Huhn started teaching law
Courses Taught

Health Law
Evidence
Administrative Law
Secured Transactions
Law and Genetics
Commercial Paper
Jurisprudence
Constitutional Law I
Constitutional Law II
Scholarly Research

Freedom of Expression
State Action Doctrine
Gay Rights
Eavesdropping
Waterboarding
Affordable Care Act
Logic and Legal Reasoning
The Stages of Legal Reasoning
Recent 5 to 4 Decisions in the Supreme Court

**McConnell v. Federal Election Comm’n** (campaign finance limits constitutional)

**Citizens United v. Federal Election Comm’n** (campaign finance limits unconstitutional)

**Van Orden v. Perry** (10 Commandments obelisk constitutional)

**McCreary County v. ACLU** (10 Commandments picture unconstitutional)

**Gratz v. Bollinger** (affirmative action struck down)

**Grutter v. Bollinger** (affirmative action upheld)

**Bush v. Gore** (recount halted in 2000 election)
Supreme Court Justices

Felix Frankfurter

Sandra Day O’Connor

Harry Blackmun

Thurgood Marshall

Oliver Wendell Holmes, Jr.

John Roberts
5

The Five Types of Legal Argument

SECOND EDITION

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Introduction to the Five Types of Legal Arguments

Textual Arguments:
Plain Meaning, Canons of Construction, and Intratextual Arguments
Why Are There Hard Cases?

Why do informed and reasonable people differ as to what the law is?
The Five Types of Legal Arguments

Text
The Five Types of Legal Arguments
The Five Types of Legal Arguments

- Text
- Intent
- Precedent
The Five Types of Legal Arguments

Text
Intent
Precedent
Tradition
The Five Types of Legal Arguments

- Text
- Intent
- Precedent
- Tradition
- Policy
Not All Arguments Are Legitimate

Common Fallacies: Ad hominem attacks, namecalling, in terrorem arguments, and appeals to prejudice.
Each Type of Argument Is Proof of What the Law Is

To prove a question of fact, lawyers call witnesses and introduce exhibits.

To prove a question of law, lawyers create valid legal arguments, drawing on legal text, intent, precedent, traditions, and policy.

The different legitimate types of legal argument are the “data” that lawyers use to prove what the law is.

Text | Intent | Precedent | Tradition | Policy
The legal philosopher H.L.A. Hart said that underlying the law are “rules of recognition” – rules that govern what “counts” as law.

The five types of legal arguments operate as rules of recognition. Judges and lawyers recognize arguments based upon text, intent, precedent, tradition, and policy as being legitimate forms of legal argument.
Each different type of argument draws on different sources of information and has a different structure.
Each Type of Argument Has Different Strengths and Weaknesses

Each type of argument has characteristic strengths and weaknesses, and may be attacked or evaluated in different ways.
Why Identify the Different Types of Legal Arguments?

It is important for legal professionals to understand the different types of legal arguments

As students
As lawyers
As judges
As Students

There are many skills a lawyer must master. The most important are “people skills” – learning how to listen, how to understand, and how to counsel. To develop those, you must simply interact with people.

But you must also master certain intellectual skills, and the theory of the Five Types of Legal Arguments can help with that. As students of the law, understanding the different types of arguments helps us to analyze difficult legal problems. If you can identify what type of argument you are studying, then you have taken the first step towards identifying the strengths and weaknesses of that particular argument.
Legal arguments are the tools that lawyers use in advising and representing clients. They are the arrows in our quiver. The Five Types of Legal Arguments is a checklist of what is available to us as we seek to develop the most powerful arguments on our clients’ behalf.
In writing judicial opinions, judges often seek to convey that the result was preordained – that there was only one possible conclusion.

But judges who are honest with themselves know that is not true. Frequently, plausible legal arguments can be constructed for more than one interpretation of the law. Understanding the different types of arguments helps us to evaluate which arguments are the most persuasive.
There Are Also Secondary Sources of Law

The five types of legal arguments are primary sources of evidence of what the law is. All other materials are secondary sources of law.

Secondary sources about the law include legal treatises, textbooks, legal encyclopedias, articles, essays, and study aids.

