Chapter 4
INTRODUCTION TO DEDUCTIVE AND INDUCTIVE REASONING

The logic of the law is neither all deductive nor all inductive. To be sure, where the law is clear and the application of the facts to the law equally plain, the argument often sounds solely in deductive reasoning. Where the law is clear and the sole question is application of facts to the law, both inductive and deductive reasoning are used. And where the law is not clear, in Cardozo's phrase, where the courts "work for the future," both types of reasoning are very much involved.

Any development of the law becomes a recursive process. First, as cases are compared and their resemblances and differences noted, a judicial decision is made and a legal precept is created. Next there is a period when that newly minted precept becomes more or less fixed. A further stage takes place when the "new" precept becomes "old" and breaks down, or evolves, as new cases are decided. Inductive reasoning usually dominates the first stage—the creation of the precept. Deductive reasoning is used in refining the created precept and in applying it to the facts before the court. Inductive reasoning appears again at a later stage when efforts are made in subsequent cases to break down the precept.

This being so, what form of reasoning do we discuss first? Here we have a chicken-or-the-egg question. As we have explained, the common law develops from specific narrow rules to broader precepts, a classic process of inductive reasoning. Yet, to understand induction, it is best to first learn deduction. Hence we put the deductive cart before the inductive horse with some introductory observations on deductive reasoning.

DEDUCTIVE REASONING

Deductive reasoning is a mental operation that a student, lawyer or judge must employ every working day. Formal deductive logic is an act of the mind in which, from the relation of two propositions to each other, we infer, that is, we understand and affirm, a third proposition. In deductive reasoning, the two propositions which imply the third proposition, the *conclusion,* are called *premises.* The broad proposition that forms the starting point of deduction is called the *major premise;* the second proposition is called the *minor premise.* They have these titles because the major premise represents the *all;* the minor premise, something or someone included in the all.

Logical argument is a means of determining the truth or falsity of a purported conclusion. We do this by following well established canons of logical order in a deliberate and intentional fashion. In law we must think and reason logically. We must follow a thinking process that emancipates us from impulsively jumping to conclusions, or frees us from argument supported only by strongly felt emotions or superstitions. That which John Dewey said for school teachers in generations past is still vital and important today: Reflective thought "converts action that is merely appetitive, blind and impulsive into intelligent action."[1]

The classic means of deductive reasoning is the *syllogism.* Aristotle, who first formulated its theory, offered this definition: "A syllogism is discourse in which, certain things being stated, something other than what is stated follows of necessity from their being so."[2] He continued: "I mean by the last phrase that they produce the consequence, and by this, that no further term is required from without to make the consequence necessary."[3] From this definition we can say that a syllogism is a form of implication in which two propositions jointly imply a third.[4]

Special rules of the syllogism serve to inform exactly under what circumstances one proposition can be inferred from two other propositions. Consider the classic syllogism:

All men are mortal.

Socrates is a man.

Therefore, Socrates is mortal.

This is a *categorical syllogism,* an argument having three propositions—two premises and a conclusion. A categorical syllogism contains exactly three terms or class names, each of which occurs in two of the three constituent propositions. A few definitions from the Socrates-is-a man syllogism:

- The major term is the predicate term of the conclusion, and of the major premise.
- The minor term is the subject term of the conclusion, and of the minor premise.
- The middle term does not appear in the conclusion, but must appear in each of the two other propositions.
- The major premise is the premise containing the major term.
- The minor premise is the premise containing the minor term.

Because the first proposition contains the major, or larger term, it is named the *major premise,* the larger precept laid down. Because the second contains the minor, or smaller term, it is called the *minor premise,* the lesser statement laid down. Because it follows from the major to the minor premise, the third proposition is called the *conclusion.* In the standard form categorical syllogism as used in the law, the major premise is stated first, the minor premise second and finally the conclusion. Returning to our classic example:

Major Premise:	All men are mortal
Major Term:	Mortal
Middle Term:	All men
Minor Premise:	Socrates is a man
Minor Term:	Socrates
Middle Term:	Man
Conclusion:	Therefore, Socrates is mortal
Minor Term:	Socrates
Major Term:	Mortal

Let us parse this syllogism identifying its parts:

> *Major Premise:* The subject, “All men” (middle term); the copula “are” that connects the middle term with “mortal” (major term).
>
> *Minor Premise:* The subject, “Socrates” (minor term); the copula “is” that connects the minor term with “man” (the middle term).
>
> *Conclusion:* Therefore, “Socrates” (the minor term); the copula “is” that connects the minor term with “mortal” (the major term).

Some helpful hints derive from the foregoing rules: the middle term (“All men”) may always be known by the fact that it does not occur in the conclusion. In law, the major term (“mortal”) often is the predicate of the conclusion. The minor term (“Socrates”) is always the subject of the conclusion.

INDUCTIVE REASONING

Deductive reasoning and adherence to the Socrates-is-a-man type of syllogism is only one of the major components of the common-law logic tradition. Inductive reasoning is equally important. In legal logic, it is often used to fashion either the major or the minor premise of the deductive syllogism. Often, a statute or specific constitutional provision unquestionably qualifies as the controlling major premise. It is the law of the case, with which the facts (minor premise) will be compared, so as to reach a decision (conclusion). Where no clear rule is present, however, it is necessary to draw upon the collective experience of the judiciary, to use Lord Diplock's felicitous phrase, to fashion a proper major premise from existing legal rules, the specific holdings of other cases. This is done by inductive reasoning.

As we now proceed to explain the difference between deductive and inductive reasoning, we do so with a pronounced caveat. This is a book on *legal* reasoning. It is not a book on *general* reasoning, nor an introduction to the general study of logic. Our formulations of definitions are guided by Max Radin's comment that the test of a definition is whether it is useful. We therefore acknowledge that our explanations may be considered by some logicians to be simplistic, if not precisely accurate when viewed against the universal cosmos of logic.

General logic, as well as law logic, deals with universal and particular propositions. And within this specialty it is possible in deductive logic to reason from a universal to another universal. For example:

All animals are mortal.

<u>All men are animals.</u>

Therefore, all men are mortal.

But the law is made up of particulars. In litigation, it is the particular facts found by the fact-finder that is the objective of any trial. In a commercial or business transaction it is the particulars of the conduct, deal, arrangement, agreement, bargain or

understanding that create the conflict between the parties. Tight particulars are controlling in the law. And although in a series of syllogisms (polysyllogisms) we may reason deductively from the universal to a less broad universal before reaching the conclusion of the last of a series of syllogisms, the ultimate conclusion sought in deductive reasoning in the law is a particular.

Thus, for our purposes in this study, we can say that deductive reasoning moves by inference from the general ultimately to the particular; inductive reasoning moves from the particular to the general, or from the particular to the particular.

In law, as in general logic, there are fundamental differences between the two types of reasoning:

- In deduction, the connection between a given piece of information and another piece of information concluded from it is a *necessary* connection. A deductive argument is one whose conclusion is claimed to follow from its premises with absolute necessity. If its premises are valid, the conclusion is valid. If the conclusion is valid, the premises are valid.
- In a valid deductive argument, if the premises are true, the conclusion *must* be true.
- An inductive argument is one whose conclusion is claimed to follow from its premises only with *probability* and not absolute necessity. All that is represented is that the conclusion is more probable than not.
- In induction, the connection between given pieces of information and another piece inferred from them is *not* a logically necessary connection. Its premises do not provide *conclusive* support for the conclusion; they provide only *some* support for it. Inductive arguments may be evaluated, for better or for worse, by the degree of likelihood or probability which their premises confer upon the conclusion.
- In a valid inductive argument, the conclusion is not necessarily an absolute truth; by induction, we reach a conclusion that is only *more probably* true than not.

