

Michigan Law Review

Volume 91 | Issue 6

1993

Constitutional Judgment

Gene R. Nichol
University of Colorado

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107 (1993).
Available at: <https://repository.law.umich.edu/mlr/vol91/iss6/2>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL JUDGMENT

*Gene R. Nichol**

CONSTITUTIONAL INTERPRETATION. By *Philip Bobbitt*. Cambridge, Mass.: Basil Blackwell, Inc. 1991. Pp. 228. Cloth, \$47.95; paper, \$16.95.

Once upon a time, there was a liberal activist U.S. Supreme Court. An ex-California Governor, a populist southern Senator, an NAACP litigator, a New Jersey Supreme Court Justice, a law professor, and some others initiated a legal revolution in America. They enforced the Bill of Rights against the states, dismantled legally imposed segregation, interpreted laws to provide protection for the poor, nixed orchestrated public school prayer, made the Fourth Amendment meaningful, discovered a right to "privacy," made *Miranda* a household word, and held that the guarantees of freedom of speech and the press actually limit the authority of government.

Many found the vision of law and legal institutions that the Warren Court announced both consistent and inspiring. Idealistic young lawyers entered the profession as a way of fostering human dignity and equality. Litigators searched for "impact" cases, and law professors cheered the Court in its crusade. It seemed possible to change the world without going to the trouble of getting elected to office. It was, in short, heady stuff.

But, as is usually the case, not everyone saw the Warren Court the same way. At first, southern racists and states' rights advocates assailed the Court's work, but this only enhanced the apparent justice of the Court's efforts. Eventually, however, large numbers of Americans and their leaders began to see the Supreme Court's record as one of usurpation. This, after all, is a democracy. If unelected judges dictate unalterable national social policies, we have ceased to govern ourselves; even "progressive" political rules should be subjected to the rigors of the electoral process. So presidents promised to change the direction of the judiciary — they appointed jurists who would apply the law, not make it up, and who would "strictly construe" the constitutional charter.¹ This political move, to be sure, was not an immediate success. Not only did the first set of new justices fail to launch an

* Dean and Professor of Law, University of Colorado. B.A. 1973, Oklahoma State; J.D. 1976, University of Texas. — Ed.

1. President Nixon eventually may have found reason to soften his views on strict construction. See *United States v. Nixon*, 418 U.S. 683 (1974).

effective counterrevolution,² but they declared women legally equal and rather violently discarded the country's abortion laws. Nevertheless, a course was set, and after ten tries or so, conservative presidents have achieved some measure of success.

While this political-legal battle raged, an academic cottage industry was born, or perhaps reborn. Constitutional theorists appeared and chose sides. Most of them sought, quite overtly, to salvage and justify what they considered the heroic legacy of the Warren and early Burger Courts. To explain that *Brown*³ and *Roe*⁴ were correctly decided, and that *Lochner*⁵ was not, became vital. That task alone was a full time job; but it was, no doubt, a job worth doing. For if theories could be woven with sufficient persuasiveness and sufficient power, the judicial world would listen. A majestic view of constitutionalism could thus be secured.

Of course, only part of the academic community joined in this enterprise. Others honed critical skills by attacking the activist legacy. Not only, in their view, was the Court's work illegitimate, but the academy's defense of it was even more elitist and flawed. Discretion in the hands of a social-engineering judiciary clearly amounted to an assumed authority to legislate. These critics, therefore, called for significant restraints on judicial power. When another former California Governor received the appointment power, he seemed just the fellow to put such restraints in place. In some important ways, he did so.

What both of these academic camps had in common was a belief that legal scholars were significant constitutional actors. Like editorial writers for major newspapers, their essays and critiques would temper the movement of government. Like minor oracles, they could speak directly to the U.S. Supreme Court. Not mere speculative theorists, these players' efforts would bring forth the desired fruit or the sought-after social policy.

