The Modalities of Constitutional Argument: A Primer

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THE MODALITIES OF CONSTITUTIONAL ARGUMENT: A PRIMER

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The Constitution is the subject of seemingly endless debate in courtrooms, committee rooms, classrooms, boardrooms, and living rooms across the United States and around the world. We argue about the meaning, or more precisely the application, of constitutional phrases and principles in an ever-changing world of human endeavors and policies. And, in our current system, lawyers and judges enjoy a place of privilege in the constitutional forum. This is so because it is lawyers (through argument) and judges (through decision) that have the most direct influence on the interpretive norms that give rise to constitutional meaning in disputed cases. It is by understanding and shaping these norms that lawyers and judges help determine how the Constitution will guide politics and statecraft in the face of unprecedented challenges. Thus, it is profoundly important for the young constitutional lawyer to understand the conventions that govern the practice of constitutional argument.

Interpretive norms have their roots in an unavoidable tension between the indeterminate nature of language and the desire for a determinate rule of law. This tension always exists, but it is necessarily more acute when we use language in deliberately vague or underdetermined ways, as is the case with many of our most significant constitutional provisions. The “vagueness” problem is well known and much debated among language philosophers, but the basic difficulty is easily summarized: Propositions that rely on vague terms cannot be verified (or falsified) empirically. In our everyday lives, vague language does not present much of a

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1 See, e.g., Bertrand Russell, Vagueness, 1 Australasian J. of Psych. & Phil. 84 (1923) (giving an introductory overview of the problem); Timothy Williamson, Vagueness (Routledge, 1994) (surveying the subject).

2 Consider, for example, David Lewis's assessment of the complications that the vague kinds of language often used in ordinary conversation can present to the semantic logician:

If Fred is a borderline case of baldness, the sentence “Fred is bald” may have no determinate truth-value. Whether it is true depends on where you draw the line. Relative to some perfectly reasonable ways of drawing a precise boundary between
problem, because there is rarely a pressing need to understand each other in precisely determined ways. When it comes to constitutional argument, however, the question of what exactly the “equal protection of the laws” (for example) means is often quite important. Because the term “equal protection” is deliberately vague, lawyers and judges must often “interpret” its meaning—that is, they must decide what counts as “equal protection” in various contexts. This need for interpretation presents a real problem for those who want the Constitution to have “objective” or verifiable kinds of meanings; meanings that can place clear normative constraints on judges. Put in current political parlance, if “equal protection” had a verifiable meaning, it would be quite easy to know when a judge was “making,” as opposed to “applying,” the law.

Words, though, often do not have verifiable “objective” or “foundational” meanings that can provide this kind of normative constraint. This is because words often do not refer to something “in the world” that we can see or touch; something we might use as a kind of measuring stick to assess the truth of particular statements. Of course, this does not mean that words cannot provide any normative constraints; it just means that the source of those constraints cannot be something “objective” in the sense of being independent of the practical conventions of language. For this reason, we can only justify a normative judgment about a judicial interpretation in terms of that interpretation’s consonance with conventional practice—not by reference to some “factual” or verifiable state of affairs in our world, or, as some suggest, in the Founders’ world. More importantly,

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bald and not-bald, the sentence is true. Relative to other delineations, no less reasonable, it is false. Nothing in our use of language makes one of these delineations right and all others wrong. We cannot pick a delineation once and for all (not if we are interested in ordinary language), but must consider the entire range of reasonable delineations.

David Lewis, Scorekeeping in a Language Game, in David Lewis: Philosophical Papers v. 1 233, 244 (1983).

3 One might think, as a counterexample, of the word “kilogram,” which refers to the mass of an actual metal cylinder in Paris. We could, in theory, verify uses of the word kilogram against the mass of that cylinder. There is, of course, no such empirical ideal for the phrase “equal protection”.


5 For an account along these lines, see Lawrence Solum, Semantic Originalism...
these conventions—what I have called interpretive norms—can derive only from the practice of interpretation itself. That is, these norms develop out of our actual arguments, as we learn by trial and error what others will or will not accept as legitimate interpretations of a particular word or phrase. Thus, the only way we can understand what “equal protection” means is by understanding the norms that govern its acceptable use, and, these norms necessarily evolve as the practice confronts new contexts and communicative problems.

