

October 2008

## Metaphors and Modalities: Meditations on Bobbit's Theory of the Constitution

Ian C. Bartrum

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#)

---

### Repository Citation

Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbit's Theory of the Constitution*, 17 Wm. & Mary Bill Rts. J. 157 (2008), <https://scholarship.law.wm.edu/wmborj/vol17/iss1/5>

Copyright c 2008 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

# METAPHORS AND MODALITIES: MEDITATIONS ON BOBBITT'S THEORY OF THE CONSTITUTION

Ian C. Bartrum\*

Language is the Flesh-Garment, the Body, of Thought. I said that imagination wove this Flesh-Garment; and does not she? Metaphors are her stuff: examine Language; . . . what is it all but Metaphors, recognised as such, or no longer recognised; still fluid and florid, or now solid-grown and colourless? If those same primitive elements are the osseous fixtures in the Flesh-Garment, Language,—then are Metaphors its muscles and tissues and living integuments.<sup>1</sup>

—Thomas Carlyle

In two remarkable books, written nearly a decade apart, Philip Bobbitt has brought Ludwig Wittgenstein's cataclysmic insights on the nature of language to bear on the study of American constitutionalism.<sup>2</sup> The first of these books, entitled *Constitutional Fate*, sets out to explore and describe the conversation that is the American Constitution, and in so doing breaks sharply with traditional efforts to discover, in some external source, a set of foundational constitutional meanings that might justify or discredit particular legislation, decisions, or policies.<sup>3</sup> From the outset, Bobbitt asks us to recognize that the Constitution is not an artifact that exists in some space apart from us; whose nature we might better search out by poking, teasing, or holding up to the proper light.<sup>4</sup> Rather the Constitution *is the search*: it is neither more nor less than the *practice*—both in court and classroom—of constitutional law.<sup>5</sup> "Law," he writes in the second book, "is something we *do*, not something we *have* as a consequence

---

\* Irving S. Ribicoff Fellow in Law, Yale Law School. I thank Philip Bobbitt, Bruce Ackerman, Dennis Patterson, and the members of the Next Generation Legal Scholars Symposium at Yale Law School for helpful comments on earlier drafts. I must reserve my deepest gratitude, however, for Akhil Reed Amar who freely offered his invaluable support and guidance throughout this endeavor.

<sup>1</sup> THOMAS CARLYLE, *SARTOR RESARTUS: THE LIFE AND OPINIONS OF HERR TEUFELSDRÖCKH* 73 (Charles Frederick Harrold ed., 1937).

<sup>2</sup> Dennis Patterson has undertaken an insightful analysis of Bobbitt's work and its relationship to Wittgenstein's. See Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993); see also Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994).

<sup>3</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) [hereinafter BOBBITT, *FATE*].

<sup>4</sup> *Id.* at 234–35.

<sup>5</sup> *Id.*

of something we do.”<sup>6</sup> Just as the late Wittgenstein abandoned the search for fixed, external referents and suggested that the meaning of some words is discoverable only through the use of those words,<sup>7</sup> Bobbitt discards the Sisyphean search for absolute constitutional meanings and commits himself instead to describing the internal grammar of constitutional discourse.

Bobbitt breaks constitutional grammar down into six “modalities” of argument, each of which can produce legitimate assertions of constitutional meaning:

[1] the *historical* (relying on the intentions of the framers and 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 among the structures it sets up); [4] *doctrinal* (applying rules generated by precedent); [5] *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and [6] *prudential* (seeking to balance the costs and benefits of a particular rule).<sup>8</sup>

*Constitutional Fate* undertakes, in biographical form, an exploration of each of these modalities of argument.<sup>9</sup> Bobbitt gives us historical argument through the story of Walter Crosskey’s controversial multi-volume epic *Politics and the Constitution* and explores textual arguments in the judicial work of Hugo Black; doctrinal argument emerges from a discussion of Henry Hart and the American Law Institute.<sup>10</sup> Bobbitt credits Charles Black’s *Structure and Relationship in Constitutional Law* with revitalizing and giving name to structural argument, and he sees prudential argument at work in Alexander Bickel’s *The Least Dangerous Branch*.<sup>11</sup> The final modality, ethical argument, is Bobbitt’s own contribution to the lexicon, and he devotes much of the remainder of the book to exploring the derivation and application of arguments that rely on the ethos of American democracy.<sup>12</sup>

---

<sup>6</sup> PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 24 (1991) [hereinafter BOBBITT, INTERPRETATION] (emphasis added).

<sup>7</sup> See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 3–7, 20–26 (G.E.M. Anscombe trans., Basil Blackwell & Mott 2d ed. 1967) (1958) (presenting a theory of meaning based on practice and usage as well as traditional reference). I have recently heard Tony Kronman describe Wittgenstein as “the liquidator of the *a priori*,” which I think neatly describes Bobbitt’s constitutional aims. Yale Faculty Workshop (Dec. 3, 2007) (on file with author).

<sup>8</sup> BOBBITT, INTERPRETATION, *supra* note 6, at 12–13 (emphasis added).

<sup>9</sup> BOBBITT, FATE, *supra* note 3, at 9–92.

<sup>10</sup> *Id.* at 9, 14–15, 25–27, 42.

<sup>11</sup> *Id.* at 61, 68, 76–77, 92.

<sup>12</sup> *Id.* at 93–177.

But Bobbitt's inspired effort to escape the regressions that persist in foundational accounts of constitutional meaning leaves some important kinds of questions unanswered. First, his depiction of constitutional practice has a static quality to it; he does little to explain how the modalities of argument may evolve or expand over time. Second, Bobbitt struggles to provide a principled account of constitutional decision making in the rare and difficult case where the different modalities may point toward divergent, yet equally legitimate, outcomes.<sup>13</sup> Both of these issues arise as a result of Bobbitt's original insight, which is committed to an account of constitutional meaning and legitimacy defined solely by the internal grammar of constitutional practice. If it is the accepted grammar that bestows legitimacy, that grammar must also be capable of excluding certain kinds of arguments as illegitimate—it is this exclusionary impulse that gives rise to Bobbitt's these-and-only-these-modalities stasis. Likewise, when faced with divergent modalities, it is tempting to look outside the practice for a means of resolution—perhaps by ranking the modes of argument—but to indulge such a temptation is ultimately to resort to foundationalism and abandon the Wittgensteinian project entirely.<sup>14</sup>

I do not imagine that I can provide complete answers to these lingering and vexing questions, particularly those surrounding the origins of the basic modalities,<sup>15</sup> but

---

<sup>13</sup> Bobbitt devotes much of his second book to this problem, which he resolves with an ultimate appeal to judicial "conscience." It takes some fancy footwork, however, to demonstrate that this "conscience" is not actually the ultimate external referent or foundation—which would defeat the entire project. BOBBITT, *INTERPRETATION*, *supra* note 6, at 163. Rather, Bobbitt sees conscience as part of the act of decision making, which is itself part of—and not external to—the practice of constitutional law. In this sense, a decision does not define ultimate constitutional meaning, rather it becomes one feature in the ongoing dialogue and practice. *Id.* at 163–165. While I agree with this approach to the problem in principle, I do not think it provides enough account of the grammatical methods by which such decisions modify and enlarge the constitutional discourse. Bobbitt also provides an excellent, practice-based account of intramodal conflicts, but I do not take up that issue here.

<sup>14</sup> For a thoughtful attempt at such a ranking scheme, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252–68 (1987).

<sup>15</sup> My intuition on this question is that the text—thus textualism—came first, and that the other modalities grew up very quickly as part of the interpretive practice. To analogize to language practice, this is something like the phenomenon of designation and derivation that is rigorously explored within the so-called "causal theory of reference." See, e.g., Richard Boyd, *Metaphor and Theory Change: What is "Metaphor" a Metaphor For?*, in METAPHOR AND THOUGHT 481, 496–500, 503 n.3 (Andrew Ortony ed., 2d ed. 1993); SAUL A. KRIPKE, *NAMING AND NECESSITY* 91–97 (Basil Blackwell 2d ed., 1980) (1972); 2 HILARY PUTNAM, *The Meaning of "Meaning,"* in MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215 (1975); 2 HILARY PUTNAM, *The Refutation of Conventionalism*, in MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 153, 176–77 (1975). The causal theory of reference is, however, a foundational explanation, in that it derives ultimate definition and meaning from an original baptismal moment, and so I am not yet certain how best to account for this within

I do hope in this paper to provide an internal, practice-based account of the evolution of constitutional discourse. If successful, this account will incorporate the resolution of difficult cases as among the possible moments of grammatical (and thus constitutional) creativity. In appealing to Wittgenstein, Bobbitt reveals the basic similarities between constitutional practices and linguistic practices, and thus, as we begin to consider how our constitutional discourse might grow and evolve, it seems appropriate to examine the means by which our language does the same. While it is likely that language evolves in a number of different ways, I suggest that one of the most important and substantial forms of linguistic growth and creativity is what we call *metaphor*.<sup>16</sup> It is in part through metaphor that we capture and express new meanings, expand our linguistic capabilities, and perhaps even enhance our cognitive capacities. In Carlyle's terms, a strong metaphor may gain acceptance, ossify, and become part of our literal discourse; then new metaphors, with still vital figurative content, become the moving parts—the soft growth tissue—of our expressive grammar and practice.<sup>17</sup> And so it is with our constitutional practice: strong argumentative modalities have ossified into the accepted grammar of constitutional law, but there are always new arguments, built on figurative uses of the accepted modalities, that make up the fluid and florid frontiers of constitutional discourse.

This paper employs a particular theory of metaphors—Max Black's version of the *interaction theory*—in the hope of providing a useful account of the evolution of constitutional law.<sup>18</sup> I contend that it is in the interaction, or figurative blending, of Bobbitt's modalities that we create new constitutional meanings and surmount constitutional impasses, and that we can only judge the merits of such endeavors over time, as we see which of our metaphors ossify and which fall away. Seen this way,

---

Bobbitt's paradigm. What I can say is that I do not dispute that some aspects of language—and perhaps some moments of constitutional law—are best reflected in these foundational terms. But there are other aspects of law—interpretation and advocacy are paradigms—for which foundational accounts may fail and a practice-based account (like Bobbitt's) may succeed. It is these interpretive aspects that are the limited subject of this paper, and I contend that the interaction theory of metaphor is a practice-based account of linguistic evolution, and, as such, it may complement and expand Bobbitt's theory of constitutional law.

<sup>16</sup> There are, of course, other tropes that may operate to similar effect—metonymy and synecdoche come to mind—and theoretical accounts of these forms may also have useful application to the study of constitutional discourse. For an explanation of these tropes, see Paul Henle, *Metaphor*, in *LANGUAGE, THOUGHT, AND CULTURE* 173, 175–76 (Paul Henle ed., 1958). The limited goal of this paper, however, is to begin a discussion of the most common of these figurative modes and to explore its relationship to law-as-practice.

<sup>17</sup> CARLYLE, *supra* note 1.

