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Teaching Legal Analysis Using a Pluralistic Model of Law

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TEACHING LEGAL ANALYSIS USING A PLURALISTIC MODEL OF LAW

by Wilson Huhn*

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions. Benjamin N. Cardozo, *The Nature of the Judicial Process* 10 (1922).

[T]he values society labors to preserve are contradictory. Philip Bobbitt, *Constitutional Interpretation* 181 (1991).

ABSTRACT

* B.A. Yale University, 1972; J.D. Cornell Law School, 1977; McDowell Professor of Law, University of Akron School of Law; Research Fellow, Seiberling Constitutional Law Center. I am grateful to my colleagues at the University of Akron School of Law, in particular Professor Samuel Oddi, Dean Richard Aynes, Associate Professor Jane Moriarty, and Associate Professor Alan Newman, for their valuable suggestions, and I wish to acknowledge the dedicated efforts of my research assistant Nora Whitten. Research for this article was funded under a summer grant from the University of Akron School of Law.

The defining characteristic of pluralistic models of law is that they recognize multiple forms of arguments as legitimate. The pluralistic model of law proposed in this article suggests that there are five kinds of valid legal arguments: arguments may be based upon text, intent, precedent, tradition, or policy. Each type of legal argument is constructed from a different set of evidence of what the law is, and is subject to characteristic kinds of attacks. The persuasiveness of an argument is measured by its susceptibility to both “intramodal” and “intermodal” attacks. Intramodal attacks challenge arguments on their own terms, while intermodal critiques are addressed to the validity or weight to be accorded to each kind of argument.

A primary purpose of legal education is to teach the skills of legal analysis -- the ability to identify, generate, and evaluate legal arguments. The pluralistic model of law is an effective tool for teaching these skills.

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INTRODUCTION

There are different ways to categorize legal arguments. Perhaps the most common method is to identify different legal arguments with specific schools of jurisprudence or moral philosophy. This is the standard approach followed by leading scholars such as Lon Fuller, who in a classic article illustrated how a murder case could be analyzed utilizing jurisprudential frameworks such as positivism, natural law, social contract, practical wisdom, and legal realism.¹ Another example of this method of characterizing legal arguments is that of R. Randall Kelso, who identified four schools of thought that have dominated the reasoning of the Supreme Court at different periods of American history.² Identifying different types of legal arguments by their jurisprudential school is useful for showing the relationship of legal thought to classic forms of political and moral reasoning, and for sketching trends of analysis over time.³

¹ Lon L. Fuller, *The Case of the Speluncean Explorers*, 112 Harv. L. Rev. 1851 (1999), reprinted from 62 Harv. L. Rev. 616 (1949). Daniel T. Ostas consciously applied Fuller's technique to a contracts case in *Teaching Legal Philosophy in the Business Law Classroom: The Case of the Windblown Widow*, 11 Journal of Legal Studies Education 209 (1999). Ostas' fictional judges variously represent Libertarianism, Positivism, Progressivism, Law and Economics, and Critical Legal Studies. *Id.* at 226.

² Kelso identifies these "constitutional styles" as the Natural Law Approach, which was the dominant analytical technique from 1789 to 1872; the Formalist Approach, which controlled from 1872 to 1937; the Holmesian Approach, from 1937 to 1954; and the Instrumentalist Approach which was dominant from 1954 to 1986. See R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in the American Legal History*, 29 Val. L. Rev. 121 (1994). Kelso also utilized these historical categories to describe contemporary styles of statutory analysis in R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 Pepp. L. Rev. 37 (1997).

³ For example, John Osborn traces "the shift of favor within the legal and philosophical communities from the principles of natural law upon which the country was founded to a more utilitarian legal positivism." John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 Harv. J. on Legis. 115, 142 (1999) (hereinafter *Legal Philosophy*). The leading historical treatise in this field is MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN*

Another powerful strategy for classifying legal arguments is to identify the logical structure of the underlying reasoning. Richard Posner and Vincent Wellman, for example, identify three categories of legal reasoning: formalism, analogy, and realism.⁴ The advantage of this system of classification is that the logical strength of different kinds of arguments can be compared and assessed. This system of classification is useful in evaluating the relative merits of formalism and realism, and inquiring into the structure of reasoning by analogy.

Over the last two decades legal scholars have developed a third method of categorizing legal arguments.⁵ This third approach is primarily descriptive;⁶ it attempts to describe the variety of

LAW, 1780-1860 (1977)(hereinafter TRANSFORMATION 1780-1860) and THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992)(hereinafter TRANSFORMATION 1870-1960).

⁴ Wellman identifies these forms of legal reasoning as "deduction," "analogy," and "practical reasoning." Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 Colo. L. Rev. 45, 64, 80, 87 (1985). Judge Posner refers to these types of analysis as "syllogistic reasoning," "reasoning by analogy," and "practical reasoning." RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 39, 71, 86 (1990). See also Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 Harv. L. Rev. 923 (1996) (hereinafter *Exemplary Reasoning*). "Law, considered as an intellectual discipline, consists of certain methods of argument." *Id.* at 925. Brewer identifies these methods as deduction, induction, abduction, and reasoning by analogy. *Id.* at 926.

⁵ The principal works setting forth these descriptive theories of interpretation are PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982), PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (hereinafter *INTERPRETATION*), and William N. Eskridge, Jr., and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stanford L. Rev. 321 (1990) (hereinafter *Practical Reasoning*).

⁶ Bobbitt contends that his model of legal argument is purely descriptive. Philip Bobbitt, *Reflections Inspired by My Critics*, 72 Tex. L. Rev. 1869, 1913-1914 (1994) (hereinafter *Reflections*). "If I refuse to accept a form of argument – such as natural law – as legitimate, it is only because I have not generally encountered it in the rationales offered for constitutional decisions made on a legal basis."

arguments that lawyers employ in the practice of law and that judges use in their opinions. Akhil Amar, for example, recently observed that we interpret the Constitution

"through a variety of techniques -- by parsing the text of a given clause, by mining the Constitution's history, by deducing entailments of the institutional structure it outlines, by weighing the practicalities of proposed readings of it, by appealing to judicial cases decided under it, and by invoking the American ideals it embraces."⁷

Amar states, "Text, history, structure, prudence, and doctrine--these are the basic building blocks of conventional constitutional argument."⁸

This approach has been variously called "eclectic," "polycentric," and "pluralistic." Eskridge and Frickey described their approach to statutory interpretation, in which "the Court considers a broad range of textual, historical, and evolutive evidence when it interprets statutes," as "eclectic"⁹ and "polycentric."¹⁰ The term "pluralistic" was coined by Stephen Griffin, who defined the term as follows:

Id. at 1916.

⁷ Akhil Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999). In this significant article Amar discusses examples of the various types of intratextual arguments. See *supra* notes 151-152 and accompanying text.

⁸ Id. at 754. To this list Amar adds Bobbitt's category of "ethical argument." Id. at 754-755.

⁹ Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 322 (1990).

¹⁰ Id. at 348.

"Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the constitution."¹¹ Michael Dorf prefers the term "eclectic" to describe theories that "recognize that courts employ a variety of forms of argument," and eschews the term "pluralistic" in order to avoid confusion with the concept of cultural pluralism and to avoid implying that there is more than one right answer to questions of constitutional law.¹²

I accept the term "pluralistic" for this descriptive model of legal argument because it reflects the fact that law arises from value choices made by different persons at different times, and it acknowledges that there are different ways to determine what choices they made. The heads of administrative agencies, judges, legislators, and the people all make law; there are a variety of methods for interpreting the law they have made; and as a result our interpretations of the law are sometimes contradictory.

Several authors have observed that pluralistic theories have great potential for application to legal education.¹³ The purpose of this article is to describe how this approach may be used to teach the skills of legal analysis.¹⁴

¹¹ Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 Tex. L. Rev. 1753 (1994) (hereinafter *Pluralism*). Griffin traces the pluralistic approach to Justice Joseph Story, who explicitly looked to text, intent, and precedent in interpreting the Constitution. *Id.* at 1755.

¹² Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L. J. 1765, 1768 fn. 14 (1997).

¹³ See *infra* note 227.

¹⁴ I have taught law for sixteen years. I currently teach Constitutional Law, Health Law, and Negotiable Instruments; in the past I have also taught Secured Transactions, Administrative Law,

The leading exponents of the pluralistic approach are Philip Bobbitt, William Eskridge, and Philip Frickey. They share a profound understanding about the nature of law. In their view, the law is not essentially a unitary system that can be explained by a "grand unifying theory"¹⁵ or "foundational analysis."¹⁶ Instead, our system of law is characterized by the fact that there are multiple legitimate forms of legal arguments.¹⁷

Bobbitt, a scholar in the field of Constitutional Law, has identified six heuristic devices which he calls "modalities" that are utilized in interpreting the Constitution.¹⁸ He describes these six interpretative modalities as "historical," "textual," "structural," "doctrinal," "ethical," and "prudential."¹⁹ Eskridge and

Evidence, and seminars in Advanced Evidence, Law and Genetics, and Law and Ethical Philosophy. My former students from all of these courses will recognize the pluralistic approach described in this article.

¹⁵ Paul E. McGreal, *Ambition's Playground*, 68 Fordham L. Rev. 1107 (2000).

¹⁶ "Foundational analysis" is the theory that one or a select few kinds of legal arguments are valid, and that other forms of argument are invalid. See *infra* notes 176-190 and accompanying text. Bobbitt characterizes his own position as "antifoundationalist." Philip Bobbitt, *Reflections Inspired by My Critics*, 72 Tex. L. Rev. 1869, 1872 (1994) (hereinafter *Reflections*). Eskridge and Frickey call foundationalism a "flawed strategy." Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 322.

¹⁷ BOBBITT, INTERPRETATION, *supra* note 5, at x; Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 321-322.

¹⁸ BOBBITT, INTERPRETATION, *supra* note 5, at 12-13 (1991).

¹⁹ *Id.* Bobbitt contends that these are the *only* legitimate means of interpreting the Constitution: "There is no constitutional legal argument outside these modalities." *Id.* at 22.

Frickey developed an analogous model of statutory interpretation in which they suggest that in deciding what statutes mean courts take into account "textual," "historical," and "evolutive" considerations.²⁰ These pluralistic approaches have gained wide acceptance among legal scholars.²¹

Pluralistic theories may be contrasted to "foundational" theories of legal interpretation.²²

Foundational theories attempt to explain or justify the law in terms of a single modality or heuristic device. Adherents of foundational theories contend that the law is legitimately based upon one method of interpretation. Such theories have the advantage of increased predictability and determinism, but the disadvantage of such theories is they accept only one conception of justice as valid. Pluralistic theories,

²⁰ Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 322 (1990).

²¹ See, e.g., Akhil Amar, *In Praise of Bobbitt*, 72 Tex. L. Rev. 1704 (1994). Even Mark Tushnet, who is generally critical of Bobbitt's theory, admits that "Bobbitt has materially advanced constitutional scholarship by providing a grammar of constitutional arguments." Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 Tex. L. Rev. 1707, 1730 (1994). Michael Curtis has acknowledged that "There are well recognized methods of interpreting the Constitution." Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughterhouse Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B. C. L. Rev. 1, 19 (1996) (hereinafter *Resurrecting*). Richard Fallon notes that "Judges and constitutional lawyers generally acknowledge that a variety of different kinds of argument have a legitimate place in constitutional interpretation and debate." Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987) (hereinafter *Constructivist Coherence*).

Eskridge's principal work, *DYNAMIC STATUTORY INTERPRETATION* (1994), has been described as "a remarkable tour de force, taking us through every major strain of thought and doctrine that has worked its way into our thinking about statutory interpretation" William D. Popkin, [book review], 45 J. Legal Educ. 297 (1995). Eskridge's approach is entirely consistent with the ideal of the pluralistic model: "Throughout the book, although Eskridge's conclusions are often debatable, he never fails to engage opposing viewpoints honestly and to acknowledge their legitimacy." Farber, *Statutory Interpretation and the Idea of Progress*, 94 Mich. L. Rev. 1546, 1547 (1996) (hereinafter *Progress*).

²² For a more detailed examination of foundational theories, see *infra* notes 176-190.

on the other hand, recognize that there are different, and often contradictory, conceptions of justice, and that these different conceptions are reflected in the different interpretative modalities.²³ As Justice Felix Frankfurter observed, "[T]here is hardly a question of any real difficulty before the Court that does not entail more than one so-called principle."²⁴ For pluralists law is inherently indeterminate because valid but contradictory legal arguments potentially exist regarding the interpretation of the law.²⁵

However, pluralistic models of law are not synonymous with "rule skepticism." Rather, these models are attempts to identify the rules that lawyers and judges use to determine what the law is. As H.L.A. Hart noted,

"It is possible that, in a given society, judges might always first reach their decisions intuitively or 'by hunches,' and then merely choose from a catalogue of legal rules one which, they pretended, resembled the case in hand; they might then claim that this was the rule which they regarded as requiring their decision, although nothing else in their actions or words suggested that they regarded it as a rule binding on them. Some judicial

²³ See *infra* notes 188-190 and accompanying text.

²⁴ FELIX FRANKFURTER, OF LAW AND MEN 43 (1956). H.L.A. Hart agrees: "It is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. ... Frequently these considerations conflict, and courts are forced to balance or weigh them and to determine priorities among them." H.L.A. Hart, *Problems of Philosophy of Law*, 6 ENCYCLOPEDIA OF PHILOSOPHY 271 (Paul Edwards, ed. 1967).

²⁵ This is the problem of "intermodal conflict," discussed *infra* at notes 150-219 and accompanying text.

decisions may be like this, but it is surely evident that for the most part decisions, like the chess-player's moves, are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged.”²⁶

Part I of this article describes a pluralistic model of law which is based upon the theories of Bobbitt, Eskridge, and Frickey. There are five kinds of legal argument: text, intent, precedent, tradition, and policy. Each kind of argument may be considered an information set, a category of evidence that is admissible to prove what the law is.

Part II describes how to measure the persuasiveness of legal arguments. There are two ways to challenge legal arguments: intramodal and intermodal challenges. An intramodal attack challenges a legal argument on its own terms. Each kind of argument is subject to characteristic lines of attack; I identify twenty-five types of intramodal challenges. Intermodal attacks challenge the legitimacy or the weight of each kind of argument. Each kind of argument advances a different underlying purpose of our system of laws; the weight one assigns to each kind of argument reflects the ordering of these

²⁶ H.L.A. HART, *THE CONCEPT OF LAW* 140-141 (1998). Steven Burton characterizes the kind of analytical approach I use as “conventionalism,” as distinguished from “formalism” and “skepticism.”

“[T]here is an alternative to formalism and skepticism as explanations of the judicial process – that judges decide cases so as to accommodate a decision coherently with the facts and the legal experience in light of the totality of the legal community’s theories about law. This conventionalist alternative neither promises the certainty required by legal formalism nor resigns us to the arbitrariness implied by legal skepticism. It offers the possibility of decisions based on legal reasoning, where reasoning is dependent on the conventions of an interpretive community.” STEVEN BURTON, AN

underlying values. The persuasiveness of a legal argument is dependent upon both its intramodal strength and the weight accorded to the kind of argument asserted.

Part III suggests that the art of "thinking like a lawyer" consists of mastering the ability to understand, create, critique, and evaluate the five kinds of legal argument. In particular, I discuss how to teach students to critically evaluate policy arguments, and how to make the connection between rules and policies.

PART I

THE FIVE KINDS OF LEGAL ARGUMENTS

There are five kinds of legal arguments: *text*, *intent*, *precedent*, *tradition*, and *policy analysis*. Each kind of legal argument is based upon a different conception of justice; that is, a different source of the law.²⁷

Four kinds of legal argument are of ancient lineage, while the fifth, policy analysis, has been expressly acknowledged as a valid legal argument only in the twentieth century.

INTRODUCTION TO LAW AND LEGAL REASONING 191 (1985)(hereinafter LEGAL REASONING).

²⁷ In my opinion, four of the forms of argument are original sources of law. Law arises not only from the written text, but from what was intended by the lawgivers. Precedent and tradition not only inform the law; they are law. Policy arguments are not an original source of law, but are a derivative source. Policies may be derived from any of the four original sources of law, and in turn are used to generate rules of law. The complex relation between rules and policies is discussed *infra* at notes 236-253 and accompanying text.

A. Text

Our starting point is legal text itself.²⁸ The development of written law in the ancient world was a fundamental step in the march of civilization.²⁹ At the end of the feudal period, written charters were used to record the rights and obligations of the parties to the feudal contract.³⁰ Ours is a *written* Constitution; the founders of our nation committed our Constitution to writing so that it might be considered binding law.³¹ In many jurisdictions the criminal law is not effective until enacted in the

²⁸ "Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (1922) (hereinafter *JUDICIAL PROCESS*). When there is no controlling text -- for example, in a case to be decided under the law of torts, contract, or property or other area of the common law which is not governed by statute -- precedent, not text, is our starting point. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *Case Wes. L. Rev.* 179, ___ (1987) (hereinafter *Legal Formalism*) ("Statutory and constitutional law differs fundamentally from common law in that every statutory and constitutional text -- the starting point for decision, and in that respect (but that respect only) corresponding to judicial opinions in common law decisionmaking -- is in some important sense not to be revised by the judges.") In such cases, where there is no precedent clearly on point, legal analysis necessarily initially proceeds by way of analogy to similar cases rather than by deduction from controlling caselaw. For a description of formalist and realist analogical reasoning see *supra* notes 133-134.

²⁹ Hammurabi, a Babylonian monarch of the 21st century B.C., was once widely credited with the first codification of laws. 7 *ENCYCLOPEDIA AMERICANA* 174 (1989). "Development of the codification concept in the ancient world marks a fundamental step in the attempt to form a government of laws, not of men." *Id.*

³⁰ In the south of France, "the custom of using charters to preserve the record of vassalage was in common use from the beginning of the twelfth century onwards." F.L. GANSHOF, *FEUDALISM* 81 (1964).

³¹ "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that

form of written statute,³² and substantive administrative regulations are not effective until published in the Federal Register.³³ The Statute of Frauds and Parol Evidence Rule require written evidence of many types of contracts and contractual terms,³⁴ and in general, to be effective, a will must be in writing.³⁵

Textual analysis looks to the language used in the legal document under review, whether it is a constitution, a statute, a regulation, a contract, or a will.³⁶ There are three different textual methods of

limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (Marshall, J.).

³² See WAYNE R. LAFAVE and AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 92 (1986). See, e.g., Ohio Revised Code 2901.03(A), which provides, "No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code."

³³ "General notice of proposed rule making shall be published in the Federal Register" 5 U.S.C. 553(b); and "The required publication ... of a substantive rule shall be made not less than 30 days before its effective date" 5 U.S.C. 553(d).