- Thus, the core of the difference between deductive and inductive reasoning lies in the strength of the claim that is made about the premises and its conclusion. In the deductive argument, the claim is that if the premises are true and valid, then the conclusion is true and valid. In the inductive argument, the claim is merely that if the premises are true, the conclusion is more probably true than not.[5]
- In the law deductive reasoning moves from the general (universal) to the particular.
- In the law inductive reasoning moves:
  —from the particular to the general (universal) (induced generalization by enumeration of instances), or
  —from the particular to the particular (analogy).

INDUCTIVE GENERALIZATION

For an introductory look at the process of induction, let us start with the all-men-are-mortal major premise. The premise, in general form, resulted from the process of enumeration; it was created by enumeration of billions of particulars to create a general statement. It is an example of inductive generalization:

> Adam is a man and Adam is a mortal.
>
> Moses is a man and Moses is a mortal.
>
> Tiberius is a man and Tiberius is a mortal.
>
> George Washington is a man and George Washington is a mortal.
>
> John Marshall is a man and John Marshall is a mortal.
>
> Pope John Paul II is a man and Pope John Paul II is a mortal.
>
> Therefore, all men are mortal.

It should be clear that the truth of the conclusion drawn from this inductive process is not guaranteed by the form of the argument, not even when all the premises are true, and no matter how numerous they are. We always run the risk of the fallacy of hasty generalization, about which we will learn more later. We can say, however, that the creation of a major premise in law by the technique of *inductive enumeration,* although not guaranteed to produce an absolute truth, does produce a proposition more likely true than not. This is the classic reasoning from a group of particulars to the general. This premise (which is the conclusion reached by inductive reasoning) is then, of course, always subject to modification as new cases are decided. Formulating a generalization in the law, that is, enumerating a series of tight holdings of cases (legal rules) to create a generalized legal precept (legal principle), is at best a logic of probabilities. We accept the result, not because it is an absolute truth, like a proposition in mathematics, but because it gives our results a certain hue of credibility. The process is designed to yield workable and tested premises, rather than truths.

From this you can see the interrelationship in the law between inductive and deductive argument. We use inductive enumeration to reach a conclusion that embodies a general class. The inductive conclusion then becomes the major premise in a deductive argument to reach the conclusion urged upon the court.

ANALOGY

Closely akin to reasoning by generalization is reasoning by *analogy,* which is the heart of the Socratic method used in teaching law and in the dialogues between judges and lawyers at oral argument. Although we find it convenient to classify analogy as a type of inductive reasoning, not all logicians agree, many suggesting that there is a difference between argument by enumeration and argument by analogy.[6] We place both processes under the heading of inductive reasoning because each process begins with an examination of particular instances. Moreover, as we shall see later, the strength of analogy in legal analysis is sometimes measured by an enumeration of relevant resemblances. In both forms the conclusion from the premises is represented as more probable than not. No further representation is made.

For our purposes, the specific room to which analogies should be assigned in the house of logic is not as important as understanding the criteria to be applied to analogies. Pursuant to the method of analogy, the courts do not generalize from a series of holdings, but proceed from certain relevant resemblances and differences between the case at bar and another single case or a relatively small group of cases. The relation between enumeration and analogy is close. Both use probability in reasoning. The force of an induced generalization by enumeration is measured by the *quantity* of instances. The force of analogy depends upon the *quality* of the positive and negative resemblances.

Lawyers and judges are often vulnerable to attacks on their reasoning by analogy. A proper analogy should identify the number of respects in which the compared cases, or fact scenarios, resemble one another (let us call these resemblances positive analogies) and the number of respects in which they differ (negative analogies). In analogy, unlike the method of enumeration, the quantity of cases is not significant. Instead, what is important is *relevancy*—whether the compared facts resemble, or differ from, one another in relevant respects. John Stuart Mill asked the question:

“Why is a single instance, in some cases, sufficient for a complete induction, while in others myriads of concurring instances, without a single exception known or presumed, go such a very little way towards establishing an universal proposition? Whoever can answer this question knows more of the philosophy of logic than the wisest of the ancients, and has solved the problem of Induction.”[7]

To refer again to the all-men-are-mortal syllogism, we can also use the process of analogy to conclude that Plato is a man:

> Socrates is a man and possesses physiological characteristics X, Y and Z.
>
> Plato possesses physiological characteristics X, Y and Z.
>
> Therefore, Plato is a man.

Let us turn to more practical examples of the process of analogy:

> Able Chevrolet Company is liable for violating the antitrust laws by requiring a tie-in purchase of a refrigerator manufactured by Mrs. Able if you want to buy a Camaro.

It is not difficult to analogize that liability also would follow from these facts:

> Baker Pontiac Company requires a tie-in purchase of a refrigerator manufactured by Mrs. Baker if you want to buy a Firebird.

What about other circumstances? Must the resemblances be relevant? Absolutely. Consider the following:

> State College had a championship basketball team last year. Team members came from high schools A, B, C, D, E and F.
>
> State College has recruited new players from high schools A, B, C, D, E and F for this year’s team.
>
> Therefore, State College will have a championship basketball team this year.

Are the resemblances relevant? We must ask if the resemblance (players from the same high schools) is relevant, i.e., critical to the conclusion we seek to draw—a championship basketball team. An irrelevant similarity cannot provide the proper basis for an analogy.

An appreciation of these methods of reasoning will both sharpen your power of analysis and facilitate your study of law. We have outlined here only an introduction to deductive and inductive reasoning. We will describe the methods in depth in the following chapters.

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1. John Dewey, How We Think 17 (1933).

2. L.S. Stebbing, A Modern Introduction to Logic 81(6th ed. 1948) (quoting *Anal. Priora* 24b).

3. *Id.* (quoting *Anal. Priora,* 18).

4. *Id.*

5. *See* discussion in Irving M. Copi & Carl Cohen, Introduction to Logic 57-61 (9th ed. 1994).

6. *See e.g.,* Joseph Gerard Brennan, A Handbook of Logic 154 (1957) ("Current logicians, however, tend to regard all inductions as following the first pattern, that is, as inferences to generalizations [rather than from particular to particular].") *But see* Irving M. Copi, Introduction to Logic 433 (7th ed. 1986). ("Because of the great similarity between argument by simple enumeration and argument by analogy, it should be clear that the same types of criteria apply to both.")