Gradually, though, things began to change. For liberal theorists, the federal judiciary became a foreign domain. Republican presidents knew what they were doing; the new jurists had different inclinations than Earl Warren and William Brennan. At least by the mid-1980s, liberal activists could no longer realistically believe that the judiciary would be sympathetic to their suggestions. In a fundamental sense, the conservative academic critics were no better off. Their strongest successes had come in debunking the work of the Court and its defenders. Although the political winds now blew in their direction, they had a difficult time taking "yes" for an answer. If the liberal

2. See VINCENT BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983).

3. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

4. *Roe v. Wade*, 410 U.S. 113 (1973).

5. *Lochner v. New York*, 198 U.S. 45 (1905).

theorists seemed suddenly anachronistic, the conservative critics had lost their principal targets and the opportunity to display their talent for hurling grenades. They suddenly lacked direction.

In recent years, to oversimplify grossly, constitutional scholars have tended to react to their lost judicial audience in one of two ways. First, and always an alternative in academia, many have simply kept doing the same thing.⁶ Somewhat more sophisticated and less doctrinal, frequently more "textured," and often reflecting the learning of other disciplines, these experts have continued to produce advocacy scholarship and simply ignored the fact that no one who counted was actually listening.⁷ They are, as my colleague Pierre Schlag puts it, "normative" with "nowhere to go."⁸

Presumably more sophisticated commentators turned inward, crafting works designed primarily to be read by other academics. This brand of constitutional theory, or perhaps "metatheory,"⁹ concerned itself little with the application of legal principles and reflected a certain detachment from law and its institutions.¹⁰ Metatheorists deemphasized the work of judges and were decidedly less inclined to attempt to supply "correct" interpretations of the Constitution. They wasted no more time constructing doctrinal arguments that could con-

6. Pierre Schlag argues that "[b]y and large, [liberal scholars] are still writing articles for the Warren Court (or wishing they could)." Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 907 (1991).

7. I am obviously reluctant to list any citations as examples of scholarship of this genre. Many of these people are my friends. A couple of recent examples, though, are Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992), and Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). It seems safer to list some of my own work. See Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315 (1984); Gene R. Nichol, Bivens, Chilicky, and *Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989); Gene R. Nichol, Jr., *The Left, the Right, and Certainty in Constitutional Law*, 33 WM. & MARY L. REV. 1181 (1992) [hereinafter Nichol, *Constitutional Law*]. But then, I've been a dean for a long time.

8. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990). See generally Ira C. Rothgerber, Jr. *Conference on Constitutional Law: Constitutional Theory and the Practice of Judging*, 63 U. COLO. L. REV. 291 (1992) (symposium explaining the relationship between constitutional scholarship and the practice of judging).

9. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, And to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389 (1992).

10. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991); Pierre Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990); Schlag, *supra* note 6; Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990); see also Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 271 (1991) ("The true realm and *métier* of legal scholarship, like that of all scholarship, is the world of ideas. It bears approximately the same relationship to adjudication that poetry bears to nursery rhymes."). Compare these sentiments with those expressed in Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

ceivably appeal to members of the judicial elite. Their work, to generalize, looked more and more like that of the humanities and less and less like that of the legal profession. “[C]onstitutional law as practiced in the legal academy . . . cast itself adrift, whether out of desperation, disgust, or despair, and engaged itself in spinning gossamer webs of republicanism, deconstruction, dialogism, feminism, or what have you.”¹¹

* * *

I have little doubt that the portrait of modern constitutional scholarship described above contains a significant dose of truth. The altered audience for constitutional theory, the expanded boundaries of the scholarship itself, the increased intellectualization of the legal academy, the estrangement of the professoriate from the legal profession and its institutions, and the political chasm that has developed between academics and the bench have led to an identity crisis for American constitutional scholars. That crisis has made the work of Philip Bobbitt¹² — his struggles and false starts, his clear successes and scholarly aspirations — particularly interesting. Bobbitt’s efforts may perhaps provide useful lessons about the future of constitutional scholarship.

