CHAPTER 7 Strategies of justification

Following the statement of facts of the case, a review of the claims and counterclaims made by the parties to the case, a summary of the decisions of the lower courts, and a statement of the issues on appeal -- after all this has been done -- Supreme Court opinions turn to justifying the judgment reached. Thus the strategy of justification comes into play. A **strategy of justification** is the general approach the opinion takes to the task of justifying the judgment of the Court. In constitutional opinion writing there are three pure strategies: the analogy, balancing, and deduction...

**THE ANALOGY**

To justify a judgment by means of the **analogy** is a deceptively easy mode of justification. Consider the following example. Assume the Court has adopted the following rule: A state's prohibition of the importation of goods into its territory is impermissible if it is a protectionist measure, but permissible if the prohibition is directed toward legitimate local concerns. Using such a rule, the Court struck down a state's barring of the importation of out-of-state milk; the law was designed, said the Court, to protect the state's own farmers from out-of-state competition. However, the Court did uphold one state's quarantine of any other states' diseased goods. Now suppose New Jersey adopts a law that prohibits the importation of solid or liquid waste that the importer seeks to dump in New Jersey. Is this law more like the invalid "milk" law or more like the valid "diseased" goods law? Which is the better analogy? In *Philadelphia v. New Jersey* (1978) the Court concluded that the New Jersey law was more like the unconstitutional milk law. The solid and liquid waste, said the Court, did not pose the same immediate health threat as did diseased meat. in fact, New Jersey permitted its own solid and liquid waste to be disposed of in its landfills. The New Jersey law, concluded the Court, was an "obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites."

In brief, justifying a result by means of the analogy rests on the assumption that a result in case "B" (the case currently before the Court) can be justified by pointing to the fact that case "A" (the precedent) is like case "B" in "material" ways, and case "A" reached result "X," the same result reached in case "B." Stated differently, if cases "A" and "B" are alike in "material" respects, then case "B" should be decided the same way as case "A." This is true because of the maxim "Like cases should be treated alike." And this maxim finds its force in the values of fairness and rationality (i.e., it is neither fair nor rational to treat like cases differently).

But clearly the difficult step in analogical reasoning is determining whether case "B" is like case "A," or more like some other case. As a practical matter no case is ever completely like another case in all respects. For example, assume that in case "A" a man with blue eyes robs a grocery store of three apples. Then in case "B" a woman with brown eyes robs a grocery store of two bananas. Are these
cases alike in "material" respects, requiring both the man and the woman to be convicted of robbery? Is the color of eyes a significant difference? Is the gender of the robbers? Is it material that one stole three apples and the other two bananas? Presumably the answer to these questions is no. But what if the apple thief had been forced into his theft by a threat to his life, but the banana thief did her deed just as a prank? This would seem to be a relevant difference. Thus you can see that to make a persuasive argument on the basis of analogy, one must be convincing that the cases are analogous on the "material" facts. And making that argument successfully opens a whole new set of problems. For example, one must be prepared to say that eye color is irrelevant, but that motivation is relevant, in deciding the two cases.

Now go back to the toxic waste case -- did the Court make the right comparison? Was the Court correct in saying that dumping toxic waste was not like trying to sell diseased meat? That diseased meat did raise a real issue of local concern, but that toxic waste dumping did not raise the same immediate health hazard? Is the immediacy of the health hazard the crucial, "material" factor that distinguishes the meat problem from the toxic waste problem? Is the fact that New Jersey permits its own toxic wastes to be disposed of within New Jersey material, showing the absence of a real health concern? Did New Jersey have any other choice regarding its own toxic waste? Why might the Court have been correct in saying the toxic waste issue was really more like the milk case? These are the kinds of problems one encounters when working with precedent.

PURE BALANCING

Introduction

Opinions that rely on "balancing" take a very simple form. Roughly speaking, the opinions say, for example, that petitioner wins because we (the justices) have concluded, after weighing and balancing the interests of the petitioner and the respondent, that the interests of the petitioner are weightier. An opinion couched in this language has the appearance of being impersonal, dispassionate, and disinterested. It also has the appearance of being practical since it seems to take into account the realities faced by the contending parties. Who can say that justice was not done when the Court considered all the factors and rendered what it considered to be its best judgment regarding what was best for the individuals involved and society? Finally, this strategy is especially practical when there is no precedent available for deciding the case. That is to say, balancing can be used in cases in which there appear to be no prior relevant analogies, when the Court must confront a problem for the very first time.

