such methods. There is no more to say about the legitimacy of such review.

Accepting (if only provisionally) that the analysis in *Constitutional Fate* resolves the problem of judicial review, let us turn to the problems that resolution poses. If legitimacy is maintained by the modalities, what if the modalities conflict? And this question will eventually lead us to the others, the practice of constitutional interpretation by other branches and the distinction between legitimacy and justification. If a legitimate system does not ensure justice, how can it be justified? And if following the methods of legitimacy does not provide justification, then how can the system be said to be just?

Philip Bobbitt,
Constitutional Interpretation
(1991)

3

THE MODALITIES OF CONSTITUTIONAL ARGUMENT

First, what is a *modality*? It is the *way* in which we characterize a form of expression as true.[1] For instance, a *logical* modality may be attributed to a proposition, "*p*," by saying that it is logically necessary or contingent or logically impossible, that "*p*." This is to say that from a logical point of view, the dimension of possibility[2] is critical to engage the inexorable force of inference while other dimensions of the proposition are from this point of view irrelevant. To say that it is known or unknown or known that it is not true that "*p*," is to employ an *epistemic* mode. That is to say that from an epistemological point of view, the role of knowledge engages the force of logic, while other features of "*p*," are irrelevant. And so on for other modalities. To say that it is obligatory, permissible or forbidden, that "*p*," is to mark a *moral* or *deontic* mode. To say that it is now or will be or was the case that "*p*," attributes a *temporal* modality. By contrast, simply to say "that *p*," or "it is *de fide* true that p," does not characterize the way in which "*p*," is true.

To see the difference among modalities, consider the following propositions with respect to a *logical* modality: it is necessarily the

What follows in this chapter does not claim to offer whatever original contributions may be part of this book. Rather it reviews material first stated in my book *Constitutional Fate*, to which I have referred. It seemed worse to assume that the reader had already read that book or must now go out and buy a second book to be able to read this one, than simply to summarize the concepts in that work that are necessary to this one.

case that a professor's husband is a married man; it is possible that a professor could be a married man; it is impossible that a professor's wife could be a married man. The way in which these propositions are true, from a logical point of view, is determined by the relationship between the facts they assert and the possibility of those facts (principally the fact that "a husband is a married man" is necessarily true, i.e., it is impossible that it could be false). There are rules that will determine the truth or falsity of a proposition in this modality; these rules construe the facts stated by the proposition according to the standards of the modality, in this case, the logical possibility of the facts stated. Now consider instead the proposition: "all professors should be unmarried men." Whether this is true or not cannot be determined by our knowing the extent to which this state of affairs is possible. It might be true even if it were impossible; it might be false even if it were absolutely necessary (as once was the case at some universities). Thus we must apply the standards of a different modality – a moral or deontic mode – to determine the truth of the facts asserted.

To see the difference between a modal statement and an ordinary proposition, consider these two statements: (1) "One can never know whether another person is telling the truth;" and (2) "You are lying" or "I believe you are lying to me." To determine whether or not (1) is true requires an inquiry into the conditions of knowledge: what counts as knowing, what are grounds for doubt and so on. But to determine the truth of (2) we need to find out something in the world (although it is not always clear precisely what, particularly in taking testimony from one whose word you doubt!). That is, (2) asserts the truth *of* a particular statement about the world while (1) asserts a truth *about* a statement, namely, that it cannot be known.[3]

I will be speaking of *constitutional modalities* – the ways in which legal propositions are characterized as true from a constitutional point of view. In my earlier work I identified six such modalities. Of course, these might be divided or recategorized in different ways, but this particular array has been accepted, I think, by persons working in this area.[4] These six modalities of constitutional argument are: the historical (relying on the intentions of the framers and ratifiers of the Constitution); 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"); structural (inferring rules from the relationships that the Constitution mandates among

the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule). Now let us look at some examples, and a somewhat more formal statement of each form of argument.

Consider the question whether a state may validly enforce a law that makes it a crime to procure an abortion. An *historical* modality may be attributed to constitutional arguments that claim that the framers and ratifiers of the Fourteenth Amendment intended, or did not intend, or that it cannot be ascertained whether it was their intention, to protect pregnant women from a state's coercion, through threats of fines and imprisonment, to bear children. Similarly, a historical modality might approach the abortion question as: did the framers and ratifiers of the Fourteenth Amendment intend to countenance, or to overturn by means of the Amendment, or are their intentions unclear as to the effect of the Amendment regarding, those state laws that existed at the time of ratification that prohibited abortions?

