

The Many Ways of Constitutional Discourse

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On January 31, 2026, in a stunning three-page order by Judge Fred Biery, the United States District Court for the Western District of Texas granted habeas relief to five-year-old Liam Conejo Ramos and his father Adrian Conejo Arias—who had been detained by ICE. Some critics, law professors among them, have claimed that Judge Biery’s order is lawless, and beyond the bounds of constitutional and legal argumentation. In this short piece, I explain how Judge Biery’s order contains several arguments completely cognizable in our constitutional discourse. Even if the district court’s order does not fit into the prototypical mold of court orders, as matter of its substance, it is appropriately engaged in constitutional discourse.

On January 20, 2026, Liam Conejo Ramos, age five, was apprehended and detained by Immigration and Customs Enforcement (ICE).¹ Liam’s father, Adrien Conejo Arias, was bringing Liam home from preschool when Arias was detained by ICE.² Onlookers reported that agents then took Liam from a running car and used him as “bait” to lure other family members out of their home.³ Liam and his father were both immediately sent to

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1. Hallie Golden and Sarah Raza, *Federal Officers Detain a 5-Year-Old Boy Who a School Official Says Was Used as ‘Bait’*, AP NEWS (Jan. 22, 2026), <https://apnews.com/article/immigration-minnesota-boy-father-detained-342f319fafb766d13afe07f5bcc1f112> [<https://perma.cc/6H3U-UY2W>].
2. *Id.*
3. *Id.* Federal officials disputed this allegation. Jack Dura, *5-Year-Old Liam Conejo Ramos and Father Return to Minnesota from ICE Facility in*

an ICE facility near San Antonio, Texas.⁴ They challenged their detention through the writ of habeas corpus.⁵

On January 31, 2026, in a stunning three-page order by Judge Fred Biery, the United States District Court for the Western District of Texas granted the Great Writ and released Liam and his father from ICE detention.⁶ The district court first observed that the case had “its genesis in the ill-conceived and incompetently-implemented government pursuit of daily deportation quotas, apparently even if it requires traumatizing children.”⁷ The court further noted that “[t]his Court and others regularly send undocumented people to prison and orders them deported but do so by proper legal procedures.”⁸

Thereafter, the district court cited to several grievances from the Declaration of Independence that, seemingly in the court’s view, mirror current practices by DHS.⁹ The district court further quoted the text of the Fourth Amendment.¹⁰ And then the court concluded its substantive analysis by noting that adminis-

Texas, AP NEWS (Feb. 1, 2026, at 21:26 CT), <https://apnews.com/article/minnesota-boy-liam-conejo-ramos-fc958185cd2b4e946b82081be11bc0f6> [https://perma.cc/25P7-TYA7].

4. Nicholas Bogel-Burroughs and Sonia A. Rao, *Detention of 5-Year-Old by Federal Agents Incenses Minneapolis*, N.Y. TIMES (Jan. 22, 2026), <https://www.nytimes.com/2026/01/22/us/liam-detention-ice-minneapolis.html> [https://perma.cc/2ZAG-YNNU].
5. *Arias v. Noem*, No. SA-26-CV-415, 2026 WL 255706, at *1 (W.D. Tex., Jan. 31, 2026).
6. *Arias v. Noem*, No. SA-26-CV-415, slip op. at 3 (W.D. Tex., Jan. 31, 2026), available at <https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172886492/gov.uscourts.txwd.1172886492.9.0.pdf> [https://perma.cc/T9S8-EQQ7].
7. *Arias*, 2026 WL 255706, at *1.
8. *Id.*
9. *Id.* (quoting THE DECLARATION OF INDEPENDENCE paras. 12, 13, 16, 29 (U.S. 1776)).
10. *Id.* (quoting U.S. CONST. amend. IV).

trative warrants issued by the executive branch do not pass constitutional muster to fulfill the probable cause requirement.¹¹

The court signed off as follows:

Philadelphia, September 17, 1787: “Well, Dr. Franklin, what do we have?” “A republic, if you can keep it.”

With a judicial finger in the constitutional dike,

It is so ORDERED.¹²

Finally, below his signature, Judge Biery included a photo of Liam Ramos and included two biblical citations: Matthew 19:14 and John 11:35.¹³

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Some critics, law professors among them, have claimed that Judge Biery’s order is lawless, and beyond the bounds of constitutional and legal argumentation.¹⁴ This, I take, to be a claim be-

11. *Id.*

12. *Id.*

13. *Arias*, slip op. at 3.