7. John Stuart Mill, A System of Logic Ratiocinative and Inductive 206 (8th ed. 1916).

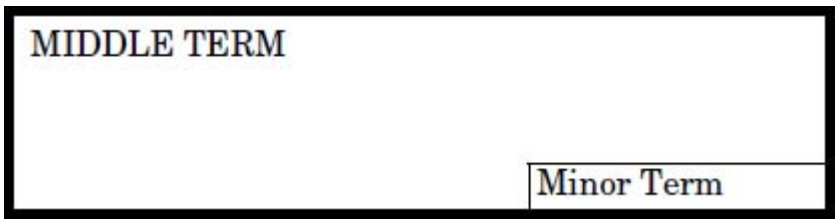
Chapter 5
DEDUCTIVE REASONING

We are now ready to take a closer look at deductive reasoning. Here we should look from two viewpoints. When we participate in the reasoning process we naturally begin with the premises and arrive at a conclusion. When we analyze or evaluate reasoning, however, we reverse the process; we begin with the conclusion, for it is in the conclusion that, as brief writers, brief readers, oral advocates and judges, we examine the quality of the reasoning and evaluate the soundness of the arguments. To do this properly, it is essential to understand the *terms* of the categorical deductive syllogism:

A "term" is defined as a word or group of words contained in a premise or conclusion. Understand this concept completely, because logicians use this expression to identify certain fallacies of form, or formal fallacies. Learn to identify the three terms of a categorical syllogism:

Major Term:	Usually the predicate of the major premise and also of the conclusion.
Minor Term:	The subject of the minor premise and also of the conclusion. It is called minor because it is less inclusive than the middle term, which is often the subject of the major premise. It is usually part of the class represented by the middle term. In most arguments, the minor term is the fact found or to be found by the fact-finder in the case.
Middle Term:	Appears in the two premises, but not in the conclusion. It is the medium of comparison between the major and minor term. In the categorical syllogism, it usually appears as the subject of the

major premise and the predicate of the minor premise.



The syllogism traces its ancestry to mathematics. Euclid's first axiom lies at the heart of the modern syllogism: Things which are equal to the same thing are equal to each other. Three canons or fundamental principles of the syllogism build on Euclid:

> Two terms agreeing with one and the same third term agree with each other.
>
> Two terms, of which one agrees and the other does not agree with one and the same third term, do not agree with each other.
>
> Two terms both disagreeing with one and the same third term may or may not agree with each other.[1]

To recapitulate, by definition the categorical syllogism consists of (a) a proposition called the major premise, in which the major and middle terms are compared together; (b) a minor premise, which compares the minor and middle terms; and (c) a conclusion, which contains the major and minor terms only.

Deductive reasoning is a mental operation that a lawyer must employ every working day in his or her life. Formal deductive logic is the act of the mind in which, from the relation of two propositions to each other, we infer, that is, we understand and affirm, a third proposition. In deductive reasoning, the two propositions which imply the third proposition, the conclusion, are called premises.

The broad proposition that forms the starting point of the deduction is called the major premise; the second proposition is called the minor premise.

They have these titles because the major premise represents the all, and the minor premise, something or someone included in the all.

Major Premise: All men are mortal.
Minor Premise: Socrates is a man.
Conclusion: Socrates is mortal.

All oral real estate conveyances are invalid.
<u>Alpha's real estate conveyance is oral.</u>
Alpha's real estate conveyance is invalid.
All persons in police custody must be given *Miranda* warnings if their statements are used.
<u>Mr. Bravo is in police custody.</u>
He must be given *Miranda* warnings.

Understand the nomenclature used by logicians in identifying the quantity of propositions or terms. Unfortunately, logicians use two different expressions when discussing these quantities.

Propositions:	If the proposition is broad or general it is called a *universal* proposition. If it is narrow or specific, it is called a *particular.*
Terms:	If a term is broad or general it is called a *distributed* term; if narrow or particular, it is called *undistributed.*

Thus, a universal proposition (All offers in contract law) is described as containing a "distributed" subject term. A particular proposition (Some offers in contract law) has an "undistributed" subject term. In each case the subject term is the Middle Term of the syllogism. We explain this in detail in the pages that follow.

CATEGORICAL SYLLOGISM

The categorical syllogism lies at the heart of all legal argument. Learn these fundamental concepts:

Syllogism: A syllogism is an argument containing premises and a conclusion.

Categorical Syllogism: A categorical syllogism is a deductive argument which consists of

1. Three categorical propositions,
2. Containing exactly three terms,
3. In which each of the three terms occurs in exactly two of the propositions.

Categorical Propositions and Classes

A class is a collection of objects that have in common some specified characteristic. “Categorical propositions” are statements about classes. There are four ways classes can be said to relate to one another:

1. Relationship of Containment: Every member of one class is said to be a member of (included or contained in) another class.
2. No relationship: No member of one class is said to be a member of a second class.
3. Relationship of Partial Containment: Some, but perhaps not all, members of one class are said to be members of (included or contained in) another class.
4. Relationship of Partial Non-Containment: Some, but perhaps not all, members of one class are said not to be members of (included or contained in) another class.

Four Standard Forms of Categorical Propositions

Categorical propositions affirm or deny these relationships between classes. There are four standard forms of categorical propositions as illustrated by the following:

1. All judges are honest.
2. No judges are honest.
3. Some judges are honest.
4. Some judges are not honest.

Each standard form categorical proposition has a name and a letter (A, E, I or O) which logicians traditionally use to identify each standard form. We can represent each standard form categorical proposition by way of a statement using the letters S and P to represent the Subject and Predicate of the proposition. The four standards forms are as follows:

A: Universal Affirmative Proposition

All S is P: Every member of the first class is also a member of the second class.

All oral contracts for the sale of real estate are invalid.

E: Universal Negative Proposition

No S is P: No member of the first class is also a member of the second class.

No oral contract for the sale of real estate is valid.

I: Particular Affirmative Proposition

Some S is P: Some members (at least one) of the first class are also members of the second class.

The oral contract for the sale of the Three Rivers Stadium, Pittsburgh, to the New York Yankees is invalid.

O: Particular Negative Proposition

Some S is not P: Some members (at least) of the first class are not members of the second class.

The oral contract for the sale of the Three Rivers Stadium, Pittsburgh, to the New York Yankees is not valid.

The letters **A, E, I, O** emanate from the Latin **A**ff**i**rmo (affirm) and **N**eg**o** (deny). Logicians describe the three propositions in the all-men-are-mortal syllogism as AII.[2]

Categorical Propositions: Quality and Quantity

Every standard form categorical proposition is said to have both a quality and a quantity:

Quality:	Affirmative or Negative
Quantity:	Universal or Particular
	Universal Quantifiers: “All,” “No”
	Particular Quantifiers: “Some”

Categorical Propositions: Distribution

A proposition distributes a term (subject class or predicate class and middle, major or minor term) if it refers to all members of the class designated by the term.

Universal Affirmative (A) Propositions:

Subject Term: Distributed
Predicate Term: Undistributed

Universal Negative (E) Propositions:

Subject Term: Distributed
Predicate Term: Distributed

Particular Affirmative (I) Propositions:

Subject Term: Undistributed
Predicate Term: Undistributed

Particular Negative (O) Propositions:

Subject Term: Undistributed
Predicate Term: Distributed

There are two rules of thumb for distribution:

Quantity of a proposition determines whether its subject term is distributed.

Quality of a proposition determines whether its predicate term is distributed.

Distributed-Undistributed Terms: Universal-Particular Propositions

Let us look at the syllogisms set forth in Judge Cardozo's majority opinion and Chief Judge Bartlett's dissenting opinion in the landmark case of MacPherson v. Buick Motor Co.[3]

Judge Cardozo

Major Premise:	Any manufacturer who negligently constructs an article that may be inherently dangerous to life and limb when so constructed is liable in damages for the injuries resulting.
Minor Premise:	A manufacturer who constructs an automobile so that the spokes on a wheel are defective is such a manufacturer.
Conclusion:	Therefore, a manufacturer who constructs an automobile so that the spokes on a wheel are defective is liable in damages for the injuries resulting.