Bobbitt’s first major effort, *Constitutional Fate*, published in 1982, presented a morphology of constitutional arguments. Emphasizing the patterns of legal discourse or the “modalities” of justificatory argument, Bobbitt embraced an ennobling vision of judicial review. Devoting separate chapters to historical, textual, doctrinal, prudential, structural, and ethical argument, he turned away from traditional efforts to legitimize constitutional review in favor of a description of accepted conventions in a continuing dialogue about the appropriate scope of judicial authority. In some ways, then, Bobbitt presaged the metatheorists — offering a theory about interpretive theories — and he did it with a depth and an elegance too seldom revealed in legal scholarship. But like a good Warren Court apologist, his modalities tended, in virtually every instance, to sustain the work of the father — he lionized *Griswold*,¹³ *Roe*,¹⁴ *Sullivan*,¹⁵ *Schempp*,¹⁶ *Reynolds*,¹⁷ and, of course, *Brown*.¹⁸ Furthermore, Bobbitt noted that the role of the

11. Balkin, *supra* note 10, at 1967.

12. Baker and Botts Professor of Law, University of Texas at Austin and Fellow of Nuffield College, Oxford University.

13. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

14. *Roe v. Wade*, 410 U.S. 113 (1973). *Roe*, of course, is actually a Burger Court decision.

15. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

16. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting orchestrated public school prayer).

17. *Reynolds v. Sims*, 377 U.S. 533 (1964) (reapportionment).

18. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

U.S. Supreme Court included the authority “to give concrete expression to the unarticulated values of a diverse nation.”¹⁹ Again, heady stuff. No wonder I liked it.²⁰

I. CONSTITUTIONAL INTERPRETATION — LEGITIMACY AND CONSTRAINT

Despite the clear power of *Constitutional Fate*, critics identified two substantial shortcomings. First, Bobbitt did not offer convincing arguments, apart from the traditions of discourse, for the legitimacy of judicial review itself. Second, and perhaps more troubling, *Constitutional Fate* presented no methodology for decisionmaking when conflicts between the various modes of argument arise. It was, therefore, massively indeterminate. Textualism, historicism, prudentialism, and doctrinalism, for example, all might well be accepted patterns of constitutional inquiry, but in actual disputes they frequently lead in opposing directions.²¹ Bobbitt offered no hierarchy of modalities or other method for determining if one pattern could trump another.

In *Constitutional Interpretation*, Bobbitt returns to these difficulties and to constitutional analysis more generally. Like his earlier work, *Constitutional Interpretation* makes probing and forceful reading. In some measure, Bobbitt also appears as a 1990s academic; he explores the theories not just of Dworkin, Fish, Unger, and Rawls, but Rorty, Dummett, and Wittgenstein as well. Nevertheless, when Bobbitt appears as philosopher or hermeneuticist, he remains, to our good fortune, a lawyer. It is an interesting and promising turn.

Perhaps not surprisingly, Bobbitt clings to his earlier deemphasis of legitimacy questions: “We must put aside our fascination with the mirage of the Countermajoritarian Objection” (p. 9). None of the traditional approaches to the legitimacy of judicial review succeeds, he claims, because each depends on assumptions about the appropriate form of argument that can only be validated as a consequence of judicial review itself (p. 8). Judicial review is, instead, “a practice by which constitutional legitimacy is assured, not endowed” (p. 9). Law, then, “is something we do, not something we have as a consequence of something we do” (p. 24). The modalities Bobbitt again identifies — historical, textual, doctrinal, prudential, structural, and ethical — are the ways law statements in constitutional matters are assessed. No appropriate constitutional argument exists outside these spheres.

Constitutional decisionmaking, therefore, is a practice, like “doing” economics or “doing” mathematics. No external referent is necessary to legitimize it — whether Dworkin’s moral and political

19. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 211 (1982).

20. See Gene R. Nichol, Jr., *Giving Substance Its Due*, 93 *YALE L.J.* 171 (1983).

21. Consider, for example, the question whether overt discrimination against homosexuals is prohibited by the Fourteenth Amendment.

