Georgia State University Law Review

Volume 19
Issue 4 *Summer 2003*

Article 5

6-1-2003

Speaking Outdoors

L. H. LaRue

SPEAKING OUTDOORS

L. H. LaRue*

INTRODUCTION

I have been assigned the topic of how to discuss the Constitution outside of the courts, and I cannot imagine a topic that is closer to my heart or one about which I am more delighted to write about. When the delegates drafted the 1787 Constitution, they sometimes referred to "the people outdoors,"[1] and when they did so, they meant to speculate on how their work might be received by "We, the People . . ." who would debate it and vote on it. So, the topic for this panel of the Symposium has an honorable history, and I am pleased to extend this ancient topic into modern garb.

Furthermore, this topic (debating the Constitution outside of courts) is especially appropriate for a Symposium to honor Professor H. Jefferson Powell's book on the foreign affairs power.[2] One of Powell's theses in his book is that constitutional debate on the allocation of power in foreign affairs should be debated outside of courts, not inside them.[3] Powell's thesis is dear to my heart, but the thesis is idle unless we can all improve our performance in doing what Powell states needs to be done.

---

* Professor of Law, Washington and Lee University.

1. 2 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 501 (Max Farrand ed. 1987). The words were spoken by James Wilson, and the actual phrase that he used is "the people out of doors." *Id.*

2. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (Carolina Academic Press 2002).

3. *Id.* at 17-19, 146-51.

So, let me begin by stating my agenda for this Article, which is twofold. First, I wish to look at the methods of interpretation that Powell uses to reach the conclusions that are his thesis and ask: how well adapted are these methods to use outside of courts? Second, I wish to look at my own practice of arguing outside of court and subject it to judgment. Do the ways that I have argued live up to the standards of constitutional discourse set forth by Powell, which I agree are the standards we should employ in interpreting the Constitution?

Perhaps it would help if I stated this agenda less abstractly. When Jefferson Powell and L.H. LaRue have been outside of the academy, they did very different sorts of things—I speak now about the two of us in the third person abstract, and using the past tense, so as to gain some distance on both of our former selves. After graduation from law school, Powell clerked on the Court of Appeals for the Fourth Circuit. Since then, he has returned to government service for several years, during which he served in the Office of Legal Counsel and in the Solicitor General's Office, both at the United States Department of Justice. LaRue also took his paycheck from Uncle Sam, but as a trial lawyer. He tried criminal cases while serving in the United States Marine Corps and in the United States Department of Justice. With these different experiences, Powell and LaRue come to the issue using different perspectives. They each approach the topic, speaking about the Constitution outside of court, in different ways: Powell as an appellate lawyer, and LaRue as a trial lawyer.

Neither of these two different perspectives can claim any inherent superiority, but perhaps it will be valuable to compare them and to subject each to criticisms that flow naturally from the other. What criticisms and suggestions can the trial lawyer offer to the appellate

lawyer, and vice versa? So, the first part of the agenda will be for LaRue to use his perspectives as a trial lawyer to judge how well Powell the appellate lawyer will do when he moves away from the elevated arena of appellate courts and high government offices into the rougher precincts in which LaRue spent his time. The criticism and suggestions must not run only one way. So, the second part of the agenda will be for me to imagine how Powell the appellate lawyer should judge the integrity of LaRue the trial lawyer's performances.[4] Has the trial lawyer betrayed the integrity of the law?

I. POWELL'S THESIS

At the heart of Powell's book, which we celebrate in this Symposium, is his thesis that one should not argue about the allocation of foreign affairs power by making traditional sorts of legal arguments.[5] Instead, the questions of power must be left to political argument.[6] Powell's thesis can easily be misunderstood. A traditional legalist might misinterpret Powell's book as merely asserting that most of the constitutional issues over allocations of power are "non-justifiable" and might apply this traditional label to the content of the book. To be sure, Powell would agree that the issues are non-justifiable, in the traditional sense of that term, but his thesis is considerably broader, more subtle, and more interesting than this traditional thesis. Let me explain how I understand the traditional thesis, and why I believe that Powell goes further.

---

4. I apologize for this sentence, in which I appear in both the first person and the third person, but I know of no better way to write it so as to make the point that I wish to make.

5. POWELL, *supra* note 2, at 17-19.

6. POWELL, *supra* note 2, at 156-59.

The traditional thesis is that some controversies are not suitable for judicial determination. A controversy may perhaps not be "ripe" yet, or perhaps be "moot" (too soon or too late). Perhaps instead it is abstract, not concrete, and so forth.[7] One such category is the so-called "political question" doctrine, that is, some controversies are to be settled by other branches of government. The actual content of this doctrine is somewhat controversial, but for today, it is enough to say that one might call a controversy a "political question" if it might be better disposed of by the legislature or the executive, and one might reach this conclusion for any one of the following three reasons: (1) because no legal standards exist that the judiciary can accurately apply, (2) because the other branches of government have strong incentives to honor the standards that do apply, or (3) because the cost of judicial intervention would be greater than any benefits one can imagine.[8]

Powell's thesis is not only much stronger than the political question doctrine but also more interesting than that. Perhaps the best way to state his thesis is to allude to one of Powell's most famous law review articles. As many of you may know, his contribution to the so-called "original intent" debate was to argue that the Framers' original intent was that their original intent should not count.[9] So, by analogy to that article, one can say that Powell's contribution to the debate before us today is to argue that the best

7. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); Lujan v. Nat'l Wildlife Fed'n, 100 S. Ct. 3177 (1990); DeFunis v. Odegaard, 446 U.S. 312 (1974); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1947).