The Simple Model of Pure Balancing

Pure balancing appears in a fair number of Supreme Court opinions, and we shall examine an example of this strategy of justification momentarily. But first it is important to note that sometimes this strategy is "disguised." That is, the idea of balancing is expressed in different ways in different opinions; it will not always be stated in precisely the form that holds that one side wins because its interests outweigh the
other side's. It takes a bit of practice to recognize that a given justification is but a disguised version of balancing.

Let us turn to an undisguised version of balancing. The opinion might begin with an assessment of the "harm" produced by the policy. The amount or degree of harm effected by the policy can be understood as a "function of" the importance of the interests of the plaintiff times the degree of impact the policy has on those interests. Thus the opinion would address the following two points:

(a) The interests of the plaintiff. The plaintiff could be an individual, as would be the case in an individual rights case; but the holder of these interests might also be a governmental official such as the federal district court that issued the subpoena to President Nixon in the "executive privilege case" discussed in chapter 2 (United States v. Nixon [1974]).

(b) The impact on those interests of the policy being challenged.

Next the opinion would discuss the "benefits" of the policy; these benefits would be a function of the interests the policy sought to secure and the extent to which the means chosen actually realized those interests. Hence the opinion would discuss

(c) The interests that the challenged policy seeks to realize.

(d) The extent to which the challenged policy actually realized those interests.

Finally, the opinion would announce its conclusion as to whether the harm was greater than the benefits; whether, on balance, the policy was constitutional.

Pure Balancing and Deferral to the Legislature

The previous section described balancing at its simplest. As you might expect, the strategy may take on a more complex form. In one variation on the simple model, the opinion writer may announce that striking the balance is an effort best left to the judgment of the legislature, to another branch of government; accordingly, the writer says he or she will examine the balance struck by the legislature only to determine whether that balance was reasonable. Even if the opinion writer might have struck the balance differently, if the balance was reasonable the Court will accept it. The writer thus concludes that the Court should defer to the judgment of the other branch of government.

Justice Frankfurter's concurring opinion in Dennis v. United States (1951) uses this strategy. The case involved a federal law that made it a crime to advocate knowingly the overthrow of the government or to organize a group that advocates the overthrow of the government. The petitioners challenged their convictions under the law on the grounds that the convictions violated their First Amendment right to freedom of speech. Justice Frankfurter's opinion, concurring in the judgment that the convictions be upheld, said that the primary responsibility of balancing the demands of free speech and the interests of
national security belonged to Congress, and that the Court should set aside Congress's judgment only if there was no reasonable basis for it. After examining those interests, the Frankfurter opinion concluded that Congress had determined that the danger created by the advocacy of overthrow justified the restriction on free speech, and that it was not for the Court to second-guess the legislature.

Two Uses of Pure Balancing

Pure balancing can be used in two ways. First, it can be used simply to decide the case before the Court, with the understanding that if a similar case were to arise in the future, the Court would once again balance the factors in reaching a judgment. Second, balancing can be used to arrive at a principle or rule that, when used in future cases, would not involve the Court in further balancing. Let us illustrate the use of both strategies.

In *Argersinger v. Hamlin* (1972) the question was whether indigents charged with "petty offenses" had a right to a court-appointed attorney. The majority opinion used balancing to justify its conclusion that Argersinger's constitutional rights had been denied when he was not appointed an attorney for a trial involving a minor offense, namely, carrying a concealed weapon. But then the opinion concluded by announcing the following rule: "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial." The concurring opinion, while agreeing that the conviction should be overturned, said that there should be no such absolute rule, that balancing should be used in each and every future case to determine whether the accused should be provided with a court-appointed lawyer. The concurrence then concluded with a sketch of the factors that should be weighed in these future cases.