Oftentimes this modality is confused with textual argument since both can have reference to the specific text of the Constitution.[5] Historical, or "originalist" approaches to construing the text, however, are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers. Thus, when Justice Taney in the *Dred Scott* case was called upon to construe the scope of the diversity jurisdiction in Article III, which provides for suits "between citizens of the several states,"[6] so that he might decide whether a slave could seek his freedom in a diversity suit before a federal court, he wrote:

> It becomes necessary to determine who were the citizens of the several states when the constitution was adopted. And in order to do this we must recur to the governments and institutions of the colonies. We must inquire who at the time were recognized as citizens of the states, whose rights and liberties outraged by the English government and who declared their independence and assumed the powers of government to defend their rights of arms. We refer to these historical facts for the purpose of showing the fixed opinions concerning the Negro race upon which the statesmen of that day spoke and acted.[7]

Now consider the same question – who are the "citizens" of the

phrase that provides for suits in federal court "between citizens of different states" ("diversity" suits) – from another point of view. A *textual* modality may be attributed to arguments that the text of the Constitution would, to the average person, appear to declare, or deny, or be too vague to say whether, a suit between a black American citizen resident in a state and a white American citizen resident in another state, is a "controversy between citizens of different states." I would imagine that the contemporary meaning of these words is rather different than that which Taney found them to mean to the framers and ratifiers of 1789. One should not be tempted to conclude, however, that textual approaches are inevitably more progressive than originalist approaches. Sometimes the text can be a straitjacket, confining the judge to language that would have been different if its drafters had foreseen later events. Thus consider whether wiretapping is prohibited by the Fourth Amendment, which guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."[8] Here is Chief Justice Taft in a case in which incriminating information was largely obtained by federal prohibition officers intercepting messages on the telephones of the conspirators:

> The amendment itself [he says] shows that the search is to be of material things – the person, the house, his papers or his effects. The amendment does not forbid what was done here for there was no seizure. The evidence was secured by the sense of hearing and that only. There was not entry of the houses. The language of the amendment cannot be extended and expanded.[9]

By contrast, a later court had no trouble finding that wiretapping came within the Amendment. It simply relied upon historical argument – the intentions that animated the adoption of the amendment – and concluded that:

> The purpose of the . . . Fourth Amendment [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed.[10]

Consider another constitutional question: can a court issue a subpoena (or should it enjoin some other subpoena) for the disclosure of the President's working notes and diaries? To say that the institutional relationships promulgated by the Constitution require

or are incompatible with or tolerate a particular answer to this question is to use a *structural* mode of argument. There are many recent, celebrated examples of this form of argument to be found in the cases of the US Supreme Court; indeed the 1980s were particularly notable for the Court's focus on structural issues.[11] But structural argument is hardly a recent invention. *McCulloch* v. *Maryland*, the principal foundation case for constitutional analysis, relies almost wholly on structural approaches. In determining whether a Maryland tax on the Federal Bank of the United States could be enforced, Chief Justice Marshall studiedly refuses to specify the particular text that supports his argument, and explicitly rejects reliance on historical arguments, preferring instead to state the rationale on inferences for the structure of federalism. Such a structure could not be maintained, he concluded, if the states, whose officials are elected by a state's constituency, could tax the agencies of the federal government present in a state and thereby tax a nationwide constituency. The constitutional structure would not tolerate such a practice.

In the following passage, taken from an 1884 case,[12] we may observe another typical example. In this case the defendant and others were convicted in a federal court for having conspired to intimidate a black person from voting for a member of Congress, in violation of federal statutes. The question was: does Congress have the power to punish violations of election laws under the Constitution since the text nowhere provides such a power? Justice Miller wrote for the Court:

> That a government whose essential character is republican . . . has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. . . . The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. . . . It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State. . . . It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. . . . In a republican government

like ours . . . the temptation to control these elections by violence and corruption is a constant source of danger.[13]