Phew. At this point, you may be wondering what all this esoteric theory can possibly mean to a practicing constitutional lawyer. What it means, in short, is that those who want to succeed in constitutional argument must be fully versed in the norms that govern its practice. Put another way, a good constitutional lawyer must completely master the language—the grammar—of constitutional argument. Fortunately, these norms have been the subject of some study, and Professor Philip Bobbitt has given a particularly helpful account of the basic rules. Bobbitt has identified and described six fundamental “modalities” (or forms) of argument that are accepted by convention as legitimate in constitutional practice.6

The forms of argument Bobbitt has identified are:

[1] the historical (relying on the intentions of the framers or ratifiers of the Constitution); [2] textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary “man on the street”); [3] structural (inferring rules from the relationships that the Constitution mandates from the structure it sets up); [4] doctrinal (applying rules generated by precedent); [5] ethical (deriving rules from the moral commitments of the American ethos that are reflected in the Constitution); [6] prudential (seeking to balance the costs and benefits of a particular rule).7

According to Bobbitt, an assertion of constitutional meaning based in one of these six modalities is legitimate, while an assertion based in something else—i.e. Hammurabi’s Code, the teachings of the Quran, or the principles of astrology—is not. Just because an assertion of meaning is legitimate does not mean it is compelling or persuasive. If a lawyer makes a weak historical argument about the

6 PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (Oxford Univ. Press, 1982).
7 PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (Basil Blackwell, 1991) (emphasis added).
meaning of “equal protection”, for example, she may never convince anyone—much less a judge—to adopt her assertion. But at least she is playing the game by the appropriate rules; she is, in effect, speaking the language of constitutional law.

Because the modalities arise out of the real-life practice of constitutional argument, the best way to understand them is to examine how they are used to make actual constitutional assertions. With that in mind, the rest of this essay illustrates each argumentative modality in action. And, in an effort to demonstrate the central place the modalities have occupied in the practice over time, I have selected examples from various points in American history, and I have tried to choose some of the best-known decisions and briefs in the constitutional catalogue.

**A. Textual Argument in Youngstown Sheet & Tube Co. v. Sawyer**

In 1951, in the midst of the Korean War, an untimely labor dispute arose in the American steel industry. After a long series of failed negotiations, the steelworkers’ union gave final notice of its intention to strike in April of 1952. Recognizing the industry’s critical importance to the war effort, President Harry Truman issued an Executive Order directing the Secretary of Commerce to seize many of the steel mills and keep production flowing. The Secretary then informed the mill managers that they worked for the United States government, and told them to carry on their business at his direction. President Truman reported his action to Congress the next morning, and the steel companies promptly brought suit in District Court claiming that the President had exceeded his constitutional authority. Just over a month later, after a string of expedited hearings, the Supreme Court heard oral arguments in the case.

The government conceded that the President lacked express constitutional or statutory authority to seize the steel mills, but argued that Truman was “acting

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8 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).
9 *Id.* at 583.
10 *Id.*
11 *Id.*
12 *Id.*
within the aggregate of his constitutional powers as the Nation’s Chief Executive and the Commander in Chief of the Armed Forces.” In other words, even without explicit constitutional language, the authority to seize the mills in an emergency was inherently a part of the “Executive power” vested in the President. That argument did not persuade Justice Hugo Black, however, who wrote the Court’s majority opinion. Justice Black was a dyed in the wool textualist—he once caustically reminded an interviewer, “You see, you have laws written out. That’s the object in law, to have it written out”—and he began his Youngstown opinion in typical form. National emergency or not, “[t]he president’s power, if any, to issue the [seizure] order must stem either from an act of Congress or from the Constitution itself.” He searched the provisions the government relied on—those providing that “the executive Power shall be vested in a President”; that “he shall take Care that the Laws be faithfully executed”; and that he “shall be the Commander in Chief”—and, of course, found no mention of seizing steel mills.

Without an express constitutional grant, Black had little trouble concluding that Truman’s order amounted to an exercise of Legislative, rather than Executive, power. And he did so in paradigmatically textualist terms:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws that the President is to execute. The first section of the first article says that “All legislative Power herein granted shall be vested in a Congress of the United States.”

Black’s conclusion was thus as uncompromising as it was straightforward. Unlike his colleague Robert Jackson, who argued for some kind of contextual sliding scale or spectrum of implicit or inherent Executive power, Black entirely rejected

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14 Youngstown Sheet & Tube Co., 343 U.S at 584.
15 Id.
17 Youngstown Sheet & Tube Co., 343 U.S. 585.
18 Id. at 586.
19 Id. at 587-88.
anything not “written out.” He made no attempt to discern what, if anything, the constitutional Framer’s might have thought about emergency or wartime powers, even though the undefined concept of executive authority might seem to call for such an inquiry. Instead, he took a straightforward textualist approach: all that matters is what the words might mean to an average person on the street.