Chief Judge Bartlett

Major Premise:	The vendor of a carriage is not liable in an action for negligence to anyone save his immediate vendee.
Minor Premise:	This plaintiff was not the immediate vendee of the vendor defendant.
Conclusion:	Therefore, defendant vendor is not liable in an action for negligence to this plaintiff.

One may not fault the logic contained in either opinion. Although the results differ, the reasoning is not flawed. The results differ because the major premise of each opinion differs.

In each argument, the major premise is a broad legal concept that qualifies as a universal proposition. By *universal* we mean that the proposition applies to all members of its class without restriction

("Any manufacturer who … is liable"). Had the assertion applied only to a restricted, or partial, class it would be called a *particular* proposition. The subject term of a universal proposition is said to be *distributed.* In our example, we speak of "any manufacturer" or "the vendor." In each case, the assertion concerns all manufacturers and vendors in the stated class without restriction. Hence, the subject is distributed. Had the proposition stated *"some* manufacturers, who … are liable," the proposition would not have been universal; it would have been particular. We would not know which of such manufacturers would be liable.

The subject term (usually the minor term) of a particular proposition is said to be *undistributed.* There are buzz words to help distinguish a universal proposition (or a distributed term) from a particular proposition (or undistributed term).

- Those suggesting a universal proposition (or distributed term) include "every," "any," "all," "each," "the," "always," "everywhere," "In every instance," "no," "never," "nowhere," "under no circumstances."
- Those suggesting a particular proposition (or undistributed term) include "some," "certain," "a," "one," "this," "that," "sometimes," "not everywhere," "sometimes not," "occasionally," "once," "somewhere."

The predicate term of a proposition is, likewise, either distributed or undistributed. Determining whether the predicate is distributed or undistributed is easy; understanding why it is so is not so easy.

- If the proposition is an affirmative statement ("All manufacturers … are liable"), then the predicate (liability) is undistributed.
- If the proposition is a negative statement ("The vendor … is not liable"), then the predicate (liability) is distributed.

Consider Judge Cardozo's major premise: "Any manufacturer who negligently constructs an article … is liable …." The subject, "Any manufacturer," is distributed; it tells us that the proposition will apply to all manufacturers who fit the given definition. Because the proposition is affirmative, we know that the predicate (liability) is undistributed. That means that the proposition tells us something

about a limited group of liable persons: the group that coincides with the subject group of manufacturers. The group of liable persons is undistributed. It is undistributed because there can be persons other than manufacturers who can be liable.

Now look at Chief Judge Bartlett's major premise: "The vendor of a carriage … is not liable …." The subject, carriage vendors, is distributed; it refers to all carriage vendors. In this negative proposition, the predicate is distributed, because the proposition tells us something about all liable persons.

In each of these examples, the subject is distributed. But it could be undistributed and the same rules would apply. Let's look at another example: "Some manufacturers are liable." Here, the subject is undistributed. The proposition refers to only a limited group of manufacturers. Because the proposition is affirmative, the predicate (liability) must be undistributed. In this case, both groups are limited, so both terms are undistributed. The proposition does not tell us about all manufacturers, or about all liable persons. It can't help us very much in a deductive argument.

An undistributed subject can also appear in a negative proposition: "Some vendors are not liable." The subject here, as in the preceding example, is undistributed because it limits the group of vendors to whom the proposition will apply. The proposition is negative, so the predicate (liability) is distributed. It is distributed because it tells us something about all liable persons: none of them will ever coincide with the limited group of vendors in the subject class, because those vendors are not liable.

To summarize, yet extend this discussion slightly beyond the perimeters of the *MacPherson* case:

1. The first inquiry is whether the subject or the predicate term refers to the whole class, or part of the class.
2. If the reference is to the whole class, the subject or predicate term is said to be distributed.
3. If the reference is to part of the class, the subject or the predicate term is said to be undistributed.

4. The subject of a universal proposition is distributed because a universal proposition applies to the whole class.
5. The subject of a particular proposition is undistributed because the proposition applies to only part of the class.
6. The predicate of an affirmative proposition is undistributed. In “All men are mortal,” the predicate mortal is not distributed because the proposition does not mean that only men are mortal. Women are also mortal.
7. The predicate of a negative proposition is distributed. “No federal judges are elected officials.” By excluding all federal judges from the class of elected officials, we necessarily exclude all members of the class of elected officials from the class of federal judges.

The *MacPherson* majority opinion and the dissent both demonstrate deductive logic, a movement of the mind from an object as a whole to some point therein; a movement from the general to the particular; an inference from the all to anyone included in the all. Each takes the form of a syllogism.

ENTHYMEMES

In ordinary writing and speaking, the formal three propositions (two premises and a conclusion) arrangement is seldom observed, except perhaps in teaching children. Good girls get a star on their forehead; Lisa is a good girl; Lisa gets a star on her forehead. Normally, we would say that Lisa got a star on her forehead because she was a good girl. We would omit the major premise completely because it would be generally understood. A large body of propositions can be presumed to be common knowledge, and many writers or speakers save themselves time and energy by not repeating well known and perhaps trivially true propositions that their hearers or readers can well be expected to supply for themselves.

In formal argument, when one of the premises or the conclusion is not expressed, the argument is called an enthymeme. Such an argument is said to be stated incompletely, part being "understood" or "only in the mind." Many legal briefs and judicial opinions are enthymematic because either premise or the conclusion is obvious and is understood (or is believed to be obvious and understood). Most often the omitted premise is the major premise (All good girls get a star on their forehead) and is called an enthymeme of the First Order. Less commonly the minor premise is unexpressed and the enthymeme is of the Second Order (All good girls get stars; Lisa gets a star).

As stated before, often the argument is compressed to a single sentence. Thus, in writing for the Court in Roe v. Wade, Justice Blackmun declared:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[4]

Implicit in this enthymematic statement of reasons was the following syllogism:

Major Premise:	The right of privacy is guaranteed by the Fourteenth (or Ninth) Amendment.
Minor Premise:	A woman's decision to terminate her pregnancy is protected by the right of privacy.
Conclusion:	Therefore, a woman's decision whether to terminate her pregnancy is protected by the Fourteenth (or Ninth) Amendment.

To be sure, much written or oral legal argument takes the form of enthymemes. Sometimes, there is a tendency to make improper assumptions (by omitting critical propositions) which may be caught by your opponent in a written brief under circumstances dictated by procedural rules which deny you the opportunity to respond. At other times, at oral argument, a judge may ask you to state the formal categorical syllogism on which your enthymematic argument is based (for example, when you omit both premises and emphasize only the conclusion). Often, in the "split second" or "moment's notice" time allocated for oral argument, especially before appellate courts, you are unable to formulate the reconstruction. And you lose points.

Wisdom dictates that you always test an enthymeme for validity, supply the missing parts of the argument and then test the resulting formal syllogism. Keep in mind that enthymemes will only constitute effective arguments if both the assumed and stated propositions are correct. In all syllogisms, the effectiveness of the conclusion depends upon the validity of the propositions and the accuracy of the premises.

