments

Intent arguments interpret the law in accordance with the intent of the people who created the law. There are four common ways of attacking arguments based upon intent. One may seek to prove that the intent of the authors of the legal text was different from what the opponent asserts. One may challenge the nature and the amount of evidence that was presented to prove the drafters' intent. One may argue that the persons who adopted the instrument could not have foreseen current conditions. Or one may challenge the assumption that the person whose intent was proven was a drafter of the law.

7. The Intent Was Different

The most basic way to attack an argument based upon the intent of the persons who drafted a law is to argue that their intent was different from what the opponent asserts. Two of the most significant rebuttals of this type issued from Abraham Lincoln, and both ultimately concerned the issue of slavery.

At the time of the *Dred Scott* case, Chief Justice Roger Taney and Senator Stephen Douglas contended that the signers of the Declaration of Independence did not intend to include blacks when they wrote that "all men are created equal." In his speech of June 26, 1857, at Springfield, Illinois, Abraham Lincoln passionately argued that the signers of the Declaration of Independence *did* intend to include blacks.

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon

them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit.²³³

Another even more “lawyerly” rebuttal to an intent argument by Taney and Douglas formed the core of Lincoln’s speech at Cooper Union on February 27, 1860. This was the speech which brought Lincoln to national attention, and the principal argument that Lincoln advanced was that the framers of the Constitution had intended for the federal government to have the power to abolish or restrict slavery in the federal territories. Lincoln laid the groundwork for his argument by identifying whose intent mattered:

Who were our fathers that framed the Constitution? I suppose the “thirty-nine” who signed the original instrument may be fairly called our fathers who framed that part of the present Government. It is almost exactly true to say they framed it, and it is altogether true to say they fairly represented the opinion and sentiment of the whole nation at that time.²³⁴

Lincoln then proceeded to prove that virtually all of these individuals had either voted for or expressed support for federal legislation controlling slavery on federal land, demonstrating that the intent of the framers on this point was directly contrary to what Chief Justice Taney had found in *Dred Scott*.²³⁵

8. The Evidence of Intent Is Not Sufficient

In rebutting an argument based upon intent it is not necessary to prove what the intent of the authors was; it is instead sufficient to prove that we cannot be confident what their intent was. The most significant example of this second kind of intra-type attack on an intent argument comes from the landmark case of *Brown v. Board of Education*. In the following passage from that opinion, Chief Justice Earl Warren described how the Court had sought additional guidance from the parties concerning the original intent of the framers of the Fourteenth Amendment with regard to the desegregation of the public schools:

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in congress and the state legislatures had in mind cannot be determined with any degree of certainty.²³⁶

In another seminal case, *Youngstown Sheet & Tube v. Sawyer*,²³⁷ Justice Robert Jackson expressed misgivings about the value of the evidence of the framers’ intent on the question of the President’s emergency power under the Constitution. Jackson said: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”²³⁸

The same issue arises in the interpretation of statutes. When one attorney proffers evidence of the intent of the legislature, opposing counsel may attack the strength of the evidence of intent, or offer conflicting evidence, or both. Robert Jackson has pithy advice for us on this subject: “It is a poor cause that cannot find some plausible support in legislative history.”²³⁹ There are a number of different types of evidence of legislative intent, and legal scholars have evaluated the relative persuasiveness of each category of evidence. In addition to the list compiled by Mikva and Lane described in Chapter 4, there is the following “Hierarchy of Legislative History” proposed by Professors William Eskridge and Philip Frickey:

1. Committee Reports
2. Sponsor Statements
3. Rejected Proposals
4. Floor and Hearing Colloquy

5. Nonlegislative Drafters and Sponsors
6. Legislative Silence and Subsequent History²⁴⁰

Attorneys frequently offer competing evidence of what the intent of the framers of a law was.

9. The Framers of the Law Did Not Anticipate Current Conditions

An additional reason expressed by the Supreme Court for not following “the original intent of the framers” in *Brown v. Board of Education* was that their intent was no longer relevant due to changed social conditions. Justice Warren stated:

An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold.... Even in the North, the conditions of public education did not approximate those existing today.²⁴¹

The intent of the framers of a law may become less relevant because of changes in society, scientific advances, or new understandings of facts.