B. Historical Argument in District of Columbia v. Heller

In early February of 2003, Dick Heller and five other plaintiffs filed suit against the District of Columbia challenging city code provisions that, in effect, banned the home ownership of handguns. Heller was a Special Police Officer at the Thurgood Marshall Judicial Center and he carried a handgun while at work. The code, however, did not allow city residents to possess unregistered guns at home, and, beginning in 1974, the city had refused to issue new registrations for handguns. On relatively rare occasions, the city would grant special licenses for handguns, but Heller’s application had been rejected. Convinced that this handgun policy violated his Second Amendment right to “keep and bear arms,” Heller asked the Federal District Court to permanently enjoin enforcement of the city code provisions. The District Court dismissed Heller’s complaint, but the D.C. Circuit reversed, and the case eventually made its way to the Supreme Court.

In the Supreme Court, the city argued that the text of the Second Amendment contemplates a right to bear arms rooted firmly in the context of militia or military service. The text seems to make this contextual understanding explicit by prefacing the right with an explanatory phrase: “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.” Thus, the city argued, the right to bear arms must be

20 See id. at 635-40 (Jackson, J., concurring).
22 Id. at 2-3.
23 Id. at 3.
24 Id. at 8.
26 Id. at
27 U.S. CONST. amend II (1791).
understood as a collective right—one held by “well-regulated” militias—not as the kind of individual right a citizen like Heller could claim against the government. Heller disagreed and argued that the prefatory clause specifies just one of many possible justifications for the right to bear arms, and that the Amendment’s operative clause also protects gun ownership for the purpose of individual self-defense. Although there was some relevant doctrine, the Supreme Court opinions turned largely on historical arguments—that is, the Court looked not to what a modern reader would think the text means, but rather to what someone reading the text in 1791 would have thought.

Writing for the majority, Justice Antonin Scalia turned to a variety of historical sources in an effort to demonstrate that the founding generation understood the right to “keep and bear arms” as serving an individual right of self-defense. In a notable passage, he offered his interpretation of the English common law rights he claimed the Second Amendment codified:

> By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, “constituted the preeminent authority on English law for the founding generation,” cited the Arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, the “natural right of resistance and self-preservation,” and “the right of having and using arms for self-preservation and defence.” Other contemporary authorities concurred.

For Scalia, then, the reason we should interpret the Second Amendment as protecting the right to possess handguns in the home is historical: it is part of the right the framers and the ratifiers thought they were protecting when they adopted the text in question.

Writing in dissent, Justice John Paul Stevens made different historical arguments. Instead of looking to English common law, he focused on the particular problems motivating the Second Amendment’s inclusion in the Bill of Rights. In particular, he focused on the states’ fear of consolidated federal military power.

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28 *Heller*, 554 U.S. at 581-610.
29 *Id.* at 593-94 (citations omitted).
The original Constitution’s retention of the militia and its creation of a divided [state and federal] authority over that body did not prove sufficient to allay fears about the dangers posed by a standing [federal] army. For it was perceived by some that Article I contained a significant gap: While it empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia’s disarmament. … This sentiment was echoed at a number of state ratifying conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents.  

According to Stevens, it was this fear of a federal power grab that led the framers to protect the militia explicitly in the Second Amendment—the English right of self-defense simply did not enter into the conversation.

Regardless of who is right on this question, the larger point is that both sides accepted the legitimacy and significance of historical arguments about constitutional meaning. That the sides could disagree so forcefully about history’s lesson in this case only illustrates the point that history cannot provide the kind of objective measuring stick that can effectively constrain judges. It is still just one modality of argument, which may be utilized more or less persuasively in particular cases.