<sup>18</sup> This is in no way meant to suggest that Black's theory is the most recent or sophisticated theory of metaphor. It is only a theory I find particularly persuasive and apt for the purposes of my argument here. For an excellent, more recent approach see George Lakoff, *The Contemporary Theory of Metaphor*, in *METAPHOR AND THOUGHT*, *supra* note 15, at 202, 202–51 (explaining how metaphor has become a part of everyday language).

constitutional law, like language, is a creative practice, and its great practitioners are more poets than logicians. My application of Black's theory to constitutional law is, in this sense, itself metaphoric, as was Bobbitt's original application of Wittgenstein: I do not suggest that there is a literal relationship between linguistic practice and law practice—but rather a metaphoric one.<sup>19</sup> My hope is that by superimposing an idea from the philosophy of language onto the study of constitutional law, I can say something figurative about the growth of law that is difficult—if not impossible—to say literally. It is probably too much to hope that my metaphor may eventually ossify and become part of the lexicon, as has Bobbitt's.<sup>20</sup>

With that said, this paper begins with a brief examination of Black's interaction theory, and his controversial claim that metaphors can actually create new meanings or semantic content. I then provide examples of interactive metaphors at work in three paradigmatic spheres of constitutional discourse: theory, advocacy, and judging.<sup>21</sup> I look first to theory, with an examination of Akhil Reed Amar's persuasive discussion of the approach he calls "intratextualism."<sup>22</sup> I then explore metaphorical advocacy as practiced by Louis Brandeis in his famous brief in *Muller v. Oregon*.<sup>23</sup> I turn finally to judging and discuss perhaps the most canonical of twentieth-century constitutional decisions: *Brown v. Board of Education*.<sup>24</sup> In each of these spheres of constitutional discourse, I see something akin to Black's theory of metaphor underlying moments of grammatical creativity, and I conclude that it is only in assessing the acceptance or rejection of these metaphors over time that we can truly evaluate their constitutional merit.

## I. MAX BLACK'S INTERACTION THEORY OF METAPHOR

Philosophers have treated the phenomenon of metaphor as something of an interesting, if inconsequential, puzzle for thousands of years. The classical theory, generally attributed to Aristotle, holds that metaphors are simply elliptical or

---

<sup>19</sup> What is of fundamental importance is that they are both *practices*, by which I mean a social organizing system within which certain acts or utterances are recognized and meaningful, and others are not.

<sup>20</sup> Dennis Patterson has noted that, when asked for his opinion on the best recent book on constitutional theory, Laurence Tribe responded, "'There are two, and they're both by the same author,' recommending Bobbitt's *Constitutional Fate* and *Constitutional Interpretation*." Dennis Patterson, *The New Leviathan*, 101 MICH. L. REV. 1715, 1731 n.64 (2003) (book review) (quoting E-mail from Stuart Taylor to Dennis Patterson (Feb. 18, 2003)).

<sup>21</sup> I do not mean to suggest that these are the only spheres of constitutional practice. There are certainly others, including the legislative and executive domains.

<sup>22</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) [hereinafter *Amar, Intratextualism*].

<sup>23</sup> 208 U.S. 412, 419 (1908).

<sup>24</sup> 347 U.S. 483 (1954).

abbreviated similes.<sup>25</sup> Thus, we can easily translate Plautus's metaphorical phrase "man is a wolf to man" into the corresponding simile: "man is *like* a wolf to man."<sup>26</sup> Seen in this way, metaphors are relatively uninteresting, as they are ultimately reducible to literal assertions, often with relatively uncomplicated referents and meanings. Aristotle's view, commonly known as the *comparison view* of metaphors,<sup>27</sup> enjoyed widespread acceptance for many years—and has even had something of a rebirth in the recent work of Robert Fogelin.<sup>28</sup> But in the twentieth century, theorists increasingly challenged this classical account as simplistic and incomplete. Some argued that, unlike a simile, a successful metaphor conveys something more than can be literally paraphrased: a contention that, if true, would elevate metaphor to a place among the most important of linguistic forms.<sup>29</sup>

Perhaps the most interesting of these new theories emerged from the work of English philosopher and literary critic Ivor Armstrong Richards, who is perhaps best known for his collaborations with Charles Ogden.<sup>30</sup> Richards strains at the bit of a classical tradition that has reduced metaphor to "a sort of happy extra trick with words . . . a grace or ornament or *added* power of language, not its constitutive

---

<sup>25</sup> ARISTOTLE, RHETORIC, Bk. III, ch. 4, 1406b, *reprinted in* ARISTOTLE, RHETORIC 12 (W. Rhys Roberts trans., 1954). Max Black terms this account a *substitution view* of metaphor; the metaphor is simply a substitute for a literal phrase. MAX BLACK, MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY 31 (1962) [hereinafter BLACK, MODELS AND METAPHORS]. I suggest that the substitution view is just a subcategory of the better-known *comparison view* described below—which Black seems to distinguish.

<sup>26</sup> See PLAUTUS, ASINARIA: THE ONE ABOUT THE ASSES 53 (John Henderson trans., 2006). Henderson actually translates *homo homini lupus* to say "A man's a wolf, not a man." *Id.* at 52–53. The more popular wording, however, seems to be that reflected in the text of this Article. See, e.g., THE ADAGES OF ERASMUS 41 (William Barker ed., 2001); DICTIONARY OF QUOTATIONS 347, 427 (Bergen Evans ed., 1968).

<sup>27</sup> Perhaps the genesis of the *comparison* part of the theory is more evident in *Poetics*, where Aristotle writes: "Metaphor consists in giving the thing a name that belongs to something else; the transference being either from genus to species, or from species to genus, or from species to species, or on grounds of analogy." ARISTOTLE, POETICS ch. 20, sec. 21, 1457b, *reprinted in* ARISTOTLE, POETICS 251 (Ingram Bywater trans., 1954). *But see supra* note 25.

<sup>28</sup> See generally ROBERT J. FOGELIN, FIGURATIVELY SPEAKING (1988) (reinvigorating comparison theory).

<sup>29</sup> See, e.g., Henle, *supra* note 16, at 173–75 (hypothesizing that the focal term in a metaphor has a literal and a metaphorical meaning); see also NELSON GOODMAN, LANGUAGES OF ART 68–71 (1968) (puzzling that many phrases are *literally false* while *metaphorically true*); John R. Searle, *Metaphor*, in METAPHOR AND THOUGHT, *supra* note 15, at 83–111 (Andrew Ortony ed., 2d ed. 1993) (theorizing the reader's role in adding semantic content to a metaphor). *But see* Donald Davidson, *What Metaphors Mean*, in ON METAPHOR (Sheldon Sacks ed., 1978), *reprinted in* THE PHILOSOPHY OF LANGUAGE 415–26 (A.P. Martinich ed., 3d ed. 1996) (rejecting figurative theories and arguing that "metaphors mean what the words, in their most literal interpretation mean, and nothing more").

<sup>30</sup> See, e.g., C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM (1945).

form.”<sup>31</sup> Rather, he sees something more profound and creative at work, and he comes thus to an early interaction theory of metaphor, upon which Max Black would build his own theoretical edifice several decades later.<sup>32</sup> To begin, Richards posits that the mechanics of metaphor are derivative of the basic mechanics of thought: “[F]undamentally [metaphor] is a borrowing between and intercourse of *thoughts*, a transaction between contexts. *Thought* is metaphoric, and proceeds by comparison, and the metaphors of language derive therefrom.”<sup>33</sup> He then goes on to suggest that a metaphor results from the interaction of two distinct ideas (or contexts), which Max Black would later label the *frame* and *focus* terms of a given metaphor.<sup>34</sup> The *frame* is the principal idea or context that a metaphor hopes to illuminate, while the *focus* is the secondary idea or context that interacts with the principal to create the metaphor.<sup>35</sup> To take Plautus again as an example, “man’s relation to man” is the *frame*, while “wolf” is the *focus*.<sup>36</sup> This much is not inconsistent with classical comparison theory, but Richards goes on to make a more provocative claim: “[I]n many of the most important uses of metaphor, the co-presence of the [frame] and [focus] results in a meaning (to be clearly distinguished from the [frame]) *which is not attainable without their interaction*.”<sup>37</sup> Richards makes some effort to explain the creative force he attributes to metaphor as a product of the reader’s (or hearer’s) reconstruction of the interacting “common characteristics” of the frame and focus,<sup>38</sup> but he leaves a more detailed resolution of this question as an invitation to posterity, which Max Black happily accepted in his 1962 book *Models and Metaphors*.<sup>39</sup>

While Black is enamored of Richards’s ideas about interaction, he is dissatisfied with several aspects of the overall account. Most significantly, he takes issue with Richards’s contention that a metaphor’s reader must assimilate the “*common characteristics*” of the presented ideas.<sup>40</sup> For Black, this seems a relapse into older comparison theories, which rely on some set of inherent similarities between the

<sup>31</sup> I.A. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 90 (1936).

<sup>32</sup> *Id.* at 89–95, 100. W. Bedell Stanford has presented a similar account, which he calls an *integration theory*. W. BEDELL STANFORD, *GREEK METAPHOR* 100–05 (Johnson Reprint Corp. 1972) (1936).

<sup>33</sup> RICHARDS, *supra* note 31, at 94.

<sup>34</sup> *Id.* at 96. Richards actually has his own somewhat confusing labels for these terms—the *tenor* and the *vehicle*—but I have chosen to use Black’s labels throughout for the sake of consistency. *Id.* In choosing the labels *frame* and *focus*, Black employed his own metaphor by invoking the concept of a painting or photograph. Black is comfortable using metaphors (as long as they are good ones) to illuminate theory, which, again, is how I see my own application of Black’s theory to Bobbitt’s. See *supra* note 19 and accompanying text.

<sup>35</sup> BLACK, *MODELS AND METAPHORS*, *supra* note 25, at 27–28.

<sup>36</sup> See *supra* note 26 and accompanying text.

<sup>37</sup> RICHARDS, *supra* note 31, at 100 (emphasis added).

<sup>38</sup> *Id.* at 116–20.

<sup>39</sup> BLACK, *MODELS AND METAPHORS*, *supra* note 25, at 35–47.

<sup>40</sup> *Id.* at 39 (quoting RICHARDS, *supra* note 31, at 117) (emphasis added).



frame and focus. Rather, Black thinks Richards is more insightful when he speaks of the reader *connecting* the two ideas: "In this 'connection' resides the secret and the mystery of metaphor. To speak of the 'interaction' of two thoughts 'active together' . . . emphasize[s] the dynamic aspects of a good reader's response to a nontrivial metaphor."<sup>41</sup> Rather than asking the reader to tease out the "common characteristics" that frame and focus share, Black suggests that the focus superimposes its own "system of associated commonplaces" over the commonplaces associated with the frame.<sup>42</sup> It is then the reader's job to reconstruct these two sets of associated commonplaces in a way that "suppresses some details [and] emphasizes others."<sup>43</sup> When such a metaphor is successfully created and reconstructed, it can evoke a new kind of meaning.<sup>44</sup>

Black provides several illustrations of his theory, a few of which may be helpful here. First, he asks us to imagine gazing at the night sky through a piece of opaque glass with a number of transparent lines cut into it.<sup>45</sup> We only see the stars that we can successfully maneuver into the lines on the glass, and the stars we do see are organized by the lines' structure.<sup>46</sup> Black suggests that we can think of the glass as a metaphor, and of the transparent lines as the associated commonplaces relevant to both the frame and focus.<sup>47</sup> In this sense, the metaphor gives us a new picture of the night sky (complete with new constellations, I suppose). Or, he imagines trying to describe a great battle using only terms drawn from the vocabulary of chess:

The enforced choice of the chess vocabulary will lead some aspects of the battle to be emphasized, others to be neglected, and all to be organized in a way that would cause much more strain in other modes of description. The chess vocabulary filters and transforms: it not only selects, it brings forward aspects of the battle that might not be seen at all through another medium.<sup>48</sup>

---

<sup>41</sup> *Id.* (quoting RICHARDS, *supra* note 31, at 125).