10. The Person Whose Intent Was Proven Did Not Count

Whose intent counts? The “Hierarchy of Legislative History” set forth above indicates that, when interpreting statutes, the statements of legislators count more than those of mere citizens, and among legislators, the statements of the sponsors of the legislation are more probative of legislative intent than those of other legislators. Similarly, one legal scholar argues that for purposes of interpreting the Constitution, we should not look to the intent of those who met in Constitutional Convention in Philadelphia in 1787, but rather to those who later ratified the Constitution in state conventions.²⁴²

An intriguing argument regarding “who counts” as a framer of the Constitution involved an attack on the views of Alexander Hamilton. Hamilton richly earned his reputation as an authoritative source on the meaning of the Constitution. Prior to the Revolutionary War, Hamilton

authored influential pamphlets supporting the colonists' cause. At the commencement of the war he organized a company of artillery, and based upon his exemplary performance in the field he became General Washington's confidential aide with the rank of Lieutenant-Colonel. He led the attack that overwhelmed the first redoubt at Yorktown. Following the War, at the Annapolis Convention, he was the motive force calling for the Constitutional Convention of 1787. He served at the Constitutional Convention; he authored, with John Jay and James Madison, the Federalist Papers; and through "sheer will and reasoning" he secured the ratification of the Constitution by the New York State convention. Later, as Secretary of the Treasury under George Washington, he issued a succession of opinions on national policy and the organization of the federal government.²⁴³

Despite Hamilton's courageous and loyal service in gaining our independence and forming our government, Justice William Rehnquist, writing for the majority in *Printz v. United States*,²⁴⁴ suggested that the views of Alexander Hamilton were not definitive upon the question of the power of the federal government to command the performance of state officials:

Even if we agreed with Justice Souter's reading of the Federalist No. 27 [authored by Hamilton], it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution."²⁴⁵

In summary, arguments based upon the intent of the drafters of a law may be attacked by challenging the nature or sufficiency of the evidence of intent, the adequacy of the framers' knowledge of contemporary conditions, or the qualifications of the person whose intent was proven.

²³³. Abraham Lincoln, 2 *Collected Works of Abraham Lincoln* 405–406 (P. Basler, ed. 1953).

²³⁴. 3 *Collected Works*, at 523.

²³⁵. *Id.* at 522–527.

236. 347 U.S. 483, 489 (1954).
237. 343 U.S. 579 (1952).
238. *Id.* at 634.
239. Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948). Mikva and Lane responded to Justice Jackson's warning by urging courts to acquire an understanding of the legislative process and to attempt to "choose legislative history that is most probative of legislative intent and not legislative history that supports their views." Mikva & Lane, *supra* note 85, at 36.
240. Eskridge, *The New Textualism*, *supra* note 35, at 636–640.
241. 347 U.S. 483, 489–490.
242. "The framers assuredly gave the document its words; they did not determine the meaning of those words as understood by the ratifiers, by those people whose views were crucial to legitimating the document as fundamental law." Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Cons. Comment.* 77, 84–85 (1988).
243. *Encyclopedia Britannica* 121–122 (1950).
244. 521 U.S. 898 (1997).
245. *Id.* at 915, quoting C. Rossiter, *Alexander Hamilton and the Constitution* 199 (1964).

CHAPTER 13

Intra-Type Attacks on Precedent Arguments

There are eight ways to attack arguments based upon precedent. These include attacks on both the authoritativeness and the applicability of the cited case.

