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Philip C. Bobbitt

Columbia Law School, pbobbi@law.columbia.edu

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METHODS OF CONSTITUTIONAL ARGUMENT

PHILIP BOBBITT†

The methods of constitutional argument¹ that may be denominated, historical, textual, doctrinal, structural, prudential and ethical, have not grown according to a plan. They have grown up in the United States because of our history and traditions — the sort of people we have become and are still becoming. To that extent, they are arbitrary and contingent. They are not the same for every culture. I would be surprised if they were very different for Canada because Canadians and Americans share so much of the same legal tradition. One can, however, easily imagine cultures around the world where legal arguments such as these are not decisive or even relevant. One can also imagine arguments that really have no resonance in our systems, yet are legitimate and persuasive in other systems. A religious argument from a text, for example the Koran, has decisive authority in the courts of Iran now but did not fifteen years ago and has never had in American or Canadian courts.

Every society has a constitution. Even though not all societies are states, all societies — including the Roman Empire, the Boy Scouts, the Mafia, a bridge club and the inmates of a prison — have constitutions. Very few of them, of course, have written constitutions. Why is this so? When the Pilgrims signed the Mayflower compact, they signed a written constitution. The most touching example I can think of is when Saint Francis gave Clare de Scifi a “form of life” for her order of nuns. This was a written constitution. Why did it take states so long to put down their arrangements? I think it has to do with the purposes of legal writing, or rather, the purposes of reducing arrangements to writing.

As every lawyer knows, a written instrument is employed to confine the discretion of the parties. Contracts set a certain price pre-

† Baker & Botts Professor of Law, University of Texas at Austin.
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¹ For a discussion of these methods see Philip Bobbitt, Constitutional Fate (New York: Oxford University Press, 1982).
ciscely because the price would otherwise fluctuate with the market, i.e., the parties would be free to follow the price. For this reason it was long presumed that a written constitution was incompatible with a sovereign state. Such a state would no longer be sovereign if it agreed to be governed by a supreme written instrument. It was once universally believed that every treaty could be renounced regardless of anti-renunciation terms because any state fixing its commitments irrevocably, setting permanently limits to the exercise of its power, would thereby render itself something less than sovereign, and its consent to the treaty would be invalid. The American innovation then was not simply the writing per se; it was the political theory whereby the state was objectified and was thus made a mere instrument of a separate sovereign. Sovereignty lay in the people which, in turn, made a written constitution possible. Thus the power of the state is subordinated because it is mediated by law.

To put this idea in a more lawyerly way, a written constitution is like a trust agreement. It specifies what powers the trustees are to have; it endows these agents with a certain authority delegated by the settlor who created the trust. But if the trustees were identical to the settlor, the “agents” could revise the terms of their authority. A written constitution is thus not only a set of rules, but it is also a way of creating rules. This latter aspect depends on the separation of the sovereign (endowing the settlor) and the organs of state (the agents). For this reason Jefferson wrote that “our peculiar security in the United States lay in having a written constitution”.

By relying upon a written instrument to protect and perfect the undertaking, the framers introduced the modalities of legal argument into the fundamental politics of our state. This was the American innovation: to take the common law methods of argument that hitherto had been used to construe deeds and wills, property settlements, trusts, and contracts, and apply these methods to the great trust created by the people — the subordinated government. As a consequence of this transposition, the legal culture of the United States developed these modes of argument by taking them from the common law. Another consequence of the subordination of the government to a written instrument was the inevitable reliance upon judicial review, that is, the review of governmental acts by courts for their constitutionality. Since courts are also subordinate to the written constitution, the only power they possess is to apply constitutional laws.

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2 “Message to Congress on the Purchase of Louisiana” (1804) in Messages and Papers of the President.
For the balance of this paper I will describe the forms of argument and give examples of them. The first modality I will talk about—historical argument—is the one which is perhaps the most familiar because it presently occupies the central position in our constitutional debate.

Historical argument is a resort to the intentions of the framers and ratifiers. I emphasize the ratifiers because they are the crucial parties here. The framers of the American Constitution were simply the lawyers. They had no political authority to draft a constitution; they were unauthorized to propose one; and, they were not authorized to adopt one. The significance of their statements, in particular their statements in the Federalist Papers3 and not at the convention, lies in their having served as advertising for the ratifiers, that is, the people who endowed the agreement. It is what the ratifiers thought they were getting that makes what the framers intended legally significant.