<sup>42</sup> *Id.* at 40–41.

<sup>43</sup> *Id.* at 41.

<sup>44</sup> Black recognizes that any given reader will bring her own set of "associated commonplaces" with her to the metaphor. *Id.* at 40. We may all associate different things with the word "wolf," and thus there is the potential for metaphors to have entirely indeterminate meanings. But Black suggests that the successful metaphor-reader does not look strictly to her *own* associations, but rather to the associations that are "the common possession of the members of some speech community." *Id.* Likewise, a successful metaphor-maker must use terms that "readily and freely evoke[]" certain associations in that community. *Id.* This issue will become important when I discuss *successful* constitutional metaphors below.

<sup>45</sup> *Id.* at 41.

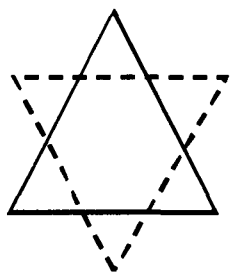
<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

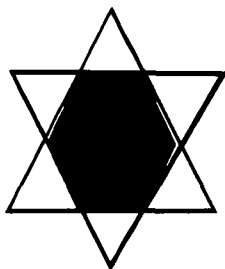
<sup>48</sup> *Id.* at 42.

In this metaphor, the battle is the frame and the chess vocabulary is the focus; the interaction of the two systems of associated commonplaces takes place in both the describer's and the listener's minds. The result is an understanding of the battle and its meaning that might not have been possible through literal description.<sup>49</sup>

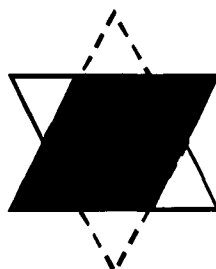
But Black also wants to provide an account of what it is to *think* metaphorically,<sup>50</sup> as he sees the process of recognizing and reconstructing a metaphor—of “think[ing] of something (A) *as* something else (B)”—as critical to an understanding of how a metaphor can create new kinds of meaning or semantic content.<sup>51</sup> To illuminate this issue he uses a geometrical example—the Star of David—which he suggests we can think about in several ways: (1) two congruent equilateral triangles superimposed; (2) a hexagon with congruent equilateral triangles on each edge; or (3) three congruent parallelograms superimposed.<sup>52</sup>



(1)



(2)



(3)

Each of these constructions of the Star is a metaphor of a very simplistic sort, in which the metaphor-maker asks the metaphor-reader to view the Star as some other group of shapes. The reader is then forced to reconstruct the image in a new way, which perhaps offers a new insight or perspective on the original Star. But, for all its clarity, Black concedes that this example is too simplistic to explain the creation of any kind

<sup>49</sup> To use an illustration of my own, I suggest thinking of the way that playing more than one musical note at a time can produce a *chord*. In this example, the overlapping notes create a new sound that cannot be understood simply in terms of its constituent parts.

<sup>50</sup> In more recent years, several theorists have developed more sophisticated accounts of the relationship between metaphor and thought. Of particular interest is the work of Michael Reddy, who has demonstrated that for at least one important class of expressions—the “conduit metaphor”—the source of metaphor is in thought, not language. Michael J. Reddy, *The Conduit Metaphor: A Case of Frame Conflict in Our Language About Language*, in METAPHOR AND THOUGHT, *supra* note 15, at 164. Reddy’s work suggests that metaphor is a major part of the way we typically conceptualize and experience the world.

<sup>51</sup> This next step in Black’s analysis is clearest in a later paper on the topic. Max Black, *More About Metaphor*, in METAPHOR AND THOUGHT, *supra* note 15, at 19, 31.

<sup>52</sup> *Id.* at 31–32. I have omitted two further suggestions for constructing the Star.

of new meaning.<sup>53</sup> After all, the reader only need draw on shapes that she already knows to reconstruct the metaphor. There is no creativity—or, in Black's words "conceptual innovation"—required, and thus these metaphors are easily reduced to literal statements (in something like the way depicted above).<sup>54</sup>

It is only when the metaphor requires the reader to see something that the diagram cannot quite depict that she must undertake an act of meaningful metaphoric construction. As an example, Black asks us to think of a straight line as a "collapsed triangle, with its vertex on the base."<sup>55</sup> This richer (and, Black suggests, more common) kind of metaphor requires the reader to do some imaginative work to create a concept that might meet the metaphor-maker's demand.<sup>56</sup> The metaphoric enterprise is thus a two-party endeavor; it is a communicative act within a larger linguistic practice that requires both parties to know the rules, limitations, and flexibilities of a shared language. It remains a fair question whether this communicative act can really create some new kind of meaning—some theorists are not convinced<sup>57</sup>—but Black believes this is the case. He suggests thinking about the problem by considering the following question: "Did the slow-motion appearance of a galloping horse exist before the invention of cinematography?"<sup>58</sup> He argues that the "view" in question only arises from a man-made instrument, but that "what is seen in a slow-motion film becomes a part of the world once it is seen."<sup>59</sup> Black contends that good metaphors function like the camera, as "'cognitive instruments,' indispensable for perceiving connections that, once perceived, are *then truly present*."<sup>60</sup> Thus, the metaphoric instrument can bring into being a new kind of meaning.

There is a further question, of course, about why we accept and use metaphors as part of our linguistic practice. One possible answer—not without its proponents—is that we do it simply because we can; that the use of metaphor is part entertainment, part vanity, and part curiosity. A more compelling answer, however, is that we do it because we *need to*. There are thoughts, senses, and insights we simply cannot express in literal terms, but which we may be able to capture in an apt metaphor. Even if we are condemned—as Wittgenstein says—to "running against the walls of our

---

<sup>53</sup> *Id.* at 32.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., Haig Khatchadourian, *Metaphor*, 8 BRIT. J. OF AESTHETICS 227, 235–37 (1968) (questioning whether *recognition* of new similarity or meaning entails *creation* of new meaning); see also Davidson, *supra* note 29, at 415.

<sup>58</sup> Black, *More About Metaphor*, in METAPHOR AND THOUGHT, *supra* note 15, at 37. The slow-motion film of a galloping horse famously resolved the question as to whether all four feet are actually off of the ground at the same time—they are.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (emphasis added).

[language] cage,” perhaps a strong, vital metaphor can bend the bars a little.<sup>61</sup> It is this function, the improvisational ability to fill in the gaps in our expressive capacities, which I believe is metaphor’s central contribution to our linguistic practice.<sup>62</sup> And it is in this capacity that Black’s theory of metaphor is helpful to Bobbitt’s theory of constitutional modalities, where, as discussed below, “modal metaphors” can help fill in the expressive gaps in our constitutional discourse.

The final question, which becomes critically important as we superimpose Black’s theory onto constitutional practice, is whether or how we can know when we have constructed a “good” or “strong” metaphor. On its face, this question seems to beg for a foundational kind of answer—one that provides clear constructive preferences of some kind—but I do not think such an answer is possible. Because a metaphor is a communicative act that requires both *creation* and *reconstruction*, the metaphor-maker can never know in advance whether her effort will succeed in conveying a new or valuable kind of meaning to the metaphor-reader. This does not mean that there are *no* rules by which the metaphor-maker must abide. Certainly, she must speak the shared language—she cannot utter nonsense words or wholly ignore the appropriate grammar and syntax—if she hopes to even engage the metaphor-reader in the communicative enterprise. But she cannot know the ultimate value of her metaphor as a new “cognitive instrument” until she sees how it is reconstructed and assimilated into the existing linguistic practice. Thus, the greatest end for an expressive gap-filling metaphor is to become what we call a “dead metaphor”: one that has been so well accepted over time that it has lost its metaphoric sense and taken on a very literal meaning (“table leg,” for example).<sup>63</sup> Dead metaphors, to again borrow Carlyle’s image, help to make up the osseous fixtures—the skeleton—of our language body, but we must keep constructing new and vital metaphors to keep that body alive and growing.<sup>64</sup> Such, I contend, is also the nature of our constitutional discourse: we have built a sturdy analytical skeleton capable of resolving most issues, but, at the living edge, we still rely on strong metaphors to fill in the emerging gaps in our practice.

---

<sup>61</sup> Ludwig Wittgenstein, *A Lecture On Ethics*, 74 THE PHIL. REV. 3, 12 (1965).

<sup>62</sup> Black calls these gap-filling metaphors “a species of *catachresis*,” which he defines as “the use of a word in some new sense in order to remedy a gap in the vocabulary . . . [I]f a catachresis serves a genuine need, the new sense introduced will quickly become part of the *literal sense*.” BLACK, MODELS AND METAPHORS, *supra* note 25, at 33.

<sup>63</sup> Black, *More about Metaphor*, in METAPHOR AND THOUGHT, *supra* note 15, at 25.

<sup>64</sup> Shelley put the idea in perhaps more accessible terms than did Carlyle:

[The poet’s] language is vitally metaphorical; that is, it marks the before unapprehended relations of things and perpetuates their apprehension, until the words which represent them, become, through time, signs for portions or classes of thoughts instead of pictures of integral thoughts; and then if no new poets should arise to create afresh the associations which have been thus disorganized, language will be dead to all the nobler purposes of human intercourse.

## II. MODAL METAPHORS

The idea that Black's theory of metaphor might contribute something useful to Bobbitt's theory of the Constitution is, as I have said, itself a metaphoric kind of thought. After all, Bobbitt's theory describes constitutional practice in terms of modalities, not words, and it seems difficult to credibly assert that interacting modalities are literally equivalent to interacting words. Nonetheless, I think there is something figurative and important to be gained in thinking about the evolution of constitutional discourse in terms of modal metaphors; I suggest that conceptualizing overlapping modalities as interacting systems of associated commonplaces might serve as the kind of cognitive instrument that can reveal new constitutional meanings. To create a modal metaphor consists in taking one of Bobbitt's modalities as a Blackian *frame*, and then positing another modality as the metaphoric *focus*.<sup>65</sup> The metaphor-reader (the theorist; the judge; the lawyer) then reconstructs the interacting commonplaces conceptually, and whatever meaning the metaphor produces then becomes a part of constitutional discourse. We can only assess the ultimate value of the modal metaphor as part of constitutional practice over time, as we gauge its usefulness and assimilation into the literal grammar.

This section presents several examples of modal metaphors at work in our constitutional discourse, attempts to analyze their construction and method, and evaluates their contribution to constitutional law. In an effort to cover three paradigmatic spheres of constitutional practice, I have chosen an example from theory, one from advocacy, and one from judging. I analyze each example within the basic terms of Black's interaction theory: I posit one modality as the *frame* and another as the *focus*, and then reconstruct the resulting modal metaphor.<sup>66</sup> I then assess the contribution that each metaphor has made to the Constitution in terms of its acceptance into the practice, and the expressive gaps it may have filled in our discourse. The first example, "intratextualism," is somewhat problematic as an example of constitutional evolution in that the method seems to have been part of the practice from very early in our constitutional history. It is, however, an excellent example of a modal metaphor, whenever it originally came into being, and so I have chosen to present it first as a clear illustration of the mechanics of the metaphoric process. The following two examples—the Brandeis Brief and *Brown v. Board of Education*—represent more clearly defined moments of constitutional creativity or evolution in our history.