8. I have borrowed my three-part statement from conversations with Mark V. Tushnet, based on his book *Taking the Constitution Away from the Courts*, especially pages 104 to 108.

9. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

legal interpretation of the Constitution is that questions of the allocation of power over foreign affairs are not legal questions. Powell quotes John Marshall on this point, who said that these questions are questions of "political law."[10]

Why might Powell reach the conclusion that the allocations of power in foreign affairs are matters of "political law?" The Constitution grants power over matters of foreign affairs to the President, the Senate, and the Congress as a whole. This much is obvious from a simple reading of the constitutional text. As a practical matter, these constitutional powers can come into conflict as the several actors use their authority to influence the substantive content of American policy in foreign affairs. The timid flee from this conflict and conclude that unseemly conflict must be avoided, and all too often, the timid imagine that the law can be a means for avoiding conflict. Powell is bold. He asserts that there is nothing wrong with conflict.[11] He believes that it is entirely legitimate for each of the institutional actors (the President, the Senate, and the Congress as a whole) to attempt to influence the substance of foreign policy and to use their institutional powers as bargaining chips.[12] Furthermore, he believes that the resolution of these conflicts must be managed politically.[13]

I have spent a few paragraphs spelling out the actual thesis of Powell's book because I think that it follows from this thesis that Powell must speak to the laity, not just the clerisy of lawyers.[14]

---

10. POWELL, *supra* note 2, at 83-89.

11. *Id.* at 147-49.

12. *Id.* at xiv-xv.

13. For an example of how this brought to bear on a particular power, see Powell's careful discussion of the power to make war. *Id.* at 113-26.

14. *See id.* at 147.

Powell's thesis states that when conflict arises political debate, not legal debate, is needed. For example, when Congress uses its power over appropriation to disagree with presidential policy, or when the President uses his power over diplomatic communications to disagree with congressional policy, it follows inevitably that the debate must be outside of the courts and must be political in nature. Unfortunately, political debate can be sidetracked from the crucial issues when the debate turns legal, that is, when someone challenges the legitimacy of the congressional power to disagree with the President or of the Presidential power to disagree with Congress.[15] Consequently, the public needs to be persuaded that both Congress and the President have legitimate authority in foreign affairs and, further, that the judiciary is not the institution to resolve conflicts between them.

Of course, Powell is not alone in saying that constitutional thinkers need to address the public and persuade "We, the People" about who has what authority under the Constitution and why. In this ambition, he resembles Philip Bobbitt, who has the same ambitions.[16] So how will Powell speak? He is explicit on this; he wishes to educate the laity on how to use the common law forms of argument.[17] This ambition is honorable,[18] but it is unlikely to succeed unless scholars know how to speak outdoors. Do they know how to speak outdoors?

15. There are, of course, many interesting details about how these disagreements can be channeled, but one needs to consult Powell's book to follow up on these details.

16. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984).

17. POWELL, *supra* note 2, at x.

18. *See* JIM WHITE, ON LEGAL LITERACY 60-76 (1985).

II. THE MODALITIES OF CONSTITUTIONAL ARGUMENT

When Powell gets down to the business of actually making his arguments about how we should construe the Constitution, he uses the famous modalities of constitutional argument that mark the actual practice of constitutional law, and of course, he cites Bobbitt, acknowledging the debt we all owe to him.[19] So, let me set forth Bobbitt's modalities, as my question is how well these forms of argument can move from indoors to outdoors.[20]

In the actual practice of constitutional argument, one normally begins with the text.[21] Of course, one has more than bare words in a textual argument; one also has the canons of interpretation that lawyers traditionally bring to a text, and the most relevant canon for constitutional argument is perhaps what statutory lawyers call "the whole act rule."[22] One must read each individual provision of the Constitution in the context of the whole document. As we all know, the constitutional text is brief,[23] so even the closest parsing will leave most questions unanswered. Even so, the moral significance of the text, and thus its claim to our respect, follows from the fact that it was adopted by a legitimate political process.[24]

If the text alone is not sufficient, there is a second source that we can consider. Sometimes one can turn to the history of the text for

---

19. *See, e.g.*, BOBBITT, *supra* note 16.

20. As I state Bobbitt's six modalities, I shall try to emphasize why each has a claim on our loyalty because in arguing the Constitution out of doors, the appeal must always speak to the deepest loyalties of those whom one would persuade.

21. BOBBITT, *supra* note 16, at ch. 3.

22. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 46.05, 47.02 (6th ed., Norman Singer ed.).

23. *See* McCulloch v. Maryland, 17 U.S. 316, 406 (1819). In McCulloch, Chief Justice Marshall declared that this brevity was a political necessity. *See id.*

24. *Id.* at 402.

aid.[25] The constitutional text was generated at a particular time in order to solve problems that seemed pressing to the generation that created it. Perhaps there is something in the production of the text that can shed light upon its meaning? Even though the evidence is less abundant than one might hope, it may shed some light. Additionally, the understanding of the generation that gave us our Constitution should always be weighed for its possible relevance to us.

Third, we can also inquire into the doctrines that have developed over time as our predecessors have interpreted the text.[26] We should never assume that we alone are wise; the interpretations of those who have gone before us are entitled to our respect, and we can learn from past practice. Furthermore, these doctrines and the precedents that have created them have been published in books that all of us can read. People may have relied upon these doctrines in arranging their affairs, and people may have assimilated these doctrines into their political morality. This reliance, and these expectations, if they exist, are also entitled to our respect.