Textual argument is easy to confuse with historical argument. It is a commonplace for politicians to say that they believe the history and text, or perhaps, that the history, text and structure are the sole legitimate modalities for constitutional decision making. But these forms of argument are in fact different. The following story reflects this distinction.

In the Federalist Papers,4 the ratifiers were assured that the States could not be sued in the federal courts. As one can imagine this was a matter of some interest to the States, particularly because they had issued a lot of currency that was by then worthless and had taken on large debts during the revolution, debts they would like to have re-flated their way out of. In Chisolm v. Georgia,5 however, the U.S. Supreme Court did entertain a suit against the State of Georgia by non-citizens of that state. The states were furious. As a consequence, the 11th Amendment was passed, in Justice Frankfurter's words, "with vehement speed".6 Angry legislators in Georgia adopted a statute to the effect that anyone trying to enforce the mandate of Chisolm would be executed and buried without religious rites.7

The 11th Amendment provides that citizens of one state cannot

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5 1 L. ed. 440 (1793).
6 Larsen v. Domestic & Foreign Commerce Corp. 377 U.S. 682 (1949) at 708 (Frankfurter J., dissenting).
sue another state in federal court. But like so many things that are drawn up with great speed, the amendment was a piece of careless drafting. Subsequently, a citizen sued his own state in the federal court; this clearly was not contemplated by the text. The Court handled this situation by resorting to historical argument. It said that despite what the text reads, it was known what the framers and ratifiers meant. This position remains the law today.

Structural argument was important in the United States during the struggle over the ideas of federalism in the first sixty years of our nationhood, and has come again to the fore of the agenda in the last ten years. The most beautiful structural opinions are written by Marshall J. Those who have a chance to read *McCullough v. Maryland* will see a splendid example of a structural argument. This form of argument is dependent on rather simple inferences from the structures of the Constitution and the relationships that they mandate.

I will give two examples. The first is taken from a case called *Carrington v. Rash*. Texas, the state I was born and raised in, had a statute providing that persons in the Armed Forces who had lived in the state less than two years could not vote in local elections. This is hardly an irrational statute. One can imagine, many defence establishments are located in rural parts of my state where there are small conservative towns, and one can also imagine the sorts of municipal statutes that 5,000 eighteen-year-old men might like to draft. Nevertheless, the statute was struck down on structural grounds: a penalty cannot be attached to federal service. The reasoning ran something like this, and illustrates the distinctive pattern of structural argument:

1. If the federal government is supreme, then disposition of its enumerated powers cannot be interfered with by the states;
2. Providing for service in the Armed Forces is one such power;
3. Taking away voting rights from servicemen as a consequence of their service attaches a penalty to the performance of a federal act.

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8 The text of the Eleventh Amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or presented against one of the United States by Citizens of another state, or by Citizens of any Foreign State.

9 *Hans v. Louisiana* 134 U.S. 1 (1890).

10 4 L. ed. 579 (1819).


12 Texas Constitution, Art. VI, s. 2.
Notice that, in contrast to the major and minor premises, the factual premise is one about which we can debate. We might say that voting is not really that important to an eighteen-year-old draftee who may at the most spend two or three months in a little town. It is on that issue that there is a controversy. But on the first two points, I think we can all agree: there is no reference to the text per se, and none to the history; there is only reference to the relationships among the structures. These premises are not controversial.

The second example involves the case of National League of Cities v. Usery. It was a hotly disputed case in the United States. The issue was whether or not Congress could impose minimum wage and maximum hour laws on state employees. The reasoning of the Supreme Court opinion deciding the matter ran like this. First, in a federal system, there must be at least one thing that the states can do that the federal government cannot tell them how to do. I think that seems uncontroversial. If this were not so, we would not have states; we would have regions. Second, among the things that the states do are at least some things that are crucial to their being states. Again that seems to follow. Third, having the power to decide the financial allocation of employees, goods and services is crucial to a state being a state. This assertion is debatable. On one hand, a person might argue that if the Congress could set the minimum wages and maximum hours of, say, farmers, but it could not manipulate the state’s choice of how much to pay teachers or policemen, it could determine the cost of a crucial part of the state’s agenda, and could largely determine the actual policy choices of a state. On the other hand, a person might argue that control over this area is not one of the crucial elements of statehood. Perhaps picking where a state’s capital should be is. In Texas, the people elect judges; in most other states, judges are appointed in one fashion or another. One might say that choice is crucial to a state being a state. I do not know, and the U.S. Supreme Court did not either because it overruled itself only last year. However, the essential imprint of a structural argument is that it does not talk about history or text per se. Instead, it refers to the relationships that these structures, confirmed in the text, mandate.