Structural arguments are a little less intuitively obvious than arguments from the text or history of the Constitution, so perhaps it would be well to briefly outline their characteristic form. Usually, arguments in this modality are straightforward: first, an uncontroversial statement about a constitutional structure is introduced [for example, in the case above, the statement that the right to vote for a member of Congress is provided for in the Constitution]; second, a relationship is inferred from this structure [that this right, for example, gives rise to the federal power to protect it and is not dependent on state protection]; third, a factual assertion about the world is made [that, if unprotected, the structure of federal representation would be at the mercy of local violence]. Finally a conclusion is drawn that provides the rule in the case. (A second example is provided in the notes.)[14]

Consider whether the state can require mandatory testing for the AIDS virus antibodies. To say that it is wise, or unwise, or simply unclear on the present facts whether or not it is wise to permit such testing is to propose an evaluation from a *prudential* point of view. In the first half of this century, this mode of constitutional argument was principally associated with doctrines that sought to protect the political position of the courts.[15] But the dramatic national crises of depression and world war soon provided ample reason to introduce the practical effects of constitutional doctrine into the rationales underpinning doctrine. For example, one such case arose when, in the depths of the midwestern farm depression, the Minnesota legislature passed a statute providing that anyone who was unable to pay a mortgage could be granted a moratorium from foreclosure. On its face such a statute not only appeared to realize the fears of the framers that state legislatures would compromise the credit market by enacting debtor relief statutes, but also plainly to violate the Contracts Clause that was the textual outcome of such concerns. Moreover, the structure of national economic union strongly counseled against permitting states to protect their constituents by exploding a national recovery program that depended on restoring confidence to banking operations. Nevertheless the Supreme Court upheld the statute, observing that:

An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community.[16]

Very simply, the Court recognized the political expediency of the legislature's action and acquiesced in it. Another national crisis framed the background of the *Bowles* case, ten years later. Congress had passed the Emergency Price Control Act providing for administrative action to freeze or reduce rents for housing accommodations in areas adjacent to defense establishments. The district court held against the government and struck down the Act as unconstitutional, but the Supreme Court reversed the decision in language that is frankly prudential:

We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort. A nation which can demand the lives of its men and women in waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property . . . Congress has done all that due process under the war emergency requires.[17]

These cases provide examples of prudential argument, but this approach is by no means confined to the extremes a nation undergoes in emergencies. Of course in such circumstances prudential arguments are likeliest to be decisive. But, as one of prudentialism's most eloquent practitioners argued, such an approach has a place in every decision:

The accomplished fact, affairs and interests that have formed around it, and perhaps popular acceptance of it – these are elements . . . that may properly enter into a decision . . .; and they may also enter into the shaping of the judgment, the applicable principle itself.[18]

Prudential argument is actuated by facts, as these play into political and economic policies as to which the Constitution is itself agnostic. The legal rule to be applied is derived from a calculus of costs and benefits, when the facts are taken into account. Accordingly, this often gives rise to a "balancing test" (the balance being a scales, not a tightrope.)

By contrast, when we say that a neutral, general principle derived

from the caselaw construing the Constitution should apply, does not apply or may apply, we make an appeal in a *doctrinal* mode. (It should also be observed, in anticipation of material that will be taken up in Book II, that doctrinal arguments are not confined to arguments originating in caselaw; there are also precedents of other institutions, e.g., the practices of earlier Presidents as well as the various corollaries incident to fashioning rules on the basis of precedent.)

To familiarize oneself with this form of argument, let us take up this question: to what extent can a state constitutionally aid parochial schools? Suppose, for example, that parochial school students whose schools are not on the route of free public school buses are given a cash allowance by the state to provide for their transportation. Does this offend the Establishment Clause of the First Amendment because the state is bearing the burdens of costs that would otherwise be born by churchmembers, in much the way that the government in Great Britain, a country that has an established church, provides funds to supplement the income of the Church of England? A judge confronting such a case would probably begin, not by reading the text of the First Amendment which states a rule in rather general terms[19] but by turning to precedent to find similar cases in which authoritative decisions would govern the present one. Not surprisingly, in the area of Establishment jurisprudence there is a great deal of constitutional doctrine, developed in many cases. The standards these cases develop and apply can be stated as legal rules; the case "on point" – that is, whose facts are similar in those aspects that are relevant to the legal question being posed – is probably *Everson* v. *Board of Education*, which sustained the power of local authorities to provide free transportation for children attending church schools.[20] In *Everson* the Supreme Court treated the provision of transportation as a form of public welfare legislation, noting that it was being extended by the state "to all its citizens without regard to their religious belief." The Court wrote:

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their pockets when transportation to a public school would have been paid for by the State.[21]

Transportation, however, benefited the child in the same way as

did police protection at crossings, fire protection, connections for sewage disposal, public highways, and sidewalks. Based on this rationale, subsequent cases have developed a three-pronged test: does the state program have a secular purpose; is its principal effect neither to advance nor inhibit religion; does its administration excessively entangle the state in religious affairs?[22]

Applying this test to the question above, the judge might write: "*Everson* must be distinguished from the instant case because the program in *Everson* provided transportation common to all students, whereas here only some students – the parochial ones – are given cash allowances. While we do not question that the legislature had a secular purpose in mind, we think the evidence indicated that the effect of these allowances was in fact to make the parochial schools more attractive to parents than their secular counterparts, and thereby advance the cause of religious institutions. Moreover, the oversight required of the state to ensure that the allowances are in fact spent on providing a system of parochial school transportation intrudes the administrative apparatus of the state into the affairs of the church schools. This can only lead to the interference with budgets and an insistence on allocations for transportation that will excessively entangle the state in the administration of church affairs. Accordingly the program must be held unconstitutional."

Or a judge might write: "*Everson*, which also involved public transportation to parochial school students, governs this case. Here as there, the state's program provides aid to students and their parents, and not – as in cases that have applied *Everson* and struck down state assistance in this area – direct assistance to church-related schools. Its secular purpose, to provide school transportation at greater efficiency and less cost to the state than expanding its own bus fleets, is apparent. Like school lunches, public health services, and secular textbooks, the transportation provided here confers a benefit on the parochial student that is at parity with what the secular student receives. Thus its effect is neither to advance nor inhibit religion, but rather to avoid exacting a penalty from the parochial student. Finally, whatever state management is required to administer the program will be limited to the oversight of transportation; such involvement as there may be need not, therefore, excessively entangle the state in those religious matters with regard to which it has no role."

In either case, the hypothetical judge has applied a rule derived

from the relevant caselaw. The rule is neutral as to the parties; that is, it applies equally to Catholics and Jews and atheist claimants and does not vary depending on who is bringing or defending the suit. And the rule is general, that is, it applies to all cases in which the state is arguably giving assistance to religious institutions, and is not confined to the facts of the original case that gave birth to the rule. One more point, however, should be made about this modality: its operation is not confined to the application of *stare decisis*, that is, the strict adherence to previously decided cases. On the contrary, in the American system one of the principles of doctrinalism is that the Supreme Court may reverse the relevant precedent.[23] This would appear to follow from the family of modalities – that provide alternative legal rules – and the supremacy of the Constitution to the acts of government (including, of course, the judicial branch). The Court is entitled, indeed obligated, to overrule itself when it is persuaded that a particular precedent was wrongly decided and should not be applied.

Finally, let us consider the modality of ethical argument. This form of argument denotes an appeal to those elements of the American cultural ethos that are reflected in the Constitution. The fundamental American constitutional ethos is the idea of limited government, the presumption of which holds that all residual authority remains in the private sphere. Thus when we argue that a particular constitutional conclusion is obliged by, or permitted, or forbidden by the American ethos that has allocated certain decisions to the individual or to private institutions, we are arguing in an *ethical* mode.

Ethical arguments arise as a consequence of the fundamental constitutional arrangement by which rights, in the American system, can be defined as those choices beyond the power of government to compel. Thus structural and ethical arguments share some similarities, as each is essentially an inferred set of arguments. Like structural arguments, ethical arguments do not depend on the construction of any particular piece of text, but rather on the necessary relationships that can be inferred from the overall arrangement expressed in the text. Structural argument infers rules from the powers granted to governments; ethical argument, by contrast, infers rules from the powers denied to government. The principal error one can make regarding ethical argument is to assume that any statute or executive act is unconstitutional if it causes effects that are incompatible with

the American cultural ethos. This equates ethical argument, a constitutional form, with moral argument generally.

Let us review a hypothetical example that shows the basic pattern of ethical argument. Note that while the American cultural ethos may encompass cheeseburgers, rock and roll, and a passion for Japanese electronics, the American *constitutional* ethos is largely confined[24] to the reservation of powers not delegated to a limited government.