---

<sup>65</sup> It is critical here to note that the modal metaphor must be constructed in terms of the pre-existing modalities of constitutional discourse. To do otherwise is analogous to constructing a linguistic metaphor with nonsense words—there is little, if any, chance of success in such an endeavor. *But see* LEWIS CARROLL, *Jabberwocky*, in *THROUGH THE LOOKING GLASS* 22–24 (MacMillan 1924) (1872) (though this is perhaps more an example of portmanteau than nonsense).

<sup>66</sup> *See supra* notes 33–37 and accompanying text.

A. Akhil Reed Amar: *Intratextualism*

In an influential article published in the *Harvard Law Review*, Akhil Amar identifies an interpretive methodology he calls “intratextualism,” and presents several compelling examples of the method at work in canonical cases and commentaries.<sup>67</sup> He describes the approach as an effort to “read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”<sup>68</sup> In a simplistic sense, the intratextualist “us[es] the Constitution as its own dictionary”;<sup>69</sup> but, in a deeper sense, the method departs from typical clause-bound textualism and demands a holistic interpretation of the document in its entirety. In this way, intratextualism is a paradigmatic example of the modal metaphor, as Amar self-consciously suggests a measured, incremental blending of Bobbitt’s grammatical structures.<sup>70</sup> Indeed, from the opening paragraph, Amar bows to Bobbitt’s work, and indicates his intent to offer his own contribution to the lexicon:

Interpreters squeeze meaning from the Constitution through a variety of techniques—by parsing the text of a given clause, by mining the Constitution’s history, by deducing entailments of the institutional structure it outlines, by weighing the practicalities of proposed readings of it, by appealing to judicial cases decided under it, and by invoking the American ideals it embraces. . . . [Intratextualism is] yet another rich technique of constitutional interpretation.<sup>71</sup>

While Bobbitt might suggest that this technique is simply a subspecies of his textualist modality, Amar makes a compelling case for intratextualism’s independence.<sup>72</sup> It is certainly distinct from the specific brand of textualism Bobbitt describes, which defines words “as they would be interpreted by the average contemporary ‘man on

---

<sup>67</sup> Amar, *Intratextualism*, *supra* note 22, at 748–82. As I noted above, Professor Amar does not claim to have invented this approach—only to have identified it—but he persuasively demonstrates that it is an independent modality of interpretation, outside of Bobbitt’s original six. *Id.* at 788–91. It is this independence, this methodological distinctiveness, which is of interest to me here, as I hope to show that intratextualism is a paradigmatic example of a modal metaphor, in that it combines two of the original modalities. And, whatever its origins, Professor Amar’s recognition and explication of the technique has introduced a new interpretive tool into the constitutional workplace. It is this growth or evolution in the practice—if it has occurred—that I want to explain through the processes of Black’s interaction theory.

<sup>68</sup> *Id.* at 748.

<sup>69</sup> *Id.* at 756.

<sup>70</sup> *Id.* at 754.

<sup>71</sup> *Id.* at 748.

<sup>72</sup> *Id.* at 788–91.

the street.”<sup>73</sup> The importance of this distinction becomes clear in the examples Amar provides, and it is useful to recount a few of his illustrations here.

To avoid “stacking the deck,” Amar draws his examples directly from the central texts of the constitutional canon, and the first opinion he explores is John Marshall’s in *McCulloch v. Maryland*.<sup>74</sup> Marshall’s argument supporting Congress’s power to establish a national bank is rich in the various modalities and textures of constitutional argument, and Amar begins by identifying passages grounded in text, history, structure, prudence, ethos, and even doctrine (though *McCulloch* cites no case by name).<sup>75</sup> Amar moves on, however, to reveal a novel form of argument—intratextualism—at work in Marshall’s analysis of the Necessary and Proper Clause.<sup>76</sup> Careful readers recall that Marshall did not rely on this clause as a source of enlarged federal powers, but addressed it only to counter Maryland’s contention that the words act to *limit* Congressional authority.<sup>77</sup> The state argued for a restrictive, mathematical reading of the word “necessary,” which would foreclose federal authority over any matter not ineluctably related to an expressly enumerated power.<sup>78</sup> As Marshall put it, Maryland asked the Court to read the clause “as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory.”<sup>79</sup> It is in support of his own broader reading of the word “necessary”—one that “imports no more than that one thing is convenient . . . to another”<sup>80</sup>—that Marshall took “the intriguing methodological turn” to which Amar draws our attention.<sup>81</sup>

Amar observes that, instead of looking to a common dictionary or some other etymological source for guidance, Marshall turned “to another passage in the Constitution itself, in effect using the Constitution as its own dictionary.”<sup>82</sup> Indeed, Marshall found the word “necessary” employed very nearby in Article 1, Section 10, which prohibits a state from imposing “duties on imports or exports, except what may be *absolutely necessary* for executing its inspection laws.”<sup>83</sup> In Marshall’s view, the prefix “absolutely” would be superfluous if the drafters had not understood the word “necessary” to have a broader meaning than the strict mathematical one that Maryland urged.<sup>84</sup>

<sup>73</sup> BOBBITT, INTERPRETATION, *supra* note 6, at 12.

<sup>74</sup> Amar, *Intratextualism*, *supra* note 22, at 749–50 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

<sup>75</sup> *Id.* at 750–55. It is interesting, in this sense, that Marshall perhaps helped establish, or at least ratified, the basic modalities of constitutional argument in this canonical opinion.

<sup>76</sup> *Id.* at 755–56.

<sup>77</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819).

<sup>78</sup> *Id.* at 413.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Amar, *Intratextualism*, *supra* note 22, at 756.

<sup>82</sup> *Id.*

<sup>83</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 414 (quoting U.S. CONST. art. 1, § 10, cl. 2) (emphasis altered).

<sup>84</sup> *Id.* at 414–15.

Marshall then drove the intratextual point home by equating the word “necessary” to “needful,” and observing that:

The [Article IV, Section 3] power to “make all *needful* rules and regulations respecting the territory or other property belonging to the United States,” is not more comprehensive, than the power “to make all laws which shall be necessary and proper for carrying into execution” the powers of the government. Yet all admit the constitutionality of a territorial government, which [like a national bank] is a corporate body.<sup>85</sup>

Amar points out that Marshall might also have looked to other constitutional uses of the word “necessary” as evidence: “In Article V, for example, Congress is empowered, ‘whenever two thirds of both Houses shall deem it *necessary*,’ to propose constitutional amendments. Context here seems to make abundantly clear that the test is practical not logical.”<sup>86</sup> But the point is made: Amar demonstrates that Marshall employed an independent interpretive technique—neither strictly textual, nor quite structural—in support of his claim about the constitutional meaning of the word “necessary.”

One more of Amar’s examples—this one taken from constitutional scholarship—helps to fully illustrate the power of this modal metaphor. In keeping with his canonical approach, Amar examines John Hart Ely’s twentieth-century classic, *Democracy and Distrust*.<sup>87</sup> After summarizing Ely’s generally holistic approach to textual interpretation, Amar suggests that Ely’s specific approach “makes at least six intratextual moves.”<sup>88</sup> Without getting into each of these moves, it is enlightening to focus on his discussion of Ely’s reading of the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>89</sup> This clause is of particular interest and importance here because, while leading scholars agree that it provides the best *textual* basis for incorporating the Bill of Rights against the states,<sup>90</sup> Supreme Court *doctrine* has all but read the words

<sup>85</sup> *Id.* at 422 (quoting U.S. CONST. art. 1, § 8, cl. 18 and art. IV, § 3) (emphasis added).

<sup>86</sup> Amar, *Intratextualism*, *supra* note 22, at 757 (quoting U.S. CONST. art. V) (emphasis added).

<sup>87</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>88</sup> Amar, *Intratextualism*, *supra* note 22, at 780.

<sup>89</sup> U.S. Const. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

<sup>90</sup> See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 166–214 (1998) [hereinafter AMAR, *BILL OF RIGHTS*] (detailing the textual and historical connections between the Privileges or Immunities Clause and the Bill of Rights); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 692 (1997) (“From the perspective of text and history, the Privileges or Immunities Clause of the Fourteenth Amendment would appear to be a more plausible basis for the protection of substantive rights (whether incorporated from the Bill of Rights or based on other sources) than the Due Process Clause.”).



out of existence.<sup>91</sup> Faced with such a direct modal conflict, Amar suggests that Ely turned to a hybrid (I would say “metaphoric”) interpretive mode: intratextualism.<sup>92</sup>

Amar observes that Ely placed the words “privileges” and “immunities” alongside the passage from Article IV containing the same words, a move that enabled him “to contrast the substantive rights language of the Fourteenth Amendment’s Privileges or Immunities Clause with the equal rights language of its Equal Protection Clause.”<sup>93</sup> This comparison makes it clear that the Fourteenth Amendment means to apply a set of *substantive* rights to all citizens *equally*. With this interpretive framework in place, Amar suggests that Ely could have gone further to establish the content of these substantive rights by exploring the historical understanding of Article IV’s first section.<sup>94</sup> Amar briefly suggests that such an exploration reveals that the Fourteenth Amendment’s Privileges or Immunities Clause promises all citizens equal enjoyment of the civil rights (speech and religion *inter alia*)—but not the political rights (voting and jury service *inter alia*)—that the Constitution provides.<sup>95</sup> Thus, Ely and Amar’s intratextual approach provides a persuasive interpretive modality through which to understand the Fourteenth Amendment. Their instructive commentary cannot, of course, dissolve the doctrinal block that the *Slaughter-House Cases* impose—that is the privileged prerogative of the Supreme Court in our constitutional practice—but it does allow us to perceive the Constitution and its meaning in a new and illuminating way. And that, after all, is the purpose of a modal metaphor.

Having demonstrated, I hope, what it is that Amar means by “intratextualism,” we can now analyze the metaphoric structure of this method using the terms of Max Black’s interaction theory. Recall that Black sees a metaphor as the deliberate interaction of two ideas or contexts, which causes an overlap of “associated common-places” that the reader must reconstruct.<sup>96</sup> Black labels these two interacting ideas the *frame* and the *focus*; the former being the primary context, upon which the latter hopes to shed new light.<sup>97</sup> Black’s choice of terms is meant to evoke the image of a painting, in which the *frame* holds the entire field of expression, while the *focus* directs the viewer’s attention to a spot of the artist’s choosing. Intratextualism—as a modal metaphor—takes the *textualist* modality as its frame, and then posits the *structural* modality as its focus. To better understand this insightful move, it is helpful to review Bobbitt’s description of the two original modalities.

<sup>91</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77–78 (1873).

<sup>92</sup> Amar, *Intratextualism*, *supra* note 22, at 780.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 780–81. Professor Amar undertakes a very thorough and enlightening exploration of this issue in his book on the Bill of Rights. See AMAR, *BILL OF RIGHTS*, *supra* note 90, at 166–214.