A fourth matter that should influence our constitutional interpretations is our best understanding of the structures created by, or presupposed by, the text.[27] The Constitution is, among other things, a document that creates a government. It recognizes the ultimate power in matters governmental of the people. It recognizes that state governments are in place and that more state governments will come into being. It creates a national government that is organized into three departments. As we go about interpreting our

25. BOBBITT, *supra* note 16, at ch. 2.
26. *Id.*, at ch. 4.
27. *Id.*, at ch. 6.

Constitution, we should keep in mind these "architectural" facts and do our best to generate interpretations that best fit into these structures.

A fifth matter is the prudential judgments that lie behind the text.[28] The Constitution was not created for the sheer delight in the act of creation; it was a practical act, intended to do important business.[29] When we interpret it, we are engaged in an eminently practical task, and it is proper for us to bring to the task the same sort of prudential judgments that inspired those who have gone before us.

Sixth, and finally, we should attend to the ethical character of the American people and their government because these are also presupposed by the text.[30] Governing is not a morally neutral matter, and its moral significance is too important to be left to the speculations of moral philosophy. Theory, perhaps, has no claim on us, but the character that we wish to embody in our constitutional interpretations goes deep into the very heart of who we are and what we wish to be.[31]

By the way, I have slightly amended Bobbitt's statements of the modalities so as to make it clear that each modality is linked to the text, albeit distantly in most cases. This is a minor stylistic preference on my part, and it is not important. I have also listed them in an order that differs from the order that they appear in Bobbitt's book, and this too is unimportant. There is a third "by the way"

---

28. *Id.*, at ch. 5.

29. U.S. CONST. pmbl. The preamble states explicitly that the Constitution is "establish[ed]" "in order to" achieve six stated ends. *Id.*

30. BOBBITT, *supra* note 16, at ch. 7.

31. Consequently, I think that it is entirely appropriate that the sharpest critics of Powell's views, as voiced in this Symposium, attacked his position on the grounds that his theses were profoundly anti-democratic and thus unfaithful to cherished constitutional values. I disagree on the merits with these criticisms, but they are surely as relevant as anything that could be said.

which is important. Let me repeat what I have already said, which is that I accept Bobbitt's account of the constitutional argument as both descriptively true and normatively desirable. The six modalities describe accurately the way that lawyers and judges argue about the meaning of the Constitution. Furthermore, we are also committed normatively to accepting these modes of argument as legitimate. The interested reader can consult Bobbitt's book if he wishes to inspect the descriptive evidence and the normative argument for this conclusion.[32]

III. HOW DO THE MODALITIES WORK OUTDOORS?

How do we judge the possible success of modalities in an outdoor context? I cannot speak for others, but I judge them by comparing what they write with my own experience.

I have talked outdoors. My own experience is that of a trial lawyer, in the U.S. Marine Corps and in the U.S. Department of Justice. In both, I spoke to juries, where the people out of doors come in and have the final say. And in both, I was also an executive department officer, either military or civil, who spoke to those "out of doors," to those who were not lawyers, so as to explain to them what the law asked of them.

My experience taught me that the fundamental mode of persuasion "out of doors" is the telling of stories. When senior trial lawyers educate their juniors into the byways of the craft, the first question that they ask of their juniors is: "What is your story?"[33] My

32. Books II and III of *Constitutional Fate* are relevant to the normative matters. BOBBITT, *supra* note 16, at 123-240.

33. I was so instructed by my mentors in the craft of trying cases, and I notice that this advice continues to be given. For example, the *ABA Journal* regularly carries a column by James W.

subsequent academic study, during which I have tried to learn about the ways of persuasion, has confirmed this lore that was handed to me.[34]

So, how do Powell and Bobbitt's modalities look when judged against the trial lawyer's stories? Perhaps the place to begin this line of inquiry is to clarify the meaning of the word "story," as I shall be using that word. I shall cite, as my authority for the best definition of this word, the definition offered by the novelist Reynolds Price:

> From Genesis we gather that Adam also invented narrative; when God hunts out the human pair after their fall, Adam says, "I heard Your voice in the garden and feared, since I'm naked, and hid myself"—a chronologically consecutive account of more than one past event, with attention to cause and self-defense: thus a narrative.[35]

According to Price, any narrative will be an account that presents a chronology, with causation and justification. It seems to me that this novelistic understanding of narrative sums up well the trial lawyer's understanding of the craft of litigation, and even though I cannot prove this thesis, I am willing to recommend it.[36]

With this understanding of the shape that a story, or narrative, must take, we can next start by considering the modalities of constitutional argument, seriatim. I believe that each is also accepted

---

McElhaney in which he offers advice on litigation strategy and tactics. In most months, the word "story" appears in this column.

34. *See generally* Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991).

35. REYNOLDS PRICE, A PALPABLE GOD 8 (Antheneum 1978). In the original, the passage quoted appears in parentheses, as a mere throw-away line. *Id.* at 8.

36. *See* CRITICAL TERMS FOR LITERARY STUDY 66-79 (Grant Lentricchia & Thomas McLaughlin eds., 1990).

out of doors as a legitimate form of argument, but not all of them make the trip to this venue with their full power. Ordinary citizens appeal to each of these modalities in their arguments, but they do not give them the same sort of valence that professionals do.