Problems in Using Pure Balancing

Let us now return to problems involved in the writing of a justification using balancing. It is difficult for an opinion writer to provide an accurate and precise comparative assessment of the harms and benefits involved in a case because there is usually no common unit of measure in which to carry out the comparison (e.g., harms are worth $352 and benefits are worth $353). This means that sometimes the opinions do little more than fully describe the interests at stake in colorful and persuasive terms. Justice Frankfurter, for example, in the concurring opinion discussed above, simply analyzed the government's interests by describing at great length the size, organization, and threat posed by the Communist Party. Opinions may resort to a mere listing of the interests at stake on each side. Or the opinion writer may try indirectly to get at the importance of the interests by citing analogies. Thus, in a case questioning the constitutionality of involuntary "stomach pumping" (vomiting induced with an emetic agent) undertaken to recover capsules the petitioner had swallowed, Justice Frankfurter wrote that this method of criminal investigation was "too close to the rack and screw to permit of constitutional differentiation" (*Rochin v. California* [1952]).

The use of the analogy to help pinpoint the degree of importance of an interest is tricky, however. As you know, analogies are never perfect. Is stomach pumping really like the rack and screw? Take another example. In *Wyman v. James* (1971) the Court considered whether a visit by a caseworker to
the home of a welfare recipient was constitutionally permissible in the absence of a search warrant. Citing the text of the Fourth Amendment and precedent, the majority opinion emphasized the importance of privacy of the home. Yet, the opinion also invoked an *analogy*. The home visit, wrote the Court, was "akin" to the routine civil audits conducted by the Internal Revenue Service. This home visit was as administratively necessary as the audit, and both invaded a sphere of privacy. Yet if those audits could be constitutionally required, so could this visit. The opinion concluded that the home visit was a reasonable administrative tool; it served valid purposes and was not an unwarranted invasion of personal privacy.

But an astute reader of this opinion would ask whether a visit in someone's home is really the same thing as looking at business records? Has not the home been traditionally considered a private sanctuary? Does it not have a status never accorded to mere business records? These rhetorical questions are meant to have only one answer; thus the critic might say that the Court offered an unconvincing argument in support of its judgment.

How strong a state's interest is in its policy may be indirectly assessed by looking at the number of other states pursuing the same policy. If many states do the same thing, the interest is strong; if many do not, the interest is less. Assessment of interests may take the opinion writer into a detailed examination of tradition, especially tradition embodied in the common law and other official policies. Thus, in *Tennessee v. Garner* (1985), in considering whether it was constitutional for the police to use deadly force to stop a fleeing and unarmed criminal suspect, the Court looked to police practices generally, the old English common law rules on the matter, the modern trend in state law on the question, the modern trend in police policy around the country, and statistical data on the effect of crime rates when the police have followed a policy of limited use of deadly force.

Besides the problem of providing a precise assessment of the interests, opinion writers face the difficulty of how to describe them. Take the Communist conspiracy case again. Is this a conflict between (1) the interest of individuals in being left alone to live their own lives and speak their own minds, as opposed to (2) the interest of the state in suppressing extreme political opinions? Or did that case involve (3) a conflict between the interest of individuals in advocating false, misleading, and immoral doctrines, and (4) the interest of those in power in suppressing political dissent in order to protect their political base? Or perhaps the conflict should be described as one between 1 and 4, or between 2 and 3. Thus, for a legal argument to be persuasive it must use descriptions of the interests that are plausible, that seem to capture what really is at stake in the dispute.

A criticism that has been made of balancing is that it is so flexible and adaptive a strategy that the justices can use it to justify any conclusion they prefer for purely personal and subjective reasons. In the "stomach pumping" case noted above, Justice Frankfurter relied on an investigation of "the decencies of civilized conduct" as part of his assessment of the interests at stake. Justice Black, who agreed that stomach pumping was unconstitutional, disagreed with Frankfurter's strategy of justification. He demanded, "[W]hat avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution?" (*Rochin v. California* [1952]).
PURE DEDUCTION

Deduction in Action

Supreme Court opinions use deduction far more frequently than balancing.... A good way to demonstrate the use of this mode of justification is to look at three opinions that reflect two different ideological perspectives, but that all use deduction. You should note that I have simplified and made clear the essence of the argument in these opinions. When you confront the actual opinions—in either edited or unedited form—the deductive argument will not be so plain. It will take some digging to uncover the premises, to sort them in the right order, to see which paragraphs serve as proofs for which premises....