³⁴ See, e.g. U.C.C. 2-201 and 2-202, for the statute of frauds and parol evidence rule governing the sale of goods.

³⁵ See, e.g., Uniform Probate Code 2-502.

³⁶ Bobbitt and Eskridge both state that the kinds of arguments used in constitutional and statutory interpretation are derived from the common law methods of legal reasoning:

"Since the Constitution was a written law, it had to be *construed*. ... Thus the methods hitherto used to construe deeds and wills and contracts and promissory notes, methods confined to the mundane subjects of the common law, became the methods of constitutional construction once the state itself was put under law." BOBBITT, *INTERPRETATION*, *supra* note 5, at 5.

Eskridge agrees that the methods judges use to interpret common law precedents are the same as the methods used to interpret the Constitution: he identifies these as "text," "historical background," and "subsequent interpretational history, related legal developments, and current societal context." William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

Steven Griffin notes:

interpretation: plain meaning, intratextual arguments, and the canons of construction. To employ "plain meaning" as a method of reasoning is to assert that the legal text is not in need of interpretation; the language is clear on its face.³⁷ Intratextual arguments are interpretive techniques that use one part of a document to give meaning to another part.³⁸ The canons of construction are rules of inference used for

“One of Chief Justice Marshall’s most important concerns was interpreting the Constitution as analogous to other laws and attempting to bypass or ignore its legal-political dualistic character. Marshall and the Justices who followed him did not attempt to develop a method of interpretation that squarely confronted the unique status of the Constitution. Instead, they enforced their understanding of the Constitution as law by employing methods of interpretation appropriate to the various sources of American law as they understood them.” Griffin, *Pluralism*, *supra* note 11, at 1760.

³⁷ “The Plain Meaning Rule basically articulates a hierarchy of sources from which to divine legislative intent. Text comes first, and if it is clearly dispositive, then the inquiry is at an end.” Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 285 (1990). Justice Antonin Scalia describes himself as “[o]ne who finds *more* often ... that the meaning of a statute is apparent from its text....” Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L. J. 511, 521 (1989)(hereinafter *Judicial Deference*). Justice Scalia is acknowledged as the leader of a school of jurisprudence which favors “an uncompromising application of statutory plain meaning,” which William Eskridge calls “the new textualism.” William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671 (1999) (hereinafter *Norms*); Eskridge, *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 623 (1990). On plain meaning generally, see Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 Kan. L. Rev. 1, 12-13 (1954).

³⁸ Akhil Amar coined the term “intratextualism” to describe this method of interpretation. Amar, *Intratextualism*, *supra* note 7, at 748. Intratextual arguments follow one of two formats: they either compare the words used in one part of the text with the words used in another part, or they deduce the meaning of portions of the text from their position within the organization of the text. Perhaps the most famous examples of these interpretative methods appear in *McCullough v. Maryland*, 17 U.S. 316 (1819), where Chief Justice John Marshall utilized both types of intratextual arguments to interpret the Necessary and Proper Clause in defining the implied powers of Congress in Art. I, Sec. 18, Cl. 18 of the Constitution. First, Marshall compared the word “necessary” from the Necessary and Proper Clause to the words “absolutely necessary” used in Art. I, Sec. 10 limiting the power of the states to impose duties, and concluded that the term “necessary and proper” was intended to be more expansive than the term “absolutely necessary.” *Id.* at 414-415. Second, Marshall noted that the Necessary and Proper Clause is set forth among the powers of Congress (Art. I, Sec. 8), not the limitations on its powers (Art. I, Sec. 9), and therefore the Necessary and Proper Clause should be considered to expand rather than contract the powers of Congress. *Id.* at 419-420.

the interpretation of legal text; they are to law what the rules of syntax are to grammar.³⁹ Each of the three textual methods of interpretation purports to achieve an objective definition of the words of the text.⁴⁰

B. Intent

The second source of law is the intent of the people who wrote the text. The fundamental precept of democracy is that governments "deriv[e] their just powers from the consent of the

Intratextual arguments are also a powerful technique for interpreting statutes. For example, to interpret the language of U.C.C. 4-403, the Connecticut Supreme Court compared it to the language of U.C.C. 4-402: "This difference in the scope of the language used in Sec. 4-403(3), as compared to that used in Sec. 4-402, is consistent with the notion that Sec. 4-403(3) is intended to impose a limited, rather than broad, form of liability on banks." *Dunnigan v. First Bank*, 217 Conn. 205, 212-213, 585 A.2d 659, 663 (1991).

³⁹ An example of a canon of statutory construction appears in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Devon Bank*, 832 F.2d 1005 (7th Cir. 1987): "It is not beyond belief that statutes contain meaningless provisions, but a court should treat statutory words as dross only when there is no alternative." *Id.* at 1008. The same textual canon was used by Justice John Marshall to interpret the United States Constitution: "It cannot be presumed that any clause in the constitution is intended to be without effect" *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

Eskridge and Frickey identify three kinds of canons of statutory construction: "linguistic presumptions about what language means," "presumptions about external sources," and "substantive" canons. Eskridge, *Norms*, *supra* note 36, at 674. Similarly, Greenawalt distinguishes between "textual" and "substantive" canons. KENT GREENAWALT, *STATUTORY INTERPRETATION: 20 QUESTIONS* 202-211 (1999) (hereinafter 20 QUESTIONS).

⁴⁰ It is this quest for objectivity and "bright-line" rules that draws many jurists and scholars such as Justice Hugo Black and Justice Antonin Scalia to textual analysis. See *infra* notes 156, 174, 179, 267, 274, and 277 and accompanying text. The same could not be said about Akhil Amar, whose nuanced intratextual analysis highlights competing values inferred throughout the text. See generally Amar, *Intratextualism*, *supra* note 7, and *infra* notes 153-154 and accompanying text.

governed,"⁴¹ and accordingly the intent of the drafters of a law is a principal method of interpretation. In constitutional law this method of interpretation is known as "original intent" or "the intent of the Framers,"⁴² while questions of statutory interpretation are resolved by reference to "the intent of the legislature."⁴³ Courts may consider the "regulatory intent" in determining the meaning of agency rules.⁴⁴ In accordance with the principles of freedom of contract and personal autonomy, the law of contracts looks to the intent of the parties⁴⁵ and the law of wills seeks to give effect to the intent of the testator.⁴⁶

⁴¹ Declaration of Independence (1776).

⁴² The foremost "originalist" in the field of constitutional law is Robert Bork, who set forth his theory of original intent in the landmark article *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971) (hereinafter *Neutral Principles*).

⁴³ "Traditional treatises on statutory interpretation generally acknowledge the primacy of legislative intent" Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 325. "For the interpretation of statutes, 'intent of the legislature' is the criterion that is most often recited." 2A SUTHERLAND STATUTORY CONSTRUCTION 22 (Norman J. Singer, ed. 1992). See also Martin H. Redish and Theodore T. Chung, *Democratic Theory and the Legislative Process; Mourning the Death of Originalism in Statutory Interpretation*, 68 Tul. L. Rev. 803, 805 (1994) (hereinafter *Democratic Theory*); and Antonin Scalia, *Judicial Deference*, *supra* note 35, at 516. The "originalist" view of statutory interpretation is challenged by William Eskridge's theory of "dynamic statutory interpretation." See *infra* notes 214-215 and accompanying text.

⁴⁴ See generally Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 Hastings L.J. 255 (2000).

⁴⁵ "In interpreting the words of a contract, it is generally said that we seek for the meaning and intention of the parties; but inasmuch as two parties may have had different meanings and intentions, the court must determine to which one of them, if to either, is legal effect to be given." 3 CORBIN ON CONTRACTS 33 (1963)(hereinafter CORBIN). "In the construction or interpretation of contracts, the primary purpose and guideline, or the controlling factor, and indeed the very foundation of all the rules for such construction or interpretation, is the intention of the parties." 17A Am. Jur. 2d CONTRACTS sec. 350. For a discussion of the potential conflict between the text of the contract and the intent of the parties see *supra* note 167 and accompanying text.

⁴⁶ "In interpreting a will, it is the meaning and intention of the testator that is sought...." 3

C. Precedent

For centuries judicial precedent has been considered an independent source of law.⁴⁷ Common law systems like ours give great weight to prior judicial pronouncements on the meaning of the law, while civil law systems consider judicial decisions to be not a source of law, but rather simply a directory opinion about the meaning of a law.⁴⁸

The principle of *stare decisis* is what lends strength to precedent. Perhaps the most dramatic invocation of *stare decisis* may be found in the plurality opinion from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁹ in which Justices O'Connor, Kennedy and Souter reaffirmed *Roe*

CORBIN 32-33. "Recognition of the fundamental axiom that the ascertainment and effectuation of the intention of the testator is controlling in the construction of wills is found in countless decisions." 80 Am. Jur. 2d WILLS sec. 1140. "Interpretation is not an effort to determine what a decedent *should* have said, or what the average person *would* have meant by the words used, although courts often do just this, notwithstanding protestations otherwise. Rather, the effort is to determine what this decedent meant by the words used." JEFFREY N. PENNELL AND ALAN NEWMAN, WILLS, TRUSTS, AND ESTATES 172 (2000).

⁴⁷ Berman and Reid trace the roots of precedent as a source of law to Sir Edward Coke and Matthew Hale. Harold J. Berman and Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L. J. 437, 446-449 (1996).

⁴⁸ See Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B. U. Int'l L. J. 57, 58 (1994).

⁴⁹ 505 U.S. 833 (1992).

*v. Wade*⁵⁰ despite their doubts that *Roe* had been correctly decided.⁵¹ After declaring "Liberty finds no refuge in a jurisprudence of doubt,"⁵² they articulated guidelines for determining when constitutional precedent must be followed and when it may be overruled.⁵³

D. Tradition

The traditions of our people are the fourth source of legal authority. Cass Sunstein has noted that "The common law ... has often been understood as a result of social custom rather than an imposition of judicial will. According to this view, the common law implements the customs of the people; it does not impose the judgment of any sovereign body."⁵⁴

The Supreme Court has identified "tradition" as the touchstone for determining our fundamental rights. Justice Benjamin Cardozo described our constitutional rights as those which are "so rooted in the tradition and conscience of our people as to be ranked as fundamental."⁵⁵ Tradition has similarly been

⁵⁰ 410 U.S. 113 (1973).

⁵¹ "[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis." 505 U.S. 833, 853.

⁵² *Id.* at 844.

⁵³ *Id.* at 854-855. For a list of these guidelines see *infra* note 137.

⁵⁴ Cass. R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 754 (1993).

⁵⁵ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Justice Powell articulated a similar principle in

cited as authority for the interpretation of the principle of federalism⁵⁶ and the President's implied powers.⁵⁷

Traditional ways of doing business, called "trade usage,"⁵⁸ supplement the meaning of contracts,⁵⁹ and have informed the drafting⁶⁰ and interpretation⁶¹ of the Uniform Commercial Code.

Moore v. City of East Cleveland, where he identified our fundamental rights as those which are "deeply rooted in this Nation's history and tradition." 431 U.S. 494, 503 (1977).

⁵⁶ In *Missouri v. Holland*, 252 U.S. 416, (1920), the question was whether a treaty protecting migratory birds invaded the reserved powers of the states. In the following passage of his opinion Justice Holmes interpreted the Constitution in light of the nation's experience, rather than by reference to text or intent:

"[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. ... We must consider what this country has become in deciding what [the Tenth Amendment] has reserved." *Id.* at 433-434 (Holmes, J.).

⁵⁷ "Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the constitution and to disregard the gloss which life has written upon them." *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

⁵⁸ "A usage of trade is any practice or method having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2).

⁵⁹ "A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement." U.C.C. 1-205(3).

Similarly, social traditions play an important role in the allocation of liability for tort,⁶² while traditional forms of ownership have shaped the law of real property.⁶³

⁶⁰ "[W]hen Professor Llewellyn directed the drafting of the Uniform Commercial Code, he identified the best commercial practices of the day and wrote them into the Code." Robert Cooter, *Normative Failure Theory of Law*, 82 Cornell L. Rev. 947, 948 (1997).

⁶¹ The U.C.C. directs that it is to be applied to promote its underlying purposes and policies, U.C.C. 1-102(1), and enumerates among its purposes and policies "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." U.C.C. 1-102(2)(b). An example of this kind of argument appears in *Taylor v. Roeder*, 234 Va. 99, 360 S.E.2d 191, (1987), where the dissenting judge argued:

"Instruments providing that loan interest may be adjusted over the life of the loan routinely pass with increasing frequency in this state and many others as negotiable instruments. This court should recognize this custom and usage, as the commercial market has, and hold these instruments to be negotiable." 234 Va., 107, 360 S.E.2d, 195 (Compton, J., dissenting).

⁶² For example, courts have been reluctant to impose liability for serving alcohol to adults in social settings. See, e.g., *Brandjord v. Hopper*, 455 Pa. Super. 426, 428, 688 A.2d 721, 722 (1997) (no liability for defendants who "engaged in the tradition of 'tailgating,' enjoying food and consuming several 12 ounce cans of beer which they had purchased together.") In contrast, the Supreme Court of New Jersey was unsympathetic to the custom of social drinking:

"Does our society morally approve of the decision to continue to allow the charm of unrestrained social drinking when the cost is the lives of others, sometimes of the guests themselves? If we but step back and observe ourselves objectively, we will see a phenomenon not of merriment but of cruelty, causing misery to innocent people, tolerated for years despite our knowledge that without fail, out of our extraordinarily high number of deaths caused by automobiles, nearly half have regularly been attributable to drunken driving. Should we be so concerned about disturbing the customs of those who knowingly supply that which causes the offense, so worried about their costs, so worried about their inconvenience, as if they were the victims rather than the cause of the carnage?" *Kelly v. Grinnell*, 96 N.J. 538, 558, 476 A. 2d 1219, 1229 (1984).

⁶³ "Let me speak first of those fields where there can be no progress without history. I think the law of real property supplies the readiest example. No lawgiver meditating a code of laws conceived the system of feudal tenures. History built up the system and the law that went with it." CARDOZO, *JUDICIAL PROCESS*, *supra* note 26, at 54.

E. Policy Analysis

Over the last century a fifth method of legal analysis has taken root in our jurisprudence,⁶⁴ and has become the principal force in American law.⁶⁵ This new method, called legal realism or policy analysis,⁶⁶ arose from the British school of utilitarianism⁶⁷ and the American philosophy of pragmatism.⁶⁸

⁶⁴ Teleological reasoning has been recognized as a basic method of moral philosophy since ancient times. Aristotle sought to identify the ends of human existence, and inferred from these purposes the general principles of right conduct. ARISTOTLE, NICHOMACHEAN ETHICS 3 (Ostwald Trans. 1962). However, American courts did not recognize consequentialist analysis as a legitimate legal argument until the legal realism movement in the first half of this century. The central point of Oliver Wendell Holmes' masterpiece, *The Path of the Law*, 110 Harv. L. Rev. 991 (1997), reprinted from 10 Harv. L. Rev. 457 (1897) (hereinafter *Path*), was that courts ought to base their decisions upon "rational policy" rather than "tradition." *Id.* at 1004.

Despite the fact that consequentialist reasoning was denied formal recognition as legal argument, its use was not unknown to nineteenth century courts; for example, in *State v. Post*, 20 N.J.L. 368 (1845), the court, in considering whether slavery had been abolished by the state constitution, described the hardships that would befall elderly and infirm slaves if masters were relieved of their responsibility to support them, and then noted that "these consequences, while they can have no legitimate influence upon the decision of the question, nevertheless give it more than ordinary importance, and call for our most serious and anxious consideration." *Id.* at 372. Craig Evan Klafter traces the origin of consequentialist analysis in American law to the early years of the Republic:

"During America's post-Revolutionary and early National periods, [legal] educators – aided by thousands of their students who quickly assumed most prominent positions in the Bar successfully – encouraged jurists to redact into American legal practice a modified doctrine of *stare decisis* which provided that precedents established by American courts should be strictly adhered to while permitting English precedents to be questioned against the standards of utility, logic, morality, and such conflicting American law and policy as already existed" CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 3 (1993). See also Chapter One of HORWITZ, TRANSFORMATION 1780-1860 1-30, entitled *The Emergence of an Instrumental Conception of Law*.

⁶⁵ "From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its power and expression in the method of sociology." CARDOZO, JUDICIAL PROCESS, *supra* note 26, at 65-66.

⁶⁶ Posner defines legal realism as "the use of policy analysis in legal reasoning." Richard Posner,

It was introduced into our case law by the greatest American jurists of this century, Learned Hand⁶⁹, Oliver Wendell Holmes,⁷⁰ Louis Brandeis,⁷¹ and Benjamin Cardozo,⁷² and was written into our statutory

Jurisprudential Responses to Legal Realism, 73 Cornell L. Rev. 326 (1988).

⁶⁷ See H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984) ("emphasizing the utilitarian origins of Holmes's legal thought"); and Wilson Huhn, *Mill's Theory of Liberty in Constitutional Interpretation*, 22 Akron L. Rev. 133 (1988).

⁶⁸ See Roberta Kevelson, *Semiotics and Methods of Legal Inquiry Interpretation and Discovery in Law from the Perspective of Peirce's Speculative Rhetoric*, 61 Ind. L. J. 355, 356 (1986) (tracing legal realism to the pragmatic philosophy of Charles Sanders Peirce). See generally Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787 (1989); and *The Pragmatism of Oliver Wendell Holmes*, 82 Nw. U. L. Rev. 541 (1988).

⁶⁹ In *United States v. Carroll Towing*, 159 F.2d 169 (2nd Cir. 1947), Hand gave shape to the consequentialist analysis that underlies the law of torts:

"Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions." *Id.* at 173.

The Supreme Court explicitly adapted Hand's balancing approach to First Amendment problems in *Dennis v. United States*, 341 U.S. 494, 510 (1951), and implicitly extended Hand's analysis to procedural due process cases in *Mathews v. Eldridge*, 424 U.S. 319 (1976). See Randy Lee, *Twenty-Five Years After Goldberg v. Kelly: Traveling From the Right Spot on the Wrong Road to the Wrong Place*, 23 Cap. U. L. Rev. 863, 894, 909 (1994).

⁷⁰ Holmes describes his realist approach in passages quoted *supra* note 64 and *infra* notes 219, 239, 244, and 245.

⁷¹ In *Muller v. Oregon*, 208 U.S. 412 (1908), the progressive attorney Louis Brandeis submitted a brief (the original "Brandeis brief") summarizing over ninety reports and studies supporting the beneficial effect of maximum hour legislation on working women and their families, under the heading *The World's Experience Upon Which the Legislation Limiting the Hours of Labor for Women Is Based*. 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63-113 (Philip B. Kurland and Gerhard Casper, eds. 1975). See generally PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 75-87 (1972).

law by reformers such as Grant Gilmore⁷³ and Karl Llewellyn.⁷⁴

Policy analysis proceeds in two steps: a predictive statement and an evaluative judgment. The court first predicts the consequences that will flow from giving the law one interpretation or another, and then decides which set of consequences is more consistent with the underlying values of the law. In attacking a legal argument based on policy analysis, one may challenge either the predictive statement of consequences or the evaluative judgment.⁷⁵

⁷² "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. ... Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all." CARDOZO, JUDICIAL PROCESS, *supra* note 27, at 66.