EVALUATING A PROPOSED INFERENCE

We are ready to look at a case that tests the logical validity of a proposed deductive inference.

Leliefeld v. Johnson
104 Idaho 357, 659 P.2d 111, 118 (1983)

[Issue: Does evidence of repairs subsequent to an accident gives rise to an inference of negligence?]

In analyzing an example from Wigmore concerning subsequent repair of machinery involved in an accident, Professor James utilized a transmutation of a proposed direct inference into its deductive form to demonstrate its invalidity as suggested: "In the case of the repaired machinery we're told: "'People who make such repairs (after an accident) show a consciousness of negligence; A made such repairs; therefore, A was conscious of negligence.'" Before this deductive proof can be evaluated, ambiguity must be eliminated from the major premise. By "people" shall we understand "some people" or "all people"? If the argument is intended to read, "Some people who make such repairs show consciousness of negligence; A made such repairs; therefore, A was conscious of negligence," it contains an obvious logical fallacy. If intended to read, "All people who make such repairs show consciousness of negligence; A made such repairs; therefore, A was conscious of negligence," it is logically valid. However, few could be found to accept the premise that all persons who repair machinery after an accident show consciousness of guilt; that is, that no single case could be found of one who, confident of his care in the past, nevertheless made repairs to guard against repetition of an unforeseeable casualty or to preserve future fools against the consequence of their future folly. Here the result of transmuting a proposed direct inference into deductive form is discovery that it is invalid—at least in the terms suggested." James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689, 696-97 (1941).

See Adv. Comm. Note to Fed. R. Evid. 407 ("(subsequent remedial measure) is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence"); G. Lilly, An Introduction to the Law of Evidence § 48, at 150-51 (1978) ("An after-the-incident

precautionary measure may reflect merely the exercise of extraordinary caution … and may not indicate the actor's belief that the condition in question was really hazardous"). It would be unfair to penalize such an individual by permitting his conduct to be introduced as evidence of his negligence because it is clear that his act could be that done by a supercautious man and not that required of a reasonable man. As Professor Lilly has written: "In negligence cases, liability attaches if the defendant acted unreasonably in view of the facts known (or which should have been known) to him before the incident in question. An after-incident remedial measure is usually taken on the basis of the additional facts revealed by the accident or injury. There is a risk that the trier, particularly a jury, might not keep this important distinction clearly in mind and might too easily infer prior knowledge from the subsequent remedial acts, which were generated by the knowledge learned from the incident itself." *Id.* at 152. *See also* 2 Wigmore, Evidence § 283, at 174-75 (Chadbourn rev. 1979).

POLYSYLLOGISMS

A polysyllogism is a series of syllogisms in which the conclusion of one is a premise of the next. In such a series the syllogism whose conclusion becomes a succeeding premise is called a *prosyllogism;* a syllogism in which one premise is the conclusion of a preceding syllogism is called an *episyllogism.* If the series contains more than one syllogism, then every syllogism except the first and the last will be both a prosyllogism and an episyllogism.

Inter-Tribal Council of Nevada, Inc. v. Hodel
856 F.2d 1344, 1349-50 (9th Cir. 1988)

For the plaintiff to prevail on the question of standing to seek a forfeiture under 25 U.S.C. § 293(a), it must prove that it is the former beneficial owner of the Stewart School site. We have concluded, as did the district court, that the Council lacks standing because it has not proved that it is the former beneficial owner of the property.

The Council's best case scenario is drawn primarily, if not exclusively, from section 8 of the 1887 Nevada statute, which provides:

> All lands purchased under the provisions of this Act shall be conveyed to said Indian School Commission in *trust for the benefit of such school….* 1887 Nev. Stat. ch. XII.

This provision forms the major premise of the Council's first syllogism. From this premise, the Council argues that it represents the majority, if not the entirety, of the Indian population of Nevada for whose benefit the school was established. From these two premises, the Council draws the conclusion that the land was conveyed in trust for the benefit of its member tribes, as contemplated in the 1887 Nevada statute.

The conclusion of this first syllogism then becomes a building block for the Council's second syllogism, which is based on 25 U.S.C. § 293(a). The major premise here is that the Secretary of the Interior may not convey the property without the consent of the "former beneficial owner." The minor premise is that, as concluded above, the Council (in its representative capacity) is the former beneficial owner of the land. Therefore, the Council concludes, the Secretary may not convey the property without its consent.

The difficulty with the prosyllogism based on the 1887 Nevada statute, and the resulting episyllogism based on section 293(a), is the Council's initial conclusion that the land was conveyed in trust for the benefit of the tribes it represents. The appellees argue that the

tracts in question were never conveyed to the Indian School Commission in trust for anyone. Rather the tracts were conveyed directly to the federal government by the private owners in fee simple. Moreover, appellees assert, the Nevada statute's language does not support the suggestion that a trust was to be implied if the land was conveyed directly to the United States, instead of to the Commission. Furthermore, appellees contend, even if a trust had been implied, the Nevada statute did not contemplate a trust for the benefit of the Council, or a particular Nevada tribe, or the Nevada Indian population in general.

The Nevada statute explicitly described the limitation of any trust: "for the benefit of such school." It is not without significance that when Congress decided to close the Stewart Indian School, only 27 students enrolled in the school came from Nevada. The remainder of the 400-student population came from other states, the majority from Arizona and California. This raises the question of whether Nevada Indians, whose children represented 6.75% of the school's population, could properly be considered the sole beneficiaries of any trust established for the benefit of the school. We think not.

A key premise of the Council's argument anchored in the Nevada statute, therefore, has no support in the statute itself. The land was not conveyed to the Indian School Commission in trust for anyone; it was conveyed to the federal government in fee simple. The only trust that was expressed or implied was (a) if the conveyance was to the Commission and (b) "for the benefit of such school," and not to any Indian tribe, band or group. Accordingly, because the premise has no basis, the argument is not sound and its conclusion is flawed. This flawed conclusion may not then serve as the minor premise in the Council's critical contention that it is the former beneficial owner as contemplated by section 293(a).[5]

VALUE JUDGMENTS—CHOICE OF PREMISES

A "performative utterance" is an expression that is not only articulated but is also operative.[6] Because judicial decisions fit this description, we can say that a court's public performance in reaching a conclusion is at least as important as the conclusion. If we evaluate a decision in terms not of "right" or "wrong," nor of subjective agreement or disagreement with the result, but rather in terms of thoughtful and disinterested weighing of conflicting social interests, it becomes critical that the "performative utterance" include a societally acceptable explanation, set forth in logical form.

But in the formulation of major and minor premises in the law, there is more at work than rules of logic. The selection of a major premise, as we have emphasized before, is a *value judgment.* The advocate or the judge makes this value judgment. A choice is made. No unerring rules of logic dictate this important decision, which is the critical threshold, the prelude to the operation of the rules of logic.