C. Structural Argument in McCulloch v. Maryland

Perhaps the most important opinion in the constitutional canon is Chief Justice John Marshall’s powerful argument in McCulloch v. Maryland. There the Court confronted fundamental questions about the relative scope of state and federal power under the Constitution. The case arose out of a controversy over the creation of a National Bank, which had begun almost as soon as the Constitution was ratified. At Alexander Hamilton’s urging, the First Congress established such a bank in 1791, with the proviso that its charter would expire in twenty years. As it turned out, James Madison—who opposed the original bank—was President in 1811, and he successfully campaigned against renewing the charter. But, after the War of 1812 left the new nation in serious financial trouble, Madison changed his

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30 Id. at 655 (Stevens, J., dissenting)
32 Id. at 393.
mind and got behind the movement for a Second National Bank.33 Unhappy with this development, the state of Maryland decided to impose an annual tax of $15,000 on the bank’s Baltimore branch.34 When cashier James McCulloch refused to pay, Maryland took him to court arguing that Congress had no constitutional authority to create the bank.35 Not surprisingly, Maryland won in its state courts, but an appeal to the Supreme Court quickly followed.36

The Court addressed two distinct questions: (1) whether Congress had the power to create the bank; and (2) if so, whether Maryland could tax it. Marshall’s opinion utilized the full array of constitutional modalities, but in answering the first question he leaned most heavily on prudentialism, arguing that Congress must have the means to establish public credit and pay troops in far-flung locales.37 In addressing the second question, however, Marshall turned decisively to structural argument in defining the relative scope of state and federal taxing powers:38

The only security against the abuse of [the taxing] power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. ... The people of a state, therefore, give to their government a right of taxing themselves and their property ... resting confidently on the interest of the legislator ... to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states.39

Marshall’s structural argument here recalls the famous Revolutionary War slogan, “No taxation without representation!” A state government may tax its own citizens because they are represented in the state legislature. But the federal government—the government of all Americans—is not represented in the Maryland legislature.

33 Id.
35 Id. at 318.
36 Id. at 317.
37 Id. at 408-09. The careful reader will recall that, contrary to modern mythology, Marshall did not rely on the text of the “necessary and proper clause”; he addressed that language only to refute Maryland’s claim that the clause limited federal power. In so doing, he borrowed almost verbatim from Hamilton’s defense of the original bank. TINDALL & SHI, supra note 31, at 331-32.
38 McCulloch, 17 U.S. (Wheat) at 428.
39 Id. at 428-29.
And, Marshall concludes, Maryland cannot impose a tax on the unrepresented citizens of other states.

This is a straightforward and powerful structural argument. It infers constitutional meaning from the institutional relationships the document establishes. It relies on no specific text, nor on any particular history or doctrine, but instead points us to the simple necessities—the laws of constitutional physics, perhaps—that govern our political architecture.

D. Doctrinal Argument in United States v. Morrison

In the fall of 1994 a woman at Virginia Tech alleged that two members of the varsity football team raped her and bragged about it around campus. After a series of mismanaged internal disciplinary proceedings—which resulted in only nominal punishment—the woman withdrew from school. She then filed suit against both the football players and the college under the Violence Against Women Act of 1994 (VAWA), which provided federal civil remedies for victims of gender motivated violence. The District Court dismissed the claims against the college, and concluded that Congress had no constitutional authority to enact civil remedies contemplated in VAWA. After a hearing en banc, the Fourth Circuit agreed that VAWA was unconstitutional, and the case went up to the Supreme Court.

Chief Justice William Rehnquist’s majority opinion first considered VAWA within the doctrinal framework the Court had adopted to evaluate exercises of Congressional power under the Commerce Clause. For almost six decades, that doctrine had been very deferential to Congressional prerogatives, but in 1995 the Court added some new teeth to the old tests. In United States v. Lopez, the Court struck down a federal law banning guns in school zones because the connection to

42 Id. at 603-04.
43 Id. at 604.
44 Id.
45 Id. at 605.
46 Id. at 607.
interstate commerce was too attenuated. In *Morrison*, Rehnquist worked his way methodically through the new doctrine, which he said had identified four important factors: (1) whether a law regulated “economic activity”; (2) whether a law contains an express “jurisdictional element” limiting its scope to interstate commerce; (3) whether the legislative history “contains express congressional findings” connecting the regulated activity to interstate commerce; and (4) whether the link between the regulated activity and interstate commerce was too attenuated. He then concluded, “With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of [this case] is clear.” Violence against women is not economic activity, VAWA contained no jurisdictional element, and the congressional findings were insufficient to establish an unattenuated connection to interstate commerce. Thus, the law exceeded Congress’s power under the Commerce Clause.