In chapter 6, in our discussion of the English case Janvier v. Sweeney, we saw an example of the kind of order that the reader should be seeking to discover. The argument of that court was laid out in the form of a syllogism involving a legal premise, a factual premise, and a conclusion. Here also we shall seek to capture the reasoning of the Supreme Court by reformulating the reasoning of several opinions in terms of premises and conclusions.

The dispute in Munn v. Illinois (1877) involved a claim by the plaintiff that a state law that set the maximum fee a private warehouse could charge for the storage of grain was unconstitutional because, among other reasons, it violated the Fourteenth Amendment's prohibition that states not deprive persons of life, liberty, or property without due process of law. The Court upheld the regulation against this and all the other challenges. The opinion justified this conclusion in the following way:

(a) **Premise:** The text of the Constitution prohibits the "deprivation" of property.

**Proof:** This point was easily established since it required nothing more than a direct quotation of the text of the Fourteenth Amendment.

The problem the Court faced at this point was that "The Constitution contains no definition of the word 'deprived.'" Hence the Court noted that "it is necessary to ascertain the effect which usage has given it, when employed in the same or like connection." (Note that the Court offered no justification for selecting this approach to determining the meaning of the text.) Thus the Court went on to establish the next premise of its argument.

(b) **Premise:** There is not necessarily a "deprivation" of property when government regulates the use of property, even the price of the use of the property.

**Proof 1:** When one becomes a member of society, one necessarily parts with some rights and privileges.
Proof 2: The body politic is a social compact through which people agree that they shall be governed by certain laws for the common good. This means people authorize government to pass laws that require citizens to use their property so as not to injure one another unnecessarily.

Proof 3. Regulation of a variety of businesses has been a custom in English law from time immemorial, and in this country from its first colonization. In 1820, only a few decades after the adoption of the Fifth Amendment, which contains the same due process clause as in the Fourteenth, Congress passed a law that regulated the rate of wharfage at private wharves, and an 1848 law regulated the rates of hauling by cartmen and others. (Note: this line of argument presupposes the premise that in interpreting the Constitution it is the "original intent of the framers" that is the best evidence of the meaning of the text.)

(c) Premise: When one devotes property to use in which the public has an interest, one must submit to public regulation.

Proof: The common law, from which the right to property derives, recognized that property "affected with the public interest" may be subject to public regulation. Property devoted to use in which the public has an interest becomes affected with the public interest.

(d) Premise and Conclusion. Public grain warehouses are "affected with the public interest"; therefore they may be regulated.

Proof: If cartmen, the wharfinger, and other business regulated in the past are affected with the public interest, so is this warehouse. And we must assume that "if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed . . . . Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

Toward the end of the opinion, the Court acknowledged that this power to regulate could be abused, but that "For protection against abuses by Legislatures the people must resort to the polls, not to the courts." (Munn v. Illinois [1877]).

Look back now over the argument of the Court and take note of the materials the Court used in constructing its argument: text, political philosophy, traditional practices, analogy, and a principle of deference to the legislature,

Forty-six years later the Court reached a very different conclusion, but the strategy of justification was the same: deduction. Challenged in Adkins v. Children's Hospital (1923) was a federal law authorizing a board in the District of Columbia to set minimum wages for women and minors In striking down the
law as a violation of the same due process clause involved in the previous opinion, the Court offered the Mowing justification:

(a) **Premise:** The right to liberty protected by the Fourteenth Amendment includes an implied right to freedom of contract.

**Proof:** The opinion based this proposition upon precedent. Freedom of contract is not expressly mentioned in the constitutional text, but prior opinions had concluded there is such an implied right.

(b) **Premise:** This law infringes freedom of contract, and therefore the right to liberty protected by the Fourteenth Amendment (an implicit assumption of the opinion).

(c) **Premise:** Freedom of contract may be infringed only if justified by the existence of exceptional circumstances.

**Proof.** No specific support is offered for this proposition at the point in the opinion in which it is announced. But elsewhere in the opinion the Court makes reference to how the good of society is served by the preservation of liberty. Precedent might also have been used to support the great weight the Court attaches to freedom of contract.