In his classic essay, "The Nature of the Judicial Process," Cardozo explained that sometimes the source of the law to be embodied in a value judgment, which we relate to selection of our *premises,* is obvious, as when the Constitution or a statute applies. In these situations, the judge simply obeys the constitutional or statutory rule. But when no constitutional or statutory mandate controls, the judge must "compare the case before him with the precedents, whether stored in his mind or hidden in the books."[7] If the comparison yields a perfect fit, if both the law and its application are clear, the task is simple. If the law is unclear, it is necessary to "extract from the precedents the underlying principle [and] then determine the path or direction along which the principle is to move and develop, if it is not to wither and die."[8]

Cardozo cautioned that decisions "do not unfold their principles for the asking. They yield up their kernel slowly and painfully."[9] He discussed what he called the "organons" of the judicial process—the instruments by which we fix the bounds and tendencies of that principle's development and growth. He discussed also the use of

history and custom, and what in 1921 was considered a revolutionary technique of decision-making—the method of sociology, a method extremely legitimate and prevalent today known not by the name “sociology,” but public policy and social welfare.

By describing the elements at work in the caldron, Cardozo was performing the valued task of a traditional common-law judicial analyst. That he ranks with Oliver Wendell Holmes, Jr., as one of our greatest common-law judges is scarcely now debatable. However, to the extent that he developed, persuasively and gracefully, a legitimation for result-oriented jurisprudence, Cardozo became more a legal philosopher than a common-law judge. He sought what *ought* to be the law, in contrast to what *is.* For Cardozo, the preferred gap-filler in addressing novel questions of law was the social welfare, defined as “public policy, the good of the collective body,” or “the social gain that is wrought by adherence to the standards of right conduct, which find expression in the *mores* of the community.”[10] To him “the power of social justice,” among all organons of the decision-making process, was the force which was becoming the greatest directive force of the law.[11]

Professor Wisdom suggests that the process of selecting a controlling legal precept, which we relate to the selection of the syllogism’s premises, “becomes a matter of weighing the cumulative effect of one group of severally inconclusive items against the cumulative effect of another group of severally inconclusive items.”[12] In exercising this choice, courts do not necessarily appeal to any rational or objective criteria. Essentially they exercise a value judgment and should be candidly recognized as doing so. Moreover, because courts have the power to alter the content of rules, no immutability attaches to their major or beginning premises. The desirability of *elegantia juris,* with its concomitants of stability and reckonability, often must be subordinated to the desirability of rule revision in the light of claims, demands or desires asserted in the public interest in changing societal conditions.

Once the controlling rule or principle has been selected or modified, however, we must use canons of logic to reach a formally correct conclusion. Dewey described the process as “formal

consistency, consistency of concepts with one another."[13] Logical validity is concerned with the relation between propositions, rather than with the content of the propositions themselves. Thus, the reasoning process can be said to require formal correctness, rather than material desirability.

Legal analysis is a three-step procedure: (1) selecting or choosing the legal precept, (2) interpreting that precept and (3) applying it, as interpreted, to the case at hand. The procedure may be viewed also from the perspective of the relations between logical propositions. Thus, steps 1 and 2, selecting and interpreting the legal precept, refer to the major premise of a syllogism. Step 3, applying the selected and interpreted legal precept, figures largely in the minor premise. If one accepts the value judgment expressed in the major premise, and if the minor premise is valid, then, theoretically, one must accept the conclusion. But we know that it is not always that neat, for the process often fails. One may accept a conclusion as a valid legal norm and use it as a precedent, although one disagrees with the beginning premise which "logically" led to the conclusion.

PREMISES: VALIDITY AND SOUNDNESS

As we have emphasized before, to understand fully the categorical syllogism, we must remember that the rules of formal logic deal only with its “validity” or “soundness” in terms of the six rules of the syllogism. There is a distinction between the validity of a syllogism and the truth of its contents. Assume we said this:

All middle terms are major terms.

Minor term is a part of middle term.

Therefore, all minor terms are major terms.

Or consider this formally correct, but truly ridiculous, syllogism we set forth here to emphasize that proper content must be poured into the syllogism’s terms:

All federal judges have green blood.

Judge Aldisert is a federal judge.

Therefore, Judge Aldisert has green blood.

The major premises in both these examples lack truthfulness.

The bottom line: The validity of a syllogism and the soundness of the argument’s structure deal only with relations between the premises. Validity deals only with form. It has absolutely nothing to do with content. Arguments, therefore, may be logically valid, yet absolutely nonsensical. Assuming valid form, the essence of argument must always be a search for the truth or falsity of the premises. Where inductive reasoning is used to determine the major premise, the search is for a result that is more likely true than not. Once this determination is made in constructing the premise in a deductive syllogism, however, we do not say that the conclusion *probably* will follow; the conclusion *must* follow. Remember, in deductive logic, the conclusion *must* follow from the premises. Watch out for *GIGO:* garbage in, garbage out.

Hogan v. Florida
427 So. 2d 202, 203 (1983)

Appellant was convicted of attempting sexual battery and kidnapping, and sentenced in two consecutive thirty-year terms in prison. Initially appellant contends that the trial court erred in requiring him to be tried by a six person jury instead of a jury of twelve. His argument is that sexual battery committed by one over 18 years upon a victim 11 years or younger is a capital felony. Section 913.10, Florida Statutes (1981), and Florida Rule of Criminal Procedure 3.270 are identical and provide that: “Twelve persons shall constitute a jury to try all capital cases.” Therefore, since he was being tried for a capital crime, appellant was entitled to the benefits of a twelve person jury.

The argument is logical, but fallacious, because the major premise is invalid. Although the statute cited does provide that the sexual battery of a victim eleven years or younger by one over eighteen years is a capital felony, case law demonstrates that is no longer correct. As the Supreme Court of Florida said: … A capital offense is one that is punishable by death. In Florida, murder in the first degree is the only existing capital offense.

Lamon v. McDonnell Douglas Corp.
19 Wash. App. 5-15 576 P.2d 426, 437 (1978)
(Anderson, J., dissenting)

[An airline stewardess brought a products liability case based on strict tort liability theory against an aircraft manufacturer for injuries sustained when she stepped into an open emergency hatch of a DC-10 airplane. Her expert witness stated the hatch was unreasonably dangerous. The Superior Court entered summary judgment for the manufacturer, and the stewardess appealed. The Court of Appeals held that the testimony of plaintiff's expert witness created a substantial fact issue as to whether design of the escape hatch was defect-free, precluding summary judgment.]

In its final analysis, the fallacy of letting an expert witness's unsupported opinion create a fact issue in a case is perhaps better answered by logic than by legal precedent. Illustrative of this is a story told of Abraham Lincoln during his trial lawyer days. Lincoln is said to have cross-examined a witness as follows:

> "How many legs does a horse have?"
>
> "Four," said the witness.
>
> "Right," said Abe.
>
> "Now, if you call the tail a leg, how many legs does a horse have?"
>
> "Five," answered the witness.
>
> "Nope," said Abe, "callin' a tail a leg don't make it a leg."

So it is here that merely calling a product unreasonably dangerous does not, without more, make it so.