philosophy,²² Fish's interpretive community,²³ or "whathaveyou."²⁴ Nor is one desirable. Constitutional determinations are not true or false statements about the world. They are, rather, "moves within a serious game . . . as practised as any classical ballet and . . . no less contingent" (p. 34). This "solution," Bobbitt concedes, will fail to satisfy many because it separates legitimation from justification and, in the process, threatens to "detach" law from justice (pp. 27-28). But, satisfactory or not, the constitutional theorist's first obligation is to understand what law is. The moves, on both the left and the right, to shore up constitutional decisionmaking by tying it to inquiries external to the practice itself are driven by

the[] belief that legal statements depend upon some factual state of affairs that is their foundation. There *is* a lesson in contemporary philosophy for the legal critic, but it is a cold one. Twentieth century philosophy discredits many of the epistemological assumptions of natural law and positivism, of formalism and realism, but it does not replace these schools The message of such philosophy is: you are on your own; we've done enough harm already. [p. 175]

For Bobbitt, then, a constitutional decision is legitimate if it remains within the grammar of constitutional argument — the modalities he describes. These patterns of discourse determine whether a legal statement is true and, over time, they secure the legitimacy of the system as a whole. Their compromise or rejection threatens the legitimacy of constitutional law commensurately. Mark Tushnet claimed that "[c]ritique is all";²⁵ Bobbitt counters that practice is all.

Bobbitt approaches the problem of modal conflict in a similarly straightforward manner. How is a constitutional dispute to be resolved if, as might be typical, historical and prudential arguments suggest that a challenged government action is permissible, but doctrinal and textual arguments indicate that the act is beyond the authority of the state? Again, Bobbitt embraces the seeming weakness of his position and declares it a strength: the "practices [of argument], taken as a group, also enable justice, not because they are determinate but . . . precisely because they are *not* determinate" (p. 31).

Bobbitt resolves the problem of modal conflict by recourse to the conscience of the individual jurist: the "United States Constitution formalizes a role for the conscience of the individual sensibility . . . when the modalities of argument clash" (p. 168). The "space for moral reflection on our ideologies is created by the conflict among modalities," (p. 177) and the "recursion to conscience is the crucial activ-

22. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

23. See STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989).

24. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 55 (1962).

25. TUSHNET, *supra* note 10, at 318.

ity on which the constitutional system of interpretation . . . depends" (p. 184). Furthermore, the "incommensurate modalities give us various possible worlds against which to measure our sense of justice and fitness" (p. 157).

The search for an overarching principle to resolve such conflicts, on the other hand, is not only doomed to failure, but it "ought to fail" (p. 157). The provision of a dispositive "meta-rule would disable moral choice. . . . [making] the art of decision into a kind of placid pornography" (p. 162). For Bobbitt, our system of constitutional review reflects an "incomplete, institutional morality that requires a decision, requires a choice" (p. 169). This is both inevitable and beneficial, since "making decisions actualizes and in some cases even precipitates our values" (p. 166).

II. CONSENT OF THE GOVERNED

There is, perhaps not surprisingly, a good deal to question about Professor Bobbitt's dual response — emphasizing law as practice and using the private judicial conscience to smooth modal conflicts. The notion of law as a set of practical moves may avoid interpretive weaknesses and the circularity of achieving legitimacy by external referent, but it fails to escape some of constitutional jurisprudence's perennial difficulties.

Consider the sweep of the modalities that Bobbitt identifies. Ethical argument, for example, is derived from the "American cultural ethos . . . reflected in the Constitution" (p. 20). Its primary focus is the "reservation of powers not delegated to a limited government" (p. 21). Examples of its use appear in cases like *Griswold*,²⁶ *Moore v. City of East Cleveland*,²⁷ *Meyer v. Nebraska*,²⁸ and *Roe*.²⁹ In addition, *Lochner v. New York*³⁰ and a bevy of other controversial cases³¹ could be added to the list. A moment's review of these decisions reveals that the line between acceptable state social policies and the reserved privacy of the citizenry is one of the most repeatedly and heatedly debated issues in American political history. These cases also reveal a remarkable list of contentions that could plausibly masquerade under the capacious notion of *ethical* argument.

This pattern of argument is likely insignificant compared to the

26. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

27. 431 U.S. 494 (1977).

28. 262 U.S. 390 (1923).

29. *Roe v. Wade*, 410 U.S. 113 (1973).

30. 198 U.S. 45 (1905).

31. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). I assume also that *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), could have been decided the other way.