<sup>96</sup> See *supra* notes 40–49 and accompanying text.

<sup>97</sup> See *supra* notes 34–35 and accompanying text.

Textualism, Bobbitt tells us, is “argument that is drawn from a consideration of the present sense of the words of [a constitutional] provision.”<sup>98</sup> In response to a suggestion that the Warren Court had unduly restricted police interrogations, Hugo Black—Bobbitt’s textual protagonist—expressed the ideal this way: “The Constitution says absolutely and in words that nobody can deny . . . that ‘no person shall be compelled in a criminal case, to be a witness against himself.’ And so, when [you] say the Court did it, that’s just a little wrong. The Constitution did it.”<sup>99</sup> Here Black exemplifies Bobbitt’s characterization of the textualist judge as “a non-decider . . . a mere conduit for the prohibitions of the Constitution”; an agent enforcing the higher law “on a basis readily apprehendable by the people at large, namely, giving the common-language meanings to constitutional provisions.”<sup>100</sup> Defined in this way, textualism does not quite have room for the intratextualist, who would give more documentarian meanings to constitutional words and phrases. And yet intratextualism does not seem wholly outside of the accepted constitutional grammar, and so from where does this new modality arise? It is undoubtedly grounded firmly in the textualist’s insistence on the primacy of the words—as Hugo Black put it, “You see, you have laws written out. That’s the object in law, to have it written out”<sup>101</sup>—but it bends in its focus towards a different, more holistic approach to constitutional interpretation: structuralism.

Bobbitt’s structuralist modality draws “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.”<sup>102</sup> But it is something slightly more than that, as he explains: “Structuralist arguments are largely factless and depend on deceptively simple logical moves from the entire Constitutional text, rather than from one of its parts.”<sup>103</sup> Charles Black, whom Bobbitt holds up as the paradigmatic structuralist, explains the methodology this way: “[J]udgment is reached not fundamentally on the basis of that [narrow] kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.”<sup>104</sup> Here, then, is the *focus* modality of the intratextual metaphor; that particular spot in the textualist field to which intratextualism draws our eye. The methodology thus arises out of the reorganized and now coexisting commonplaces associated with textualism and structuralism. An attempt to reconstruct the modal metaphor might emphasize the neutral focal point that the words provide, but then stress an interpretive approach that eschews

---

<sup>98</sup> BOBBITT, FATE, *supra* note 3, at 7.

<sup>99</sup> *CBS News Special: Justice Black and the Bill of Rights* (CBS television broadcast Dec. 3, 1968), in *Justice Black and the Bill of Rights*, 9 SW. U. L. REV. 937, 947 (1977) [hereinafter *Justice Black*] (quoting U.S. CONST. amend. V).

<sup>100</sup> BOBBITT, FATE, *supra* note 3, at 31.

<sup>101</sup> *Justice Black*, *supra* note 99, at 940.

<sup>102</sup> BOBBITT, FATE, *supra* note 3, at 74.

<sup>103</sup> *Id.*

<sup>104</sup> CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969).

“contemporary man on the street”<sup>105</sup> definitions in favor of understandings that are common to the larger constitutional text and structure. In this way—as a modal metaphor—intratextualism may allow us to perceive constitutional meanings of which we were not yet aware.

We can assess the acceptance and value of intratextualism as a part of the constitutional discourse in two different ways. The first is by looking through the history of constitutional practice to see if the technique enjoys widespread use. Professor Amar has already done an admirable job of this, and he has ably demonstrated that intratextualist arguments appear in the most canonical of our constitutional cases and commentaries.<sup>106</sup> As I suggested above, it seems that the intratextualist metaphor has been with us from very early on—perhaps it should even count as one of the original modalities of interpretation—but, whenever it first made an appearance, I suggest that it represents a metaphoric kind of a thought about textual interpretation. Its early acceptance and widespread use in the practice are in this way evidence that the metaphor is a good and useful one, and that it hardened into part of our literal practice at an early stage.

The second kind of assessment may be unique to the theoretical sphere of constitutional discourse. I suggest that we can evaluate whether “intratextualism”—Amar’s specific modal label—has gained acceptance in the practice, and has influenced practitioners moving forward. While the first kind of assessment is perhaps more significant to constitutional law as a whole, the second has value as a measure of the academy’s impact on the constitutional conversation. A quick search reveals that, although the Supreme Court has not invoked intratextualism by name since 1999, the methodology has made an appearance in several amicus briefs.<sup>107</sup> More significantly, the circuit courts have referenced the technique in at least three cases, albeit in opinions authored by particularly academic-minded judges.<sup>108</sup> And, not surprisingly, Amar’s approach has had its greatest impact in the academic community, where, at last check, more than 260 scholarly articles had specifically addressed intratextualism since Amar coined the term.

---

<sup>105</sup> BOBBITT, INTERPRETATION, *supra* note 6, at 12–13.

<sup>106</sup> See *supra* notes 66–95 and accompanying text.

<sup>107</sup> E.g., Brief for Cato Institute as Amicus Curiae in Support of Petitioner at 2, *Sabri v. United States*, 541 U.S. 600 (2003) (No. 03-44); Brief of Malla Pollack, Amicus Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), *reprinted in* 324 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 447, 461 n. 4 (Gerhard Casper & Kathleen M. Sullivan eds., 2004) (citing Amar, *Intratextualism*, *supra* note 22, at 748).

<sup>108</sup> *Parker v. Dist. of Columbia*, 478 F.3d 370, 382 (D.C. Cir. 2007) (Silberman, J., writing for the majority); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005) (Easterbrook, J., writing for the majority) (citing Amar, *Intratextualism*, *supra* note 22, at 747); *Silveira v. Lockyer*, 312 F.3d 1052, 1071 n.27 (9th Cir. 2002) (Reinhardt, J., writing for the majority).

In less than a decade, then, the intratextualist metaphor has gained widespread acceptance in the theoretical sphere, and it is slowly but surely seeping into the realms of advocacy and judging. On these terms, I think we can qualify intratextualism (by name) as a successful or strong modal metaphor. Moreover, if we look back through the history of constitutional practice, as Amar has done, we can see that intratextualism (perhaps by other names) has long been an accepted mode of constitutional discourse. Thus, I suggest that intratextualism is a singularly straightforward and compelling example of an interactive modal metaphor.

*B. Louis Brandeis: The Brandeis Brief*

In February of 1903, the State of Oregon passed a law limiting the number of hours a day women could spend working at certain trades.<sup>109</sup> Two years later, Curt Muller, owner of the Grand Laundry in Portland, challenged the state statute as a violation of his Fourteenth Amendment liberty to contract with his workers, and the case eventually found its way to the Supreme Court.<sup>110</sup> In 1907, two National Consumer League lawyers—Florence Kelley and Josephine Goldmark—hired Louis Brandeis to represent Oregon in Washington; a decision that Goldmark would later claim “gave a revolutionary new direction to judicial thinking, indeed to the judicial process itself.”<sup>111</sup> Brandeis envisioned presenting a new kind of written argument to the Court; one not limited to the traditional legal forms, but instead built on facts about the social conditions that Oregon’s law sought to address.<sup>112</sup> Working for two straight weeks, a team of ten researchers mined the Columbia University and New York Public Libraries for data on the detrimental effects of extended work hours on women: “[T]he research team unearthed the reports of English factory commissions and medical commissions, translated sources from western Europe, and amassed information from states with women’s hours laws. In each source, they sought statements about the dangers of long hours and the benefits of shorter ones.”<sup>113</sup> The result was an unprecedented 113-page brief, which relied heavily on the testimony of a range of nonjudicial authorities—from doctors to sanitary inspectors—to persuade the justices that the challenged statute was a reasonable exercise of Oregon’s police power to protect women’s health.<sup>114</sup> The State won a unanimous decision, and the phenomenon known as the Brandeis Brief was born.<sup>115</sup>

It is perhaps now conventional to think of Brandeis’s *Muller* brief as a clear-cut exercise in prudential argument, one intended to convince the Court that the social

---

<sup>109</sup> NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 21 (1996).

<sup>110</sup> *Muller v. Oregon*, 208 U.S. 412, 417–18 (1908).

<sup>111</sup> WOLOCH, *supra* note 109, at 23.

<sup>112</sup> *Id.* at 27–29.

<sup>113</sup> *Id.* at 28.

<sup>114</sup> *Id.* at 29.

<sup>115</sup> *Muller*, 208 U.S. at 423.

benefits of the Oregon law simply outweighed the costs as a matter of sound constitutional policy. But that is not quite the whole story. After all, *Muller* was decided at a particularly interesting moment in our legal history, just two years after the now-infamous *Lochner* decision, in which the Court summarily rejected the constitutional importance of men's health in striking down maximum-hour legislation in New York.<sup>116</sup> Thus, Brandeis had to tailor his factual arguments quite narrowly to fit within the existing doctrinal framework, and for this reason modern critics often attack the brief for its (necessary) reliance on gender differences and vulnerabilities.<sup>117</sup> In this way, Brandeis's approach is not strictly prudential in nature; rather, it focuses on particular kinds of social facts that are directly relevant to fairly specific aspects of the constitutional doctrine. It is certainly something more than the broad kind of prudential argument that Bobbitt describes, which "need not treat the merits of the particular controversy . . . [but] instead advanc[es] particular doctrines according to the practical wisdom of using the courts in a particular way."<sup>118</sup> I suggest that the *Muller* brief is a modal metaphor—one that combines doctrine and prudence—and if we now view it as a literal act of prudentialism, then that is a testament to the strength and success of Brandeis's insight: it has become a dead metaphor.

It is worth briefly revisiting Brandeis's approach in *Muller*, particularly the structure of the overall argument, to deconstruct the modal metaphor. It is sometimes forgotten that Brandeis actually submitted *two* briefs in the case: the first, prepared by the Oregon Attorney General, focuses strictly on the doctrinal issues.<sup>119</sup> The second and more famous brief summarizes the doctrine concisely, and then explores the social data described above.<sup>120</sup> It is instructive that Brandeis believed he needed both briefs to make his argument. He needed to establish the doctrinal *frame* within which to posit his prudential *focus*. It is not worth recounting in detail the doctrinal brief, which explores seven state decisions and six federal decisions, but a quick look at Brandeis's concise summation of the case law is helpful. He cites *Lochner* for the

---

<sup>116</sup> *Lochner v. New York*, 198 U.S. 45, 57–58 (1905).

<sup>117</sup> See, e.g., BARBARA BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW* 29–30 (1975); SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905–1925*, at 54–56 (1987); see also WOLOCH, *supra* note 109, at 31–32.

<sup>118</sup> BOBBITT, *FATE*, *supra* note 3, at 7. Think, for example, of the kind of prudential argument we find in Marshall's *McCulloch* opinion. This argument is directed at the simple political efficiencies of having a national bank from which to salary the troops during wartime. *McCulloch*, 17 U.S. (4 Wheat.) 316, 408–09 (1819). It is plainly not the kind of doctrinally focused prudentialism that Brandeis employs in *Muller*.