11. The Court's Opinion Was Not Holding but Rather Obiter Dictum

One of the most difficult aspects of analyzing precedent is to determine the precise holding of the court. How much of the court's opinion is essential to the outcome and therefore "holding," and how much of it is merely "dictum?" That was the problem that confronted Chief Justice Warren Burger in *Walz v. Tax Commission*.²⁴⁶

The issue in *Walz* was the constitutionality of property tax exemptions for churches. Precedent from earlier cases decided under the Establishment Clause contained broad language forbidding all government assistance to religion. For example, in *Everson v. Board of Education*,²⁴⁷ the Supreme Court had said: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."²⁴⁸ However, despite this broad language, the Court in *Everson* upheld a law under which local school boards repaid parents for the cost of transportation to private and parochial schools. In *Walz*, Justice Burger warned against reliance on "sweeping utterances" contained in prior opinions:

In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been to[o] sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.²⁴⁹

Another famous example of an objection to a court's opinion because it contained unnecessary reasoning was Thomas Jefferson's attack on Justice Marshall's opinion in *Marbury v. Madison*.²⁵⁰ In that case William Marbury sued Secretary of State James Madison for a court order (specifically, a writ of mandamus) that would require Madison to deliver to him a commission appointing him as a federal Justice of the Peace. Justice Marshall first determined that Marbury was entitled to the writ of mandamus, but then Marshall held that the Supreme Court lacked jurisdiction to issue the writ. Why didn't Marshall simply dismiss the case for lack of jurisdiction? In a letter to William Johnson dated June 12, 1823, Thomas Jefferson bitterly complained about John Marshall's tendency towards *obiter dictum*:

This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable.... [In *Marbury v. Madison*] [t]he court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case....²⁵¹

The principle of *stare decisis*, which provides that the deciding court and all lower courts within the same jurisdiction are bound by the judicial opinion, applies solely to the holding of the court, and not to *obiter dictum*.

12. The Opinion Did Not Command a Majority of the Court

The reasoning contained in dissenting opinions is not binding on future courts for obvious reasons. However, the reasoning of plurality and concurring opinions must be accorded some weight. When the majority of the judges on a multi-member court agree upon a result in a case, even if they disagree as to the proper rationale, the result is binding on future courts. Plurality opinions express the reasoning agreed to by the largest number of judges, and as such are of some precedential value. Where no single line of reasoning commands a majority of the court, the opinion that expresses the narrowest grounds for the result is the reasoning that is binding on future courts.²⁵²

Occasionally it may not be clear whether the court's rationale has been adopted by a majority of the court. In *Hopwood v. Texas*,²⁵³ the United

States Court of Appeals for the Fifth Circuit refused to follow the opinion of Supreme Court Justice Lewis Powell upholding “plus factor” affirmative action admissions programs in *Regents of the University of California v. Bakke*.²⁵⁴ The Fifth Circuit based its decision in part on this ground: “Justice Powell’s opinion in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case.”²⁵⁵ In *Grutter v. Bollinger*, however, a majority of the Supreme Court followed *Bakke* and embraced the reasoning of Justice Powell.²⁵⁶

The weight of an opinion cannot be measured solely by the number of votes it garnered when it first was issued. A concurring opinion may gain precedential force if later courts perceive its reasoning to be more powerful than that of the majority opinion. For example, Justice Robert Jackson’s concurrence in *Youngstown Sheet & Tube v. Sawyer*²⁵⁷ has at least equaled, if not surpassed, the importance of the majority opinion of Justice Hugo Black.

Factors affecting the precedential weight of dissenting and concurring opinions also include the prestige of the author and whether the reasoning of the majority opinion has been overruled. For these reasons, as well as their soaring prose, the dissenting opinion of the elder Justice Harlan in *Plessy v. Ferguson*,²⁵⁸ the dissenting opinions of Justice Holmes in *Abrams v. United States*²⁵⁹ and *Lochner v. New York*,²⁶⁰ and the concurring opinion of Justice Brandeis in *Whitney v. California*,²⁶¹ are today justly considered authoritative. In the First Amendment context, Robert Bork refers to this as “the triumph of Holmes and Brandeis.”²⁶²

13. The Opinion Was Not Issued by a Controlling Authority

Precedential weight depends in part upon the level and jurisdiction of the tribunal rendering the decision. As Judge Leo A. Jackson of the Eighth District Court of Appeals for the State of Ohio once noted: “[We are not] bound by the decisions of our sister Courts of Appeals, although they are entitled to due consideration and respect. We are bound by the decisions of our Supreme Court.”²⁶³

Courts must follow the decisions of higher courts within the same jurisdiction, and apply the doctrine of *stare decisis* to previous decisions of the same court. The precedential weight of decisions by other courts depend upon the location, level, and reputation of the court issuing the decision.