⁷³ Gilmore's creation of Article 9 has been called "perhaps the largest burst of legal creativity in modern commercial law." William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 Cornell L. Rev. 1511, 1519, 1521 (1997).

⁷⁴ Llewellyn wrote:

"[T]he central problem of all law has to do with this still almost completely neglected descriptive science, with this 'legal sociology,' this natural science of living law. What we need to study, what we must know, is not how a legal rule reads, nor how a philosophically correct rule would read, but what the legal rule means. Not in ... the heaven of legal concepts, but in human experience. What happens in life with it? What does a law mean to ordinary people?" Michael Ansaldi, *The German Llewellyn*, 58 Brook. L. Rev. 705, 748-749 (1992).

See also William Twining, *Talk about Realism*, 60 N.Y.U. L. Rev. 329, 342 (1985); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 Geo. L.J. 1141 (1985); and Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. Miami L. Rev. 351 (1983).

Two other leading figures in the legal realism movement were Roscoe Pound and Arthur Corbin. HORWITZ, TRANSFORMATION 1870-1960 34, 49-51.

⁷⁵ For a discussion of the methods of attacking policy arguments, see *infra* notes 140-145 and 236-253 and accompanying text.

Policy analysis may be contrasted to each of the foregoing sources of law because rather than requiring the court to ascertain the value choices made by others, this method of analysis invites the court itself to make a policy choice⁷⁶ by balancing all of the relevant values and interests that will be affected by the decision to pursue a particular policy.⁷⁷

F. The Five Kinds of Legal Argument Represent Different Sets of Evidence of What the Law Is

⁷⁶ Richard Posner refers to policy arguments in constitutional law as "top down" reasoning, and criticizes the approach for its indeterminacy:

"When you think of all those constitutional theories jostling one another -- Epstein's that would repeal the New Deal, Ackerman's and Sunstein's that would constitutionalize it, Michelman's that would constitutionalize the platform of the Democratic Party, Tushnet's that would make the Constitution a charter of socialism, Ely's that would resurrect Earl Warren, and some that would mold constitutional law to the Thomists' version of natural law -- you see the range of choice that the approach legitimizes and, as a result, the instability of constitutional doctrine that it portends." Richard Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. Chi. L. Rev. 433 (1992).

It is because of this indeterminacy that Robert Bork considers policy analysis to be an "illegitimate" form of argument in the interpretation of the Constitution. Bork, *Neutral Principles*, *supra* note 41, at 6. In Bork's opinion, the Supreme Court has, in dozens of cases, "without authority in the Constitution ... forced Americans to adopt the Court's view of morality rather than their own." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 114 (1996).

⁷⁷ For example, in deciding whether to give effect to a contractual provision that stripped the buyer of defenses to payment, the New Jersey Supreme Court balanced the interests of the commercial community against the interests of installment buyers:

"The courts have recognized that the basic problem in consumer goods sales and financing is that of balancing the interest of the commercial community in unrestricted negotiability of commercial paper against the interest of installment buyers of such goods in the preservation of their normal remedy of withholding payment when, as in this case, the seller fails to deliver as agreed, and thus the consideration for his obligation fails." *Unico v. Owen*, 50 N.J. 101, 112, 232 A. 2d 405, 411 (1967).

The various methods of analysis utilize different criteria for determining what the law is;⁷⁸ each type of argument consists of different set of legal information.⁷⁹

Textual arguments place the most stringent limitation on the evidence that is admissible to prove what the law is. Advocates of "plain meaning" would confine the evidence of the law to the text itself; those using intratextual arguments look to other parts of the document or the document as a whole; and those employing the canons of construction refer as well to these interpretive aids.

The interpretative method of "intent" expands the admissible evidence to include contemporary references indicating what was in the minds of the framers when they created or adopted the constitution, statute, regulation, contract, or will.⁸⁰ Evidence of intent may include previous versions of

⁷⁸ Although the pluralistic model of law recognizes that there are multiple legitimate kinds of legal arguments, and although the model acknowledges that these arguments are often contradictory, the model does not presume that the courts are *creating* law rather than *finding* it. Attorneys frame arguments based upon text, intent, precedent, tradition, and policy for the purpose of persuading judges as to what the law *is*. The obligation of the court in every case is to decide what law governed past events, and in so deciding the court does not hold, "The law *should be* ABC;" rather, the court holds, "The law *is* ABC."

⁷⁹ "The materials I use as backing for any constitutional inference-warrant depend then on the type of argument I mount, the modality I employ." Brian Winters, *Logic and Legitimacy: The Uses of Constitutional Argument*, 48 Case W. Res. L. Rev. 263, 304 (1998) (hereinafter *Logic and Legitimacy*). For a description of the different types of evidence that may be taken into account by a court in the course of determining the "intent of the legislature," see Eskridge, *The New Textualism*, *supra* note 36, 626-640.

⁸⁰ There are, however, different understandings of how courts ought to determine legislative intent. For citations to sources discussing the difference between "originalism" and "new textualism" in statutory interpretation, see *infra* notes 98-100 and 163-166 and accompanying text.

the text,⁸¹ its legislative history,⁸² contemporary commentary,⁸³ and official comments.⁸⁴

⁸¹ For example, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court noted that the 10th Amendment of the Constitution of the United States reserves to the states those powers "not delegated to the United States," whereas the analogous provision of the Articles of Confederation had reserved to the states those powers "not expressly delegated to the United States," and concluded that this change had broadened federal power. *Id.* at 406. Similarly, in *Diaz v. Manufacturers Hanover Trust Co.*, 92 Misc. 2d 802, 401 N.Y.S.2d 952 (N.Y. Sup. Ct. 1977), the court's interpretation of the statute turned upon the fact that "the New York version of section 3-804 of the Uniform Commercial Code pointedly changed the word 'may' to 'shall'" 92 Misc.2d, at 804, 401 N.Y.S.2d, at 953. Akhil Amar refers to this kind of argument as "intertextual," as distinguished from "intratextual" arguments that draw inferences from language in the same legal text. Amar, *Intratextualism*, *supra* note 6, at 800.

⁸² In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Supreme Court identified the following methods of determining the intent of a governmental decision: (1) "The historical background of the decision;" (2) "The specific sequence of events leading up to the challenged decision;" (3) "Departures from the normal procedural sequence;" (4) "The legislative or administrative history ..., especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports;" and (5) "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action" *Id.* at 267-268. Abner Mikva and Eric Lane discuss the value of different categories of legislative history and suggest a "rough pecking order" in ABNER J. MIKVA and ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36-40 (1997). William Eskridge also proposes a hierarchy of the various sources of legislative history in *The New Textualism*, *supra* note 36, at 636-640 (1990).

⁸³ One of the principal sources in Constitutional interpretation is the Federalist Papers, a series of essays published by James Madison, Alexander Hamilton, and John Jay to promote the ratification of the United States Constitution. In *Printz v. United States*, 521 U.S. 898 (1997), the justices of the Supreme Court referred extensively to the Federalist Papers; the majority opinion alone cited eleven different works of the Federalists. *Id.* at 910, 914, 918, 919, 921, 922, and 923 (Scalia, J.). For a discussion of the use of the Federalist Papers as evidence of original intent see John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 *Geo. Wash. L. Rev.* 1337 (1998).

The use of another type of contemporary commentary, presidential signing statements, has been both supported and questioned by scholars. Compare GREENAWALT, 20 QUESTIONS, *supra* note 38 at 155 (supporting such use), with Marc N. Harbert and Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 *Harv. J. on Legis.* 363 (1987)(opposing such use).

⁸⁴ For example, the Official Comments to the Uniform Commercial Code and the Advisory Committee Notes accompanying the Federal Rules of Evidence are persuasive evidence of legislative intent.

Examination of precedent shifts our attention to legal rules articulated by courts; proof is limited to statements of judges in formal legal opinions.⁸⁵ Proof of tradition is more expansive, involving historical evidence of our people's beliefs and behavior patterns over decades or centuries.⁸⁶

The scope of what may be considered by a court engaged in policy analysis is virtually unlimited. To support the predictive portion of a policy argument a court may take judicial notice of any "legislative fact" it finds relevant to determining the question of law.⁸⁷ In so doing it is not limited to evidence that is introduced by the parties at trial, but it may instead take into account matters set forth in

⁸⁵ In common law systems, "[d]ecisions are both the source and the proof of law." Esin Orucu, *An Exercise in the Internal Logic of Legal Systems*, 7 *Legal Studies* 210, 214 (1987).

⁸⁶ For example, the Supreme Court has identified the following relevant traditions in interpreting the Fourteenth Amendment: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to case aside millennia of moral teaching." *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J. concurring); "[T]he question before the Court is ... properly characterized as whether the 'liberty' specially protected by the Clause includes a right to commit suicide which itself includes a right to assistance in doing so. This asserted right has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults." *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (Rehnquist, C.J.).

⁸⁷ Courts are permitted to take judicial notice of "adjudicative facts" (relating to the matters to be decided by the trier of fact) only if they are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. Evid. R. 201(b). In contrast, courts may take judicial notice of any "legislative facts" (relating to questions of policy to be decided in interpreting the law) whether or not such facts are indisputable; judicial notice of "legislative facts" is not subject to the limitations of Rule 201 or any other rule of evidence. See the Advisory Committee Notes to Federal Evidence Rule 201. The distinction between "legislative facts" and "adjudicative facts" was first described by Kenneth Culp Davis in *An Approach to Problems of Evidence in the Administrative Process*, 55 *Harv. L. Rev.* 364, 404-407 (1942).

a "Brandeis brief,"⁸⁸ or it may make an independent judicial inquiry into the underlying facts which bear upon the policy choice.⁸⁹ Perhaps the most famous example of "legislative factfinding" by a court is footnote 11 from *Brown v. Board of Education*,⁹⁰ citing leading social scientists for the proposition that enforced segregation of the races harms children, and "may affect their hearts and minds in a way unlikely ever to be undone."⁹¹

G. A Comparison of This Model to Other Pluralistic Models

William Eskridge and Philip Frickey suggest three principal categories of legal arguments: textual, historical, and evolutive.⁹² Philip Bobbitt proposes the following six modalities: textual, historical, doctrinal, structural, ethical, and prudential.⁹³ The model proposed in this article is comprised of five kinds of legal arguments: text, intent, precedent, tradition, and policy.

⁸⁸ See *supra* note 70.

⁸⁹ "Where the existence of a rational basis for legislation [depends] upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry." *United States v. Carolene Products*, 304 U.S. 144, 153 (1938).

⁹⁰ 347 U.S. 483, 494 (1954).

⁹¹ *Id.* Compare Richard L. Aynes, *An Examination of Brown in Light of Plessy and Croson: Lessons for the 1990s*, 7 Harv. Blackletter J. 149, 152-153 (1990) (defending footnote 11) with Donald N. Bersoff and David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. Chi. L. Sch. Roundtable 279, 293-294 (1995) (criticizing footnote 11).

⁹² See *supra* note 20 and accompanying text.

⁹³ See *supra* note 19 and accompanying text.

The model of legal argument used in this article bears the most resemblance to the typology constructed by Richard Fallon, who identified the following five modalities:

"arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy."⁹⁴

It is also similar to the list of modalities cited by Michael Curtis:

"We can look at the text, the plain or ordinary meaning of the words used. We can look at the text contextually to see how similar words are used elsewhere in the Constitution. We can delve into the history giving rise to the provision. We can look at prior precedent. We can explore the Constitution's overall structure, how it is to work as a whole -- as an organism or a machine. Finally, we can consider wise public policy, including moral and ethical concerns."⁹⁵

⁹⁴ Fallon, *Constructivist Coherence*, *supra* note 21, at 1189-1190.

⁹⁵ Curtis, *Resurrecting*, *supra* note 21, at 19.

For the purpose of teaching law, I believe that the model proposed in this article will be more useful than those of Bobbitt, Eskridge and Frickey for the following reasons:

1. *This Model Is Simpler*

The descriptive terms of the model proposed in this article are already familiar to law students, attorneys, and judges. The term "precedent," for example, has an established meaning within the profession, referring to the body of legal rules developed by adjudicatory tribunals such the courts or administrative agencies. Similarly, the term "policy arguments" is more familiar to students and practitioners than descriptive terms such as "structural," "ethical," "prudential," and "evolutive," whose precise meanings are familiar principally within the academic community.⁹⁶

An additional difficulty with describing kinds of legal arguments as "ethical" and "prudential" is that these terms have alternative and well-established meanings in the law. "Prudential" considerations are known as "a series of rules under which [the Supreme Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision,"⁹⁷ while "ethical" considerations

⁹⁶ According to Bobbitt, structural arguments "[infer] rules from the relationships that the Constitution mandates among the structures it sets up;" ethical arguments "[derive] rules from those moral commitments of the American ethos that are reflected in the Constitution;" and prudential arguments "[seek] to balance the costs and benefits of a particular rule." BOBBITT, INTERPRETATION, *supra* note 5, at 12-13. Evolutive arguments, according to Eskridge, are used to interpret statutes according to "their subsequent history, related legal developments, and current societal context." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, *supra* note 35, at 1479 (1987).

⁹⁷ *Ashwander v. T.V.A.*, 297 U.S. 288, 346 (1935) (Brandeis, J., concurring). Bobbitt acknowledges the alternative meaning of the term "prudential" in INTERPRETATION, *supra* note 5, at 16.

commonly refer to the requirements of the canons of professional responsibility. These alternative meanings pose a significant obstacle to their use in introducing law students to a system of legal analysis. For pedagogical purposes, it makes sense to use the most clear and unambiguous terms possible.

2. *This Model Is More Neutral*

Both Bobbitt and Eskridge have been criticized for including categories of arguments in their models that are arguably more normative than legal. Bobbitt's category of "ethical argument" has been characterized as "unavoidably critical and normative."⁹⁸ In a similar vein, Patrick Gudridge accuses Bobbitt of using the descriptive label of "ethical arguments" to promote a "hidden program" to elevate individual rights over other constitutional considerations.⁹⁹

Similarly, Eskridge's identification of "evolutive" arguments as a standard technique of statutory interpretation has drawn fire. Eskridge contends that since both the Constitution and the common law have been interpreted using not only textual and historical arguments, but also "subsequent history, related legal developments, and current societal context," that courts do -- and should -- also interpret statutes "dynamically," using subsequent history, related legal developments, and current societal

⁹⁸ J.M. Balkin and Sanford Levinson, *Constitutional Grammar*, 72 Tex. L. Rev. 1771, 1785 (1994).

⁹⁹ Patrick O. Gudridge, *False Peace and Constitutional Tradition*, 96 Harv. L. Rev. 1969, 1977-1978 (1983). Akhil Amar, however, defends Bobbitt's inclusion of ethical arguments: "By 'ethical,' Bobbitt has in mind not an argument from morality pure and simple, but an argument from the ethos, or character, of the American people and the American experience." Amar, *Intratextualism*, *supra* note 7, at 754.

context. Hence, he advances the theory of "evolutive" or "dynamic" statutory interpretation over modalities such as the intent of the legislature.¹⁰⁰ Critics of Eskridge's theory contend that the evolutive approach undermines the principles of separation of powers¹⁰¹ and popular sovereignty.¹⁰²

Both ethical arguments and evolutive arguments are species of policy arguments, and can be appropriately collapsed into that familiar and neutral category.

3. *Under This Model, Each Kind of Argument Corresponds to a Distinct Set of Evidence of What the Law Is, and Is Subject to Characteristic Kinds of Attacks*

Each type of argument that I have identified corresponds to a distinct collection of evidence that

¹⁰⁰ Eskridge, *Dynamic Statutory Interpretation*, *supra* note 35. This is an example of a "relational intermodal argument." See *infra* notes 206-216 and accompanying text.

¹⁰¹ Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. Cin. L. Rev. 911, 912 (1996).

¹⁰² Redish and Chung state that "dynamic statutory interpretation presents serious problems from the standpoint of both practicality and democratic theory." *Democratic Theory*, *supra* note 42, at 879. M.B.W. Sinclair writes that Eskridge's argument in favor of dynamic statutory interpretation has not prevailed because of "our faith in democracy, the principle of legislative supremacy, and the ideal of a governance of laws." M.B.W. Sinclair, *Legislative Intent: Fact or Fabrication?*, 41 N.Y.L. Sch. L. Rev. 1329 (1997). John Nagle noted irony in the fact that Eskridge's book DYNAMIC STATUTORY INTERPRETATION (urging that courts interpret statutes in accordance with current political trends) was published in 1994, just as the Republican Party ascended to power in Congress. John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. Pa. L. Rev. 2209, 2211 (1995). Daniel Farber, however, maintains that Eskridge's conclusions "are more nuanced than some readers may expect," and that "the view that statutory meaning changes over time ... need not be hostile to the need of the legal system for continuity and fidelity to the past." Farber, *Progress*, *supra* note 21, 1546, 1547 (1996).

bears upon the question of what the law is,¹⁰³ and each type of argument is characterized by particular strengths and weaknesses.¹⁰⁴ For example, under Bobbitt's system of constitutional modalities, policy arguments may be either "structural," "ethical," or "prudential." As I use the term, however, policy arguments consist of any consequentialist reasoning that measures the rightness or wrongness of a legal rule based upon an evaluative judgment of the factual result that would flow from application of the rule in the particular case. So defined, all policy arguments consist of a predictive statement of consequences and an evaluative judgment,¹⁰⁵ and all policy arguments may be attacked by challenging either the predictive statement or the evaluative judgment.¹⁰⁶ This holds true for policies that may be described as "structural,"¹⁰⁷ "ethical,"¹⁰⁸ or "prudential."¹⁰⁹ Because both the structure of consequentialist arguments

¹⁰³ See *supra* notes 77-89 and accompanying text.

¹⁰⁴ See *infra* notes 120-144 and accompanying text.

¹⁰⁵ See *infra* note 236 and accompanying text.

¹⁰⁶ See *infra* notes 140-144 and 236-253 and accompanying text.