14. For example, a University of Minnesota law professor and constitutional scholar criticized it for having “[n]o reasoning, no explanation of what the legal claim is or why it’s right or wrong, gratuitous political comments, and dubious and extraneous invocation of the Declaration.” Ilan Wurman (@ilan_wurman), X (Jan. 31, 2026, at 17:14 CT), https://x.com/ilan_wurman/status/2017738196717867195 [<https://perma.cc/X8G5-G3MM>]. The Resident Fellow of an immigration thinktank criticized the opinion for “lack[ing] any legal analysis” and said Judge Biery was “placing a ham-fisted thumb on the legal scale.” Andrew R. Arthur, *Texas Judge Orders Five-Year-Old Minnesota Boy, Father Released in Bizarre Order*, CENTER FOR IMMIGRATION STUDIES (Feb. 2, 2026), <https://cis.org/Arthur/Texas-Judge-Orders-FiveYearOld-Minnesota-Boy-Father-Released-Bizarre-Order> [<https://perma.cc/W9MS-A9Q3>]. An Associate Professor at St. Johns University School of Law and Senior Editor at Lawfare wrote of the decision, “Unpopular opinion: Meme law is bad.” Kate Klönick (@klönick.bsky.social), BLUESKY (Feb. 3, 2026, at 18:01 CT), <https://bsky.app/profile/klönick.bsky.social/post/3mdyl3hrkgk2i> [<https://perma.cc/A8MA-J3VD>]. And the former Chief of Staff of this Administration’s Department of Justice said the order shows that “the liberal judiciary is unhinged.” Chad Mizelle (@chad_mizelle), X

yond criticism of the correctness of the district court’s order — rather, I understand it to be a claim that the district court was not engaged in constitutional or legal reasoning at all.¹⁵

I disagree. I contend that Judge Biery’s order contains several arguments completely cognizable in our constitutional discourse. To this end, I embrace scholar Philip Bobbitt’s six modalities of constitutional argumentation:

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).¹⁶

Bobbitt’s modalities have been called a “constitutional grammar.”¹⁷ They are a typography of the proper forms of constitutional argumentation.¹⁸

(Jan. 31, 2026, at 18:21 CT), https://x.com/chad_mizelle/status/2017755027901644902 [<https://perma.cc/42CJ-8XXG>]. See also T. Beckett Adams, ‘Resistance’-Rotted Judge’s Anti-ICE Emoting Only Undermines His Own Case, N.Y. POST (Feb. 3, 2026, at 18:15 ET), <https://nypost.com/2026/02/03/opinion/resistance-rotted-judges-anti-ice-emoting-undermines-his-own-case-judge/> [<https://perma.cc/57XC-5X8V>] (calling the order “heavy on moral posturing and light on law” and saying it “mudd[ies] things with unnecessary sentimentalism”).

15. Cf. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (“[*Roe v. Wade*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”).
16. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991).
17. J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEXAS L. REV. 1771, 1776 (1994).
18. *Id.* Bobbitt’s modalities are not the only typology of constitutional argumentation. In his opus, *Memory and Authority: The Uses of History in*

To be clear, that does not mean every argument fashioned in the form of one of these modalities is correct. Of course not. In every case, there are diametrically opposed arguments offered in the form of some modality, and indeed many cases will involve opposed arguments of the same modality. Rather, the point is that when one is making arguments of the modalities, they are engaging in our constitutional discourse.

With respect to Judge Biery's order, my point is not that his order is correct on the law—for present purposes, I am agnostic on that matter. Additionally, I do not claim that the order is well-crafted—again, for present purposes, I am agnostic. It is not the opinion that I would write, but inquiries into the efficacy and quality of judicial writing implicate questions about the judicial role—questions too big for this piece. Rather, my point is that, even if short, even if pithy, and even if it cites materials that are

Constitutional Interpretation, Jack Balkin offers eleven modalities: text, structure, purpose, consequences, precedent, convention, custom, natural law, national ethos, political tradition, and honored authority. JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 18-20 (2024). Richard Fallon contended that there were five principal types of constitutional argument:

arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy.

Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987).

I use Bobbitt's modalities mainly because his typology appears to be more limited and restrictive in what it recognizes as appropriate constitutional discourse, and thus if the order is cognizable under Bobbitt's modalities, *a fortiori* it would be appropriate under other typologies, including Balkin's and Fallon's.

not themselves legally binding, the order is properly engaged in our constitutional discourse.

The following are cognizable constitutional arguments I see in the order:

First, the district court makes a straightforward textual argument: The text of the Fourth Amendment requires reasonable searches and seizures, and that has been interpreted to mean that law enforcement must obtain a warrant prior to engaging in such searches and seizures.¹⁹ Here the government seems to have cited its administrative warrant as satisfying the Fourth Amendment requirements.²⁰ The court explains that is insufficient—because it does not provide the requisite oversight that the Fourth Amendment contemplates—and consequently orders release.²¹

Second, the district court cites the Declaration of Independence to suggest that ICE and DHS, at the direction of the President, are engaged in wrongful behavior.²² Now, the Declaration of Independence itself is not binding law in the United States. But the Declaration is relevant to understanding the meaning of the Constitution.²³ That is, we know that the Constitution was drafted in the shadow of the Declaration of Independence—which enumerates several grievances against King George III’s

19. *Arias*, 2026 WL 255706, at *1 (quoting U.S. CONST. amend. IV).