14. The Case Is Distinguishable Because of Dissimilar Facts

One of the most powerful ways to attack an argument based on precedent is to distinguish the prior case. As noted in Chapter 5, to rely on precedent is to reason by analogy. When we follow a previous case, we apply the rule of the previous case by analogy to the case at hand. When we distinguish a previous case, we do not apply its rule to the case at hand. In logical terms, to apply a case by analogy is to find that there is a *sufficient* condition for applying the rule of the cited case to the case at hand, whereas to distinguish a case is to find that a *necessary* condition for applying the rule of the cited case is lacking.²⁶⁴

In easy cases, courts may apply or distinguish prior cases on factual grounds, *i.e.*, because the facts of the cited case are similar or dissimilar to the facts of the case at hand. In most cases it is clear whether or not the facts of the cited case are similar to the facts of the case under consideration. Typical fact patterns emerge in every area of the law, and are efficiently decided by invoking precedent. But in difficult cases, the factual similarity or dissimilarity is not clear. For example, when technological or social change occurs, it becomes difficult to reason by analogy to past cases. The analogies break down because it is not obvious whether the new facts are similar or dissimilar to the facts of the previous cases.

For example, in the 1916 case *McPherson v. Buick Motor Co.*,²⁶⁵ the New York State Court of Appeals was presented with a difficult case at the intersection of the law of tort and contract. Buick Motor Co. had purchased a defective wheel from another manufacturer, assembled the wheel into an automobile, and sold the automobile to a retail dealer, who resold it to a customer. When the wheel broke, the customer was injured. The customer sued Buick on the ground that Buick had negligently failed to inspect the wheel and discover the defect.

This case arose in the context of the widespread and growing carnage on the roads caused by the advent of the automobile. Accordingly, the New York State Court of Appeals was dealing with a novel and serious social problem.

The Court of Appeals considered a number of similar cases where people who had been injured by a defective product had sued the manufacturers, even though they had not purchased the product directly from the manufacturer. In those cases the principal stumbling block to the plaintiffs' recovery was that they were not in "privity" with the

manufacturer, meaning that they did not have a contractual relationship with the manufacturer. In the past, the general rule was that manufacturers were *not* liable to the ultimate consumers of a product unless the product when sold was “inherently dangerous.” Liability had been imposed on remote manufacturers for selling mislabeled poisons, defective scaffolding, and coffee urns and bottles of aerated water that exploded. On the other hand, courts had found no liability in cases where the manufacturer had sold a defective circular saw or a defective steam boiler. In the principal case, *Winterbottom v. Wright*,²⁶⁶ a British court had imposed no liability on the manufacturer of a wagon that had collapsed and injured a passenger. Dissenting in the *McPherson* case, Chief Justice Bartlett cited *Winterbottom*, and drew the following factual analogy:

In the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and yet unless the courts have been all wrong on this question up to the present time there would be no liability to strangers to the original sale in the case of the horse-drawn carriage.²⁶⁷

Justice Bartlett believed that the courts had imposed liability on manufacturers only in cases where “the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof; in other words, where the article sold was inherently dangerous.”²⁶⁸

Writing for the majority, Justice Cardozo could not persuasively distinguish *Winterbottom* on the facts. Instead, Cardozo turned to a realist analogy, discussed in the following section.