The first modality is the textual argument. Historically, our nation has been a majority Protestant nation, and within that tradition, the appeal of *sola scriptura* is strong. Consequently, it can make for a good story to claim that one wants to vindicate the text. The story would move from the text, to an interpretation that is "caused" by the text, to the justification for adhering to that interpretation. Unfortunately, our constitutional text lacks the length and the richness that scripture has, so the stories that are based on text run the risk of being too thin. In order to generate a reasonably thick interpretation of the constitutional text, one must employ a rather elaborate set of canons, and this move detracts from the story telling. The "causal link" between the event of the text and the event of one's interpretation become implausible. Most textual interpretations do not make good stories.[37]

The second modality builds on the history of the text for its meaning as understood by those who gave it life. Ordinary people can and do refer to this sort of history, but they do so in a limited way, and furthermore, the laity never face the difficult questions with which scholars grapple: Whose understanding? Is it that of the drafters or of the ratifiers? I believe, like Crosskey, that one should give precedence to the ratifiers, and the moral case for this preference seems overwhelmingly correct to me—the drafters worked in secret, so their views were not presented to the people, and the drafters had

37. Charles Black, whom both Powell and Bobbitt revere, once sneered at "textual algebra." He meant no contempt for the text; he meant to condemn refined interpretations.

no legal authority to give life to the document, whereas the ratifiers did. The evidence is thin, inconclusive, and contradictory. Furthermore, one must always consider the possibility that contemporary understandings should trump ancient ones.[38]

The third modality is argument from precedent and doctrine, from the meaning that the text has been given over time.[39] Respect for authority is alive and well, and judges enjoy high prestige. Powell's practice calls for more; it calls for the laity to learn to make arguments from precedent. In one sense, any child can do it: "You let Johnny . . . ." However, consider the precedents that he would rely upon. His arguments draw upon court decisions, opinions of the Attorney General, practices of the executive department over time, and so forth. The arguments run the risk of becoming obscure and arcane, so they may not carry well.

The fourth modality is the argument from structure. One is to step back from the text and discern the structure of government created by it, and then, instead of interpreting the relevance of the text to the problem before us, one interprets the relevance of the structure created by the text to the problem. This argument takes two steps, not one; one does not argue directly, from text to result, but indirectly, from text to structure to result. Like many academics, this is my own personal favorite among the modalities. When I read a good structural argument, I am reminded of the sort of arguments that I was trained to make when I studied political science, architecture, and art; in each of the fields, I was taught to make the sort of argument that respected the many ways in which the parts fit together

38. Preferring current understanding is routine in the law, for example in the terms "dangerous weapons," "sound medical practice," and "commerce."

39. BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 17 (4th ed. 2000).

to make up a whole. Indeed, the interpretation of poetry in English class, in those ancient days, was an elaborate version of the structural argument. We were taught to understand the poem as a complex organic object; we were rewarded for seeing the complex structures of language, thought, and feeling that the poem captured.[40] However, I fear that this form of argument does not make for a good story.

The fifth modality is the prudential argument. This argument is as American as apple pie; it taps into the fundamental pragmatic temper of our people, and it makes a good story. One need only tell a story about probable consequences of different interpretations. These stories can be gripping, and they fit within Reynolds Price's typology rather easily. One tells the story of a sequence of events that moves chronologically from an interpretation, to actions based on that interpretation, to the consequences of those actions. In the sequence, chronology and causation are tightly linked. Moreover, the results are used as the justification for adopting or rejecting the initial interpretation.

Finally, there is the ethical argument, which proceeds from the character of the American people and their government. This argument generally works well outdoors; one can appeal to the fundamental aspirations of our people. One can tell a story about who we have been and who we hope to be, and these stories will fit Price's typology.

40. *See generally* WILLIAM EMPSON, THE STRUCTURE OF COMPLEX WORDS (Spottiswoode, Ballantine & Co. Ltd). This could be taken as the Ur-Text for all such interpretations.

IV. AN OBJECTION TO POWELL'S USE OF THE MODALITIES

As one looks back over Part III of this Article, one can note that the last two modalities, the arguments from pragmatism and character, make the best stories, if one assumes that my understanding of story-telling is correct. This fact makes some people uncomfortable.[41] Why? Is this disquiet well founded?

These last two modalities are the least technical in form, the least differentiated from ordinary discourse, and the easiest for outsiders to appraise. If one thinks that these matters should be the monopoly of the clerisy, then giving pride of place to these two modalities threatens the monopoly. To my taste, this is a base objection, as are most arguments that assume the rightness of a monopoly. Lawyers are not the only people who are entitled to make legal arguments. The outsiders have the right to say that we lawyers are misusing our craft.

A more subtle form of the monopoly thesis, and this is a morally proper reservation, is the sense that arguments from prudence and ethics are not really "legal" arguments. If true, this would be a good objection. However, it is false. Bobbitt has asserted that the six modalities are indigenous to the common law.[42] Indeed, his claim is that once we decide to make the Constitution our law, then the six modalities are inevitable because they are the heart of the common law argument. Speaking only for myself, I think that he is right about this. If one wants the Constitution to be law (one need not),

41. The reader of this Collection will be able to supply examples of those who are uncomfortable with Powell's use of the last two modalities.

42. This sort of article is not the place to engage in an elaborate empirical assessment of the accuracy of Bobbitt's thesis; for the moment, I will rest on the fact that most lawyers would be willing to nod "Yes" on hearing his thesis.

then it follows that legal arguments will be used to apply the Constitution to daily life. Legal arguments must come from somewhere; they must be found within the legal culture that exists, which in our culture, is the common law form of argument. Indeed, any objection to using the common law modes of argument to interpret the Constitution is really an objection to using the Constitution as law.