Most people are familiar with prudential argument, but it was only in this century, and really only quite recently, that it became a legitimate form of argument to be found in constitutional opinions. Prudential argument is argument about costs and benefits. It is prac-

tical argument. When judges retire to their robing rooms, and one says to the other, "Well, I don't know what the cases are on this, but I can tell you I'm sure as hell not going to hold 'X'", he or she is usually referring to the outcome of a holding that is simply impossible for practical reasons.

Prudential argument counts up the costs to the state, or to individuals, of a particular outcome. The example I would give in this regard is a mortgage moratorium case from the 1930's. The American Constitution has a clause forbidding the modification by the states of the obligation of contracts, yet in the depths of the Depression many states passed mortgage moratoria in desperation. The U.S. Supreme Court, even in the face of the clearest text and a history that showed that this was precisely the sort of situation the framers had in mind by this clause, was simply not going to overturn all these states' statutes and throw a society already in tremendous political chaos into a further debate about judicial power.

Prudential arguments for a long time have been about judicial power. They were introduced into our jurisprudence by one of our greatest judges, Louis Brandeis. In my lifetime they have begun to shift away from the costs and benefits of a discrete and independent judiciary to the costs and benefits of some external policy. It is less uncommon, now, to see a judge talking about the political pluses and minuses of a particular holding in an opinion.

Doctrinal argument is the argument with which lawyers are most familiar, and in a mature constitutional society like the United States much of the constitutional law will be doctrinal. It is the case law of precedent on which we rely. There is a wonderful story that Judge Learned Hand told about Judge Holmes. They had lunch one day in Washington and Judge Hand was dropping Judge Holmes back at the court. As Holmes got out of the car and was walking away, Hand said to him, "Well sir, good-bye. Do justice!" Holmes turned on Hand and said, "That is not my job. My job is to play the game according to the rules." That is the keystone of a doctrinal judge. He or she is trying to adhere as conscientiously as possible to neutral principles (without saying that these principles will inevitably, or even in a particular case, lead to a just outcome).

Ethical argument is perhaps the most elusive, certainly the most

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15 Art. I, s. 10.
16 For example, the Minnesota Mortgage Moratorium Law, Laws of Minnesota 1933, c. 339, upheld in Blaisdell, supra, note 14.
controversial, but I believe the most ineluctable element in our jurisprudence. Here I will tell another story. In the U.S. Supreme Court case of *Brown v. Board of Education*\(^{17}\) there is a footnote that refers to a study done by Kenneth Clark.\(^{13}\) People might easily have read the opinion and never have noticed the footnote, or if they saw the footnote they might not have known that this is what is referred to. It was a crucial part of the decision, however, and as is sometimes the case with extremely important decisions, the holding in *Brown* is not at all what the opinion says it is. The opinion talks about education and appears to be based on the premise that fundamental rights must be distributed equally. However, on the basis of the holding in *Brown*, the U.S. Supreme Court issued per curiams desegregating golf courses and swimming pools\(^{19}\) — things that have nothing to do with education or fundamental rights. These judgments, in my view, were based on a deeper perception and reasoning.

Clark, an American psychologist, had done a series of studies with black and white children in segregated schools. He had them draw figures of themselves and others. When the black children drew portraits of themselves, they drew figures partially disfigured, with a limb missing or with enlarged hands. [At this point in Professor Bobbitt’s lecture he drew stick figures on a blackboard and referred to them.] No society such as ours, that has placed law in the very centre of the relationship among individuals, can tolerate this. These drawings are a powerful example of an appeal to the American ethos: not necessarily what we are, but perhaps what we think we are, and thus how we think about ourselves and our society; that is, what we would like to be, or in some cases what we know we are and what we are no longer willing to abide.

The modalities of constitutional argument are the ways in which legal propositions are assessed. There is no constitutional legal argument in the United States outside of these modalities. A proposition about the Constitution can be a fact, it can be elegant, it can be poignant, it can be amusing, it can even be poetic, but it is not legal; it has no significance as an argument unless it follows one of these modalities.