(d) **Premise:** The exceptional circumstances necessary to justify infringement of freedom of contract do not exist in this case.

**Proof:** The opinion examined a series of arguments offered to justify the law, and rejected each one.

1. The opinion rejected an argument from analogy, namely, that this regulation was similar to other minimum wage regulations that the Court in previous cases had upheld. The opinion brushed aside the point that several states had adopted similar legislation. The validity of the law could not be determined "by counting heads."

2. The opinion rejected evidence that such minimum wage laws had improved the earnings of women. The improvements may be, and quite probably are, due to other causes.

4. The opinion rejected the claim that the law served social justice. -To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

Then in the midst of these passages (points 1 through 4) the opinion interjected an additional and separate argument.
Premise: This law violates the Constitution because it is a naked, arbitrary exercise of power.

Proof: The argument for this conclusion is best directly quoted.

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do .... The ethical right of every worker, man or woman, to a living wage may be conceded . . . . [But] the fallacy of the proposed method of attaining it is that it as- that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely Ignored . . . . Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. H one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities." (Adkins v. Children’s Hospital [1923])

Fourteen years after the decision in Adkins, the Court reversed itself and overturned Adkins in West Coast Hotel Co. v. Parrish (1937). The opinion questioned the existence of the implied right to freedom of contract. Relying on an argument reminiscent of the political theory used in point "b" in the Munn case discussed above, the opinion stressed that the "liberty" protected by the Constitution was not absolute. In an implied attack on the last argument of the Adkins opinion, the Court said it could be assumed the "minimum wage is fixed in consideration of the services that are performed." The opinion quoted with approval Chief Justice Taft's comment that the minimum wage would have the effect only of cutting into the profits of business wrung from thew employees. It noted the social good that would be done by the law. It would reduce 'exploiting workers at wages so low as to be insufficient to meet the bare costs of living, thus, making their very helplessness the occasion of a most injurious competition." The opinion used a "head count" of other states to show the importance of these laws and their presumed value. It noted the unparalleled demands for relief during the Depression. And it concluded by saying, "The Community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest." (West Coast Hotel v. Parrish [1937]).

Deduction and the Illusion of Certainty
Justification through use of a deductive argument is obviously a powerful tool of persuasion. But it should now be clear that it is a tool that can be used to justify many different positions. The key to the effort is the premises and the providing of proof for those premises. Note that the effort of providing proof of the premises may not be an exercise in pure deduction. Look again at the last argument of the Adkins opinion. It contains a bald unsupported assertion: "The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored." It relies on an analogy: "In principle, there can be no difference between the case of selling labor and the case of selling goods." And though the opinion adopted this analogy, it also denied that there was any analogy between the law in this case and those other minimum wage laws protecting women that were upheld in prior Supreme Court opinions.

Also recall that Adkins used precedent to support the conclusion that there was a constitutional right to freedom of contract. That conclusion probably was a fair reading of the precedent. But sometimes precedent is subject to multiple and conflicting interpretations (see chapter 6); thus using precedent to establish premises can be a tricky exercise. In any event, what if the precedent you rely on was itself incorrectly decided? The Parrish opinion attacks the precedent in Adkins when it questions the existence of a constitutional right to freedom of contract. In short, deduction is a powerful tool, but it requires skill, art, and judgment in order to use it well. The argument may be logical, but is it plausible? Are the premises well grounded?

Digging Out the Argument

The above summaries of Munn, Adkins, and Parrish "cleaned up" and made clearer the arguments of those opinions. In the original opinions the basic structure of the arguments is not so evident. Supreme Court opinions are not written with the premises and proofs labeled as such. The reader must determine which of the many sentences are the premises, which of the paragraphs are the proofs.

One may also have to "restructure" the opinion to make it clear. The material in the fourth paragraph of the opinion may in fact contain the premise for which the first three paragraphs provide the proof. And sometimes, as we saw in Adkins, there may be implicit or unstated premises at work... In sum, opinions, especially in their unedited versions, can be unruly, complex affairs in which it seems the thread of the argument has been lost as the opinion takes up seemingly extraneous points, rebuts arguments it disagrees with, and explores precedent.