20. *Id.*

21. *Id.* Indeed, I have argued that where the government engages in willful, widespread, egregious Fourth Amendment violations, there should be a “Proceeding Exclusionary Rule” that would restrict the government from bringing a removal proceeding (at least for some period of time). Guha Krishnamurthi, *Remedying Unconstitutional Immigration Enforcement*, 2025 CARDOZO L. REV. *de novo* 68, 89 (2025).

22. *Arias*, 2026 WL 255706 at *1 (quoting THE DECLARATION OF INDEPENDENCE paras. 12, 13, 16, 29 (U.S. 1776)).

23. CHARLES L., JR. BLACK, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 5–9 (1997).

abuses of power.²⁴ It stands to reason that the framers, in drafting the Constitution, would have been responsive to the very abuses that gave rise to their declaration of independence. Consequently, we have strong reason to read the Constitution as prohibiting—or at least requiring a check on—those abuses of power by the executive branch. This fits into the historical modality of constitutional discourse.

Third, the court’s sign-off, referencing Franklin’s quip,²⁵ is a separation of powers argument. The judiciary is one of the branches that checks executive overreach, and the court maintains that it is simply fulfilling its constitutional duty. This is in the structural modality of constitutional discourse.

Fourth, even the biblical references arguably sound in constitutional argumentation. Those citations come under a picture of Liam Conejo Ramos being detained.²⁶ The cited passages read:

But Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven.²⁷

And,

Jesus wept.²⁸

One way of understanding the citation of these passages is as a claim that DHS’s actions violate our common notions of decency. That is, the biblical passages substantiate a broad and fundamental belief that children should be treated with special care. In that way, I think of this argument as sounding in the “ethical” modality. It is an argument that captures a feature of the ethos of our society—namely, that we should treat innocent children

24. See THE DECLARATION OF INDEPENDENCE paras. 2–29 (U.S. 1776).

25. *Arias*, 2026 WL 255706 at *1.

26. *Arias*, slip op. at 3.

27. Matthew 19:14 (King James).

28. John 11:35 (King James).

with the utmost care and consideration, rather than unnecessarily detaining them or using them as bait against family members.

However, scriptural citations are not common in judicial opinions, and their appropriateness is not without nuance. Critically important is the purpose for which the biblical passages are cited. If, as I suggest, the passages are cited for the purpose of substantiating *widespread* moral and ethical views, that is appropriate, as an instantiation of the ethical modality of constitutional reasoning. However, if the passages are cited for idiosyncratic or sectarian principles, then such citation would seem to violate our principles of secularism and our commitment against Establishment.

There are at least three ways that a judge's use of scriptural citations may be inappropriate: First, it would be inappropriate for a judge to contend that the cited scripture is a legal source in itself. This is distinct from scripture serving as *evidence* of some widespread ethical view; it is the claim that scripture is itself legally binding. Here, the claim would be that these biblical passages have legally binding effect, not merely that they evidence an ethical principle undergirding our law.

Second, and relatedly, it would be inappropriate for a judge to suggest that particular religious adherents are commanded by scripture to act a certain way—here, that Christians in government roles should be following biblical principles, as reflected in those passages.

Third, it would be inappropriate for a judge to use scripture to suggest hypocrisy on the part an actor's purported religious commitments—for example, that the Trump Administration is not acting in accord with its own purported commitment to Christianity, as demonstrated by these biblical citations.

It is not clear that Judge Biery is pursuing any of these inappropriate ends with his citation of biblical passages. On my read-

ing, Judge Biery's order is employing the biblical citations to suggest that the government conduct violates well-settled, accepted norms. But insofar as the opinion is employing these passages for the aforementioned inappropriate reasons, I contend that all of these are outside the bounds of our constitutional discourse. It is simply not the case that the Bible, or any other religious scripture, is binding law in our nation. And it would be inappropriate for judges to opine on whether individuals and the government are acting in accord with particularized religious commitments. That is beyond the judicial role in our secular constitutional republic.²⁹

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Thus, in sum, although the district court's order does not fit into the prototypical mold of court orders, its arguments fit within well-established modalities of constitutional interpretation. As a matter of its substance, then, it is appropriately engaged in constitutional discourse.

29. Finally, one might suggest that the placement of the biblical citations, after the signature line, suggest that these were personal annotations—and not part of the content of the legal order. If so, such annotations do not contribute to the legal arguments of the order, and are thus not part of the constitutional discourse.