Legal reasoning is subject to more scrutiny than any other aspect of the judicial process. Forming the very fiber of argument and persuasion, it is the heart of both the written brief and the court's opinion, the essence of the process of justification. It constitutes the

foundation of the case system by which law students are trained. Formal criticism of the "reasoning" of courts seems, at times, to form the *raison d'etre* for law review publications. Yet there is little analysis of reasoning *qua* reasoning. Often an alleged attack on the "reasoning" of the court is really a disagreement with the value judgment implicit in the court's major premise—a disagreement with the court's selection and interpretation of the applicable legal precept. This disagreement with the selection of legal precepts, "the authoritative starting points for judicial reasoning" in Dean Pound's formulation, is, in reality, a quarrel with the acceptance of the legal norm or, in many cases, a philosophical difference with the values reflected in the choice. Criticism of court opinions would be more professional, briefs more clear, points of friction between litigants earlier identified and accommodated, if resort to the cosmos of "reasoning" were minimized, and attention directed instead to the precise components of that cosmos. It is not too much to ask whether one disagrees with the choice of the "authoritative starting point" and, if so, why; or whether one's quarrel is with the formal correctness of the syllogism used and, if so, where. The facts in the minor premise might not be subsumed in the major, or the conclusion might lack elements common to the major and minor premises. As Professor Levi explains, there might be a "logical fallacy … the fallacy of the undistributed middle or [in hypothetical syllogisms] the fallacy of assuming the antecedent is true because the consequent has been affirmed." We will describe these particular fallacies in our discussion of fallacies of form.

To adequately evaluate the reasoning in a legal argument, we must strip away extraneous detail and verbiage. We must reduce the argument to the components of the syllogism. Do not look for spare, laconic briefs or judicial opinions setting forth only the bare bones of a syllogism. Very few do. Lawyers and judges write and talk too much. Arguments are loaded with declarative sentences that are not the necessary propositions of our argument. They are not the necessary premises of the syllogism. Rather, they are inserted to convince the reader to accept the argument in an adversarial environment. But the argument eventually stands or falls on the bare bones of the syllogism. Thus, a fifty-page brief in the United States

Court of Appeals is soon reduced to a fifteen minute oral presentation that features a lively colloquy between the judges and the lawyers. In the judges' conference following argument, a decision is often reached by mere recitation of the naked syllogism. This is because experienced judges are familiar with the subject matter. They soon cut through to the basic structure of the argument because they are familiar with most, if not all, of the reasons supporting the propositions. Fortunately, or unfortunately, when the statement of reasons appears in print, however, judicial opinions are filled with countless pages giving reasons for (1) selecting the major premise, (2) interpreting the major premise, (3) interpreting the minor premise, (4) applying the premises to the facts found by the fact-finder and (5) stating the conclusion. Too often judicial opinions are overwritten and it becomes necessary always to identify the precise structure of the argument by stripping away explanatory materials. It is important not to confuse these materials with the critical framework of the argument.

RULES OF THE CATEGORICAL SYLLOGISM

All logicians refer to six rules for categorical syllogisms.[14] They vary in language only slightly. These rules are traceable to definitions first articulated by Aristotle, now summarized by the principle *dictum de omni et nullo* because it is an axiom concerning *all* or *none* of a class. For our purposes, I will use the formulations of Professor Copi.

> **Rule One: A valid categorical syllogism must contain exactly three terms, each of which is used in the same sense throughout the argument.**

Three terms (major, middle and minor) must be involved in every valid syllogism. Any categorical syllogism that contains more than three terms is said to commit the formal Fallacy of Four Terms *(quaternio terminorem)* (see Chapter 10). If a term is used in different senses in the argument, it is being used equivocally, and the informal fallacy of equivocation results (see Chapter 12).

> **Rule Two: In a valid categorical syllogism, the middle term must be distributed in at least one premise.**

Any syllogism that violates Rule Two is said to commit the formal Fallacy of the Undistributed Middle (see Chapter 10). For the two terms of the conclusion (minor and major) to be connected through the third (middle) term, at least one of them must be related to the whole of the class designated by the third or middle term. Otherwise each may be connected with a different part of that class, and not necessarily connected at all. This is what happens in the following:

> All dogs are mammals.
>
> All cats are mammals.
>
> Therefore, all cats are dogs.

Dogs are included in part of the class of mammals and cats are included in part of the class of mammals. But different parts of the class may be (and, in this case, are) involved so that the middle term does not connect the major and minor terms. Because it is through

the middle term that the connection between the extreme terms is secured, it is essential that the same part of the middle term should be related to both extreme terms.

In the law, the fallacy may occur when the middle term is not broad enough to encompass the entire class of which the minor term is a part. Thus, we cannot proceed too far in the following major premise in a contest over a will's validity:

> In some non-holographic wills, the testator's signature must be witnessed.

The middle term "In some non-holographic wills" is not distributed. It does not represent the whole of a class. For the argument to proceed properly, the term must read "In all non-holographic wills."

> **Rule Three: In a valid categorical syllogism, no term can be distributed in the conclusion which is not distributed in the premise.**

Because to distribute a term is to take in its whole extent, a distributed term refers to every member contained under the term. If a term is undistributed in one of the premises (Some defendants found guilty of the crime of mopery must go to jail under the Sentencing Guidelines), the conclusion must not be distributed (and refer to all such defendants) because the conclusion would go beyond the data. The rule rests upon the fundamental principle that if the data refer to some only of a class, no conclusion referring to every member of the class can be deduced. Violation of this rule is known as a formal Fallacy of Illicit Major or Illicit Minor as set forth in Chapter 10.

In the law, this rule is closely related to Rule Two, depending on how the lawyer or judge structures the argument.

> **Rule Four: No categorical syllogism is valid which has two negative premises.**

This rule proceeds from the same consideration as in Rule Three, i.e., that both premises must refer to the same part of the middle term, whether by inclusion in one case or exclusion in the other. If all

that were given were the exclusion of the minor and the major term from the middle in the form of negative premises, no connection between the minor and the major would be established.

No U.S. Circuit Judges are infallible.

No Russian citizens are U.S. Circuit Judges.

From this no connection between those who are infallible and Russians can be deduced.

Rule Five: If either premise of a valid categorical syllogism is negative, the conclusion must be negative.

An affirmative conclusion asserts that one class is either wholly or partly contained in a second. This can be justified only by premises that assert the existence of a third class that contains the first and is itself contained in the second. To entail an affirmative conclusion both premises must assert class inclusion.

All oral real estate contracts are invalid.

This contract is an oral real estate contract.

This contract is invalid.

The middle term “All oral real estate contracts” is included the class of the major term, invalid contracts. The minor term, “This contract” is included in the class of the middle term, “All oral real estate contracts.”

But class inclusion can be stated only by affirmative propositions. Because an affirmative conclusion can only follow from affirmative premises, if either premise is negative, the conclusion cannot be affirmative; it must be negative, too. Because it is so obvious, in the law we seldom encounter the Fallacy of Drawing an Affirmative Conclusion from a Negative Premise.

Rule Six: No valid categorical syllogism with a particular conclusion can have two universal premises.

This is but to say that an undistributed term, usually the minor term, must appear in one of the premises. Otherwise, it may not

properly appear in the conclusion for the first time.

As we shall see in Chapters 9 and 10, a departure from these rules results in a fallacy of form, or formal fallacy. Unfortunately, such fallacies occur frequently in oral arguments, written briefs and judges' opinions.

A MISSION:
LOCATE THE SYLLOGISMS IN THE FOLLOWING CASES

We are now ready to examine excerpts from leading United States Supreme Court cases. Read them not for their substantive content, but for their syllogisms. Identify the major and minor premises. In what order do the premises appear? Does the conclusion appear first? Look out for enthymemes and polysyllogisms, and decide if the court leaped to conclusions or followed logical order. Test your knowledge of the foregoing materials by locating the syllogisms in the following excerpts. After completing the exercise, test your results against the analysis set forth in Appendix “B” at the end of the book.