Rehnquist’s opinion is a clear-cut example of doctrinal argument, which aims to derive and apply what Professor Herbert Wechsler has called “neutral principles” to solve constitutional problems. The doctrinal approach, which is the focus of much of the first year law school curriculum, aims to give stability, credibility, and coherence to the common law. The skilled doctrinalist must have deft facility with the many tests, categories, formulas, and factors that the Court has created over time and passed down as precedent. She well understands that arguments which seem to fit within the existing doctrine enjoy a substantial argumentative advantage; one that even has a Latin name: *stare decisis*. This is not to suggest, of course, that doctrine exists as some kind of constitutional algorithm—just plug in the facts and get the “neutral” legal answer. But a good doctrinalist can often make it seem that way, and that is the power of doctrinal argument.

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48 *Morrison*, 529 U.S. at 610-12.
49 Id. at 613.
50 Id. at 613-17.
51 Id. at 617.
E. Ethical Argument in *Reynolds v. Sims*

In 1961 a group of Alabama voters brought suit in federal District Court alleging that the apportionment of the state legislature violated the Equal Protection Clause of the Fourteenth Amendment.\(^{53}\) Despite a provision in the state constitution requiring decennial reapportionment, the existing districting scheme still reflected the 1900 census.\(^{54}\) In the intervening decades population shifts had created significant disparities in electoral influence, so that by 1961 Jefferson County’s 600,000 residents had the same number of state Senators as did Lowndes County’s 15,471 residents.\(^{55}\) As a result, Lowndes County residents enjoyed a nearly 40 to 1 representative advantage in the Senate; a dilution of voting power that the plaintiffs said amounted to a denial of the equal protection of law. The resulting Supreme Court decision is among the most controversial and important rendered in the second half of the 20th century.

Writing for the majority, Chief Justice Earl Warren repeated, and reemphasized, a powerful ethical argument Justice William Douglas had made just a year before in deciding similar dispute over state primary elections.\(^{56}\) In *Gray v. Sanders*, Douglas had written,

> The concept of “we the people” under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions. ... The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.\(^{57}\)

Every first year law student learns that the Declaration of Independence, the Gettysburg Address, and even the Constitution’s Preamble have no binding legal authority—so why do they appear in the center of an important constitutional

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\(^{54}\) *Id.* at 540.

\(^{55}\) *Id.* at 546.

\(^{56}\) *Id.* at 557-558. (quoting *Gray v. Sanders*, 372 U.S. 368, 380-81 (1963)).

argument? The answer is, in a word, *ethos.* These texts are fundamental expressions of the American constitutional and democratic tradition, and it is to this tradition that the *ethical* modality of argument appeals.

It is important to note here that ethical arguments are not “moral” or “natural law” kinds of arguments. Rather, they look to our national traditions and founding commitments. In this sense, the word “ethical” as used here derives not from the Greek *ethike,* but from the Greek *ethos.* Thus, legitimate ethical arguments are rooted in broad and constitutive American values rather than in particularized claims of moral duty or right. And for this reason, an ethical arguments’ persuasiveness ultimately depends upon how broadly the values it invokes are shared. In the case of *Reynolds v. Sims* (and by extension, *Gray v. Sanders*), the argument was very persuasive indeed, as “one person, one vote” has become the slogan of a generation of American election activists.

**F. Prudential Argument in the “Brandeis Brief”**

In 1903, the Oregon legislature limited the number of hours a day women could work at certain trades. Two years later, Curt Muller, who owned a laundry in Portland, challenged the limitation as a violation of the constitutionally protected liberty of contract, and the case eventually made its way to the Supreme Court. National Consumer League lawyers Florence Kelley and Josephine Goldmark then hired the famous Boston Progressive lawyer Louis Brandeis to argue their case in Washington. This turned out to be quite a momentous decision; one that

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58 Some of these ideas first appeared in Ian Bartrum, *The Constitutional Canon As Argumentative Metonymy,* 18 WM. & MARY BILL OF RTS. J. 327, 368-69 (2009).

59 It is important to note here that ethical arguments are not “moral” or “natural law” kinds of arguments; rather they look to our national traditions. In this sense, the word ethical here derives from the Greek “ethos,” not the Greek “ethike”.

60 For a seminal discussion of this distinction in terms of “public” and “nonpublic” reasoning, see John Rawls, *Political Liberalism* 213-17 (1993).

61 In fairness, the slogan existed long before the Court adopted it. Indeed, the phrase’s broad popularity helps explain its power in the ethical form of argument.