¹⁰⁷ At first blush, it might appear that "structural" arguments are synonymous with "intratextual" arguments, since both are concerned with inferences drawn from the text of the entire document. However, unlike intratextual arguments, which focus on the definition of a specific term, structural arguments are a species of policy argument; intratextual arguments are used to ascertain the meaning of specific terms, while structural arguments are used to infer the underlying purposes of the law. The leading constitutional structuralist, Charles Black, observed that "to succeed, [a structural argument] has to make sense -- current, practical sense." He explained that "we can and must begin to argue ... about the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting." CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22 (1969). Akhil Amar agrees: "structural argument often goes hand in hand with a certain kind of pragmatic argument." Amar, *Intratextualism*, *supra* note 7, at 752. Bobbitt concurs that structural arguments, while they arise from text, are essentially consequentialist. BOBBITT, *INTERPRETATION*, *supra* note 5, at 16.

¹⁰⁸ See *supra* note 94.

and the methods of attack upon them are the same, all consequentialist arguments are treated as a single kind of legal argument under this model.

Similarly, Bobbitt, Eskridge, and Frickey classify "historical" arguments as a single broad type of legal argument. However, "historical" arguments are comprised of two distinct categories of evidence of what the law is, which are subject to distinct methods of attack. One kind of "historical" argument seeks to interpret the law based upon the intent of the people who drafted or adopted it.¹¹⁰ Another altogether different kind of historical legal argument is to interpret law based upon traditional modes of behavior.¹¹¹ Because these are different sets of evidence of what the law is, and because each type of argument possesses different strengths and suffers different weaknesses, I have chosen to present them to students as two different modalities.

4. *This Model Is Applicable to All Areas of the Law*

The pluralistic model of law proposed in this article applies to *all* areas of the law, rather than to specialized fields or particular forms of legal text.¹¹² For example, "text" may refer to the Constitution, a

¹⁰⁹ Id.

¹¹⁰ See *supra* notes 40-45, 78-82 and accompanying text.

¹¹¹ See *supra* notes 53-62, 84 and accompanying text.

¹¹² The obvious exception is that textual arguments are not available to interpret the law where there is no text, i.e., to interpret the common law. See *supra* note 27.

statute, a regulation, a contract, or a will.¹¹³ "Intent" may be the intent of the framers of the Constitution, the intent of the legislature, the intent of an administrative agency, the intent of the parties to a contract, or the intent of a testator.¹¹⁴ "Precedent" refers to the rules of law developed by courts or the adjudicatory divisions of administrative agencies. "Tradition" may be our traditional ways of allocating governmental power, traditional ways of conducting business, traditional ways of holding property, or social traditions.¹¹⁵ And, as noted above, policy arguments consist of all consequentialist reasoning.¹¹⁶

These five kinds of legal arguments may be used to teach legal analysis in any subject, although the different kinds of arguments are given different weights in different fields.¹¹⁷ The pluralistic model can be used to describe the categories of legal arguments in all areas of law.

¹¹³ See *supra* note 35.

¹¹⁴ "The search for the intent of the lawmaker is the everyday procedure of lawyers and judges when they must apply a statute, a contract, a will, or the opinion of a court." ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144-145 (1990) (hereinafter *TEMPTING*). Another leading originalist, Raoul Berger, states, "Effectuation of the draftsman's intention is a long-standing rule of interpretation in the construction of all documents – wills, contracts, statutes – and although today such rules are downgraded as 'mechanical' aids, they played a vastly more important role for the Founders." RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 403 (1997). "Originalists ... base their approach to constitutional interpretation on interpretive principles drawn from the law of contracts and wills and from analogies to the use of legislative history in statutory interpretation." Griffin, *Pluralism*, *supra* note 11, at 1761.

¹¹⁵ See *supra* notes 53-62 and accompanying text.

¹¹⁶ See *supra* notes 74-76 and accompanying text.

¹¹⁷ See *infra* notes 210-215 and accompanying text.

PART II
HOW TO ATTACK AND EVALUATE LEGAL ARGUMENTS

In learning "to think like lawyers," the first step students take is to learn how to identify the five different kinds of legal arguments. The second step is to learn how to generate and articulate each kind of argument. The third step is to learn how to attack or rebut legal arguments, and the fourth step, the ultimate goal, is for students to learn how to critically evaluate each kind of legal argument. The third and fourth steps are the subject of this portion of this article.

Legal reasoning is not comprised of deductive arguments framed for the purpose of proving the truth of a particular proposition,¹¹⁸ but is a species of rhetoric, designed to persuade others to accept a

¹¹⁸ Bobbitt points out that many commentators on both the left and right wings make the "fundamental epistemological mistake" of assuming "that law-statements are statements about the world (like the statements of science) and thus must be verified by a correspondence with facts about the world." BOBBITT, INTERPRETATION, *supra* note 5, at xii. It is important to emphasize, as Philip Bobbitt has, that law is not a science, but "something we do." *Id.* at 24. Descriptions of law are therefore not descriptions of physical phenomena, but descriptions of how lawyers and judges reason. John Dickinson of Princeton cogently described the legal realists' rejection of the notion that law is a science:

"Thus jural laws are not, like scientific 'laws,' descriptive statements of verifiable relations between persons or things -- relations which exist and will continue to exist irrespective of whether human choice and agency enter into the situation. ... They are ... the result of value-judgments, rather than of judgments of fact -- judgments, i.e., that one arrangement of relations is better, as for some reason more just or more convenient, than another arrangement which is admitted to be physically possible." John Dickinson, *The Law Behind Law II*, 29 Colum. L. Rev. 285, 289-290 (1929) (hereinafter *The Law Behind Law*).

particular interpretation of the law.¹¹⁹ But how is the persuasiveness of a legal argument to be evaluated? What is the yardstick against which we measure the "correctness" of legal reasoning?

There are two fundamental types of challenges to legal arguments: "intramodal"¹²⁰ and "intermodal"¹²¹ challenges. Intramodal critiques challenge legal arguments on their own terms, while intermodal critiques are addressed to the validity or weight to be accorded to each kind of argument.

A. Intramodal Arguments

Each different kind of legal argument has characteristic strengths and weaknesses, and as a result each kind of argument may be attacked in characteristic ways; the effectiveness of these attacks determines the persuasiveness of the argument. Below is an outline of twenty-five specific approaches that are used to test the strength of the five kinds of legal arguments.

I. ATTACKS ON TEXTUAL ARGUMENTS

A. ATTACKS ON ARGUMENTS BASED UPON PLAIN MEANING

¹¹⁹ See *infra* notes 221-226 and accompanying text.

¹²⁰ "Intra-modal" conflicts are "conflicting arguments within a single modality." Balkin and Levinson, *Constitutional Grammar*, *supra* note 96, at 1796 (1994).

¹²¹ Balkin and Levinson use the term "cross-modal" to refer to this type of conflict. *Id.*

1. The Text Has a Different Plain Meaning¹²²
2. The Text Is Ambiguous¹²³

B. ATTACKS ON ARGUMENTS THAT ARE BASED UPON CANONS OF CONSTRUCTION

3. The Canon of Construction Does Not Apply¹²⁴

¹²² In an article generally critical of the "plain meaning" approach, Eric Lasky notes that in *Smith v. United States*, 508 U.S. 223 (1993) and *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), the majority and dissenting justices reach contradictory conclusions about the "plain meaning" of the text of the law. Eric Lasky, *Perplexing Problems with Plain Meaning*, 27 Hofstra L. Rev. 891 (1999).

¹²³ Under the *Chevron* doctrine, where the meaning of a statute is ambiguous, an administrative agency charged with enforcing the statute has discretion to interpret it, but where the statute is unambiguous, the agency must interpret the law in accordance with its meaning. In a series of cases reviewing statutory interpretations by administrative agencies, the Justices of the Supreme Court have disagreed about whether statutory terms such as "stationary source" or "modify" are or are not ambiguous. See the discussion of the *Chevron* doctrine *infra* notes 254-272 and accompanying text. The "new textualist" Justice Antonin Scalia has observed that "One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." Scalia, *Judicial Deference*, *supra* note 35, at 521. For a classic article arguing that the meaning of language can usually be determined from its context, see Gerald Graff, "*Keep Off the Grass, 'Drop Dead,' and Other Indeterminacies: A Response to Sanford Levinson*," 60 Tex. L. Rev. 405 (1982).

¹²⁴ As noted *supra* note 38, in *Marbury v. Madison* Justice John Marshall utilized the canon of construction that text should not be construed so as to render any portion of the text superfluous or meaningless. Marshall reasoned that Art. III, Sec. 2, Cl. 2 of the Constitution, which assigns original and appellate jurisdiction to the Supreme Court, would be rendered "mere surplusage ... entirely without meaning" unless interpreted as forbidding Congress from adding to the original jurisdiction of the Supreme Court. 5 U.S. 137, 174.

"If Congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original, and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance." *Id.*

A leading textbook asks students to consider two possible rejoinders to Marshall's reasoning: "(1) ... The Constitution sets up a provisional allocation, which Congress can alter if it wishes. The power to alter is recognized in the 'exceptions' clause. ...

(2) The Constitution defines an irreducible minimum of original jurisdiction, but permits

4. A Conflicting Canon of Construction Applies¹²⁵

C. ATTACKS ON INTRATEXTUAL ARGUMENTS

5. There is a Conflicting Intratextual Inference Drawn From the Same Text¹²⁶

Congress to expand original jurisdiction if it chooses to do so." GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, AND MARK V. TUSHNET, *CONSTITUTIONAL LAW* 32 (1996).

Both of these responses to Marshall's argument represent attempts to prove that Art. III, Sec. 2, Cl. 2 would not be "entirely without meaning" if Congress were given power to alter the original jurisdiction of the Supreme Court, and that therefore the canon of construction does not apply to the interpretive problem at hand.

Akhil Amar proposes a "Story-like" intratextual argument to buttress Marshall's holding: "the Appellate Jurisdiction Clause explicitly authorizes Congress to subtract from the Supreme Court's appellate docket; but the Original Jurisdiction Clause contains no comparable language authorizing Congress to add to the Court's original jurisdiction docket." Amar, *Intratextualism*, *supra* note 7, at 764.

¹²⁵ The legal realists contended that the canons of construction could be manipulated to generate a variety of different textual interpretations. Karl Llewellyn developed a list of fifty-six canons of statutory construction, and suggested that for each and every canon of construction there is an equal and opposite canon. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950). See also Richard Posner, *Statutory Interpretation -- in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805-817 (1983); and Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992). Kent Greenawalt argues that although the textual canons "are not nearly as opposed to one another as has sometimes been claimed reliance on canons is too uneven to provide much assurance about the way particular language will be interpreted if its apparent meaning is unclear." GREENAWALT, 20 QUESTIONS, *supra* note 37, at 211.

¹²⁶ In *Barron v. Baltimore*, 32 U.S. 243 (1833), the Supreme Court was called upon to decide whether the Just Compensation Clause of the Fifth Amendment was applicable against the States. The Court noted that Art. I, Sec. 10 of the original Constitution expressly stated that "No state shall" enter into treaties, coin money, or pass any ex post facto laws. From this the Court concluded that, "[Had] the framers of [the] amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention." *Id.* at 249. On the other hand, one could argue that the quoted language of Art. I, Sec. 10 is evidence that the Constitution of the United States was binding upon the States as well as the federal government, and that therefore in the absence of limiting language the provisions of the Fifth Amendment were equally

6. There is a Conflicting Intratextual Inference Drawn From Different Text¹²⁷

II. ATTACKS ON ARGUMENTS BASED UPON INTENT

7. The Evidence of Intent Is Not Sufficient¹²⁸

8. The Framers of the Law Did Not Anticipate Current Events¹²⁹

binding upon the states.

¹²⁷ As discussed in the previous footnote, in *Barron v. Baltimore* Justice Marshall drew an inference from the language of Art. I, Sec. 10 of the Constitution that the Fifth Amendment was applicable solely against the federal government, and not against the states. However, a noted contemporary scholar drew the opposite inference from different language in the Constitution. William Rawle, in his 1829 treatise on the Constitution, observed that while the language of the First Amendment expressly forbids Congress from abridging freedom of speech, press, religion, and assembly, the remaining provisions of the Bill of Rights are not by their terms limited to Congress, and that they are therefore alike applicable to the States as to the national government:

"The preceding article [the First Amendment] expressly refers to the powers of congress alone, but some of those which follow are to be more generally construed, and considered as applying to the state legislatures as well as that of the Union. The important principles contained in them are now incorporated by adoption into the instrument itself; they form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 124-125 (1970).

¹²⁸ The most significant example of this kind of challenge to intentionalism in American law comes from the seminal case of *Brown v. Board of Education*, 347 U.S. 483 (1954):

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in congress and the state legislatures had in mind cannot be determined with any degree of certainty." *Id.* at 489.

9. The Person Whose Intent Was Proven Did Not Count¹³⁰

III. ATTACKS ON ARGUMENTS BASED UPON PRECEDENT

10. The Case Does Not Stand for the Cited Proposition¹³¹

¹²⁹ This argument was another central feature of *Brown*:
"An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. ... Even in the North, the conditions of public education did not approximate those existing today." *Id.* at 489-490.

¹³⁰ Charles Lofgren has argued that, for purposes of interpreting the Constitution, we should not look to the intent of those who met in Constitutional Convention in Philadelphia in 1787, but rather to those who later ratified the Constitution in state conventions.

"The framers assuredly gave the document its words; they did not determine the meaning of those words as understood by the ratifiers, by those people whose views were crucial to legitimating the document as fundamental law." Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Cons. Comment.* 77, 84-85 (1988).

Similarly, when it appears that the framers held conflicting views upon an issue, one may question the weight to be accorded to a particular person's views. In *Pritz v. United States*, 521 U.S. 898 (1997), Justice Rehnquist, writing for the majority, suggested that the views of Alexander Hamilton were not authoritative upon the question of the power of the federal government to command the performance of state officials:

"Even if we agreed with Justice Souter's reading of the Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was 'from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution.' *Id.* at 915, quoting C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 199 (1964).

¹³¹ Judge Aldisert cites the dissenting opinion in *Council of Organizations v. Governor of Michigan*, 548 N.W.2d 909 (Mich App. 1996) as an example of an argument that a cited case did not stand for the proposition attributed to it. *Id.*, at 920 (O'Connell, J. dissenting). RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 158 (1997).

11. The Opinion Did Not Command a Majority of the Court¹³²
12. The Opinion Was Not Issued By a Controlling Authority¹³³
13. The Court's Opinion Was Not Holding But Rather Obiter Dictum¹³⁴
14. The Case Is Distinguishable Because of Dissimilar Facts¹³⁵

¹³² Plurality, concurring and dissenting opinions do not carry the precedential weight of a majority opinion. For a discussion of the standards that should govern the task of assigning precedential weight to concurring opinions, see Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995).

Occasionally it may not be clear whether the court's rationale has been adopted by a majority of the court. In *Hopwood v. Texas*, 78 F.3d. 932, cert. den. 518 U.S. 1033 (1996), the United States Court of Appeals for the Fifth Circuit refused to follow Justice Powell's opinion upholding "plus factor" affirmative action admissions programs in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978), in part because "Justice Powell's opinion in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." 78 F.3d, at 944 (1996). Akhil Amar and Neal Katyal, in contrast, note that four other members of the Supreme Court joined Section V-C of Powell's opinion, thus conferring upon it the imprimatur of the Court. 438 U.S. 265, 324. See Akhil Amar and Neal Katyal, *Bakke's Fate*, 43 U.C.L.A. L. Rev. 1745, 1750 (1996).

A concurring or dissenting opinion may gain precedential force if the original case is overruled or its reasoning rejected. The dissenting opinion of Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), the dissenting opinions of Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 624 (1919), and *Lochner v. New York*, 198 U.S. 45, 74 (1905), and the concurring opinion of Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 372 (1927), are today justly considered authoritative. See Bork, *Neutral Principles*, supra note 40, at 23 (noting "the triumph of Holmes and Brandeis").

¹³³ Precedential weight depends in part upon the level and jurisdiction of the tribunal rendering the decision. For example, Judge Leo A. Jackson of the Eighth District Court of Appeals for the State of Ohio once noted: "[We are not] bound by the decisions of our sister Courts of Appeals, although they are entitled to due consideration and respect. We are bound by the decisions of our Supreme Court." *Hogan v. Hogan*, 29 Ohio App.2d 69, 77, 278 N.E.2d 367, 372 (1972)(Jackson, J.).

¹³⁴ In a letter to William Johnson dated June 12, 1823, Thomas Jefferson bitterly complained about John Marshall's tendency to announce constitutional doctrine in *obiter dictum*:

"This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. ... [In *Marbury v. Madison*] [t]he court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case" BASIC WRITINGS OF THOMAS JEFFERSON 781 (Philip S. Foner, ed. 1944).

15. The Case is Distinguishable For Policy Reasons¹³⁶

¹³⁵ To apply a case by analogy is to find that there is a sufficient condition for applying the rule of the cited case to the case at hand, whereas to distinguish a case is to find that a necessary condition for applying the cited case is lacking. Brewer, *Exemplary Reasoning*, *supra* note 4, at 1016. In easy cases, courts may apply or distinguish prior cases on factual grounds, *i.e.*, because the facts of the cited case are similar or dissimilar to the facts of the case at hand. See STEVEN BURTON, LEGAL REASONING, *supra* note __, at 25-40. Justice Cardozo criticized this method of reasoning by analogy:

"Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule." CARDOZO, JUDICIAL PROCESS, *supra* note 26, at 20. Like Cardozo, Cass Sunstein also criticizes the judicial practice of following or distinguishing cases based solely upon factual similarities or dissimilarities: "Formalist analogical thinking is no better than any other kind of bad formalism. Different factual situations are inarticulate; they do not impose order on themselves. ... Whether one case is analogous to another depends on substantive ideas that must be justified." Sunstein, *supra* note 53, at 756-757.

Hart concurs:

"The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice [between competing interests], once the general rule has been laid down." HART, THE CONCEPT OF LAW, *supra* note __, at 129.

¹³⁶ In hard cases it is difficult to determine whether the facts of the cited case are similar to the case to be decided. Are the factual similarities and dissimilarities "important?" Burton refers to this as "the problem of importance." BURTON, LEGAL REASONING, *supra* note 132, at 83. Importance (*i.e.*, similarity) is measured by whether the policies underlying the rule from the cited case would be served by applying that rule to the case at hand. See J.C. Smith, *Machine Intelligence and Legal Reasoning*, 73 Chi.-Kent L. Rev. 277, 314-315 (1998) (hereinafter *Machine Intelligence*).

In comparing two contracts cases, for example, Richard Warner argues, "The salient difference between *Columbia* and *Southern Concrete* is that, in the latter, the two companies had never dealt with each other before. Is this a relevant difference? Courts answer such questions by appeal to the legitimate goals and purposes of the law." Richard Warner, *Three Theories of Legal Reasoning*, 62 So. Cal. L. Rev. 1523, 1539-1540 (1989). H.L.A. Hart makes a similar observation:

"In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule." HART, THE CONCEPT OF LAW, *supra* note __, at 127. See M.B.W. Sinclair, *Statutory Reasoning*, 46 Drake L. Rev. 299, 364 (1997) ("The criterion of similarity ... comes from the realm of policy....") See also Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 Cal. L. Rev. 119 (1985) (distinguishing between formalist and instrumentalist analogies).