<sup>119</sup> Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), reprinted in 16 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 37 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>120</sup> Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), reprinted in 16 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 63 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Brandeis Brief, *LANDMARK BRIEFS*].

proposition that the Fourteenth Amendment protects the “liberty” of contract, subject to reasonable state impositions of police power to provide for public “health, safety, morals, and the general welfare.”<sup>121</sup> He then acknowledges that *Jacobson v. Massachusetts* stipulates that a valid exercise of this police power “must have a real or substantial relation to the protection of the public health and the public safety.”<sup>122</sup> Finally, he returns to *Lochner* and recasts the relevant language to establish the doctrinal ground rules by which he intends to play:

The validity of the Oregon statute must therefore be sustained unless the Court can find that there is no “fair ground, reasonable in and of itself, to say that there is material danger to the public health (or safety), or to the health (or safety) of the employees (or to the general welfare), if the hours of labor are not curtailed.”<sup>123</sup>

Through a skillful bit of doctrinalism, then, Brandeis has set the stage for an in-depth analysis of both the social data regarding the particular dangers women may face by remaining too long in the workplace, and the reasonableness of the specific state regulation.

While far from a seamless narrative, the exegesis that follows is not quite the “hodgepodge” that Owen Fiss has described.<sup>124</sup> Rather, the body of the brief is explicitly organized around the two basic doctrinal elements: (1) whether Oregon’s law is “reasonable”; and (2) whether extended hours present a “material danger” to women’s health and safety.<sup>125</sup> Thus, nearly the first twenty pages of the argument—comprising the “Part First”—are devoted to an extensive survey of existing state and foreign<sup>126</sup> laws regulating women’s workdays.<sup>127</sup> This first section is plainly an effort to show the relative “reasonableness” of Oregon’s legislation. The remaining ninety-five pages—the “Part Second”—are broken into a number of subsections exploring both “The Dangers of Long Hours” and the “General Benefits” and “Economic Aspect[s]” of short hours.<sup>128</sup> Again, this is a transparent effort to tailor the sociological data to the doctrinal touchstones. As I have suggested above, this is not simply an out-and-out utilitarian brand of prudentialism; it is a species of prudentialism

<sup>121</sup> *Id.* at 74 (quoting *Lochner*, 198 U.S. at 53, 67).

<sup>122</sup> *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)) (internal quotations omitted).

<sup>123</sup> *Id.* at 75 (quoting *Lochner*, 198 U.S. at 61).

<sup>124</sup> Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910*, in THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT 175 (1993).

<sup>125</sup> Brandeis Brief, LANDMARK BRIEFS, *supra* note 120, at 74–75.

<sup>126</sup> This appeal to foreign law has fascinating echoes in more recent jurisprudence, notably *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

<sup>127</sup> Brandeis Brief, LANDMARK BRIEFS, *supra* note 120, at 66–82.

<sup>128</sup> *Id.* at 83, 122, 130.

evolved to suit a specific doctrinal landscape. The Brandeis Brief, then, is a powerful modal metaphor that takes doctrinalism as its frame and prudentialism as its focus.

An effort to reconstruct the overlapping systems of doctrinal and prudential commonplaces might begin by recognizing the values of neutral principle, reliance, and custom that characterize doctrinal argument; then cast these values in terms of the evolving empirical understandings and changing social values that prudential argument emphasizes. Understood in this way, Brandeis's metaphor—let us call it “doctrinal-prudentialism”—allows us to apply neutral judicial doctrines to modern problems in innovative and efficient ways. It enables the advocate or judge to introduce cutting-edge, nonjudicial information into longstanding legal rubrics and venerable doctrinal tests, thereby permitting the “rule of law” to account for current social realities. Given the interpretive flexibility this modal metaphor makes possible, it is fairly easy, I think, to understand the acceptance and value of doctrinal-prudentialism within the practice of constitutional law. In historian Nancy Woloeh's words, “The era after *Muller* became a golden age of Brandeis briefs, which mushroomed in size as the data mounted. The goals of the briefs expanded, too, to include maximum hours for men in industry and the minimum wage for women.”<sup>129</sup>

In this way, the Brandeis Brief represents a particularly discreet moment of constitutional evolution—an act of constitutional creativity—of the sort I was not able, and did not attempt, to identify with precision in the case of intratextualism. While a careful examination might reveal historical antecedents of doctrinal-prudential arguments that predate Louis Brandeis, I suggest that it is Brandeis's particular metaphor that captured the attention of constitutional practitioners and allowed it to harden into a widely accepted interpretive mode. Indeed, Louis Brandeis was appointed and confirmed to a seat on the Supreme Court within a decade, and by 1937 the Constitution came to embrace what Bruce Ackerman has called “the activist welfare state.”<sup>130</sup> And while Brandeis Briefs may not be as in vogue as they once were, I think it is safe to say that doctrinal-prudentialism is now a well-established mode of constitutional argument.<sup>131</sup>

---

<sup>129</sup> WOLOCH, *supra* note 109, at 41.

<sup>130</sup> Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1761 (2007). Professor Ackerman has reminded me that the growth of the activist state, or what he calls “government by numbers,” was the product of a much broader sociopolitical movement in the early decades of the twentieth century. See Bruce Ackerman, *The Civil Rights Revolution*, in WE THE PEOPLE (forthcoming) (copy on file with author). I certainly do not mean to suggest that the Brandeis Brief is the sole, or even primary, engine of that wider change; I merely suggest that Brandeis's modal metaphor is the conduit through which this larger change entered constitutional practice.

<sup>131</sup> Doctrinal prudentialist arguments are frequently made in support of the “rational basis” a state may have had for legislation challenged pursuant to the Due Process or Equal Protection Clauses. See, e.g., Brief for the United States as Amicus Curiae, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), available at 1999 WL 1032809; Brief for the Appellants, *Hodel v. Indiana*, 452 U.S. 314 (1981) (No. 80-231), available at 1980

C. *Brown v. Board of Education: Resolving A Modal Conflict*

The Supreme Court's decision in *Brown v. Board of Education* is undoubtedly among the most important moments in our twentieth-century constitutional conversation.<sup>132</sup> In some minds, it signaled the beginning of a profound constitutional revolution that resulted in the landmark Civil Rights statutes of the 1960s.<sup>133</sup> If not a revolution, it was, at the very least, a moment of deep constitutional creativity, in which the Court confronted a direct and entrenched modal conflict, and ultimately resolved it by means of a powerful modal metaphor. The Court faced a number of contradicting modal arguments: the *text* plainly promised "equal protection," but the *doctrine* permitted "separate but equal" treatment; *history* suggested that the Fourteenth Amendment did not reach segregated schooling,<sup>134</sup> but the constitutional *structure* hardly seemed to favor barriers to conversation and association among citizens.<sup>135</sup> I contend that the advocates and the Court overcame these conflicts by creating a modal metaphor that takes ethical argument as its *frame* and posits prudentialism as its *focus*. In an effort to fully illustrate both the conflicting modalities and the Court's metaphor, I will briefly sketch the social, political, and legal context in which *Brown* was decided, and then revisit some of the less-publicized aspects of the argument and decision-making process.

After the cataclysm of the Civil War, the Fourteenth Amendment promised all Americans "the equal protection of the laws."<sup>136</sup> This promise was specifically intended to ensure legal equality between the races, and a new Civil Rights Act soon followed that entitled blacks to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement . . ."<sup>137</sup> Over the next twenty years, however, the promise of racial equality seemed to wither on the vine, and in 1896 the Supreme Court gave its blessing to Jim Crow era racial segregation by embracing "separate but equal" as constitutional doctrine.<sup>138</sup> Thus, for the first half of the twentieth century, the textual promise of "equal protection" had little force when brought

---

WL 339846; Brief for the Appellees, *Maryland v. Wirtz*, 392 U.S. 183 (1968) (No. 742), available at 1968 WL 129327.

<sup>132</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>133</sup> Ackerman, *supra* note 130, at 1762–65.

<sup>134</sup> See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 656–57 (1975) (describing law clerk Alexander Bickel's year-long "open-ended assignment" from Justice Frankfurter, which parsed the historical record and revealed no evidence that the Framers of the Fourteenth Amendment had intended to abolish school segregation).

<sup>135</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 429–30 (1960).

<sup>136</sup> U.S. CONST. amend. XIV, § 1.

<sup>137</sup> Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336.

<sup>138</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).



into conflict with a doctrinal position that, in fact, allowed for superior and inferior classes of citizenship. But as American blacks returned from World War II—where they had fought valiantly against the forces of racial supremacy—they began to demand racial equality at home.<sup>139</sup> In 1946, President Harry Truman appointed a Committee On Civil Rights to study the issue, and in 1948, he issued Executive Order 9981, which guaranteed “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.”<sup>140</sup> At the same time, Thurgood Marshall, Charles Houston, and other NAACP lawyers began to bring the desegregation fight to the courts.<sup>141</sup> In 1948, the Supreme Court invalidated racially restrictive property covenants in *Shelley v. Kraemer*, and revived a seemingly forgotten ethos of American democracy—an ethic grounded in equality and basic fairness—which began, slowly, to motivate the Court’s jurisprudence.<sup>142</sup>

Phil Elman, former law clerk and long-time friend of Felix Frankfurter, wrote a historic brief for the Solicitor General’s office in *Shelley*; one which, for the first time in many years, put the United States government firmly on the side of racial equality.<sup>143</sup> He later recalled that brief as being largely an ethical kind of argument: “It was not an ordinary brief. It was a statement of national policy. We were showing the flag; we were expressing an authoritative, forthright position that all government officials would be bound by.”<sup>144</sup> Even one of the most recalcitrant members of the Court, Chief Justice Fred Vinson, would note that Elman’s brief “certainly had heart appeal” as it played to the most elemental of American values.<sup>145</sup> And during oral argument, Elman recalls the words of an elderly black lawyer that captured the Court’s attention:

It was a dull argument until he came to the very end. [But] [h]e concluded his argument by saying . . . “Now I’ve finished my legal argument, but I want to say this before I sit down. In this Court, this house of the law, the Negro today stands outside, and he knocks on the door, over and over again, he knocks on the door

---

<sup>139</sup> I should note that the NAACP legal team was working tirelessly against segregation before the war even began. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (finding “separate but equal” not satisfied when a state pays to send black students out of state).

<sup>140</sup> Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

<sup>141</sup> KLUGER, *supra* note 134, at 251.

<sup>142</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>143</sup> Brief for the United States as Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72), reprinted in 46 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 233 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>144</sup> Interview by Norman Silber with Philip Elman, Law Clerk to Justice Felix Frankfurter, as reprinted in *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–60: An Oral History*, 100 HARV. L. REV. 817, 819 (1987) [hereinafter Interview with Elman].

<sup>145</sup> KLUGER, *supra* note 134, at 252.

and cries out, 'Let me in, let me in, for I too have helped build this house.'" All of a sudden there was drama in the courtroom, a sense of what the case was really all about rather than the technical legal arguments. The Negro had helped build this house, and he wanted to be let in the door. Well, I've never forgotten this man whose name I don't remember, who in a few sentences made the most moving plea in the Court I've ever heard.<sup>146</sup>

Attorney General Tom Clark—who would sit as a member of the Court for *Brown*—published Elman's brief as a book,<sup>147</sup> and a growing number of civil rights litigants rode a renewed wave of American egalitarianism into Court.<sup>148</sup> In deciding these cases, the Court seemed to be rediscovering, or at least revitalizing, some fundamental tenets of the American ethos. It was reinforcing an ethical foundation upon which to build the difficult decisions to come.