64 Woloch, *supra* note 50, at 23.
Goldmark would later claim “gave a revolutionary new direction to judicial thinking; indeed to the judicial process itself.”

Brandeis decided to present the Court with a new kind of written argument—a brief not limited to the traditional legal forms, but built instead upon facts and studies about the social conditions the Oregon law was meant to address. The resulting 113-page argument ushered in a new era of appellate advocacy, and the phenomenon known as the “Brandeis Brief” was born.

Brandeis’s argument exhibited almost none of the narrative structure that characterized briefs of the time. Instead, he assembled summaries of hundreds of studies and reports from many different states—and even from other democratic nations—regarding the health and safety dangers long hours presented to women workers.

Brandeis hoped the data would persuade the Court of the overwhelming rationality of Oregon’s exercise of its police powers. In one notable passage under the heading “The General Benefits of Short Hours”, he made the following prudential argument:

History, which has illustrated the deterioration due to long hours, bears witness no less clearly to the regeneration due to the shorter working day. To the individual and to society alike, shorter hours have been a benefit wherever introduced. The married and unmarried working woman is enabled to obtain the decencies of life outside of working hours. With the improvement in home life, the tone of the entire community is raised. Wherever sufficient time has elapsed since the establishment of the shorter working day, the succeeding generation has shown extraordinary improvement in physique and morals.

Brandeis followed up this brief narrative passage with abstracts of a dozen reports generated in Great Britain and various states on the “regenera[tive]” effects shorter hours tend to have on women and the community. Brandeis’s intention here—as is true of all of prudential arguments—was to convince the Justices that his position made good sense as a matter of sound constitutional policy.

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65 Id.
66 Id.
67 Louis Brandeis, Brief for the Defendant in Error in Muller, 208 U.S. at 412, reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 63 (Philip B. Kurland & Gerhard Casper, eds. 1975)
68 Id. at 120.
69 Id.
Given the doctrinal climate, it is perhaps surprising that Brandeis won his case in *Muller*. Just a few years earlier the Court had struck down a maximum hours law for male bakers in the now-infamous *Lochner v. New York*.\(^7^0\) In the formalistic jurisprudential culture of the time the Justices often held fast to theoretical legal ideals—such as the “liberty of contract”—even when faced with the stark reality of unequal bargaining power.\(^7^1\) But the Brandeis Brief, with its avalanche of sociological data, seemed temporarily to overwhelm the formalist defenses and persuade the Court that, at least in the case of women laundry workers, state regulation of the workplace might be good policy. The years following *Muller* were a “golden age of Brandeis briefs,” as lawyers tried to emulate the future Supreme Court Justice.\(^7^2\) And, although the Brandeis model has evolved a great deal since 1908, prudential argument remains a vital and fundamental part of our constitutional practice.

**Conclusion**

My intention here has been to provide a brief primer on the interpretive norms—what Philip Bobbitt has called the “modalities”—that govern legitimate constitutional argument. Because these norms arise from actual arguments, I have chosen to illustrate them using examples drawn from the constitutional canon. While Bobbitt has argued, and I agree, that each of these modalities represents an independent and equal form of argument, there are those who would argue in favor of some kind of modal ranking—i.e. all things being equal, a textualist argument should trump a doctrinal argument.\(^7^3\) While such a ranking might be possible if the *practice itself* resolutely adopted it, all of the efforts I have seen on this point simply reflect their authors’ preferred forms of argument. But this observation itself raises a final, and I think very important, point. Judges, too, have modal preferences. There are those (such as Justice Antonin Scalia, perhaps) who respond to historical

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\(^7^0\) *Lochner v. New York*, 198 U.S. 45, 57 (1905).
\(^7^1\) Bartrum *Metonymy*, *supra* note 46, at 358.
\(^7^2\) WOLICH, *supra* note 50, at 41.
\(^7^3\) For a particularly thoughtful attempt at such a ranking, see Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).
arguments; some (such as Chief Justice John Roberts) seem drawn to doctrinal arguments; while still others (such as Justice Steven Breyer) prefer prudential arguments. It is, I suggest, much more productive to understand judges’ preconceptions along these lines than simply to classify them as “liberal” or “conservative.” By this I mean that the lawyer who does a thorough modal assessment of both her case and the Court to whom she must present will always be better prepared for constitutional argument. And, as I have hinted in opening, the Constitution itself is really nothing more than this ongoing debate about the meaning of our founding commitments. I hope this primer has helped clarify the rules of engagement.