It was recently reported[25] that a state judge in South Carolina had given the choice of thirty-year prison sentences or castration to three convicted sex offenders. Suppose a convicted man accepted the bargain and was released on probation terms that incorporated this pledge (as by drug-induced impotence). Then suppose that he ceased taking the prescribed drug. If his probation were revoked, a constitutional challenge to the terms of his probation might take this form:

1 The reservation to the individual of the decision to have children is deeply rooted in the American notion of autonomy; there is no express constitutional power to implement a program of eugenics.
2 Moreover, such programs are not a conventionally appropriate means to any express power.
3 Those means denied the federal government are also denied the states.
4 The South Carolina sentence amounted to ordering a man to comply with a eugenics scheme that deemed him ineligible to procreate.

The element of the American ethos at stake is the reservation to individuals and families of the freedom to make certain kinds of decisions. Similar sorts of arguments are to be found in cases in which a state attempted to bar schools from teaching foreign languages;[26] in which a state passed a compulsory education act requiring every school-age child to attend public school (that is, implicitly outlawing private schools);[27] in which a local zoning ordinance was applied to prohibit a grandmother from living with her grandchildren;[28] in which a hospital sought authority to amputate a gangrenous limb from an elderly man who refused his consent;[29] in which a man allegedly suffering from delusions (but concededly harmless) was confined to a mental hospital for almost twenty-five years without treatment.[30] One may test one's mastery of this form of argument

by taking each of these examples and stating an ethical argument to resolve it, e.g., (1) There is no express constitutional power to monopolize education; (2) moreover, a statute outlawing private education is not an appropriate means to any express power (such as regulating commerce or providing for armed forces); (3) The decision to educate one's children privately or parochially or publicly is reserved to the family; (4) A statute compelling attendance exclusively at public schools amounts to a scheme to coerce families into a particular educational choice and destroy private educational options.

These then are the six modalities of constitutional argument in the United States. I have argued elsewhere[31] that each of these forms of argument can be used to construct an ideology, a set of political and practical commitments whose values are internally consistent and can be distinguished, externally, from competing ideologies. I will discuss this relationship in more detail and indeed I will argue in Book III that this move from the modalities to ideology is a mistaken inference of explanation from description. For the moment, however, I am merely concerned that the reader should not conclude that, because of this relationship – because, for example, some persons may believe that one particular modality represents the only legitimate means of interpreting the Constitution (e.g., historical argument) since it is verifiable by a resort to materials (e.g., the intentions of the ratifiers) that are mandated according to a particular political theory of interpretation (e.g. "originalism") – the modalities of argument are no more than instrumental, rhetorical devices to be deployed in behalf of various political ideologies. The modalities of constitutional argument are the ways in which law statements in constitutional matters are assessed; standing alone they assert nothing about the world. But they need only stand alone to provide the means for making constitutional argument.

There is no constitutional legal argument outside these modalities. Outside these forms, a proposition about the US constitution can be a fact, or be elegant, or be amusing or even poetic, and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world.

4

THE USEFULNESS OF THIS APPROACH

What is the usefulness of approaching American constitutional law through the study of these modalities? First, it permits the critical reader to describe the ideological and political manipulations of the various grammars of constitutional law without pretending that these ideological and political commitments are somehow "behind" or "beneath" these grammars. It is a flaw of conventional Marxism, and of some contemporary movements in American jurisprudence, that these approaches simply assume an epistemological attitude that is highly controversial, i.e., they undertake to explain events in the world by reference to ideas that allegedly cause such events while maintaining that the explanatory scheme itself is outside the otherwise pervasive causal influence it allegedly describes. No doubt there are many persons who continue to believe that class, or race, or sex or personal history determine "how we see the world" – as though these were spectacles that are put on at a certain age and could be removed, indeed have been removed by the clear-sighted analyst. This is only a modern version of the claim that such influences determine how we behave. But to a growing number this will seem naive. The world is a human idea, inseparable from our perceptions and appreciation of it, and thus something we can apprehend only with the spectacles of humanity firmly in place. Nor are our faculties detachable from the perspectives they enable or the world without which they are disabled.

There is no reason to believe that our faculties are either inductive (gathering unassimilated raw data that sorts itself out into ideas) or deductive (proceeding from first principles that are our genetic