Among the most notable of these cases—*Sweatt v. Painter*—came out of Texas, where the University of Texas Law School systematically denied admission to black students.<sup>149</sup> The state had set up separate law schools for blacks, and argued that these institutions met with *Plessy*'s "separate but equal" requirement.<sup>150</sup> The NAACP argued that the separate law schools were not, in fact, equal, but were inferior and did not carry the same prestige as the University of Texas.<sup>151</sup> The Court agreed, finding that "the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school," and accordingly enjoined the school's exclusive admissions policy.<sup>152</sup> But, while reflective of the emerging civil rights ethic, the opinion did not squarely address the central constitutional conflict: whether *Plessy* and "separate but equal" truly was the nation's higher law. After all, *Sweatt* (and *McLaurin*, decided the same day) simply concluded that the particular acts of segregation did not satisfy the *Plessy* doctrine; not that such segregation was per se unconstitutional.<sup>153</sup> This fact did not

---

<sup>146</sup> Interview with Elman, *supra* note 144, at 820.

<sup>147</sup> TOM C. CLARK & PHILIP B. PERLMAN, *PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS* (1948).

<sup>148</sup> *Henderson v. United States*, 339 U.S. 816 (1950) (invalidating racial segregation practiced under the Interstate Commerce Act); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (invalidating classroom segregation in graduate schools); *see, e.g.*, *Sipuel v. Univ. of Okla.*, 332 U.S. 631 (1948) (requiring states to provide a black law school); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (invalidating racial restrictions on commercial fishing licenses).

<sup>149</sup> *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>150</sup> *Id.* at 632.

<sup>151</sup> Brief for Petitioner, *Sweatt*, 339 U.S. 629 (No. 44), *reprinted in* CLARK & PERLMAN, *supra* note 147, at 62–73.

<sup>152</sup> *Sweatt*, 339 U.S. at 634, 636.

<sup>153</sup> *Id.* at 636; *McLaurin*, 339 U.S. at 642.

go unnoticed in the South, where, in anticipation of future suits, the governors of South Carolina and Virginia both made considerable financial efforts to equalize (materially) the existing black schools.<sup>154</sup> The NAACP and others, of course, believed that any racial separation was inherently unequal, but it would be another two years before their epic challenge to segregated public elementary schools would raise this issue directly and inescapably.

In late 1952, NAACP lawyers brought a quartet of grade school segregation cases before the Supreme Court: *Brown v. Board of Education* out of Kansas; *Briggs v. Elliott* out of South Carolina; *Davis v. County School Board* out of Virginia; and *Gebhart v. Belton* out of Delaware.<sup>155</sup> The Court heard oral arguments on the consolidated cases on December 9, but a decision would be long postponed as the Justices (particularly Felix Frankfurter)<sup>156</sup> strategized the best judicial means of resolving an issue that was as much social and political as it was legal. In those oral arguments, the petitioners made it clear that they intended to challenge the “separate but equal” doctrine itself rather than the relative quality of black schools: “It is the gravamen of our complaint. . . [that] the act of segregation *in and of itself* denies [black children] educational opportunities which the Fourteenth Amendment secures.”<sup>157</sup> This tactic placed the conflicting constitutional modalities in bold relief. The direct challenge to the “separate but equal” doctrine laid a potent ethical argument squarely before the Court, and forced the justices to reconcile the other modalities as best they could.

Even though most Americans recognized *Brown*’s profound ethical implications—Philip Elman recalls feeling that “[t]he constitutional issue went to the heart of what kind of country we are, what kind of Constitution and Supreme Court we have”—and the justices remained divided through much of 1953.<sup>158</sup> Justices Hugo Black and William Douglas were in favor of immediately and unconditionally overruling *Plessy*. Black, the textualist, later explained his rationale quite directly: “I never, for one moment, based my decision on anything except [that] I thought it was a denial of equal protection of the law then, had been in the past, and will be in the future.”<sup>159</sup> Robert Jackson—at least if we are to believe his law clerk William Rehnquist—believed that the NAACP was “[u]rging a view palpably at variance with precedent and probably with legislative history,” though his final position on the issue was much more sympathetic.<sup>160</sup> Justice Harold Burton, a conservative Midwesterner, slowly

<sup>154</sup> Interview with Elman, *supra* note 144, at 823.

<sup>155</sup> KLUGER, *supra* note 134, at 535–40.

<sup>156</sup> Elman would later call Frankfurter the *Kochleffel*—the cooking spoon that stirred the Court on the segregation issue. Interview with Elman, *supra* note 144, at 832.

<sup>157</sup> Transcript of Oral Argument, *Brown v. Bd. of Educ.*, 347 U.S. 483 (No.8), *reprinted in* ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, at 12 (Leon Friedman ed., 1969) (emphasis added).

<sup>158</sup> Interview with Elman, *supra* note 144, at 843.

<sup>159</sup> Justice Black, *supra* note 99, at 941.

<sup>160</sup> Memorandum from William Rehnquist, Law Clerk, to Robert Jackson, Justice, United States Supreme Court (undated), *reprinted in* MARK WHITMAN, *BROWN V. BOARD OF*

came around to the position that, even if *Plessy* was correct when decided, it was no longer a viable doctrine: "Today . . . I doubt that it can be said in any state . . . that compulsory 'separation' of the races, even with equal facilities, *can* amount to an 'equal' protection . . . ." <sup>161</sup> Justice Sherman Minton eventually came to share Burton's opinion, though his position was initially unclear, and many thought he might vote to affirm. <sup>162</sup>

Chief Justice Fred Vinson and Tom Clark both thought the issue would be better settled in the state legislatures, and sought to delay a decision as long as possible. <sup>163</sup> Justice Stanley Reed, for his part, was flatly opposed to overruling *Plessy* as a matter of stare decisis. <sup>164</sup> Frankfurter, the master strategist, thought *Plessy* was wrong but counseled patience in overturning it, as he believed the Court was not well-positioned at that time to initiate such a momentous social change. He later confided in Judge Learned Hand, "I will tell you that if the 'great libertarians' [Black and Douglas] had had their way we would have been in the soup." <sup>165</sup> Recognizing the looming impasse, Frankfurter began to look for a historical argument to break the modal deadlock. He assigned his law clerk Alexander Bickel a year-long research project on the framing of the Fourteenth Amendment, but the resulting memorandum was largely inconclusive regarding public education. <sup>166</sup> And so, while most—if not all—of the justices agreed that the ethical arguments weighed in favor of overturning *Plessy*, <sup>167</sup> some believed that other modalities pointed persuasively in different directions. It was not until Fred Vinson's death in 1953, and Earl Warren's subsequent appointment, that the Court was ready to embrace an ethical-prudential solution. <sup>168</sup>

Two kinds of prudential arguments, both advanced in the briefs submitted in 1952, became the focal point of the evolving modal metaphor as the Court heard re-argument on the cases in 1954. The first kind of prudential argument, which appeared explicitly in the NAACP brief, looked to a wealth of social and psychological material suggesting that segregation had a negative impact on black children's self-esteem. <sup>169</sup> An appendix attached to the brief entitled *The Effects of Segregation and*

---

*EDUCATION: A DOCUMENTARY HISTORY* 196, 197 (2d ed. 2004). There is, however, considerable reason to doubt Rehnquist's word on the matter. See KLUGER, *supra* note 134, at 609 n.\*.

<sup>161</sup> KLUGER, *supra* note 134, at 613.

<sup>162</sup> *Id.* at 615–17; see Interview with Elman, *supra* note 144, at 828.

<sup>163</sup> KLUGER, *supra* note 134, at 614–15; accord Interview with Elman, *supra* note 144, at 828.

<sup>164</sup> KLUGER, *supra* note 134, at 617.

<sup>165</sup> *Id.* at 606.

<sup>166</sup> See *supra* note 134 and accompanying text.

<sup>167</sup> Philip Elman recalls the shock in the courtroom when Milton Korman opened his argument for the respondents by reading from Roger Taney's opinion in *Dred Scott v. Sandford*. Elman, *supra* note 144, at 836–37. This reliance on (and negative reaction to) "the one case everyone agrees was the worst decision in the history of the Supreme Court" illustrates how segregation seemed to settle within the American ethos. *Id.*

<sup>168</sup> See KLUGER, *supra* note 134, at 656.

<sup>169</sup> Brief for Appellants, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), reprinted in 49

*the Consequences of Desegregation: A Social Science Statement* vividly recalled the doctrinal-prudentialism of the Brandeis Brief, but with a slightly different focus.<sup>170</sup> Here, the petitioners relied on the social science data—including the testimony of the famous “doll man,” Kenneth Clark<sup>171</sup>—to indicate that the doctrine itself was wrong.<sup>172</sup> In the public elementary school setting, separate could *never* be equal. While this social science data was not entirely conclusive,<sup>173</sup> it did ultimately make an appearance in the Court’s opinion.<sup>174</sup> But it was the second kind of prudential argument, one grounded in the political realities, which truly made the Court’s landmark decision possible.

Years later Philip Elman would recall the “unprincipled” but ingenious prudential argument he advanced in the Solicitor General’s brief:

[It] is the one thing I’m proudest of in my whole career. Not because it’s a beautifully written brief; I don’t think it is. Rather, it’s because we were the first to suggest . . . that if the Court should hold that racial segregation in public schools is unconstitutional, it should give district courts a reasonable period of time to work out the details and timing of implementation of the decision. In other words, “with all deliberate speed.” The reason I’m so proud of that proposal is that *it offered the Court a way out of its dilemma*, a way to end racial segregation without inviting massive disobedience, a way to decide the constitutional issue unanimously without tearing the Court apart.<sup>175</sup>

Although the idea of delaying relief to wronged individuals was unconventional—Elman would later say “it was just plain wrong as a matter of constitutional law”—it was just the kind of creative push the Court needed to overcome the modal deadlock.<sup>176</sup> Frankfurter would later tell Elman he had “rendered a real service to [his]

---

LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 23, 35 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Brief for Appellants].

<sup>170</sup> *Id.* at 41–42.

<sup>171</sup> KLUGER, *supra* note 134, at 557. Kenneth Clark conducted experiments wherein he asked children whether a black doll or a white doll looked smarter; most children chose the white doll. *Id.*; see also Interview with Elman, *supra* note 144, at 837–38.

<sup>172</sup> Brief for Appellants, *supra* note 169, at 35–36.

<sup>173</sup> KLUGER, *supra* note 134, at 575. The negative effect Clark demonstrated on children’s self-esteem was just as pronounced among children who did not attend segregated schools, which undercut the studies’ force in court.

<sup>174</sup> *Brown*, 347 U.S. at 494 n.11. This, instructively, is actually an act of Brandeisian “doctrinal-prudentialism.”

<sup>175</sup> Interview with Elman, *supra* note 144, at 827 (emphasis added).