Some legal treatises are very influential – but they are not law by themselves. Instead they cite the law.
The Five Presentations In This Series

1. Introduction; Textual Arguments – Plain Meaning, Canons of Construction, and Intratextual Arguments
The Five Presentations In This Series

1. Introduction; Textual Arguments – Plain Meaning, Canons of Construction, and Intratextual Arguments

2. Historical Arguments – Intent, Precedent, and Tradition
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1. Introduction; Textual Arguments – Plain Meaning, Canons of Construction, and Intratextual Arguments
2. Historical Arguments – Intent, Precedent, and Tradition
3. Policy Arguments
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4. Identifying and Attacking the Different Types of Arguments
The Five Presentations In This Series

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2. Historical Arguments – Intent, Precedent, and Tradition
3. Policy Arguments
4. Identifying and Attacking the Different Types of Arguments
5. The Stages of Legal Reasoning – Logic, Analogy, and Policy
Textual arguments look to the text of the law itself to determine what the law is.
Examples of Legal Text

Legal Text Includes:

Constitutions
Examples of Legal Text

Legal Text Includes:

Constitutions
Statutes
Examples of Legal Text

Legal Text Includes:

- Constitutions
- Statutes
- Ordinances
- Regulations
Examples of Legal Text

Legal Text Includes:

- Constitutions
- Statutes
- Ordinances
- Regulations
- Contracts
Examples of Legal Text

Legal Text Includes:

Constitutions
Statutes
Ordinances
Regulations
Contracts
Deeds
Wills
There Are Three Sub-Types of Textual Arguments

A. Plain Meaning
B. Canons of Construction
C. Intratextual Arguments
The most basic type of legal argument is one that is based upon the “plain meaning” of legal text.

“Plain Meaning” means that the law is simply what the words of the constitution, statute, regulation, or ordinance mean.
There Are Three Sources of “Plain Meaning”

Lay usage

Dictionary definitions

“Terms of Art” – words that have a specialized meaning in the law

Definitional sections in statutes
Some Laws Are Clear
The Law of Murder
(State Law)

No person shall intentionally cause the death of another human being.
Law Against Use of a Weapon of Mass Destruction (federal law)

18 U.S.C. § 2332a(a) - Use of a Weapon of Mass Destruction:

A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction ... shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.
“Weapon of Mass Destruction” Defined

18 U.S.C. 2332a(c) - Definitions:

For purposes of this section ... the term “weapon of mass destruction” means ... any destructive device as defined in section 921 of this title.
“Destructive Device” Defined


As used in this chapter ... the term “destructive device” means ... any explosive ... bomb.
“Plain Meaning” Arguments Are Determinative ... Unless ...

You might think that the law ALWAYS consists of “plain meaning” arguments – but that is not the case. Even if a law is clear in most cases, there will always be some situations where the meaning of the law is unclear.

In addition, the courts will not apply the “plain meaning” of legal text if it would lead to an “absurd” result.
Some Laws Are Not Clear: “No Vehicles in the Park”
Antonin Scalia: Advocate of “Plain Meaning"

Justice Scalia is widely considered the leader of the “New Textualism” movement.

He is the author of “The Rule of Law Is a Law of Rules.”

He rightly identifies himself as someone who is more likely than other judges to perceive “plain meaning” in constitutional or statutory provisions.
A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.
Justice Scalia’s Opinion in *District of Columbia v. Heller*

Justice Scalia found, in the text of the Second Amendment, an individual right to possess a gun for self-defense. This decision overruled centuries of judicial precedent.

It is in reality based not upon the text of the Constitution, but rather upon “tradition” – the tradition of gun ownership in the United States.

Justice Scalia is not so much a “textualist” as he is a “traditionalist.”
Another Source of Ambiguity: Rules and Standards

Some laws are very clear and specific – these are **rules**.

Other laws are vague and general – these are **standards**.
Example of a Rule “Stop at red light.”

• Rules are clear, but may be unfair.
  – Rules are efficient in situations where facts of different cases are basically similar.

• Rules are difficult to create but easy to apply.
  – Example: specific emissions limits for industries

• Rules are applied formalistically
  – Did the person stop at the red light or not? Do the facts of the case match the fact portion of the rule?
Example of a Standard
“Proceed cautiously on yellow light”

• Standards are fair, but may be ambiguous
  – Standards are efficient where it is necessary for the law to cover many different fact situations

• Standards are easy to create but difficult to apply
  – Example – “reasonable person” standard in tort law

• Standards are applied realistically
  – What are the facts, what are the underlying values and interests to be considered, and how are those values and interests involved in the case to be decided?
More Examples of Standards

Due Process: Judicial and administrative procedures must be “fundamentally fair.”

Equal Protection: Persons who are “similarly situated” must be treated alike.

The Law of Tort: Persons must act according to what the “reasonable person” would do under the circumstances.
If the Law Is Not Absolutely Clear ...

If the text of the law is not determinative – if the “plain meaning rule” does not resolve the difficulty – then it opens the door to every other form of legal argument ...