15. The Case Is Distinguishable for Policy Reasons

In *McPherson* one might conclude, like Justice Bartlett, that an automobile is more similar to a wagon than to poison or to scaffolding, and that therefore no liability should be imposed on the defendant Buick Motor Co. But Justice Cardozo declined to rely upon factual analogies. Instead, he drew a realist analogy, observing that “[t]he principle of the distinction is for present purposes the important thing.”²⁶⁹ The Buick Motor Company had argued that liability could be imposed only upon the manufacturers of

“poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy.”²⁷⁰ Cardozo noted, however, that the “trend” of the law had been to extend liability to any defective product that was inherently dangerous:

Whatever the rule ... may once have been, it has no longer that restricted meaning. A large coffee urn may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water.²⁷¹

Cardozo imposed liability on the Buick Motor Co. on the ground that an automobile “was liable to become a source of great danger to many people if not carefully and properly constructed.”²⁷² He explained that even though *Winterbottom* was factually analogous to *McPherson*, the principle that was at stake in *Winterbottom* would not be served by denying liability, because times had changed:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.²⁷³

In *The Nature of the Judicial Process*, Justice Cardozo disapproved of the practice of drawing analogies to the *facts* of a case as overly simplistic: “Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.”²⁷⁴

Like Cardozo, other leading legal scholars have criticized the judicial practice of following or distinguishing cases based solely upon factual similarities or dissimilarities. Professor Cass Sunstein has written: “Formalist analogical thinking is no better than any other kind of bad formalism. Different factual situations are inarticulate; they do not impose order on themselves.... Whether one case is analogous to another depends on substantive ideas that must be justified.”²⁷⁵

For this reason, in difficult cases courts are not satisfied with using “formalist analogies,” comparing the similarities and differences in the facts, but are drawn to “realist analogies,” in which cases are compared based upon the underlying values that are at stake.

In hard cases it is difficult to determine whether the facts of the cited case are similar to the case to be decided. Are the factual similarities and dissimilarities “important?” Steven Burton refers to this as “the problem of importance.”²⁷⁶ Importance (*i.e.*, similarity) is measured by whether the policies underlying the rule from the cited case would be served by applying that rule to the case at hand.²⁷⁷

In comparing two contracts cases, for example, Richard Warner argues, “The salient difference between *Columbia* and *Southern Concrete* is that, in the latter, the two companies had never dealt with each other before. Is this a relevant difference? Courts answer such questions by appeal to the legitimate goals and purposes of the law.”²⁷⁸

H.L.A. Hart makes a similar observation: “In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule.”²⁷⁹

Cass Sunstein warns, however, that realist analogies may be as bad as formalist analogies. In the following passage Sunstein criticizes the realist analogy that Oliver Wendell Holmes used in his shocking decision in *Buck v. Bell*,²⁸⁰ where the Supreme Court upheld the forced sterilization of people with mental disabilities:

Holmes suggested that if people can be conscripted during wartime, or can be forced to obtain vaccinations, it follows that the state can require sterilization of the ‘feeble minded.’ But this is a casual and unpersuasive claim. Many principles may cover the possibly relevant similarities and differences among these cases. He does not identify the range of possible principles, much less argue for one rather than another. Instead, he invokes a principle of a high level of generality—“the public welfare may call upon the best citizens for their lives”—that is not evaluated by reference to low- or intermediate-level principles that may also account for the analogous cases.²⁸¹

Despite their potential for abuse, realist analogies are a crucial analytical tool for resolving disputes between competing lines of authority. This is discussed in the following section.

16. There Are Two Conflicting Lines of Authority

When there are two competing lines of case law—when precedent is conflicting—how is the dispute resolved? In these situations the difference between formalist and realist analysis becomes apparent. As John Dickinson explained, disputes between competing precedents are resolved realistically, not formalistically:

The choice which a judge makes of one analogy rather than another is an expression of ... a value-judgment; and the possibility of competing analogies therefore arises not merely or so much out of the doubtfulness of the factual resemblances among his materials, but rather out of the possibility of differences of opinion as to the comparative value of the different results which one analogy or the other would bring about.²⁸²

Justice Cardozo agreed with Dickinson that the interpretation of the law turns upon a balancing of the principles or interests that are at stake. Cardozo described how this balancing worked in the case of *Riggs v. Palmer*,²⁸³ in which the court had held that a murderer could not inherit from the person he killed:

Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator [the author of a will] in conformity with law.... There was the principle that civil courts may not add to the pains and penalties of crimes.... But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong.²⁸⁴

When there are competing lines of authority from prior case law, it is important to not simply identify which *facts* of the previous cases are most similar to the case at hand. It is also necessary to identify which *values* or

policies from previous case law are at stake in the case at hand, and to identify which rule from the prior cases best serves those policies.