Sunstein warns, however, that realist analogies may be as bad as formalist analogies, invoking as an example Holmes' "notorious" opinion in *Buck v. Bell*, 274 U.S. 200 (1927):

16. There Are Two Conflicting Lines of Authority¹³⁷

17. The Case Has Been Overruled¹³⁸

18. The Case Should Be Overruled¹³⁹

"Holmes suggested that if people can be conscripted during wartime, or can be forced to obtain vaccinations, it follows that the state can require sterilization of the 'feeble minded.' But this is a casual and unpersuasive claim. Many principles may cover the possibly relevant similarities and differences among these cases. He does not identify the range of possible principles, much less argue for one rather than another. Instead, he invokes a principle of a high level of generality - 'the public welfare may call upon the best citizens for their lives' - that is not evaluated by reference to low- or intermediate-level principles that may also account for the analogous cases." Sunstein, *supra* note 53, at 757.

¹³⁷ See *infra* notes 145-149 and accompanying text for a discussion of how courts resolve cases with conflicting precedents.

¹³⁸ A case that has been expressly overruled, of course, has no precedential force, but in some cases it may be unclear whether a prior decision has been overruled in its entirety. The holding of the Supreme Court in *Brown v. Board of Education*, for example, did not expressly overrule the holding of *Plessy v. Ferguson* which had authorized the official segregation of railroad cars, but instead had more limited scope: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. 483, 495 (1954).

Moreover, although a lower court has no power to overrule the decision of a higher court, it may be unclear to the lower court whether or not the higher court still recognizes the original decision as authoritative. In *Hopwood*, *supra* note 129, the Fifth Circuit held that Justice Powell's reasoning in *Bakke v. Regents* had been overruled *sub silentio* by subsequent decisions of the Supreme Court striking down affirmative action programs outside the educational setting. 78 F.3d 932, 944. Amar and Katyal disagree with the decision of the Fifth Circuit, arguing that *Bakke* is still good law. Amar and Katyal, *Bakke's Fate*, *supra* note 130, at 1768.

¹³⁹ The principle of *stare decisis* militates against reversal of precedent. In the context of constitutional law, the leading authority defining the scope of *stare decisis* is the plurality opinion of Justices Kennedy, O'Connor, and Souter from *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), summarized *supra* in the text accompanying notes 48-52. The four factors considered by the plurality in deciding whether to overrule *Roe v. Wade* were the workability of the existing rule, society's reliance on the existing rule, whether the rule had been undermined by subsequent decisions, and whether the premises of fact underlying the decision had changed. *Id.* at 854-855. In another case Justice Scalia proffered a somewhat different list of factors: "[O]ne is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also

IV. ATTACKS ON ARGUMENTS BASED UPON TRADITION

19. No Such Tradition Exists¹⁴⁰

20. There Is a Conflicting Tradition¹⁴¹

V. ATTACKS ON ARGUMENTS BASED UPON POLICY

21. The Predictive Judgment Is Not Factually Accurate¹⁴²

has proved unworkable in practice, then all reluctance ought to disappear." *Rutan v. Republican Party*, 497 U.S. 62 110-111 (1990)(Scalia, J., dissenting).

¹⁴⁰ Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), indicated the difficulty of proving "tradition" when he stated, "What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable." *Id.* at 549.

¹⁴¹ In a famous passage from an opinion dissenting from the denial of certiorari in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan recognized the existence of conflicting traditions; he indicated that due process represents "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." *Id.* at 542 (Harlan, J., dissenting).

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia and Justice Brennan invoked competing traditions. The issue in that case was the constitutionality of a state law that conclusively presumed that the husband of a woman was the father of a child born during the marriage. The biological father challenged the presumption. Justice Brennan, in dissent, invoked the American tradition of respecting the rights of "parenthood," *id.* at 141, but the majority, led by Justice Scalia, cited "the historic respect -- indeed, sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123. In footnote 6 of the opinion, Justice Scalia urged that the relevant tradition should always be "the most specific level at which a relevant tradition ... can be identified." *Id.* at 127. Richard Fallon correctly identifies this as a conflict between "general" and "specific" traditions. Fallon, *Constructivist Coherence*, *supra* note 20, at 1198-1199.

¹⁴² In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court rejected the President's policy argument that a private lawsuit brought against him would impair his ability to perform the duties of his office:

"As a factual matter, petitioner contends that this particular case -- as well as the potential

22. The Policy Is Not One of the Purposes of the Law.¹⁴³

23. The Policy is Not Sufficiently Strong¹⁴⁴

additional litigation that an affirmance of the Court of Appeals judgment might spawn -- may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office. Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. In the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the district Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time." *Id.* at 701-702.

¹⁴³ An example of an opinion rejecting the evaluative portion of a policy argument is Justice Scalia's separate concurring opinion from *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), where he wrote, "There is no basis for thinking that our society has ever shared the Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal -- much less for thinking that it was written into the Constitution." *Id.* at 574-575 (1991). For an extended discussion of how policies are ascribed to laws, see *infra* notes 238-253 and accompanying text.

A closely related argument is that the *asserted* purpose of the law was not the *actual* purpose, and that the actual purpose was an invalid purpose such as animus towards an unpopular group. "The record convinces me that this permit was required because of the irrational fears of neighboring property owners rather than for the protection of the mentally retarded persons who would reside in [the] home." *Cleburne v. Cleburne Living Centers, Inc.*, 473 U.S. 432, 455 (1985)(Stevens, J., concurring); "[T]he legislative history ... indicates that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)(Brennan, J.); "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Romer v. Evans*, 517 U.S. 620, 635 (1996) (Breyer, J.).

¹⁴⁴ The Supreme Court has developed a spectrum of ends-means tests for evaluating the constitutionality of governmental acts: strict scrutiny, intermediate scrutiny, and the rational basis test. These represent different standards for measuring the sufficiency of the policy analysis supporting the law; the governmental policy must be "compelling" to pass strict scrutiny, "substantial" to pass intermediate scrutiny, and merely "legitimate" to pass the rational basis test. To apply these standards one must first identify all of the governmental interests, and then to determine whether any of those interests justify the law under the relevant standard. For example, after identifying four governmental interests offered in support of an affirmative action college admissions program, Justice Powell noted, "It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification." *Regents of the University of California v. Bakke*, 438 U.S. 265, 306 (1978)(Powell, J.).

24. The Policy Is Not Served In This Case.¹⁴⁵

25. The Policy Is Outweighed by a Competing Policy¹⁴⁶

The foregoing intramodal attacks are not the only way to critique legal arguments; clashes within a single mode are often resolved by resort to different forms of argument. For example, Argument 16, "There are two conflicting lines of authority," on the surface presents a purely intramodal problem -- which precedent controls? But how can a court resolve a conflict between competing precedents? Assume that none of the other intramodal arguments apply; assume that the issuing courts are of equal authority, that both opinions were holdings contained in majority opinions, that the facts of both cited cases have similarities to the case at hand, and that the underlying policies of each cited case have application to the case at hand. In such cases, Benjamin Cardozo suggests that the interpretation of the

¹⁴⁵ This is essentially a *causation* argument; it disputes that there is any causal nexus between the law and the policy goal. Justice Powell employed this argument in *Bakke*: "Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. ... But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal." *Id.* at 310. Justice Brennan also used this approach in a gender discrimination case: "[T]he relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed's* requirement that the gender-based difference be substantially related to achievement of the statutory objective." *Craig v. Boren*, 429 U.S. 190, 203 (1976)(Brennan, J.).

¹⁴⁶ Justice Steven Breyer is perhaps the foremost judicial advocate of balancing, as the following passage illustrates: "The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves ... and the disadvantage to the First Amendment interests of cable operators and other programmers" *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 743 (1996)(Breyer, J.). In contrast, Justice Kennedy has "expressed misgivings about judicial balancing under the First Amendment." *Id.* at 784 (Kennedy, J., concurring in part and dissenting in part). The balancing of policies is also a key element in the development of the common law; for example, see Justice Cardozo's description of the underlying policy analysis in *Riggs v. Palmer* in the text accompanying note 146 *infra*. See also the excerpt from *Unico v. Owen* quoted *supra* note 76.

law turns upon a balancing of the principles or interests that are at stake. Cardozo's famous example came from the case of *Riggs v. Palmer*,¹⁴⁷ where the court held that a legatee who had murdered his testator could not inherit under the will.

"Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. ... There was the principle that civil courts may not add to the pains and penalties of crimes. ... But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong."¹⁴⁸

Analogies may be either formalistic or realistic. A formalist analogy is one based upon the factual similarities between the previous case and the case under consideration.¹⁴⁹ A realist analogy is based upon the similarities between the values served by the cited case and the values that are at stake in the case at hand.¹⁵⁰ As one legal realist explained, competing analogies are resolved realistically, not

¹⁴⁷ 115 N.Y. 506 (1889).

¹⁴⁸ CARDOZO, JUDICIAL PROCESS, *supra* note 26, at 40-41.

¹⁴⁹ See *supra* note 133.

¹⁵⁰ See *supra* note 134.

formalistically:

"The choice which a judge makes of one analogy rather than another is an expression of ... a value-judgment; and the possibility of competing analogies therefore arises not merely or so much out of the doubtfulness of the factual resemblances among his materials, but rather out of the possibility of differences of opinion as to the comparative value of the different results which one analogy or the other would bring about."¹⁵¹

Thus it is that intramodal conflict between two lines of precedent is resolved by recourse to another mode of reasoning, policy analysis. This example of intramodal conflict thus serves as a transition to the following discussion of intermodal conflict.

B. Intermodal Arguments

Each of the five kinds of legal argument is like a single voice. In cases where the five methods of legal analysis all lead to the same conclusion, the law is like a chorus singing the same tune. But where the different methods of analysis give different answers -- where they are in dissonance or cacophony -- it is a hard case, and the proper interpretation of the law is unclear.¹⁵²

¹⁵¹ John Dickinson, *The Law Behind Law*, *supra* note 116, at 290 (1929).

¹⁵² Akhil Amar uses a visual metaphor to illustrate the complementary function of the methods of interpretation: "[E]ach tool [of interpretation] is a lens through which to read, an imperfect but still useful lens whose reading must be checked against readings generated by other lenses." Amar, *Intratextualism*, *supra* note 7, at 801.

Discussing conflicting legal arguments is the staple fare of legal education, grist for the mill of socratic discussion.¹⁵³

"Intermodal arguments" arise when one kind of argument is set against an argument of a different kind. For example, in his review of the Supreme Court's reasoning in *Morrison v. Olson*,¹⁵⁴ Akhil Amar deplores the "embarrassing and blinkered ... clause-bound" textual approach of the majority,¹⁵⁵ as compared to the "remarkably promising" technique of intratextualism.¹⁵⁶

¹⁵³ The appellation is apt, for "intermodal" conflict was at the core of the Socratic dialogues. The dialogues typically concerned the definition of an abstract concept such as "courage" (*Laches*), "friendship" (*Lysis*), "virtue" (*Meno*), or "knowledge" (*Theaetetus*). In each dialogue, by asking questions Socrates demonstrated that his conversant possessed a number of different understandings of the concept, dependent on context; from this, Socrates would conclude that the other speaker did not understand the concept. "For Socrates, if you couldn't define something with unvarying comprehensiveness, then you really didn't know what it is." I.F. STONE, *THE TRIAL OF SOCRATES* 69 (1989). Stone accuses Socrates and Plato of "gross oversimplification and the search for absolute abstractions where there are only complex realities." *Id.* at 49. Thus Socrates and Plato, in their search for pure and absolute definitions, are similar to those who adhere to "foundational" legal analysis, rejecting a pluralistic understanding of law. Foundational analysis is discussed *infra* at notes 176-190 and accompanying text.

In what may be an appropriate reminder to law teachers, Stone reminds us that the socratic deconstructive teaching technique could be simply destructive: "Socrates was the master of a negative dialectic that could destroy any and every definition or proposition put to him. But he rarely offered a definite proposition of his own." *Id.* at 56.

¹⁵⁴ 487 U.S. 654 (1988).

¹⁵⁵ Amar, *Intratextualism*, *supra* note 7, at 811.

¹⁵⁶ "If the Court is to place so much emphasis on text, it owes us a more sophisticated version of textualism." *Id.* at 812.

A principal example of intermodal conflict may be found in the field of Separation of Powers. In Separation of Powers cases the classic division on the Supreme Court has been between those Justices who reason from text and those who rely upon policy analysis. In *Youngstown Sheet & Tube v. Sawyer*,¹⁵⁷ the textual approach of Justice Black¹⁵⁸ stands in stark contrast to the realist analysis of Justice Jackson.¹⁵⁹ This pattern of conflict between "formalism" and "functionalism"¹⁶⁰ has been repeated in subsequent separation of powers cases.¹⁶¹

The same intermodal conflict lies at the heart of the Black-Frankfurter debate on the proper

¹⁵⁷ 343 U.S. 579 (1952).

¹⁵⁸ Justice Black stated that the Constitution prevented President Truman from seizing the steel mills because this would constitute the presidential exercise of legislative power in violation of Art. I, Sec. 1, which vests "all legislative powers" in the Congress: "[T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Id.* at 587.

¹⁵⁹ Justice Jackson rejected Black's textual approach: "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." *Id.* at 635. Instead, Justice Jackson observed that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. He reasoned that the President was disabled from seizing the steel mills because he had acted in the face of Congressional disapproval of his actions. *Id.* at 640.

¹⁶⁰ See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions -- A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987); and William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 Harv. J. L. & Pub. Pol'y 21 (1998).

¹⁶¹ See *INS v. Chadha*, 462 U.S. 919 (1983) (Chief Justice Burger principally employed a textual approach in writing for the majority, while Justice White, utilizing policy analysis, dissented); *Bowsher v. Synar*, 478 U.S. 714 (1986) (same); and *Morrison v. Olson*, 487 U.S. 654 (1988) (Chief Justice Rehnquist, writing for the majority, used primarily policy analysis, while Justice Scalia, in dissent, relied principally upon text).

interpretation of the Due Process Clause of the Fourteenth Amendment. *Adamson v. California*¹⁶²

essentially concerned whether it is more legitimate to define the rights inherent in due process through a textual approach (Black's "total incorporation" theory),¹⁶³ or whether it is more appropriate to utilize a realist approach (Frankfurter's "fundamental fairness" test).¹⁶⁴

Another familiar intermodal conflict is presented by the competing interpretative techniques of text and intent.¹⁶⁵ Larry Alexander poses the question cogently:

¹⁶² 332 U.S. 46 (1947).

¹⁶³ "I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights." *Id.* at 89 (Black, J., dissenting). Akhil Amar has observed that the appeal of the theory of incorporation for Justice Black lay in its mechanical and textual quality. Akhil Amar, *In Praise of Bobbitt*, *supra* note 20, at 1706 (1994). Bobbitt, who refers to Justice Black as "our most noted textualist," argues that "If Black had had his way, the Ninth and Tenth Amendments would simply have vanished, because they were too textually vague to serve as the basis for textual arguments." BOBBITT, INTERPRETATION, *supra* note 5, at 62, 63. Judge Posner agrees with Justice Black on this point: "If [the Ninth Amendment] gives the courts anything, it gives them a blank check. Neither the judges nor their academic critics and defenders want judicial review to operate avowedly free of any external criteria." Posner, *supra* note 72, at 441.

¹⁶⁴ "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses." 332 U.S., at 67-68 (Frankfurter, J., concurring).

¹⁶⁵ This conflict is not new; John Wigmore derided the plain meaning rule, while Holmes embraced it. *Compare* 9 JOHN H. WIGMORE, EVIDENCE 198 (James H. Chadbourn rev. 1981) ("[T]he 'plain meaning' is simply the meaning of the people who did *not* write the document."); and Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-418 (1899) ("[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English").

A seminal article on this conflict is Eskridge's *The New Textualism*, *supra* note 36. See also Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1025-

"What is a statute? Knowing what a statute is -- whether, for example, a statute is what the lawmakers intended to accomplish by their words (what they meant by them), or alternatively is what those marks signify conventionally as words in a particular language -- precedes knowing what the statute means."¹⁶⁶

Kent Greenawalt suggests that judges may reject unambiguous statutory language that is in conflict with the purpose of the law.¹⁶⁷ Alexander, in contrast, notes that clear text may control intent: "[O]ne can make authorial intentions the touchstone of authoritative meanings so long as those meanings are not inconsistent with conventional understandings of the words."¹⁶⁸ The conflict between text and intent arises in the context of the interpretation of contracts as well:

1032, (1998) (hereinafter *Textualism and Contextualism*) (contrasting textualism and intentionalism); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); and Redish and Chung, *Democratic Theory*, *supra* note 42, at 817-831. Redish and Chung propose a compromise between the two positions: "textualist originalism." *Id.* at 859.

¹⁶⁶ Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's Legal Reasoning and Political Conflict*, 72 Notre Dame L. Rev. 531, 544 (1997).

¹⁶⁷ "Somewhat more controversially, judges may also be justified in rejecting a straightforward reading of the text if it is clearly at odds with the underlying statutory purpose, is manifestly absurd, or is undoubtedly unjust." GREENAWALT, 20 QUESTIONS *supra* note 38, at 57 (1999). Posner agrees in *Legal Realism*, *supra* note 28, at _____. See also Sinclair, *Statutory Reasoning*, *supra* note 136, at 345-346, for an example of a case where "[c]lear and demonstrable legislative intent trumped clear and undisputed statutory language." See also Robert Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 Md. L. Rev. 1192, 1206 (1993). In this article Keeton discusses cases where the Supreme Court discerned statutory purposes which were not apparent from the text of the law. *Id.* at 1201-1203.

¹⁶⁸ Larry Alexander, *The Banality of Legal Reasoning*, 73 Notre Dame L. Rev. 517, 520-521 (1998).

"One goal of contract law is to enforce contracts as written so as not to 'jeopardize the certainty of contractual duties which parties have a right to rely on.' ... But contract law has other, competing goals as well. One such goal is to interpret and enforce contracts in light of the reasonable expectations the parties had at the time the contract was made."¹⁶⁹

The case of *Ankenbrandt v. Richards*¹⁷⁰ posed a stark conflict between text and precedent. In that case the Supreme Court held that the federal courts lack jurisdiction to adjudicate domestic relations cases under the diversity-of-citizenship statute even though the statute extends jurisdiction to the district courts in "all civil actions" between citizens of different states.¹⁷¹ The Court justified this "domestic relations exception" to diversity jurisdiction by relying on Congress' acquiescence to the Court's longstanding interpretation¹⁷² of previous versions of the diversity statute.¹⁷³ The Court specifically

¹⁶⁹ Warner, *supra* note 134, at 1540, quoting *Southern Concrete Services, Inc., v. Mableton Contractors*, 407 F. Supp. 581, 584 (N.D. Ga. 1975). See also Nicholas M. Insua, *Dogma, Paradigm, and the Uniform Commercial Code: Sons of Thunder v. Borden Considered*, 31 Rutgers L. Rev. 249 (1999) (arguing against a "plain meaning" approach to the interpretation of contracts).