Another possible objection is that these two forms of arguments are vague and open ended, that they do not offer the solid ground that the first four do. I think that this objection is naive. The first four are just as indeterminate as the last two. Indeed, one can suggest that the fundamental achievement of the American Legal Realist movement was to make the academy, and large parts of the bar, aware of just how open ended legal argument in fact was.[43]

The deepest objection is that it is morally improper to let arguments from pragmatism and character be the trumps in constitutional argument, which I have argued that they will in fact be "out of doors." Prudentialism can have a bad name. Ronald Dworkin has claimed that policy cannot trump principle,[44] and one of our panelists asserted that policy cannot trump fundamental constitutional values.[45] There are two responses to this claim.

---

43. A thorough footnote would be as long as this essay, so perhaps a simple cite to Karl Lewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934), and to the greatest of his books, *The Case Law System in America* (Paul Gewirtzed and Michael Ansaldi trans., 1989), which was originally published in German in 1933 and first translated and published in English in 1989.

44. RONALD DWORKIN, MATTER OF PRINCIPLE (1986).

45. David Gray Adler, Speech at the Georgia State University College of Law Law Review Symposium (Jan. 31, 2003).

The simple minded response is that prudentialism is a fundamental value. Perhaps this reply does not go deep enough and can only appeal to a simple minded person like myself.[46]

So, let me make a deeper response to the argument. What is the story behind the claim that the prudential can never be the trump? I believe that it is the story of moral heroism, the stories about the prophets who condemned the abuse of Kingly power and the story about Socrates, who condemned the abuses of democracy. In these stories, the prophets and the philosopher stood up for principle against a worldly pragmatism. Alternatively, consider Bolt's More,[47] which may be a story that is closer on point because More argued a constitutional issue, unlike the moral heroes that we see in the Hebrew scriptures or in Greek philosophy, who seem to argue non-constitutional issues. Bolt's More would stand on the constitution of Christiandom against the dissolution of Europe into multiple secular sovereignties, and he rejected all arguments of pragmatism.

For this story to be persuasive, the values must be ultimate values. One can understand how the Prophets, Socrates, and More thought that they were resting their case on ultimate values. Why would panelists such as David Gray Adler and Louis Fisher believe that the constitutional values for which they would argue are ultimate values? Our constitutional values are human values; they are not the divine values that moved the great moral heroes. Perhaps the best story that Powell (and Bobbitt) could tell in response to Adler and Fisher is the

46. *See, e.g.*, RICHARD POSNER, ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS 167-77, 187-88 (1994).

47. Most of us know very little about the historical person, but many of us have been moved by the playwright's portrayal of him in *A Man for All Seasons*.

story that they have committed the sin of idolatry.[48] Alternatively, for those who prefer secular categories and do not wish to use the category of idolatry, perhaps a citation to President Abraham Lincoln[49] or Justice Jackson[50] will suffice.

Let me return to Powell and Bobbitt. I have spoken of the modalities in general, whether they make good stories. What about Powell and Bobbitt themselves? Do they tell good stories? Yes! They have the southern gift for narrative. Bobbitt's book on the modalities is full of stories,[51] and he has just published a book that is an historical narrative on the grandest of scales.[52] Furthermore, consider Powell's book that we celebrate today. The centerpiece of that book is a sixty page section entitled "President Washington's Answer to Professor Corwin's Question," in which he tells the story of how the Constitution was construed and administered in the days of the Early Republic. [53] I will confess that to my mind, these sixty pages are the best part of the book; his prose, which is always graceful, becomes vigorous and animated in these pages, and the stories that he tells about the Early Republic are fascinating.

---

48. Because they are both men of faith, they would probably find the metaphor of idolatry to be appropriate.

49. *See* BREST ET AL., *supra* note 39, at 224-25.

50. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

51. Note how he presents each modality by telling a story about someone who was devoted to that modality.

52. PHILIP C. BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (Knopf 2002).

53. POWELL, *supra* note 2, at 34-94.

V. JUDGING THE STORIES TOLD OUTDOORS

Finally, we will shift the focus to myself. When I spoke out of doors, what sort of constitutional stories did I tell, and were my stories legitimate, if they are judged by the modalities? I set aside the stories that were part of my trial practice of criminal law. These were fascinating stories that resembled the soap operas of desires driven by lust and greed, but they are not the topic of today's essay.

My most dramatic constitutional stories were told when I was in the Department of Justice during the summer of 1965. The Voting Rights Act of 1965 had just passed, and the Department had the responsibility of enforcing it. Young lawyers such as myself were first sent out as a member of teams. We quickly gained experience in the first hand administration of the Act, so after I was a seasoned hand, had done the job for two or three months (we were dreadfully short handed for the vast task that faced us, and consequently, a large responsibility was given to junior lawyers), I was sent out on my own. My assignment was to go to Jeff Davis County, Mississippi.[54] My job was to find each polling place, find each person who would have any role in the administration of voting laws, and speak to them about their legal responsibilities under the new Act.

I would start by showing them my identification, the black leather folder which one would flip open to reveal a picture and a certificate, the evidence that I was a civil officer of the United States, employed by the Department of Justice. Then, I would state my business: "My name is Lewis Henry LaRue. I am an attorney with the Civil Right Division of the United States Department of Justice. You know,

54. The formal name is Jefferson Davis County, but I never heard it called that, either in the District or in Mississippi.

don't you, that blacks will be voting in this next election? I hope that there will be no problems."