17. The Case Has Been Overruled

A judicial decision that has been expressly overruled, of course, has no precedential force, but in some cases it may be unclear whether a prior decision has been overruled in its entirety. The holding of the Supreme Court in *Brown v. Board of Education*,²⁸⁵ for example, did not expressly overrule the holding of *Plessy v. Ferguson*²⁸⁶ which had authorized the enforced segregation of railroad cars. Instead, the original decision in *Brown* had a more limited scope: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”²⁸⁷ Nevertheless, in subsequent *per curiam* decisions the Supreme Court struck down state-sponsored segregation of public beaches, golf courses, buses, etc., citing *Brown v. Board of Education*.²⁸⁸

Furthermore, although a lower court has no power to overrule the decision of a higher court, it may be unclear to the lower court whether or not the higher court still recognizes the original decision as authoritative. In 1996, in *Hopwood v. Texas*,²⁸⁹ the Fifth Circuit Court of Appeals held that the Supreme Court had silently but effectively overruled *Regents of the University of California v. Bakke*²⁹⁰ by subsequent decisions of the Supreme Court striking down affirmative action programs outside the educational setting.²⁹¹ The Fifth Circuit guessed wrong. In 2003 the Supreme Court reaffirmed its holding in *Bakke* in the case of *Grutter v. Bollinger*.²⁹²

18. The Case Should Be Overruled

As discussed in Chapter 5, the principle of *stare decisis* militates against reversing precedent. As noted in that chapter, the leading authority defining the scope of *stare decisis* in constitutional cases is the plurality opinion of Justices Kennedy, O’Conner, and Souter from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁹³ The four factors considered by the plurality in deciding whether to overrule *Roe v. Wade* were the workability of the existing rule, society’s reliance on the existing rule, whether the rule had been undermined by subsequent decisions, and whether the premises of fact underlying the decision had changed.²⁹⁴ The three justices found that the rule from *Roe* allowing women to choose to abort a fetus before

viability was clear and easily applied, that society had changed in reliance on the ruling in *Roe*, that the original holding had not been undermined by later decisions, and that no facts or understandings of fact relevant to the original decision had been proven to be incorrect. Accordingly, they voted to reaffirm *Roe*.

In *Rutan v. Republican Party*,²⁹⁵ Justice Scalia proffered a somewhat different list of factors to be taken into account in deciding whether to overrule precedent: “[O]ne is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear.”²⁹⁶

The strength of precedent varies from field to field. For example, courts are less likely to overrule decisions interpreting statutes than they are cases interpreting the constitution. The stated reason is that if the legislature disagrees with a judicial interpretation of a statute, it may amend the statute; accordingly, if the legislature has declined to amend the law, then the original decision probably is consistent with the intent of the legislature.²⁹⁷

In summary, arguments based on precedent may be attacked on the ground that the cited case is not authoritative, that it is distinguishable on the facts or on the basis of policy, or that it ought to be overruled.

246. 397 U.S. 664 (1970).

247. 330 U.S. 1 (1947).

248. *Id.* at 15.

249. *Id.* at 668.

250. 5 U.S. 137 (1803).

251. Basic Writings of Thomas Jefferson 781 (Philip S. Foner, ed. 1944).

252. See *Marks v. United States*, 430 U.S. 188 (1977) (suggesting factors to be considered for determining the holding of the Court in when there is no majority opinion); *Triplett Grille v. City of Akron*, 40 F.3d 129, 134 (1994), holding that Justice Souter’s concurring opinion from *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), “resolved the question before the Supreme Court on the narrowest grounds,” and thus provided the rule of the case. Another view is that concurring opinions that are necessary to form a majority vote for a result are entitled to added weight. See Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995).

253. 78 F.3d. 932, *cert. den.* 518 U.S. 1033 (1996).

254. 438 U.S. 265, 320 (1978). The policy arguments in Justice Powell’s opinion in the *Bakke* case are described in Chapter 15.