¹⁷⁰ 504 U.S. 689 (1992).

¹⁷¹ 28 U.S.C. 1332.

¹⁷² The "domestic relations exception" to federal diversity jurisdiction was first recognized in *Barber v. Barber*, 62 U.S. 582 (1859). For a discussion of this principle see generally Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. Rev. 669 (1995).

¹⁷³ "We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly

invoked the principle of "statutory stare decisis:" "Considerations of stare decisis have particular strength in this context, where 'the legislative power is implicated, and Congress remains free to alter what we have done.'"¹⁷⁴ The Court thus elevated precedent over what one justice characterized as unambiguous text.¹⁷⁵

Intermodal arguments take two forms. First, one may assert that one form of argument is legitimate and that the competing form of argument is illegitimate.¹⁷⁶ Second, one may assert that one form of argument categorically or contextually outweighs an argument of a different kind. The first strategy, that of denying the legitimacy of one or more kinds of arguments, is called "foundational,"¹⁷⁷

based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to 'suits of a civil nature at common law or in equity.'" 504 U.S., at 700.

¹⁷⁴ Id., quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

¹⁷⁵ "The diversity statute is not ambiguous at all." 504 U.S., at 707 (Blackmun, J., concurring) (contending that the diversity statute confers jurisdiction over all civil cases, but that federal courts had discretion to abstain from exercising that jurisdiction in domestic relations cases).

¹⁷⁶ For example, in *Adamson v. California*, 332 U.S. 46 (1947), Justice Black, in dissent, excoriated what he referred to as the "natural law" approach of Justice Frankfurter:

"This decision reasserts a constitutional theory spelled out in [*Twining v. New Jersey*, 211 U.S. 78 (1908)], that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.' ... But I would not reaffirm the *Twining* decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise" Id. at 69-70.

¹⁷⁷ See *supra* notes 22-25.

while we may refer to the second kind of intermodal attack as "relational." Each kind of intermodal argument is considered below.

1. *Foundational Attacks*

Foundational or "privileged factor" theories assert that only certain kinds of arguments are valid; as a result, they deny the legitimacy of other kinds of argument.¹⁷⁸ Justice Scalia, for example, has taken the position that "a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."¹⁷⁹ Consistent with his "foundationalist" approach to the law, Justice Scalia expressly rejects the concept of "legislative intent,"¹⁸⁰ and specifically the use of legislative history,¹⁸¹ in

¹⁷⁸ "Privileged factor theories give determinative significance to arguments within one or two of the categories and virtually ignore the other kinds of arguments." Fallon, *Constructivist Coherence*, *supra* note 21, at 1209. "An attack on these modalities is an attack on the legitimacy of the decisions they support." BOBBITT, INTERPRETATION, *supra* note 5 at 108.

¹⁷⁹ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (footnote 6) (1989). Justice Brennan responded, "In a community such as ours, 'liberty' must include freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty." *Id.* at 141.

¹⁸⁰ See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1997)(hereinafter A MATTER OF INTERPRETATION). He has observed that "to tell the truth, the quest for the 'genuine' legislative intent is probably a wild-goose chase anyway." Scalia, *Judicial Deference*, *supra* note 36, at 517.

¹⁸¹ Scalia maintains that legislative history "is much more likely to produce a false or contrived legislative intent than a real one," A MATTER OF INTERPRETATION, *supra* note 178, at 32, and that the intent of Congress "is best sought by examining the language that Congress used." *Moskal v. United States*, 498 U.S. 103, ___ (Scalia, J. dissenting).

the interpretation of statutes.¹⁸² Another example of foundational analysis is the "originalism" of Robert Bork. Bork rejected policy analysis in the interpretation of the Constitution as illegitimate because it is not a "neutral principle."¹⁸³ Nor is foundationalism limited to conservative jurists. Scholars arguing for recognition of emerging claims reject precedent,¹⁸⁴ a critic of Justice Scalia rejects tradition as a valid legal argument,¹⁸⁵ and the legal realist Karl Llewellyn conducted a furious attack on the canons of construction.¹⁸⁶

¹⁸² See generally Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 Harv. J. on Legis. 369 (1999) (graphing a dramatic reduction in the number and proportion of citations to legislative history between 1980 and 1998). Justice Breyer, in contrast to Justice Scalia, is an "avid supporter" of the use of legislative history. *Id.* at 374.

¹⁸³ Bork, *supra* note 41, at 8, 17 (1971); see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 364 (1977).

¹⁸⁴ "The baselines on a baseball field are made of lime dust. With a small breeze, the baseline blows away. The argument that judges should not change the law has a similar quality. It starts out fuzzy around the edges, and on the slightest examination, it disappears." Beerman and Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 Ga. L. Rev. 911, 989 (1989) (hereinafter *Baseline Questions*).

¹⁸⁵ "Because the appeal to long-standing tradition is prone to abuse, courts should reject it as an interpretative rule or strategy for even though cloaked in neutrality it favors majoritarianism over individual rights, encourages social conformity, fuses social biases and prejudices into the Constitution, and fails to constrain judicial discretion. ... [I]t is clear that ... these interpretive techniques merely mask substantive political values that the Justice holds." David Schultz, *Scalia on Democratic Decision Making and Long Standing Traditions: How Rights Always Lose*, 31 Suffolk U. L. Rev. 319, 348 (1997).

¹⁸⁶ See *supra* note 123.

Philip Bobbitt maintains that foundational intermodal arguments are fundamentally flawed.¹⁸⁷ Bobbitt notes, for example, that originalists and libertarians endow their theories with "axiomatic correctness" because they assume that all other methods of interpretation are invalid.¹⁸⁸ Bobbitt contends that the country rejected foundational analysis when the Senate voted not to confirm Robert Bork to the Supreme Court:

"For fifteen years Robert Bork had been attacking the legitimacy of the means of judicial reasoning that undergirded the Warren Court decisions. To this campaign, in part, he owed his public reputation, his nomination, and ultimately his defeat."¹⁸⁹

Bobbitt asserts that "no one of real insight can long work with American constitutional materials and believe that a single favored interpretive approach assures justice."¹⁹⁰ Eskridge and Frickey make the same point with respect to statutory interpretation: "Each criterion is relevant, yet none necessarily trumps the others."¹⁹¹ Many legal scholars agree with Bobbitt, Eskridge and Frickey on this point.¹⁹²

¹⁸⁷ See Bobbitt, *Reflections*, *supra* note 16, at 1872.

¹⁸⁸ BOBBITT, INTERPRETATION, *supra* note 5, at 102.

¹⁸⁹ *Id.* Bobbitt also argues, however, that Bork in reality was not doctrinaire, "even if [he] could appear that way, even if perhaps he wished to be that way" *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 352.

¹⁹² "No tool of interpretation is a magic bullet." Amar, *Intratextualism*, *supra* note 7, at 801. Paul McGreal agrees: "[C]onstitutional scholars from such varied positions as Laurence Tribe and Robert

However, Bobbitt goes beyond attacking foundational arguments; he also contends that the different forms of legal argument are "incommensurable,"¹⁹³ and that therefore one cannot directly compare the persuasive authority of any legal argument with a competing argument of a different kind.¹⁹⁴ His position challenges the validity of "relational arguments," considered below.

2. *Relational Attacks*

Bobbitt proposes that conflicts between the incommensurable modalities can be resolved only by recourse to "conscience," which he describes as the exercise of "moral choice."¹⁹⁵ Scholars have criticized Bobbitt for the *deus ex machina* of "conscience," dismissing it as "moral theory,"¹⁹⁶ a

Bork have, at one time or another, joined the hunt for a grand theory of constitutional law. ... This article takes a contrary view: The Constitution does not require or prefer any particular theory of constitutional interpretation." McGreal, *Ambition's Playground*, *supra* note 15, at 1108.

¹⁹³ BOBBITT, INTERPRETATION, *supra* note 5, at 116.

¹⁹⁴ *Id.* at 155-162.

¹⁹⁵ "In the very incommensurabilities of the forms of argument lies the possibility of moral choice." *Id.* at 161. "The United States Constitution formalizes a role for the conscience of the individual sensibility by requiring decisions that rely on the individual moral sensibility when the modalities of argument clash." *Id.* at 168.

¹⁹⁶ Dennis Patterson, *Truth in Law: A Modal Account*, in LAW AND TRUTH 128, 149 (Dennis Patterson, ed. 1996) (hereinafter *Truth in Law*). "It is far from self evident that the exercise of conscience is consistent with -- or guarantees -- justice." *Id.* See also Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 Chi.-Kent L. Rev. 415 (1999), suggesting that "Bobbitt thinks that judges should decide these cases in the way that their personal ultimate values imply is most desirable." *Id.* at 445.

"conversation stopper,"¹⁹⁷ and "a black box."¹⁹⁸ Similarly, Eskridge and Frickey suggest that the resolution of intermodal conflicts ultimately depends upon the exercise of "practical reason."¹⁹⁹ In response, Larry Alexander has stated, "I think the claims on behalf of such practical reason are hogwash."²⁰⁰

In an important critique of pluralistic approaches to Constitutional interpretation, Richard Fallon identified the "commensurability problem,"²⁰¹ and proposed a solution: he suggested that intermodal conflicts may be resolved by resort to a hierarchy among constitutional modalities.²⁰² Fallon ranks legal arguments in the following order: text, intent, structural argument, precedent, and value arguments.²⁰³

¹⁹⁷ Gene R. Nichol, *Constitutional Judgement*, 91 Mich. L. Rev. 1107, 1115 (1993).

¹⁹⁸ "Conscience for Bobbitt seems to be largely a black box; the heart may have its reasons, but they are not otherwise subject to rational examination" Balkin and Levinson, *Constitutional Grammar*, *supra* note 93, at 1796.

¹⁹⁹ Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 351-352.

²⁰⁰ Alexander, *The Banality of Legal Reasoning*, *supra* note 164, at 521.

²⁰¹ "Constitutional law has a commensurability problem. The problem arises from the variety of kinds of argument that now are almost universally accepted as legitimate in constitutional debate and interpretation." Fallon, *Constructivist Coherence*, *supra* note 21, at 1189.

²⁰² "Sometimes ... the strongest arguments within the different categories will point irreversibly to different conclusions. In such cases, ... [t]he implicit norms of our constitutional practice ... require that the claims of the different kinds of arguments be ranked hierarchically." *Id.* at 1286.

²⁰³ *Id.* at 1193-1194. For example, Fallon concludes, "When arguments from text and from the

Although Fallon's hierarchy of forms seems intuitively reasonable,²⁰⁴ it does not explain why in one case the law elevates text over policy,²⁰⁵ and in another chooses policy over text.²⁰⁶ One could argue that every case elevating policy over text is wrongly decided, but such an explanation would not be a *descriptive* model of legal decisionmaking.

Intermodal conflicts are resolved in a more nuanced and complex way than is imagined by either a foundational or hierarchical relational system. I propose that intermodal conflicts are resolved by balancing the policies that are served by the different kinds of legal arguments, and that there exist not

framers' intent prove resistant to accommodation, their hierarchical authority demands recognition. And while the range of permissible accommodations is broad, the hierarchical ordering of categories of argument presumes that there are limits." *Id.* at 1282.

²⁰⁴ Fallon's hierarchy corresponds to the order in which other scholars, including me, have listed the forms of argument. However, Fallon's hierarchy has been criticized for being "admittedly intuitive and somewhat hesitant." Griffin, *Pluralism*, *supra* note 11, at 1764. As Bobbitt notes, "If there is a hierarchy of modes, which mode supports this hierarchy?" BOBBITT, INTERPRETATION, *supra* note 5, at 156.

²⁰⁵ "The [policy and intent] arguments of the *Ervin* and *Cooper* courts are persuasive, but we are compelled to reach an opposite conclusion. We can ignore neither the plain language of the statute which expressly includes depositary and collecting banks in its description of representatives nor the comments which appear to exclude such banks from liability." *Denn v. First State Bank*, 316 N.W.2d 532, 536 (Minn. 1982).

²⁰⁶ "[T]o adhere blindly to the limitations imposed by those rules, if to do so would violate the policies which the U.C.C. otherwise seeks to promote, would be unwise and unjust." *United States Fidelity & Guaranty Co. v. Federal Reserve Bank of New York*, 620 F.Supp. 361, 369 (S.D. N.Y. 1985), *aff'd per curiam* 786 F.2d 77 (2d Cir. 1986).

just one but multiple hierarchies of arguments.²⁰⁷

To begin with, we should ask, what are the general policies and values served by a system of law? What do we ask of the law? First, we ask that it be transparent and susceptible to objective proof of what the law is. Second, we ask that it respect the value of popular sovereignty (in the case of publicly enacted law) or the value of personal autonomy (in the case of contracts, deeds, and wills). Third, we ask that the law be stable, predictable, and determinate. Fourth, we ask that the law conform to the settled expectations of society, and contribute to societal coherence. Fifth, we ask that the law be flexible enough to adapt to a changing society, and to reflect contemporary notions of justice.

These five values of course correspond to the five kinds of legal argument. But each kind of argument contributes, to varying extent, to these values. For each underlying value we can construct a hierarchy based upon the extent to which each kind of argument contributes to it. Here is a set of proposed hierarchies:

1. Certainty -- Ease of Proving the Law

²⁰⁷ Fallon acknowledged that "by accommodating the claims to interpretive authority of five factors," a pluralistic model of law "respects the values underlying all of them." *Id.* at 1250. Similarly, Fallon characterizes balancing theories as having "intuitive plausibility," (*id.* at 1227-1228), but ultimately concludes that such theories suffer from the defects that courts do not expressly balance one form of legal argument against another, and that the interdependence of legal arguments militates against balancing. *Id.* at 1229-1230. By "interdependence," Fallon is referring to the fact that the forms of argument are often mixed. *Id.* at 1238. A single legal argument may employ more than modality; for example, a judicial opinion may be cited for the proposition that a certain policy was intended by the framers to be the purpose of the law, as does Justice Brandeis' famous concurrence in *Whitney*: "Those who won our independence believed that the final end of the state was to make men free to develop their faculties" *Whitney v. California*, 274 U.S. 357, 375 (1927). When legal arguments are bimodal or polymodal the "commensurability problem" is of course made more complex.

Text

Precedent

Intent

Tradition

Policy

2. Popular Sovereignty -- The Will of the People

Intent

Text

Tradition

Precedent

Policy

3. Stability -- Predictability in the Law

Precedent

Text

Tradition

Intent

Policy

4. Societal Expectations -- Convention and Cohesion

Tradition

Text

Precedent

Intent

Policy

5. Flexibility and Evolving Notions of Justice

Policy

Intent

Precedent

Text

Tradition

In the passage quoted at the beginning of this article and repeated below, Benjamin Cardozo eloquently posed the question of how to balance these values:

"What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed

daily in the cauldron of the courts, all these ingredients enter in varying proportions."²⁰⁸

Adrian Vermeule describes intermodal conflict as the problem of "interpretive choice."²⁰⁹

Vermeule suggests that judges should maximize certainty and predictability by excluding legislative history, by picking and staying with one canon of construction rather than using competing canons, and by observing a strict rule of statutory *stare decisis*.²¹⁰ This approach to the problem of interpretive choice would certainly achieve Vermeule's goals of certainty and predictability, but it would necessarily devalue the competing goals of popular sovereignty and flexibility.²¹¹

A complicating factor is that the relative rankings of the forms of argument vary from field to field; for example, the doctrine of *stare decisis* is generally acknowledged to be weaker in the field of Constitutional Law than in it is for statutory interpretation.²¹² Similarly, although "the intent of the

²⁰⁸ CARDOZO, JUDICIAL PROCESS, *supra* note 27, at 10.

²⁰⁹ "[T]he problem is one of 'interpretive choice' -- the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation." Adrian Vermeule, *Interpretative Choice*, 75 N.Y.U. L. Rev. 74, 76 (2000).

²¹⁰ *Id.* at 74, 128-148.

²¹¹ Cardozo, of course, would not have agreed with Vermeule's proposed solution: "As the years have gone by, and as I have reflected more and more on the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable." CARDOZO, JUDICIAL PROCESS, *supra* note 27, at 166. See also *infra* note 218.

²¹² See *Rutan v. Republican Party*, *supra* note 135, 497 U.S., at 110 (1990) (Scalia, J., dissenting). The reduced role for the doctrine of *stare decisis* in constitutional interpretation is a development of the twentieth century, according to one scholar:

"Thus, the prevailing doctrine of *stare decisis* at the time of the framing and throughout the nineteenth century generally rejected the notion of a diminished standard of deference

legislature" is widely considered to be the touchstone of statutory interpretation,²¹³ in the field of constitutional law the theory assigning primary force to "the intent of the framers" was rejected along with the nomination of Robert Bork.²¹⁴ Constitutional originalists such as Raoul Berger and Robert Bork argue against the standard ordering by seeking to equate the intent of the framers with legislative intent, thus elevating "intent" to a preferred position in constitutional interpretation.²¹⁵ In contrast, William Eskridge's theory of "dynamic statutory interpretation" may be understood as an attempt to reduce the reliance on legislative intent in statutory analysis to the level it currently enjoys in constitutional law.²¹⁶ These "parallel debates" over constitutional originalism and statutory dynamism²¹⁷ ultimately concern

to constitutional precedent. When Justice Brandeis (dissenting in *Burnet*) sought to lay claim to a purportedly longstanding position of the Court that constitutional cases should readily be corrected where they are found inconsistent with reason, the Court's actual position on that point had been to treat constitutional precedent in the same way it treated other decisions. Despite its questionable historical pedigree, Brandeis' approach has been unquestioningly adopted by the modern Court." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 727 (1999).

²¹³ See *supra* note 42 and accompanying text.

²¹⁴ See *supra* note 187 and accompanying text.

²¹⁵ See *supra* note 112 and accompanying text.

²¹⁶ "[O]riginal legislative expectations should not always control statutory meaning." Eskridge, *Dynamic Statutory Interpretation*, *supra* note 35, at 1481. Kent Greenawalt discusses a number of criticisms of the concept of "legislative intent" in GREENAWALT, 20 QUESTIONS, *supra* note 38, at 91-159.

²¹⁷ Eskridge acknowledges these "parallel debates" in William N. Eskridge, *Should the Supreme Court Read the Federalist But Not Statutory Legislative History?*, 66 Geo. Wash. L. Rev. 1301 (1998).

the proper relation among the underlying values of our system of law.