The first response was one of incredulity, sort of "you've got to be kidding," even though those exact words were not said. Once it was clear that I was indeed serious, we could proceed to the conversation that dealt with important business.[55] Not only did I speak with those who were part of the election apparatus, I also spoke to law enforcement officers and other public officials. Of course, as in any small town in the south of those days, in the small town of Prentiss, Mississippi, the county seat, it is soon known when a stranger comes to town; it is soon known who he is and why he is there. Furthermore, it was easy for anyone to pick me out by eye. Most of the time, I would be the only man in view who was wearing a suit.

As you can imagine, I was asked questions. Sometimes, people would walk up to me on the sidewalk and ask questions. When I say that I spoke "out of doors" about the Constitution, the phrase was literally accurate. My interlocutors would typically ask me two types of questions. To put them abstractly: by what authority does the U.S. Justice Department have the power to play a role in local elections, and by what authority does the U.S. Congress have the power to pass the Act? Of course, the questions were not asked in the abstract legal vocabulary that I have just used; a colloquial version was asked.

---

55. In what follows, I report on questions asked to me by white citizens of Mississippi. The black citizens asked different questions; they wanted to know if we were serious, or if we would cut and run when the heat went up. Additionally, they wanted to know exactly what practical steps we would take. Their questions were far more difficult to answer than the questions asked by whites. Perhaps this is the place to record the first two lines of a folk song that was sung among civil rights workers: "There's a Department named Justice. They say it's in D.C." Put the right intonation on the verbs "named" and "say," and you may obtain the right feel for the fact that blacks as well as whites had some doubts about Justice Department lawyers.

Consider the first question, the one that addresses the Justice Department's authority and role. The question asked was more personal; it was always about my role. Not an abstract question about the Department; a personal question about me. A white Mississippian would ask: "Why are you here?" "What are you doing here?" The unspoken assumptions were: I was in Jeff Davis County as a Justice Department lawyer, and I was there because I (and the Department) did not trust the local government. The tone of the question was that of an accusation; the implied question that lay behind the words used was: "How can you justify your treating us with such contemptuous disrespect and distrust?"

The school book answer is trivially obvious. The Justice Department is charged by law with enforcing the statutes of the United States. The Voting Rights Act of 1965 is a statute of the United States. Investigation is a necessary preliminary to enforcement, and so on. It is also trivially obvious that such an answer would not speak to the inner needs of the human before me. The school book answer is abstract, not concrete. It addresses institutional necessity, not human necessity.

To speak to the human before me, I did not make a speech. I asked questions, preferring to speak by way of a colloquy rather than a monologue.

My first query: "You know, don't you, that people are going to say that the local government here in Mississippi denies people their right to vote?" The conversation that followed this question was short, and there was agreement. My interlocutors believed that the world was full of malcontents, who were being "stirred up" by "outside agitators." Indeed, my interlocutors might even believe that unfair

complaints would be made, no matter how fairly the election was run.

My second query: "And you also know, don't you, that the national press will pick up on these complaints and report them?" As before, agreement followed. It was a commonplace opinion in Mississippi that the national press was hostile to their state. In those days, CBS was referred to in Mississippi as the "Communist Broadcasting System." I will refrain from saying what the "N" in NBC was said to stand for. Clearly, my interlocutors would assume hostility from these organizations.

Then, the third pitch for three strikes in a row: "So, what would you rather I do? Do you want me to stay up in D.C. and rely on what I read in the Washington Post or what I see on NBC, or would you rather that I come down here and see for myself?" It may seem strange to some, but agreement followed. While I was not exactly welcomed with open arms, the basic legitimacy of my presence was accepted.

Why did this appeal work?[56] I think that it worked because the most powerful of all human illusions is self-deception. We all believe that our actions are more honorable than they really are. We all tell stories about our lives in which we cut a somewhat grander figure than an objective observer would perceive. So, it should come as no surprise to anyone to learn that one of the basic stories of Mississippi culture was a story about how the national press was

56. This precise question was asked of me in an informal colloquy after the formal presentation; what follows is my best answer.

unfair, together with a story that anyone who knew the real facts would learn how unjust the press had been to them.[57]

Let me move now to the second question that I was asked on the sidewalks of Prentiss, the question which asks about the authority of Congress to pass the Voting Rights Act of 1965. Once again, the school book answer is trivial. Congress has the power to enforce the Fifteenth Amendment. Mississippi had violated the Fifteenth Amendment by denying its black citizens the right to vote. Consequently, Congress can compel Mississippi to comply with the Fifteenth Amendment. One can even add at this point some doctrine about congressional power to choose among various means of enforcing the statute and point out that the Congress has wide discretion in choosing among means.

However, the question was never as abstract as I have just stated it to be. Instead, the questions focused on a particular detail of the Act: "How is it fair that Congress can tell us that we have to let illiterates vote here in Mississippi, while they let New York prevent illiterates from voting?" As above, I responded with a three part colloquy.

First query: "Did you know that in Wyoming they let illiterates vote?" This fact was not familiar to my interlocutors[58] and always had a sort of shock value that generated puzzlement. By throwing my interlocutors off guard, it opened them up to the possibility of entertaining new and different thoughts.

Second query: "And, you don't think that book learning is what gives a man good sense, do you?" This rhetorical question drew

57. Perhaps here I could allude to the famous Socratic argument that no one does wrong willingly, that all who do wrong this they are doing right. Whether one finds the Socratic argument plausible turns on how powerful one thinks the illusions of self-deception are.