... including two other types of textual arguments as well as arguments based on intent, precedent, tradition, and policy.
B. The Canons of Construction

The canons of construction are not “rules” of law. They are instead general presumptions about how legal text should be interpreted. The canons of construction are analogous to rules of syntax, like the rules governing word order in English:

“Only I love you” or “I love only you.”
There Are Dozens of Canons of Construction
Some Canons of Construction Are Similar to Each Other

The Rule of Lenity: “Criminal statutes are to be narrowly construed against the state and in favor of the defendant.”

“Ambiguous words in a contract that is drafted by only one of the parties such as an insurance policy should be construed against the party who drafted it and in favor of the other party.”
Some Canons of Construction Are in Contradiction to Each Other

Statutes in derogation of common law are to be narrowly construed.

Remedial statutes must be broadly construed.
Example: Dogs Allowed – How About Cats?

Suppose you are travelling with your cat and see this sign outside a restaurant –

Is your cat welcome?
Canon Number 1: *Expressio unius est exclusio alterius* - meaning, “to say the one is to exclude the other” –

So “Dogs Allowed” means

“Cats **Not** Allowed”
Canon Number 2: *Ejusdem Generis*

Canon Number 2: *Ejusdem Generis* – meaning, “of the same kind”

So “Dogs Allowed” means “Cats Also Allowed”
Another Example: Marbury v. Madison

Article III, Section 2, Clause 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

Issue in Marbury:

May Congress enact a statute giving the Supreme Court original jurisdiction in other kinds of cases?

Dispositive Choice in Marbury:

In the interpretation of Article III, Section 2, Clause 2, should the Court apply *expressio unius* or *ejusdem generis*?
For Every Canon of Construction There Is an Equal and Opposite Canon

Karl Llewellyn studied the canons of construction and discovered that for every canon of construction there is an opposite canon.
Llewellyn’s List of Canons (first six)

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<td>1. A statute cannot go beyond its text.³</td>
<td>1. To effect its purpose a statute may be implemented beyond its text.⁴</td>
<td>2. Such acts will be liberally construed if their nature is remedial.⁶</td>
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<td>2. Statutes in derogation of the common law will not be extended by construction.⁵</td>
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<td>3. Statutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.⁷</td>
<td>3. The common law gives way to a statute which is in consistent with it and when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law.⁸</td>
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C. Intratextual Arguments

Look to one portion of legal text to interpret another portion of same text
– Same word used more than once
– Different words used in different places
– Organization or structure of the document
The Necessary and Proper Clause

One of the most important passages in the Constitution is the Necessary and Proper Clause, Article I, Section 8, Clause 18.

It is understood to mean that Congress not only has express powers, but also has implied powers to act.
Necessary and Proper Clause

Article I, Section 8, Clause 18:

Congress shall have power to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.
McColloch v. Maryland (1819)

When the United States was formed one of the principal issues was whether the country should have a central bank – a government-owned bank that could be used to hold and transfer government funds.

Congress created the Bank of the United States. In this case the State of Maryland argued that Congress did not have the power to create a bank, because that power was not expressly listed in the Constitution.
The Arguments

The United States contended that the Bank of the United States was created to facilitate both taxation and spending, and could be used to purchase materials and support the army, navy, and movement of the armed forces.

The State of Maryland argued that the bank wasn’t “necessary” for any of these purposes.
Chief Justice Marshall’s Two Intratextual Arguments

Contrast between “necessary and proper” and “absolutely necessary”

Placement of the Necessary and Proper Clause among the powers of Congress

Chief Justice John Marshall
“Necessary and Proper” versus “Absolutely Necessary”

Article I, Section 8, Clause 18:
“Congress shall have power to make all Laws which shall be necessary and proper ...”

Article I, Section 10, Clause 2:
“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws ...”
Placed Among the Powers of Congress, Not the Limits

The Necessary and Proper Clause is in **Article I, Section 8** (the powers of Congress)

not **Article I, Section 9** (the limits on the powers of Congress)
Plain meaning arguments look only to the particular words in question in determining the meaning of the law. The canons of construction require us to consider not only the particular words under consideration but also the traditional presumptions and inferences about the meaning of legal text.

Intratextual arguments look not only to the particular words under consideration but to the document as a whole.
Intent, Precedent, Tradition, and Policy

The next two presentations will further expand the universe of information we will consider in determining what the law is.

In Presentation Two we shall look at the three types of historical arguments: Intent, Precedent, and Tradition. Presentation Three will cover Policy.
End