In summary, each kind of argument has particular virtues and vices which vary from case to case and from field to field. The solution that I propose to the "commensurability problem" is that judges take into account not only the intramodal strength or weakness of an argument on its own terms, but also the intermodal strength or weakness of the type of argument as measured by the force of the comparative values that the legal system as a whole is intended to serve.²¹⁸

Hard cases are by definition cases where the law is indeterminate, where plausible arguments can be constructed for either side,²¹⁹ and where able judges may, in good faith, come to different conclusions about what the law is.²²⁰ In such cases the persuasiveness of the court's opinion depends upon the

²¹⁸ Kent Greenawalt discusses this strategy of balancing the value of different interpretative techniques of statutory interpretation in GREENAWALT, 20 QUESTIONS, *supra* note 38, at 59-76.

²¹⁹ "In hard cases, two or more legitimate modalities will conflict." BOBBITT, INTERPRETATION, *supra* note 5, at xiv. "Reasonable, respectable legal arguments often are available on both sides of such legal issues, which is just what makes them 'hard.'" David Lyons, *Justification and Judicial Responsibility*, 72 Calif. L. Rev. 178, 182 (1984). "The fact that in 'hard' cases we can construct plausible arguments in support of contradictory conclusions would seem to show that no deductively valid argument can be constructed in support of either conclusion." Winters, *Logic and Legitimacy*, *supra* note 77, at 277. "In easy cases, most of the evidence points in the same direction and is thereby mutually reinforcing. In the hard cases, however, the evidence points in different directions" Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 322-323.

²²⁰ Robert Bork considers "indeterminacy" to be the central problem in constitutional law, and he developed his theory of originalism as a solution to that problem. See *supra* note 74. "Certainly, Bork deserves high praise for his brilliant insights and for his effort to find certainty in the Constitution. But his quest for certainty continues, while others, such as Cardozo, Coke, Corbin, and Wilson have taken a more pragmatic approach and 'have become reconciled to the nature of uncertainty, because [they] have grown to see it as inevitable.'" Paul Brickner, *Robert Bork's Quest for Certainty: Attempting to Reconcile the Irreconcilable*, 17 J. Contemp. L. 49, 66 (1991), quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-167 (1921). Two generations ago Justice Holmes warned of the danger of believing that a system of law "can be worked out like mathematics from some

complex balance of intramodal and intermodal arguments.²²¹

III. TEACHING LEGAL ANALYSIS USING THE PLURALISTIC MODEL

A. What Does It Mean "To Think Like a Lawyer?"

Students enter law school expecting to learn "the law," that is, rules of law. They conceive law to be a science, a set of determinate rules that govern human behavior.²²² Students are frustrated by law professors who insist that the principal purpose of legal education is not to learn rules of law, but rather that students are expected to learn "to think like lawyers."

What exactly does it mean "to think like a lawyer?"²²³ "To think like a lawyer" is to be adept at

general axioms of conduct. ... I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and if they would take more trouble, agreement inevitably would come." Holmes, *Path*, *supra* note 63, at 998. See also Kent Greenwalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359 (1975); and Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 380.

²²¹ "No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do justice between competing interests." H.L.A. Hart, *Problems of Philosophy of Law*, *supra* note 24, at 271.

²²² For arguments that law is not a science, see *supra* note 116 and accompanying text.

²²³ In recent years this question has attracted considerable scholarly attention. A number of sources are listed in Kurt M. Saunders and Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. Rev. 121, fn. 3 (1994). Most scholars agree with James Boyle that "thinking like a lawyer" is learning a

legal analysis; it is to be able to predict, argue, and decide what the law is in hard cases. The purpose of legal education is to train students in the mastery of this skill.

Attorneys' stock in trade is to create arguments that interpret the law. In hard cases, where the law is not self-explanatory, attorneys create arguments to explain the law to clients, negotiate with other attorneys, make oral arguments, and draft briefs. Arguing for favorable interpretations of the law is not only a professional service, it is an ethical obligation.²²⁴

Judges, like attorneys, are also required to create legal arguments that seek to persuade. Not only must they evaluate the strengths and weaknesses of competing arguments, they must explain their rulings in a manner that will be accepted by the parties, by higher courts, and by society as a whole.²²⁵

method of argument, rather than learning the content of rules. James Boyle, *The Anatomy of a Torts Class*, 34 Am. U. L. Rev. 1003, 1051 (1985). For example, Kevin Smith suggests that thinking like a lawyer is "the ability to analyze issues and organize arguments like an attorney," and he sets forth a roadmap for attorneys to follow in solving complex legal problems. Kevin Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. Mem. L. Rev. 1, 68 (1998).

²²⁴ "A lawyer should act with zeal in advocacy upon the client's behalf." Model Rules of Professional Conduct, Rule 1.3, Comment [1]. In the course of advocacy attorneys may make "a good faith argument for an extension, modification, or reversal of existing law." *Id.*, Rule 3.1. However, an attorney is also obliged not to "knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel" *Id.*, Rule 3.3(a)(3).

²²⁵ H.L.A. Hart identifies three "judicial virtues" that are the hallmark of an "acceptable" judicial opinion:

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

Persuasive legal argument is as much an obligation of the jurist as it is of the practitioner.²²⁶

Donald Hermann has cogently observed that legal reasoning is not essentially deductive, but rhetorical; the goal of legal argument is not to describe truth, but to persuade:

"[L]egal reasoning entails a practice of argumentation. The reasons given for the conclusions reached are to be measured by their persuasiveness, not by reference to some established true state of affairs."²²⁷

I have found the pluralistic model to be an effective tool for teaching students how to create

CONCEPT OF LAW, *supra* note ___, at 205.

M.B.W. Sinclair agrees that purely *intuitive* reasons are not *acceptable* as judicial reasoning: "Although, 'I decide thus-and-so because: this is how I was brought up; my horizons dictate so; my education, religion, and socialization force me to it; my breakfast didn't agree with me' may describe judicial motivation in some cases, they are not acceptable as justifications in opinions." Sinclair, *Statutory Reasoning*, *supra* note 136, at 331.

Benjamin Cardozo explained how the acceptability of judicial opinions come to be evaluated by society:

"Only experts may be able to gauge the quality of [the judge's] work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith." CARDOZO, JUDICIAL PROCESS, *supra* note 27, at 35.

²²⁶ The obligation to produce judicial opinions "expos[es] judicial decisions to the discipline of reason and judicial reasoning to the judgment of the world." Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445, 479 (1984).

²²⁷ Donald H.J. Hermann, *Legal Reasoning as Argumentation*, 12 N. Ky. L. Rev. 467, 507 (1985). See also Linda Levine and Kurt Saunders, *Thinking Like a Rhetor*, 43 J. Legal Educ. 108 (1993) (suggesting that legal education should incorporate training in classical rhetorical techniques). Dennis Patterson has criticized Bobbitt's theory for failing to describe "the practice of persuasion that is so much a part of constitutional law and law generally." Patterson, *Truth in Law*, *supra* note 194, at 143.

persuasive legal arguments.²²⁸

The pluralistic approach to teaching legal analysis is consistent with the recommendations of Paul Wangerin, who suggests that students may be given the following "recipe" for learning to write legal arguments:

I. Introduction

II. Facts

III. Applicable Statutes Support the Stated Answer

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

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

VI. A Consistent Underlying Policy Is Reflected in All of the Cases and Statutes previously discussed

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

VIII. Conclusion²²⁹

²²⁸ Other legal educators agree. "Bobbitt's book has ... helped me see how the law game is played and (I hope) has helped me play it better and teach it to my students." Akhil Amar, *In Praise of Bobbitt*, *supra* note 21, at 1704 (1994). "Students trained in the modes of constitutional argument emerge from the classroom equipped to argue constitutional issues in a way that, without such training, would come haphazardly or not at all." Luthor T. Munford, *Constitutional Interpretation*, 14 *Miss. C. L. Rev.* 691, 697 (1994). Bobbitt states, "[I]n my law classes, I spend a good deal of time with students practicing various kinds of argument. Every professor does this -- every one must, although perhaps usually less self-consciously." Bobbitt, *Reflections*, *supra* note 16, at 1914.

²²⁹ Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 *U. Miami L. Rev.* 409, 473 (1986).

Persuasive advocacy makes use of more than one kind of legal argument.²³⁰ When the text of a legal rule, the intent of its drafters, judicial precedent, relevant tradition, and policy analysis all militate in favor of a single interpretation of the law, the reasoning seems airtight. Where all five kinds of legal argument yield the same answer, it would appear to be an easy case. The lesson for law students is that in writing a brief or preparing for oral argument, effective advocates attempt to incorporate all five kinds of legal argument into their presentation. This creates the impression that there is only one correct legal answer.²³¹

B. Identifying the Kinds of Legal Arguments

The five kinds of legal arguments, the twenty-five kinds of intramodal attacks, and the two kinds of intermodal attacks serve as a reminder, a checklist. The pluralistic model is a list of the kinds of legal arguments that may legitimately be made. The law student who is preparing for class or writing a paper, the lawyer who is drafting a brief or responding to questions in oral argument, the judge who is framing those questions or who is composing a judicial opinion, all could make use of a taxonomy of

²³⁰ "[T]he most satisfying opinions deploy a multiplicity of modes." Bobbitt, *Reflections*, *supra* note 16, at 1937. "Whether ultimately correct, the opinion in *Griffin*, by its strategy of cumulative assessment and weighing of factors potentially relevant to interpretation, seems more persuasive than would any foundationalist avenue to the same result." Eskridge and Frickey, *Practical Reasoning*, *supra* note 5, at 349.

²³¹ Eskridge and Frickey urge judges, however, not "to ignore those considerations that point in a different direction," but to "recognize the complexities" of the case. *Id.* at 365.

legal arguments.

In using the pluralistic model to teach legal analysis, I start by identifying the five kinds of legal arguments and briefly describing each category. I explain to my students that although this seems like pure academic theory, it is in fact the most practical thing that I will teach them.

My first objective is for students to learn to recognize each kind of argument in whatever form it is presented. We start, of course, with the arguments that are set forth in the edited judicial opinions of the casebook. When a student is briefing a case in class, and is explaining the reasoning that the court used to arrive at a particular interpretation of the law, I ask the student, "What kind of argument is that?" By this I mean, "Which of the five kinds of legal arguments has the court used to justify the rule of law that it invoked to decide the case?" In class discussion, as students debate the correctness of the holding of the case, they give legal reasons for their opinions. At times I interrupt the flow of the discussion to ask a student, "What kind of argument did you just make?" This is particularly effective with students who have just made a passionate argument, because it forces them to think rationally and logically about the source of their authority, which is the first step for them to eventually reflect on the possible weaknesses of their argument.

Within a week students anticipate the question, "What kind of argument is that?" However, they eventually learn to anticipate it, and they know that they are expected not only to recite the reasoning of the court or to advance a legal argument, but also to classify the argument. Within a few weeks almost all students can, with a moment's reflection, correctly identify the kinds of legal arguments.²³²

²³² When I ask students, "What kind of argument is that?" occasionally the correct answer is that the reasoning in question was not a valid legal argument at all, but was instead a logical fallacy. Judge

I do not limit this technique to assigned cases and to classroom discussion. We also practice this technique on legal arguments contained in appellate briefs, transcripts of oral arguments, law review articles, op-ed pieces, and political press releases. Legal arguments advanced in any setting fall into one of these five patterns, and potentially are subject to the characteristic attacks that are typical of that pattern.

The opportunity to train students to identify the different kinds of legal arguments depends in large part upon the availability of appropriate course materials, which varies from course to course. Decisional law is the principal focus of nearly every course, generating arguments based upon precedent. In Evidence, Civil Procedure, and Commercial Law, the official commentary which is included in most compilations of the Federal Rules or Uniform Commercial Code makes it possible to teach students about "intent." In Constitutional Law, most casebooks include excerpts from the Federalist Papers; to facilitate students' understanding of historical and policy arguments I supplement the course with the words of Anne Hutchison, Roger Williams, Alexander Hamilton, Thomas Jefferson, John Calhoun, Daniel Webster, Stephen Douglas, Abraham Lincoln, John Bingham, Thurgood Marshall, and other figures in American history.

C. Creating Legal Arguments

Once students have learned to identify the different kinds of legal arguments, they are ready to

Aldisert has usefully identified a number of formal and material fallacies that are sometimes offered as legal argument. ALDISERT, LOGIC FOR LAWYERS, *supra* note 129, at 137-224.

tackle the second objective -- creating legal arguments. In discussing a hypothetical case, law professors typically ask, "Have you read a case that applies to these facts?" This is, of course, inviting students to apply a rule of law based upon precedent. Typically, we also ask students, "What text controls?" or "Did the Framers (or the Rules Advisory Committee or the legislative history) have anything relevant to say about the interpretation of this law?"

There are a number of other standard techniques for teaching students to create legal arguments. Perhaps the most challenging activities are moot court exercises in which students are required to prepare briefs and engage in oral argument.²³³

I have also used another effective method of teaching this skill. In Constitutional Law I require students to write papers assessing the constitutionality of laws or other government actions.²³⁴ Students are asked to support their conclusions with at least one of each of the five different kinds of legal arguments. I usually give the students a variety of materials to work with such as law review articles, draft legislation, legislative history, excerpts from the federalist papers, and newspaper accounts, and do not require additional research.²³⁵ The papers are not competitively graded; instead, students are

²³³ We also listen to recordings of past oral arguments before the Supreme Court; when a question is asked, I stop the recording and ask my students to formulate a response to the Justice.

²³⁴ I choose "hot topics" of the day; recent subjects include the impeachment of President Clinton, the proposed Taiwan Security Enhancement Act, and proposed California gun control legislation.

²³⁵ The source materials are carefully chosen to provide the basis for arguments of each type on both sides of the dispute.

awarded one point for correctly framing each kind of legal argument. The best arguments are read to the class, and sometimes the arguments from several papers are summarized to show the breadth of approaches students took with the same materials.²³⁶

D. Attacking and Evaluating Legal Arguments

The third and fourth objectives in teaching legal analysis are to train students to critique and evaluate the strength of legal arguments.

Have you ever had the experience of reading or listening to a legal argument and being utterly convinced by it -- until you heard the other side? And when you read the dissent, or heard the respondent, were you convinced by this argument as well? As attorneys, how do we respond to an opponent's well-crafted legal argument? As judges, how do we evaluate the merits of competing legal arguments? What is the measuring rod of justice?

In Part II of this article I suggest that the persuasiveness of a legal argument is measured by the susceptibility of the argument to both intramodal and intermodal lines of attack. In teaching these methods of attack, it is appropriate to start with the simplest and most direct methods, and progress to the more complex and nuanced types. This progression is implied by the order in which the arguments are listed in Part II. For example, attacks on arguments based upon precedent may be that the decision is not authoritative; that it can be distinguished; or that it should be overruled. To counter textual

²³⁶ For example, when I assigned students to assess the constitutionality of the proposed Taiwan Security Enhancement Act, all of the students correctly made textual arguments, but only when the student papers were taken as a whole did the variety of possible textual arguments become apparent.

arguments, we progress from arguments about the plain meaning of the text, to the assertion of competing canons of construction, to conflicting intratextual arguments. We also progress from intramodal to intermodal methods of attack, ultimately debating the relative merits of different kinds of arguments in different cases.

Periodically throughout a course I return to this topic, asking my students, "What makes this kind of argument persuasive? What are the characteristic ways to attack this kind of argument?"

Policy arguments present a number of unique challenges. In the following section of this article I examine in detail the particularly difficult process of attacking policy arguments, and I illustrate the relation between rules and policies with a marine metaphor.

E. Attacking Policy Arguments: The Relation Between Rules and Policies

The distinctive feature of policy arguments is that they are consequentialist in nature. The other four kinds of argument are appeals to authority, but the core of a policy argument is that a certain interpretation of the law will bring about a certain state of affairs, and that this state of affairs is either acceptable or unacceptable in the eyes of the law. Deriving rules of law from text, intent, precedent and tradition is inherently conventional; such rules represent specific choices that our lawgivers have already made. Deriving rules from policy arguments, on the other hand, is inherently open-ended; the specific choice has not yet been made. Text, intent, precedent and tradition look principally to the past for guidance; policy arguments look to the future for confirmation.

As noted above, consequentialist arguments have a more complex structure than the other forms of legal argument. Once students have learned to identify a policy argument as such, they must learn to identify its constituent elements: the predictive statement and the evaluative judgment. They learn to ask themselves, "What is the factual prediction of the argument?" and "What is the underlying value that the argument asserts is served by the law?"

In attacking policy arguments, as with other kinds of arguments, we follow a progression. The following questions give students a pattern for challenging policy arguments:²³⁷

1. "Is the factual prediction accurate?"
2. "Is the value at stake one of the purposes of the law?"
3. "Is the value at stake sufficiently strong?"
4. "How likely is it that the decision in this case will serve this value?"
5. "Are there other, competing values that are also at stake?"

Of these, the most intricate type of argument is the fifth, because when there are competing values at stake, the comparison between policy arguments will turn upon a complex balancing of the weight of the competing values and the likelihood that these values will be served. This balancing process has been described as follows:

²³⁷ These are the five "intramodal" forms of attack on policy arguments described *supra* notes 139-142 and accompanying text.

"Each case decided in favor of a plaintiff or a defendant resolves a conflict of interest by hierarchically ordering the goals pitted against each other in the dispute. ... An examination of the law will show that the decisions of the courts and the effects of legislation result in a fairly consistent ordering of our values. The prevention of physical harm, for example, is ranked higher and more important than the prevention of economic loss. ... In particular, an examination of the goal matrix of the law will show that whenever one ordering of a pair of conflicting goals will maximize only the first goal at the extreme expense of the second, while the converse ordering will maximize the second goal and produce only a minimal interference with the first, the law will generally prefer the second ordering."²³⁸

Thus, balancing one policy argument against another involves comparing the *likelihood* as well as the *weight* of the competing goals.

However, of the five ways to attack policy arguments, I have found that the most difficult one for students to master is Question 2, "Is the value at stake one of the purposes of the law?" This simple question masks the complex relationship between rules and policies, a relationship that I have chosen to illustrate with the following metaphor.