58. By the way, I did not do any research to support this statement of fact; I relied upon what I was told by my colleagues in the Department. I hope that they were reliable.

willing assent. My interlocutors were always people who had only limited "book learning," so they had to assent, or else condemn themselves.

Finally, the third pitch for the strike out: "So, let me ask you, who would you rather have vote? Those students out at Berkeley who are always rioting and running around naked? Or, the good church-going blacks who live right here in Jeff Davis County?" Given the poor reputation of Berkeley in Mississippi, this too would draw forth assent.

These were the stories that I told "out of doors." In telling them, did I betray the modalities of argument that Powell and Bobbitt advance? I do not fear that they will condemn me. They are both gentlemen; they are both men of faith; neither suffers from the common academic defect of hardness of the heart. I can confidently expect charity. Unfortunately, charity is not enough. I have a duty to judge myself more rigorously than that. Did I betray what they have written? Did I fail to educate? At the time, back in 1965, my colleagues knew what I had said on the sidewalks of Prentiss in Jeff Davis County; I told them. Some of them thought that what I had said was improper.

My response to the first question—why are you here?—was judged to be both clever and funny; I was never condemned for it. My response to the second question, with the concluding line about the students at Berkeley, was controversial. One of my mentors, whom I admired greatly, said to me: "Lash, you are a bigger whore than [name-deleted]."[59]

59. I have no desire to suppress the actual name of "[name-deleted]," but I did not want to state his name in the text, but rather reserve it for this footnote. My colleague's reference was to Nicholas Katzenbach, whom I admired greatly as one of our finest public servants, but whom my colleague

According to Powell and Bobbitt, my fundamental duty, when I spoke out of doors, was the duty to educate. I agree, but to lecture is not to educate. Merely making an argument, while using the modalities, is not to educate. One of the basic maxims of teaching is that one does not teach material, one teaches students (the second most basic maxim is that the best logical order for the material in a course is never the best pedagogical order for presenting the material). So, by engaging in a colloquy with my interlocutors, and by speaking to their human needs, not the Department's institutional needs, I took the right step toward fulfilling my duty to educate. What about the content of what I said? Let us take each of the three parts of my colloquy in order, for each of the questions.

First question: When I asked whether they agreed that complaints would be made, one may judge me to have pandered too much to the paranoia of my interlocutors, but speaking to another's fears is always appropriate. To remind others that things can go wrong is always important, so saying that there would be complaints was to say the truth. The interlocutors may have agreed because of paranoia, but I rested on a true story, a story of inevitable error and complaint. To say that our errors will be publicized is again a reasonable story. When I was starting out as a government lawyer, one of the most useful pieces of advice that I ever received was: "When you write a memo, imagine that it will be on the front page of

---

thought was a mere fence-sitting politician. Such variable evaluations are the lot of anyone who serves as Attorney General of the United States. One can only hope that whatever torment that Katzenbach suffered from knowing that he was misjudged by people like my colleague will be the sort of torment that counts off in Purgatory. One can have this hope, even if there is no Purgatory.

the Washington Post tomorrow and ask how it will look."[60] So, I always tried to imagine what that story would be and whether I could live with that. The second step in my colloquy was no more than what I had lived by. As for the third question, I merely appealed to the superiority of first hand knowledge, which is one of the basic principles of the rules of evidence.[61] I admit that the paranoia of my interlocutors may have motivated the assent, yet I defend that I had spoken a true and honorable story.

My colloquy in response to the question about congressional authority is rather more controversial, and I admit that I will have to work harder to defend this one. Consider first the question about Wyoming. I believe that this was not a red-herring; it was an attempt to force my interlocutors to change their reference class. My appeal was that they see the issue not as a comparison that pits Mississippi against New York and Connecticut, but one that holds up the comparison of Mississippi against Wyoming and Montana. Why is that not legitimate?[62] I was asking the interlocutors to expand their imagination.

---

60. My memory is that I first heard this when I worked during the summer for Robert Hatch, Counsel to the Commandant of the Marine Corps, but I do not remember whether I heard it from him or from one of the other experienced government lawyers that I met that summer.

A law school colleague, Albert Beveridge, told me that when he first formed a partnership with William Ruckelshaus, Ruckelshaus stated the same principle for memo writing, which leads me to believe that this sort of advice is widespread among government lawyers.

Furthermore, as one of my wise mentors in criminal law once told me: "Remember that you must always treat your client's statements as confidential matters, but also remember that your clients have no such duty toward you. If they can get any advantage in life by disclosure, they will. So, be careful about what you say or write."

61. FED. R. EVID. 602.

62. Note that Congress eventually amended the Voting Rights Act so that the prohibition on using literacy tests applied nationwide, so in retrospect, my sin may have been being ahead of the time.