<sup>176</sup> *Id.*

country” by giving the Court an ethical-prudential way to decide the case.<sup>177</sup> The Court would incorporate this approach into its unanimous opinion by expressly reserving judgment on “appropriate relief” until another reargument could provide “the full assistance of the parties in formulating decrees.”<sup>178</sup> And, of course, it was in the second *Brown* opinion that Chief Justice Warren borrowed Justice Holmes’s now famous phrase, which required the district courts to enforce desegregation “with all deliberate speed.”<sup>179</sup>

If the *Brown* Court really resolved an entrenched conflict between established modalities by means of an ethical-prudential metaphor, how might we reconstruct this new mode of argument? I suggest that ethical-prudentialism takes the basic, elemental principles of the American ethos as its principal and defining context; it looks first to those democratic, egalitarian, and libertarian values that define who we are—or who we want to be—as a nation. But the metaphor then tempers ethical idealism by focusing prudentially on the social and political realities of governing a large and diverse population. It recognizes that, over time, institutions and interests accrete around social and legal practices that may not reflect our best national self, and therefore constitutional remedies sometimes require time and deliberation. Thus caution and delay, while sometimes distasteful, are a necessary part of constitutional growth. In the case of *Brown*, at least, this measured, metaphoric approach helped the Court surmount a modal impasse. Again, in Philip Elman’s words,

[M]any people think that “with all deliberate speed” was a disaster. [But] it broke the logjam. It was the formula that the Court needed in order to bring all the Justices together to decide the constitutional issue on the merits correctly. Without “all deliberate speed” in the remedy, the Court could never have decided the constitutional issue in the strong, forthright, unanimous way that it did; and it was essential for the Court to do so if its decision was to be accepted and followed throughout the country.<sup>180</sup>

In evaluating the acceptance of the ethical-prudential metaphor within the practice today, we must recognize that *Brown*—while not immediately embraced<sup>181</sup>—now

---

<sup>177</sup> *Id.* at 830.

<sup>178</sup> *Brown*, 347 U.S. at 495.

<sup>179</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). The controversial phrase is taken from *Virginia v. West Virginia*, 222 U.S. 17, 20 (1918), but some have suggested that Holmes himself borrowed it from Francis Thompson’s poem “The Hound of Heaven.” See FRANCIS THOMPSON, *The Hound of Heaven* 121, in *I FLED HIM, DOWN THE NIGHTS AND DOWN THE DAYS* (1908) (“But with unhurrying chase, And unperturbed pace, Deliberate speed, majestic instancy . . .”).

<sup>180</sup> Interview with Elman, *supra* note 144, at 830.

<sup>181</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26–28 (1959) (calling *Brown* “the hardest test of my belief in principled adjudication”).

holds an imperturbable place in the constitutional canon. Lawrence Lessig writes, "No one questions *Brown*'s result (anymore). Indeed, so completely has the legal system reoriented itself after the decision that it may not even be possible to find the legal material with which to mount a serious challenge to its conclusion."<sup>182</sup> Likewise, Bruce Ackerman has suggested that in contemporary politics "no Supreme Court nominee could be confirmed if he refused to embrace *Brown*,"<sup>183</sup> and Bobbitt attributes Robert Bork's failure in this regard at least partly to his views on the desegregation cases.<sup>184</sup> But just because our modern practice universally accepts *Brown* does not mean that we wholeheartedly accept ethical-prudentialism, which may seem at once too idealist and too political for principled decision making. In fact, many Americans seem to venerate *Brown* for its ethical foundation *despite* its prudentialist compromise. It may be that the ethical-prudential metaphor was a one-trick pony, that it was specifically tailored to meet a particularly acute constitutional crisis, and that it was never destined to become a regular or common modality of constitutional discourse.<sup>185</sup> Be that as it may, however, I contend that it was the Court's grammatical creativity—its willingness to re-envision and realign the accepted modalities at a critical moment in the nation's history—that enabled it to overcome a two-year judicial standoff and render the most important constitutional decision of the last century.

### CONCLUSION

The most profound theoretical advances in any field are those that open up entirely new areas of inquiry, insights so fundamental that they expose completely new kinds of questions—exactly the right kinds of questions—for those that follow to confront. I suggest that Philip Bobbitt's practice-based account of constitutional law is this type of advance, and, like other such insights, it reveals important questions that beg our attention. First among those questions, for me, is the problem of growth or evolution in the practice of constitutional law. Because Bobbitt wants to legitimate constitutional arguments internally—by looking to the practice of law, and not to external foundational justifications—he seems to present a static and exclusive set of argumentative modalities. For the same reasons, he struggles to account for the resolution of modal conflicts; those cases where equally legitimate constitutional arguments may point to divergent outcomes or meanings. Bobbitt concludes that this final problem is a matter of judicial "conscience" and thus a part of the practical act of decision making. While I agree conceptually with this solution, I suggest here

---

<sup>182</sup> Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1242 (1992) (citations omitted).

<sup>183</sup> Ackerman, *supra* note 130, at 1752.

<sup>184</sup> BOBBITT, INTERPRETATION, *supra* note 6, at 92–93.

<sup>185</sup> *But see Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (concluding that the Vermont Constitution guarantees homosexual couples the common benefits of heterosexual marriage, but leaving it to the state legislature to fashion an appropriate remedy).

that this “conscience” is something closer to judicial artistry. The great practitioners of constitutional law are able to construct modal metaphors out of the existing forms of argument, thus growing the practice internally to encompass changing social, political, and legal circumstances. The best of these metaphors, I suggest, harden and become a literal and legitimate part of the practice moving forward, while the others are rejected or fall away quietly.

It is my deep admiration for Bobbitt’s work that inspired this piece, and in it I have only tried to make a small contribution to Bobbitt’s larger and humbling theoretical edifice. My intention here has simply been to provide a plausible account of the evolution of constitutional practice in terms that are consistent with Bobbitt’s larger thesis, and I contend that a theory of growth through modal metaphor accomplishes this goal. The goal itself is only worthwhile, however, if it provides some real theoretical or practical benefit to the practice of constitutional law, and so I want to close by offering an honest appraisal of the strengths and weaknesses of the modal metaphor as an addition to the practitioner’s interpretive toolbox. Let me begin with the weaknesses.

In the limited space of this paper, I have not been able to adequately address the question of how the original modalities came into being, or the order in which they may have arisen. I have suggested above that a satisfying answer to this question might ultimately need to resort to a foundational kind of explanation—perhaps something analogous to Saul Kripke’s or Hilary Putnam’s causal theory of reference—which is a move that goes beyond the scope or ambitions of Bobbitt’s project. Bobbitt was satisfied to describe the practice of constitutional law, as it now exists, without reference or resort to its ultimate origins. It is a shortcoming of my account, however—which hopes to describe constitutional evolution—that I have not traced this process back to its original sources. I would very much like to be able to say which modality came first (I suspect it is textualism) and then track the evolution of constitutional practice in metaphoric terms. This might help the practitioner to gauge which modalities are best suited to combine metaphorically, and which kinds of metaphors best solve particular kinds of problems. Unfortunately, I am not prepared to provide a detailed history of modal evolution here; though that is certainly an area I hope to explore in future work.

A second and related question is whether or not the examples I provide really represent the emergence of entirely new modalities of constitutional argument—whether these are truly examples of constitutional evolution—or whether they are simply instances when constitutional practitioners have rediscovered or re-implemented modalities of argument that already existed at other points in our constitutional conversation. This problem is most clearly present in the discussion of Professor Amar’s intratextualism, a method which has been around since nearly the beginning of our interpretive practice. In response to the specific question about intratextualism, I suggest that it is not particularly important for my purposes *when* this technique first arose, only that it provides a clear illustration of the mechanics of a modal metaphor



in action. In this sense, I am not concerned that Amar has only labeled and revitalized a pre-existing metaphor—it is the clarity of the interactive mechanics at work that I hope to demonstrate. In response to the more general objection about evolution as opposed to rediscovery, I would suggest that—while a diligent scholar might find historical antecedents of doctrinal-prudentialism, for example, that predate Louis Brandeis—each metaphoric construction, even of the same two modalities, is slightly different; and what is important is how a particularly powerful modal metaphor affects the practice. In other words, Brandeis’s contribution—his metaphor—was unique to the particular issue it confronted; and given the circumstances it was a particularly strong and effective metaphor, which is reflected in the effect it had on the practice. Doctrinal-prudentialism, as Brandeis constructed it, moved the entire practice forward, and that is the phenomenon I hope to have illustrated.

Having appraised potential shortcomings of my account, I also want to point out what I hope are the benefits of conceiving constitutional growth in terms of modal metaphors. First, the concept may be helpful to theorists or advocates who seek to resolve constitutional problems or express their constitutional insights in new and creative ways. For them, the great lesson of Bobbitt’s work is that there are *rules* to follow. It is not useful to build theories on argumentative modalities that are entirely outside of the existing practice—to do so is akin to speaking the wrong language, or uttering nonsense words, when trying to express an important point in conversation. (Anyone who has witnessed a pro se appellate argument has probably seen this happen.) The modal metaphor, however, provides some creative flexibility within the existing rules. If the skillful advocate can combine the existing modalities to express a new constitutional thought, she can make an important contribution to the practice. The real trick, I suggest, is making the modal metaphor a strong and vital one. To do so, the advocate must pick the right frame and the right focus to suit the facts and circumstances, and she must have deft facility with the existing modalities (the language) to create the most persuasive form of the metaphor possible. This, as I have suggested, is more art than science.

The metaphor model also provides a normative account—though it may seem unsatisfying to some—of “better” constitutional theories or arguments. In keeping with Bobbitt’s initial insight, this account is not foundational—it does not purport to reveal absolute answers. Rather, I suggest that the way to evaluate metaphoric arguments is over time, as we see their value and assimilation into the practice. In this way, the modal metaphor is most like the kind of linguistic metaphor Max Black labels “catachresis”; it is intended to fill an expressive gap in the practice. Thus, we must evaluate modal metaphors based on how successfully they fill the gaps that arise, by deciding over time whether the new mode of argument contributes something important or useful to our understanding of constitutional meaning. The proof is in the pudding, so to speak; the metaphors that contribute something of value become permanent and accepted fixtures within the practice, while those that do not

fade away, perhaps to be revived some day to meet a future problem. This is of little help, I concede, to the judge who must make an immediate constitutional decision; but, again, this is the essential creative nature of the judicial role in our practice. Again, the final act of decision necessarily remains something closer to art than science. That much, I suggest, remains completely consistent with Bobbitt's original account, and I can add very little that he has not already expressed more eloquently.

In introducing Charles Black's substantial contribution to modern constitutional practice, Bobbitt recalls words T.S. Eliot penned in an introduction to a new edition of *Seneca*: "[F]ew things that can happen to a nation are more important than the invention of a new form of verse."<sup>186</sup> Eliot's thought seems at first startling, but a little reflection reveals its depth. If the mechanics of metaphor really do—as Max Black and others contend—replicate some of the essential mechanics of thought, then a new form of verse can allow us to comprehend some part of our world anew. At the very least, a new form of verse enables us to express ourselves to one another in ways not before possible; it gives us means to interdependently affect and change our collective understanding of the human condition. This, I contend, is also the elemental power of the modal metaphor in the practice of constitutional law. It gives to the deft and insightful practitioner—the constitutional poet—the tools of profound human change. And, as with poetry, there are no absolutes in the constitutional conversation, only ideas and insights that might move us, in some small measure, closer to our better selves.

---

<sup>186</sup> BOBBITT, FATE, *supra* note 3, at 77 (citing T.S. Eliot, *Introduction* to *SENECA: HIS TENNE TRAGEDIES* v, xlix (T.S. Eliot & Thomas Newton eds., Constable & Co., Ltd. 1927) (1581)).