Rules of law are like marker buoys, put for signs to guide our course. The lay public and novice law students think that this is what the law is: determinate rules of conduct. But just as buoys are secured by unseen anchors, rules of law are justified by the policies they serve. Every rule serves a

²³⁸ J.C. Smith, *Machine Intelligence*, *supra* note 134, at 326, 327 (1998).

purpose,²³⁹ and a standard question we teach our students to ask in every case is to identify the purpose of the rule.²⁴⁰

Furthermore, just as a bouy may be secured by more than one anchor, laws may serve more than one policy; in fact, that is usually the case. The law of tort, for example, seeks to compensate victims, deter misconduct, and promote economic efficiency, and the specific rules of the law of tort depend upon the relative weight accorded to these disparate goals. Similarly, Separation of Powers law is torn between the goal of allowing each branch of government the leeway to perform its assigned function, and the goal of curbing each branch's power through an effective system of checks and balances. Another example of this tension is that in every case where a law is challenged for being in violation of the Constitution two fundamental principles are at stake: the principle of limited government, and respect for the democratic political process and the principle of majority rule.²⁴¹

²³⁹ "[I]t is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Holmes, *Path, supra* note 63, at 1000-1001.

²⁴⁰ In *Heydon's Case*, 76 Eng. Rep. 637, 638 (1584), Sir Edward Coke proposed that in interpreting statutes judges should take into account the following factors:

"1st. What was the common law before the making of the act.

2nd. What was the mischief and defect for which the common law did not provide.

3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

²⁴¹ Alexander Bickel identified this as "the countermajoritarian difficulty," and described it as follows:

Thus, on the surface, law seems to be a set of determinate rules, but under the surface, the law is derived from and justified by myriad values and interests.²⁴² These values and interests are often conflicting; the law represents a compromise among the pull of their competing aims.²⁴³

There also exist many values and interests which are not valid purposes of the law; for example, racism, religious bigotry, and class bias. Although these values exist as sometimes powerful forces in society, they do not form a part of any valid legal argument.

A fundamental aim of Legal Realism was "to get the dragon out of his cave,"²⁴⁴ that is, to bring

"[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."
ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962).

This "difficulty" arises because in our nation the Constitution is law that is binding on government. *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁴² A number of legal scholars have proposed contextual theories urging that legal text should be interpreted in light of the broader goals and purposes of the law. See, e.g., Eskridge, *Dynamic Statutory Interpretation*, *supra* note 35; Siegel, *Textualism and Contextualism*, *supra* note 163; and Fallon, *Constructivist Coherence*, *supra* note 21.

²⁴³ "The attempt to derive rules from ... supposedly neutral principles has a notorious habit of leading nowhere. For if no human purposes were deemed more valuable than others, there would be no way to decide what sorts of liberty or equality to protect. Legal rules typically settle conflicts between one citizen's pursuit of his purposes and another's pursuit of his own." James Gordley, *Legal Reasoning: An Introduction*, 72 Calif. L. Rev. 138, 143 (1984).

²⁴⁴ "When you get the dragon out of his cave on to the plain and into the daylight, you can count his teeth and claws, and see just what is his strength." Holmes, *Path*, *supra* note 63, at 1001. "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and

forth the underlying policies of the law into the light of day, and not to hide the true rationale of a decision behind a formalistic facade.²⁴⁵ This process performs two valuable functions; first, the stated premises of the law will over time be empirically tested,²⁴⁶ and second, baseline assumptions²⁴⁷ and invalid purposes²⁴⁸ will be exposed.

But what is the connection between rules and policies? How do we determine what the purpose or purposes of a rule is? What are the "anchor lines" that bind rules to policies?

the reasons for desiring them." *Id.* at 1005.

²⁴⁵ "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious" *Id.* at 999.

²⁴⁶ For example, in *Erickson v. Erickson*, 246 Conn. 359, 716 A.2d 92 (Conn. 1998), the Connecticut Supreme Court held that extrinsic evidence of a testator's intent is admissible in cases where that intent was thwarted by a "scrivener's error." 246 Conn. 359, 371, 716 A.2d 92, 98, (overruling *Connecticut Junior Republic v. Sharon Hospital*, 188 Conn. 1, 448 A.2d 190 (1982)). The majority in *Erickson* observed that "[e]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better," 246 Conn. 359, 372, 716 A.2d 92, 99, (internal quotations and citations omitted) and explicitly adopted the policy analysis of the dissent from *Connecticut Junior Republic*. 246 Conn. 359, 373-375, 716 A.2d 92, 99-100.

²⁴⁷ "Baselines" are the legal "givens" that justify the existing state of the law. "To deal with uncertainty, judges rely on presumptions." Beerman and Singer, *supra* note 182 at 933. Similar to "baselines" are "cognitive schemas," which are unexamined and often unspoken assumptions about human potential that purport to explain existing social relationships. See Marianne LaFrance, *The Schemas and Schemes in Sex Discrimination*, 65 *Brook. L. Rev.* 1063 (1999) (assumptions about women); and Todd Brower, *A Stranger to Its Laws: "Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 *Santa Clara L. Rev.* 65 (1997) (assumptions about gays).

²⁴⁸ For a brief summary of some cases where the Supreme Court identified "invalid purposes," see *supra* note 142.

The answer is "text," "intent," "precedent," and "tradition." Policies may be expressly stated in the preamble or body of legal text; in such a case, the underlying value to be served may be determined by the plain meaning or structure of the law. Underlying policies may also be proven by reference to the intent of the framers or legislators, from judicial opinion, or by citation to tradition. When announcing broad policy guidelines, courts attribute the underlying value to those who wrote or interpreted the law or to the longstanding practices and traditions of our society. For example, when Justice Robert Jackson held that an implied purpose of the Commerce Clause was that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation,"²⁴⁹ he attributed the choice to the Founders.²⁵⁰

Moreover, the policy choice may be attributed to more than one original source of law. For example, the doctrine of checks and balances may be inferred from the text and structure of the constitution,²⁵¹ from contemporaneous evidence of the framers' intent,²⁵² from explicit holdings of the

²⁴⁹ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

²⁵⁰ "Such was the vision of the Founders" *Id.*

²⁵¹ The system of checks and balances is textually manifest in the President's power to veto Congressional enactments, Art. I, Sec. 7, Cl. 2; the Senate's power to reject the President's nominees to federal court or as principal officers, Art. II, Sec. 2, Cl. 2; the Senate's power to refuse to ratify treaties negotiated by the President, *id.*; and the power of the House of Representatives to impeach and the Senate to remove the President, Vice-President, other civil officers, and federal judges for the commission of high crimes and misdemeanors. Art. 1, Sec. 6, Cl. 2, and Art. II, Sec. 4.

²⁵² As James Madison observed in *The Federalist Number 51*, "Ambition must be made to counteract ambition." ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, *THE FEDERALIST* 356 (Benjamin Fletcher Wright, ed. 1961).

Supreme Court,²⁵³ or from the way our nation's government has been conducted for two hundred years.²⁵⁴

The persuasiveness of a policy argument thus depends in part upon the kind and extent of the evidence offered to prove that the policy is one that the law is supposed to serve.

In Constitutional Law, a particularly difficult challenge that students face in constructing policy arguments is to distinguish between policy arguments that must be addressed to a legislature from policy arguments that may be addressed to a court.²⁵⁵ Long after students have mastered the ability to identify policy arguments, I find that many of them -- perhaps most -- overlook the necessary step of connecting the underlying policy to the provision of the constitution that they are interpreting. For example, in assessing the constitutionality of a proposed gun control law under the Second Amendment, students were required to make arguments based upon policy. Several students wrote that the law was

²⁵³ “Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. These standards are by now well accepted.” *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Rehnquist, J.) (citations omitted).

²⁵⁴ See the reasoning of Justice Frankfurter in *Youngstown Sheet & Tube v. Sawyer*, quoted *supra* note 56 (stating that “deeply embedded ways of conducting government” act as a gloss upon the Constitution).

²⁵⁵ “Bobbitt's notion of the modalities as practice must be built upon an assumption that not every type of policy assertion is legal argument.” Nichol, *supra*, note 195, at 1114. A quarter of a century ago Ronald Dworkin drew the line between principles and policies, rights and goals, and reason and force, in distinguishing those policies that legitimately form the basis for judicial decisionmaking from policies that are the prerogative of the legislature to enact. Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1067-1073 (1975). Dworkin, who was concerned principally with fundamental rights, drew the line between individual rights and collective goals: “Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.” *Id.* at 1067. In contrast, I propose that courts may construct policy arguments from either individualistic or collective values so long as the value is one that is drawn from the text of the law, the intent of its drafters, judicial precedent, or tradition.

unconstitutional because guns are necessary for self-defense. This argument should be addressed to the legislature, not to a court that has the duty to interpret the Second Amendment. The students made a factual prediction and an evaluative judgment, but did not tie the evaluative judgment to the Second Amendment. To complete this policy argument, it was incumbent upon the students to prove that the Second Amendment embodies the value of personal self-defense.²⁵⁶

In summary, before students can argue the *weight* of competing policies or the *extent* to which a policy would be served in the present case, they must learn how to invoke text, intent, precedent, and tradition to prove that the policy in question is one of the purposes of the law.

F. Chevron Problems: An Example of the Usefulness of the Pluralistic Approach.

The pluralistic model of law is an excellent tool for analyzing a fundamental issue in Administrative Law: "Should a court defer to an administrative agency's interpretation of the law that is at odds with one or more legal arguments?" To answer this question, it is useful to consider the *kinds* of arguments that may be asserted in opposition to an agency's interpretation of the law.²⁵⁷

²⁵⁶ William Van Alstyne quotes Blackstone as recognizing "the right of having and using arms for self-preservation and defense." William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L. J. 1236, 1248 (1994)(quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 144). For additional arguments supporting the view that the right to keep arms is based upon the right to self-defense, see Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Alb. L. Rev. 103, 117-120, 130 (1987); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637, 645-646 (1989); and Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 Rutgers L. J. 1, 66-67 (1992).

²⁵⁷ For example, Siegel identifies the following arguments:
"A court construing an administrative law statute must, of course, consider the usual and well-known guides to statutory interpretation: the statute's text, its structure, and its history. Contextualism recognizes that another vital consideration -- sometimes the most

The leading case on the topic of judicial deference to administrative interpretation is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁵⁸ The issue in *Chevron* concerned the validity of the E.P.A.'s interpretation of the statutory term "major stationary source" from the Clean Air Act Amendments of 1977. In 1981, under the new administration of President Ronald Reagan, the E.P.A. adopted a plantwide interpretation (the "bubble concept") of the term stationary source,²⁵⁹ in place of the Carter administration's definition that had identified each emitting device as a stationary source.²⁶⁰ In Part VII of its opinion, the Supreme Court expressly addressed the "Statutory Language," the "Legislative History," and "Policy" of the 1977 Amendments in reviewing the reasonableness of the agency's new interpretation.²⁶¹ The Court found that the text was "not dispositive,"²⁶² the legislative history was "unilluminating,"²⁶³ and that the arguments over public policy should be "more properly

important consideration -- in the interpretation of administrative law statutes is the judicial maintenance of a sound structure of administrative law." Siegel, *Textualism and Contextualism*, *supra* note 163.

²⁵⁸ 467 U.S. 837, reh. den. 468 U.S. 1227 (1984).

²⁵⁹ *Id.* at 840-841, 857-859.

²⁶⁰ *Id.* at 856.

²⁶¹ *Id.* at 859-864.

²⁶² *Id.* at 861.

²⁶³ *Id.* at 862.

addressed to legislators or administrators, not to judges."²⁶⁴ Accordingly, the Court deferred to the agency's interpretation of the Act.²⁶⁵

In teaching Administrative Law, *Chevron* cases may be organized on the basis of the kind of arguments that are raised against the agency's interpretation. In two leading cases that followed *Chevron*, the Supreme Court struck down the administrative agency's interpretation of its enabling act. In *I.N.S. v. Cardoza-Fonseca*,²⁶⁶ the majority opinion of Justice Stevens relied in part upon an exhaustive analysis of the legislative history in determining that the agency had misconstrued the statute.²⁶⁷ The concurring opinion of Justice Scalia reached the same conclusion on the basis of the statutory language, but sharply criticized the majority for relying on legislative history.²⁶⁸ In *M.C.I. Telecommunications Corp v. American Telephone and Telegraph Co.*,²⁶⁹ Justice Scalia writing for the majority found that the agency had misinterpreted the "plain meaning" of the Communications Act of 1934.²⁷⁰ The dissent, in

²⁶⁴ Id. at 864.

²⁶⁵ Id. at 865.

²⁶⁶ 480 U.S. 421 (1987).

²⁶⁷ Id. at 432-443.

²⁶⁸ Id. at 452-453.

²⁶⁹ 512 U.S. 218 (1984).

²⁷⁰ The majority relied largely upon dictionary definitions of the word "modify" in concluding that: "'Modify' in our view, connotes moderate change." Id. at 228. Scalia's reasoning on this point has been described as "particularly unpersuasive." Osborn, *Legal Philosophy*, *supra* note 3, at 156.

contrast, argued that the statutory term was ambiguous,²⁷¹ and invoked intratextual and policy arguments to support the agency's interpretation of the Act.²⁷²

Other cases have turned upon whether or not the courts should uphold agency interpretations that were inconsistent with prior agency practice,²⁷³ with canons of construction,²⁷⁴ or with judicial

²⁷¹ 512 U.S., at 241-242.

²⁷² *Id.* at 239-245.

²⁷³ In *F.D.A. v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000), the Supreme Court overturned an agency decision to assume jurisdiction over tobacco products. Noting that the F.D.A. had over the years repeatedly informed Congress that the agency did not have jurisdiction to regulate tobacco products, the Court observed: "[t]he consistency of the F.D.A.'s prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the F.D.A. is without jurisdiction to regulate tobacco products and ratified that position." *Id.* at 1313. This is consistent with Justice Stevens's opinion in *Cardoza-Fonseca*: "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." 480 U.S., at 447 (Stevens, J.). In other cases, however, members of the Court have discounted the precedential weight of prior agency interpretations of the law. For example, in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), Justice Rehnquist stated:

"A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

²⁷⁴ For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), Justice O'Connor, in dissent, argued that the agency interpretation was in violation of the "long-standing canon of statutory construction" that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 223, quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). For a general discussion of the impact of canons of construction on *Chevron* cases, See Russell Weaver, *Some Realism About Chevron*, 58 Mo. L. Rev. 129, 162 & fn. 223 (1993). See also Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) (arguing that the nondelegation doctrine of administrative law has not been abandoned, but

precedent.²⁷⁵ Although the *Chevron* cases are difficult to reconcile with each other, the pluralistic model of law provides a useful structure for organizing and understanding these cases.

G. Tailoring Arguments to Specific Judges

The pluralistic model of law may also be used to identify the preferred jurisprudential style of specific judges.²⁷⁶ The study of Constitutional Law intensifies this aspect of the pluralistic model, because the course is typically concerned with the decisions of only one court, and as many scholars have noted, the idiosyncratic jurisprudential preferences of each judge can be carefully studied and tracked. Justice Antonin Scalia is drawn to text and tradition;²⁷⁷ Justice Sandra Day O'Connor, Justice

rather relocated into various canons of statutory construction).

²⁷⁵ In *Lechmere v. N.L.R.B.*, 502 U.S. 527 (1992), the Supreme Court refused to defer to the agency's interpretation of Section 7 of the National Labor Relations Act on the ground that the agency had interpreted the law in a manner contrary to the Court's prior interpretation: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Id.* at 536-537, (Thomas, J.) quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

²⁷⁶ "What, after all, is 'judicial philosophy,' if it is not the belief that certain forms of argument may provide a legitimate basis for a judicial decision?" Bobbitt, *Reflections*, *supra* note 16, at 1920. Bobbitt notes, however, that "it is usually more a matter of emphasis and style (style for a judge being the preference for certain forms of argument over others) than complete rejection." *Id.*

²⁷⁷ See *supra* note 178-179 and accompanying text. In particular, Justice Scalia practices a "philological" brand of textualism. "For Scalia, the ordinary social and dictionary meaning of individual words is the most important, and often decisive, ingredient of his analysis of a constitutional provision." David M. Zlotnik, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 *Emory L.J.* 1377, 1389 (1999).

Kennedy, and Justice Souter to precedent;²⁷⁸ and Justice Breyer to intent and policy analysis.²⁷⁹ Justice Hugo Black was a textualist,²⁸⁰ while Justice William Brennan and Justice Thurgood Marshall relied principally upon policy analysis.²⁸¹ Had he ascended to the Supreme Court, Judge Robert Bork would in all likelihood have remained an originalist.²⁸²

²⁷⁸ One of the hallmarks of their moderate brand of jurisprudence is "respect for precedent." Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 717 (1994). Justices Scalia and Black, on the other hand, resist precedent: "[N]o two justices in this century have called for overruling more precedents than Justices Black and Scalia." Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. Rev. 25, 33 (1994).

²⁷⁹ See Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 Admin. L.J. Am. U. 747 (1995). "The opinions he authors or influences will include significant discussions of legislative intent, the factual context in which the dispute arises, and the likely consequences of alternative resolutions of the dispute." *Id.* at 751.

²⁸⁰ Like Justice Scalia, Justice Black was drawn to bright line rules and textual analysis; unlike him, he rejected tradition as an interpretative modality. Gerhardt, *supra* note 275, at 26-27, 51-52. (1994).

²⁸¹ See Ruggero J. Aldisert, *The Brennan Legacy: The Art of Judging*, 32 Loy. L.A. L. Rev. 673 (1999)(identifying Brennan with the realist jurisprudential philosophy of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo). Justice Marshall expressed his jurisprudential philosophy in his dissenting opinion in *United States v. Kras*, 409 U.S. 434 (1973), where he presented the following consequentialist analysis:

"It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have -- like attempting to provide some comforts for a gravely ill child, as Kras must do." *Id.* at 460.

²⁸² "In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American Republic." BORK, TEMPTING, *supra* note 112, at 143.

It is probable that all judges tend to find one or more forms of argument more persuasive than others.²⁸³ By studying prior judicial opinions and by listening carefully in open court, lawyers can discover the preferred jurisprudential style of the judges before whom they appear, and can tailor their briefs and oral arguments with that in mind.

H. Learning About One's Own Preferred Jurisprudential Style

The forms of legal argument are relevant not only to law students, lawyers, and judges, but to all persons. Everyone, not just jurists and legal educators, has a preferred mode of analysis, a philosophy of life.²⁸⁴ I challenge my students to discover which forms of arguments appeal to them -- are they textualists, intentionalists, traditionalists, bound by precedent, or drawn to policy analysis? Everybody has a preference -- a decision matrix that resonates with his or her deepest moral convictions. Studying the pluralistic model of legal analysis creates an opportunity to explore one's own moral beliefs.

²⁸³ "We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them -- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall." CARDOZO, *supra* note 27, at 12.

²⁸⁴ Id.

And so, at the conclusion of these thoughts, I ask you the same questions I ultimately ask my students: "What attracts *you* to one form of argument over another? How do *you* tell right from wrong?"

CONCLUSION

A principal purpose of legal education is to teach students legal reasoning: "how to think like lawyers." "To think like a lawyer" is to be able to identify, create, and critically evaluate each of the five methods of legal argument: text, intent, precedent, tradition, and policy.