Marbury v. Madison
5 U.S. (1 Cranch) 137, 177-78 (1803)

[In the Judiciary Act, Congress had authorized the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The ultimate question in this case was whether the Court had the power to issue mandamus directed to Secretary of State James Madison, because he was "such a person holding office." The Court concluded that it had no jurisdiction to issue the writ and declared the statute giving the Court jurisdiction to be repugnant under Article III, section 2 of the Constitution. Chief Justice Marshall reasoned:]

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

McCulloch v. State of Maryland
17 U.S. (4 Wheat.) 316, 435-36 (1819)

[This case required interpreting the Supremacy Clause. Speaking through John Marshall, the Court held that Maryland could not tax the operations of a branch of the bank of the United States.]

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

Dred Scott v. Sandford
60 U.S. (19 How.) 393, 403, 408, 416, 426, 454, 572, 576, 582 (1856)

Mr. Chief Justice Taney delivered the opinion of the Court:

The question is simply this: can a Negro whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen. One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a Negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen Colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different Colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different Colonies furnishes positive and indisputable proof of this fact….

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen states by which that instrument was framed; and it is hardly consistent with the respect due to these states to suppose that they regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the state sovereignties, to assume they had deemed it just and necessary thus to stigmatize,

and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens….

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different states, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we not give to the word “citizen” and the word “people.”

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it….

Mr. Justice Curtis, dissenting.

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those states, but such of them as had the other

necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

I can find nothing in the Constitution which, *proprio vigore,* deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any state after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any state, who is a citizen of that state by force of its Constitution or laws, is also a citizen of the United States.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original states, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that state. In some of the states, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the Constitution was ordained and established, but in at least five of the states they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

Youngstown Sheet & Tube Co. v. Sawyer
343 U.S. 579, 582-83, 585-87 (1952)

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.

On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a.m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel.

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.

The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive power shall be vested in a President;" that "he shall take

Care that the Laws be faithfully executed"; and that "he shall be Commander-in-Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Brown v. Board of Education
347 U.S. 483, 492-95 (1954)

There are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to

[retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority [Famous footnote 11 setting forth titles of books and articles showing deleterious effects of segregation in education]. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated from whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws, guaranteed by the Fourteenth Amendment.

Griswold v. Connecticut
381 U.S. 479, 484-86 (1965)

[A Connecticut statute made it a crime to use any drug, medicinal article or instrument to prevent conception and that any person who assists, abets, counsels or causes another to commit any offense may be prosecuted as if he were the offender. Griswold was convicted for giving medical advice to married persons and prescribing contraceptive devices. On appeal the Court declared the statute unconstitutional.]

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law, which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means of having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" [citation omitted]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of

the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Roe v. Wade
410 U.S. 113, 129, 152-53, 172-73 (1973)

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras… or among those rights reserved to the people by the Ninth Amendment.

The Constitution does not explicitly mention any right of privacy. In a line of decisions the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment … in the Fourth and Fifth Amendments … in the penumbras of the Bill of Rights … in the Ninth Amendment … or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment …. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," … are included in this guarantee of personal privacy [and thus requiring strict scrutiny rather than the less stringent test of examining whether the legislation has a rational relation to a valid state objective]. They also make it clear that the right has some extension to activities relating to marriage … procreation … contraception … family relationships … and child rearing and education ….

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Rehnquist, J., dissenting.

I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective…. The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective…..But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

Bowers v. Hardwick
478 U.S. 186, 190-91, 195-96 (1986)

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was … described as dealing with child rearing and education; … with family relationships; … with procreation; … with marriage; … with contraception; and … with abortion. [Certain] cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between

consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, [we have] asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots…. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults…. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on Stanley v. Georgia, 394 U.S. 557 (1969), where the

Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of his home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Miller v. Johnson
115 S.Ct. 2475 (1995)

The constitutionality of Georgia's congressional redistricting plan is at issue here. In Shaw v. Reno, 509 U.S. 630 (1993), we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced in *Shaw,* and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Its central mandate is racial neutrality in governmental decision-making. Though application of this imperative raises difficult questions, the basic principle is straightforward: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination …. This perception of racial and ethnic distinctions is rooted in our nation's constitutional and demographic history." This rule obtains with equal force regardless of "the race of those burdened or benefited by a particular classification."

In Shaw v. Reno, we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, an application of these principles to electoral districting is a most delicate task. Our analysis began from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the course of [the Equal Protection Clause's] prohibition." This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but "unexplainable on grounds other than race." Applying this basic Equal Protection analysis in the voting rights context, we held that "redistricting legislation that is so bizarre

on its face that it is 'unexplainable on grounds other than race,'… demands the same close scrutiny that we give other state laws that classify citizens by race."

To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. There is a "significant state interest in eradicating the effects of past racial discrimination." The State does not argue, however, that it created the Eleventh District to remedy past discrimination, and with good reason. There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands. Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw,* compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

Adarand Constructors, Inc. v. Pena
115 S.Ct. 2097 (1995)

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause.

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals." Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to

section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

Adarand's claim arises under the Fifth Amendment of the Constitution, which provides that "No person shall … be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall… deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

Cases continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, Fifth Amendment equal protection problems are discussed on the assumption that Fourteenth Amendment precedents are controlling: The Equal Protection Clause demands that racial classifications be subjected to the 'most rigid scrutiny.' Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n. 2 (1975); *see also* Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); United States v. Paradise, 480 U.S. 149, 166, n. 16 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate.

The Court resolved the issue, at least in part, in 1989. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny."

With *Croson,* the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in Fullilove v. Klutzniock, 448 U.S. 448 (1980), cannot be dispositive here," because *Croson's* facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment.

Our action today makes explicit: federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.

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1. W. Stanley Jevons, Elementary Lessons in Logic: Deductive and Inductive 121-22 (1965).

2. For a detailed discussion of A, E, I and O and how they are applied to propositions, *see* Irving M. Copi and Carl Cohen, Introduction to Logic 210, 214 (9th ed. 1994).

3. 227 N.Y. 382, 11 N.E. 1050 (1960).

4. 410 U.S. 113, 153 (1973).

5. *See also* Hernandez v. Denton, 861 F.2d 1421, 1438-39 (9th Cir. 1988).

6. John Langshaw Austin, Philosophical Papers 233-41 (1961).

7. Benjamin N. Cardozo, The Nature of the Judicial Process 19 (1921).

8. *Id.* at 28.

9. *Id.* at 29.

10. *Id.* at 71-72.

11. *Id.* at 65-66.

12. John Wisdom, Philosophy and Psycho-Analysis 157 (1953).

13. John Dewey, How We Think 20 (1933).

14. Irving M. Copi & Carl Cohen, Introduction to Logic 261-268 (9th ed. 1994); W. Stanley Jevons, Elementary Lessons in Logic 127-129 (2d ed. 1952); L.S. Stebbing, A Modern Introduction to Logic 87-88 (6th ed. 1948); James Edwin Creighton, An Introductory Logic 139 (1898); Ralph M. Eaton, General Logic, An Introductory Survey 95-100 (1931); John C. Cooley, A Primer of Formal Logic 306 (1942).