Consider next my question about the relevance of book learning. Perhaps I betray myself as nothing but a populist redneck, but I honestly believe that my claim was true, that common sense and political sense are not related to the amount of education that one has. If I may be allowed a further comment in this vein, a career spent in academia has done nothing to change my opinion.[63]

Finally, there is the slighting reference to Berkeley students. This part of my colloquy sounds like a terrible ad homonym, like pandering to the worst prejudices of my interlocutors. However, once again, I plead the defense of honesty. I honestly believed, then and now, that the uneducated blacks of Mississippi deserved the vote just as much as did the highly educated students at Berkeley. I spoke to many of the black citizens of Mississippi, both the literate and the illiterate. They taught me that they understood perfectly well what mattered, and what did not matter, in politics.[64]

In light of the above, the reader may grant me the fact of honesty, but the issue of the relevance of the honesty remains a problem. The argument was honest, but this does nothing to prove that my argument was constitutionally legitimate. To show legitimacy, I must show that my colloquy fits into the modalities of constitutional argument because I agree that these modalities are the measure of legitimacy. My thesis that I can defend what I said should perhaps be discounted by my obvious self-interest in so claiming, and one can

63. My belief is solidified in my mind by the judgments of my wife, who has run for office and served as a member of City Council in Lexington, Virginia. She has seen both academics and non-academics speak in public on public business, and she agrees totally with my position on this issue.

64. "And for insight into the human reality of constitutional law, I owe the most to the good citizens of Mississippi, both black and white, who taught me what was at stake." L. H. LARUE, CONSTITUTIONAL LAW AS FICTION (1995).

easily plead against me my comments above about the power of self-deception. At the risk of appearing foolish, let me proceed.

The basic thesis that underlies the entire colloquy is the thesis of human equality. The whole point of the colloquy is that illiterates are morally equal to literates and that they are equally entitled to political representation. This thesis has its source in the Declaration of Independence,[65] and the narrative that best embodies this thesis appears in President Lincoln's Gettysburg Address, where he tells a story that begins, "Four score and seven years ago, our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal."[66] As the reader may have guessed, the modality that gives legitimacy to this thesis is the sixth modality, the modality of ethical character. One may ask, "What type of people are we?" The answer is that we are a people who are dedicated to a proposition. One may further ask, "What is the character of our government?" The answer is that it is one of the several forms of government that one could build on the basis of this proposition.

I know that my appeal to the Declaration of Independence as a defense of my colloquy will not persuade many because this noble defense is spoiled by the ugly fact that I appealed to a prejudice in making it. I appealed to the anti-Berkeley prejudice that was so rampant in Mississippi, to the anti-intellectual prejudice that is rampant in the entire nation. So, what plea can I enter to the charge that my noble defense is spoiled by the ugly fact of the appeal to

65. See Title 1, United States Code, where the Declaration leads off the section entitled "The Organic Laws of the United States of America."

66. Garry Wills' book, *Lincoln at Gettysburg*, is the loveliest evocation of the spirit of this great speech. See also Ronald C. White, Jr., *Lincoln's Greatest Speech*, for commentary on Lincoln's Second Inaugural, which is an even greater speech.

prejudice. In common law pleading, there are only three pleas that go to the merits of a claim: one can traverse, demur, or confess and avoid.

The word "traverse" can best be translated into modern English by the phrase "not so."[67] When one enters this plea, one denies the truth of the facts alleged in the complaint. I cannot deny the plain fact that I did appeal to a prejudice. So, what about the second of the three pleas? The word "demur" can best be translated by the phrase "so what." When one enters this plea, one admits that the facts are true, but one asserts that the facts do not give rise to a valid claim. I cannot say that appealing to prejudice is not morally, legally, or constitutionally relevant; it is. Therefore, I am left only with the last plea as my hope.

The phrase "confess and avoid" can best be translated by the phrase "yes, but . . . ." When one enters this plea, which I do, one says "yes, it is true what you say, but even so, I have a defense." So, my defense is that yes, I appealed to a prejudice and normally that would be bad, but in this case, the prejudice to which I appealed had a redeeming feature within it, and I appealed to the redemptive element in this prejudice. Anti-intellectualism has as a part of it the bad feature of unthinking hostility to that which is above us. It also contains within itself the belief in human equality, which is good. It is an unfortunate fact of life that human beliefs often combine both good and bad features. Patriotism often comes mixed with xenophobia. Justice often comes mixed with rigidity and self-righteousness. Prudence often comes mixed with cowardice. When appealing to the good in a social belief, one often stirs up the bad, but

67. In what follows, I borrow from the witty exposition of common law pleading set forth by Charles Rembar in his book *The Law of the Land* at page 226.

I see no alternative, or at the least, I saw none back in 1965 when I stood on the sidewalks of Prentiss, Mississippi.

CONCLUSION

One of my theses in this Article is that constitutional lawyers need to know how to argue to people other than to judges. It is our civic duty to leave our clerisy behind and speak to the laity. However, I have not argued for this thesis; I merely take it for granted. I have argued a thesis about what skills one needs to argue the Constitution "out of doors." The most important skill is knowing how to tell a story.

Consequently, it should come as no surprise that I have told stories throughout this Article, trying to mix the different modes of story and argument so as to advance my thesis. At the very beginning of this Article, I told a story about my career, about how I differed from most academics in my having been a trial lawyer. At the end of the Article, I told stories about being in Prentiss, Mississippi after the Voting Rights Act of 1965 was passed. In between, the discerning reader will be able to notice some shifts into the narrative mode from time to time. After all, it would not be right for me to praise stories unless I was also willing to tell them myself.

Yet, story telling is not self-evidently a worthy pursuit, although it does seem endemic to our species. Furthermore, not all stories are morally defensible. So, I needed to end Part V by trying to defend the particular stories that I once told. It would not surprise me to discover that many will find the stories interesting but the defense weak. Our polity is comprised of those who hold radically different moral views; therefore, it would be astonishing if my defense

persuaded everyone. Consequently, I do not regard my self-defense as an important thesis. The key thesis is the importance of telling a story in speaking to the laity. I rest on this point.