Assessments of the kinds I have just mentioned outside of these modalities may be legal statements in some possible legal world or in
some other culture, but not in the American constitutional world. Missouri v. Holland\textsuperscript{20} is an interesting, brief and splendid opinion. I give it as an example of a great brief and splendid opinion. I give it as an example of a great judge working with great economy. If one took a coloured pencil and marked through this case attaching a different colour to each of these modalities, one would find nothing out of place. This is the mark of a great judge. There is no idling of the judicial machinery, no wandering back and forth from arguments that do not drive towards a conclusion. I will not go through the opinion, but I will describe what happened at the oral argument.

Holland was a federal game warden in the United States. The State of Missouri sued him in a federal district court to enjoin his enforcement of the regulation of certain game in Missouri governed by a treaty between the U.S., Canada and Mexico involving the Migratory Birds Treaty Act.\textsuperscript{21} The regulations at issue were adopted pursuant to that treaty.\textsuperscript{22} Missouri claimed, and the District Court agreed,\textsuperscript{23} that Congress had acted unconstitutionally in attempting to legislate with regard to a subject over which it had no express power, and which, therefore, was presumed to have been reserved to the states. In the U.S., the states have power over their wild game.\textsuperscript{24} Here Congress had authorized regulations pursuant to a treaty that it could not have authorized pursuant to a statute.

The arguments urged by counsel during oral presentation largely tracked the various forms of constitutional argument. The Attorney General from Missouri argued that the entire federal arrangement depended upon the principle that both federal and state authorities are supreme within their spheres. This was a structural argument that was commonly made towards the end of the last century. Then he argued that the framers never intended the states to be shorn of their sovereignty over game. This was an historical argument, and historical examples such as speeches at the convention and the first Congress were given to support the assertion. In addition, he argued that under the common law of England the absolute control of wild game was held to be an attribute of state sovereignty. This was a doctrinal argument. Next he noted that the text of the 10th Amend-

\textsuperscript{20} 252 U.S. 416 (1920).
\textsuperscript{21} c. 128, 40 Stat. at L. 755, s. 8837a.
\textsuperscript{22} 40 Stat. at L. 1812, 1863.
\textsuperscript{23} 258 Fed. 479.
\textsuperscript{24} 10th Amendment, U.S. Constitution.
ment expressly reserved to the states those powers not delegated to the federal government. This was a textual argument. Moreover, he argued that the text of Article I specifically enumerates the powers of Congress and does not mention jurisdiction over game. This was another textual argument.

The Solicitor General, who appeared for the federal government of the United States, argued that the text of Article I grants Congress the power necessary and proper to carry out its functions, including the implementation of treaties. This was a textual argument. He then cited two decided cases, *Cohens v. Virginia* and the *Legal Tender Cases* that had determined Congress to be empowered to adopt legislation pursuant to treaties. This was a doctrinal argument. Finally, he argued that the power of the states over game was limited by federal norms and the norms of the Bill of Rights. This was an ethical argument. These arguments were put to the U.S. Supreme Court on March 2, 1920, and they are not different from the kinds of oral arguments that we will hear when the Supreme Court opens its term.

These forms of arguments do not decide cases. Human beings decide cases. The next frontier in American constitutional scholarship lies in determining what a judge or a president or a citizen can do when the modalities conflict. One of the most important things about these forms is that they are not owned by judges and lawyers; they are accessible to anyone. A person does not have to be familiar with the latest case law to be able to resort to these modalities and to get some feel for what the Constitution provides.

The next frontier, as I say, will be sorting out what we will do when the modalities clash. I will tell one last story, this time involving Judge Friendly and Judge Hand. Judge Friendly was a new judge at the time on the Second Circuit, and Judge Hand was the premier doctrinal judge. Judge Friendly had been wrestling with a difficult case and he went to Judge Hand’s chambers to ask advice. He laid out the facts in an extremely masterful way and asked Judge Hand’s opinion. Judge Hand said, “Henry, just decide it. That's what you’re paid for”. In other words, these modalities and the arguments on which they depend do not usually relieve a judge of his or her moral duties.

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25 5 L. ed. 257 (1821).
26 20 L. ed. 287 (1870).
In concluding, I would like to say something about the Canadian experience which is just beginning, and how much we in the United States envy you this wonderful experience. The title of the conference, “The Loss of Innocence”, reminds me of a remark I once heard in Washington by a foreign politician. He claimed that when Adam and Eve were expelled from the Garden of Eden, Adam said to Eve, “Don’t worry darling, this is just a period of transition”.