“prudential” category. Bobbitt describes the prudential mode of argument as “seeking to balance the costs and benefits of a particular rule” (p. 13). Prudential assertions legitimately introduce “the practical effects of constitutional doctrine into the rationales” (p. 16). Prudential claims are “actuated by the political and economic circumstances surrounding the decision.”³²

Doctrinal argument, yet another of Bobbitt’s modes, focuses on “the distinctive characteristics of common law courts.”³³ Its greatest description was offered by Henry Hart:

[T]he Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law. . . .³⁴

My point here is not the obvious one that such forms of argument are significantly indeterminate. Rather, Bobbitt’s notion of the modalities as practice must be built upon an assumption that not every type of policy assertion is legal argument. After all, not everything qualifies as doing economics or doing math. But, given the potential breadth of at least these three patterns of argument,³⁵ all forms of policy disputation could apparently be reformulated into one of Bobbitt’s modes. I have never had a great deal of confidence that constitutional argument could be segregated — Langdellian style — from the broader strands of social and public discourse.³⁶ But surely one would have a better shot at doing that by adopting a rigid and grudging vision of the acceptable sources of legal doctrine, such as Lino Graglia’s.³⁷ A conception as grand and encompassing as Bobbitt’s makes the task hopeless.

Regardless of his wishes, the breadth of Bobbitt’s categories of argumentation also resurrects the dreaded countermajoritarian difficulty. One can overcome philosophical problems of legitimacy by concentrating on law’s performative characteristics, but surely the demands of democracy remain. Bobbitt argues, for example, that “[b]y relying upon a written instrument to perfect the constitutional understanding, the framers of the United States Constitution introduced the modalities of legal argument into the politics of the state” (p. 5). But

32. BOBBITT, *supra* note 19, at 61.

33. *Id.* at 41-42.

34. *Id.* at 44 (quoting Henry M. Hart, Jr., *The Supreme Court 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959)).

35. Charles Black has shown that structural argument can be quite expansive. See CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* (1981).

36. See Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 420 (1992) (arguing that Langdell’s efforts “enabled legal academics to stabilize and close off that which we call ‘law’ and to insulate this domain from the other humanities”).

37. See Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331, 1344 (1985) (book review).

the modalities that Bobbitt describes are not the modalities that prevailed in 1789. Constitutional decisions obviously stay the hand of majority sentiment. Did the Framers implicitly endorse any form of legal argument that the profession might subsequently develop? Surely not. If they did, they overplayed the turn to legalism in this constitutional democracy. Despite Bobbitt's efforts to free us from legitimacy concerns, Alexander Bickel's conviction that the limits of judicial authority "can be sensed but not defined and are communicated more as cautions than as rules"³⁸ hits closer to the mark.

On more than one level, Bobbitt's recursion to conscience to resolve modal conflicts is also troubling. When the patterns of argument lead in inconsistent directions, under this view, a constitutional decisionmaker should consult her conscience to achieve the appropriate result.

My purpose is not to deride Bobbitt's turn to conscience. As I will explain below, removing choice from our understandings of constitutional decisionmaking is neither possible nor desirable. Nevertheless, one need not be a professional nihilist to conclude that the patterns of constitutional argument conflict in almost every significant case. Thus, individual conscience assumes a huge role in Bobbitt's scheme. For many Americans, the notion that the consciences of certain Justices will measure the powers of government would cause significant and perhaps understandable apprehension.

Bobbitt's heavy dependence on private conscience also suffers from a disappointing inconsistency. *Constitutional Interpretation* masterfully explores the processes of constitutional argument. It illuminates classic opinions of constitutional law as it unravels them. It teaches about the public processes of constitutional inquiry by examining the nature of argument and assessing the validity, with measured skepticism, of proffered claims. In this sense, it seeks to make constitutional analysis more accessible, accountable, and comprehensible for all citizens. If, however, at the crucial moment, constitutional decisionmaking turns inward to the private conscience of the judge, Bobbitt's hopeful project seems, ultimately, futile. Conscience is a conversation stopper, like, ironically, the critical scholar's claim that all is politics. Its role in the constitutional decisionmaking process is unexplored and, perhaps, unexplorable. Yet Bobbitt has described the play of conscience in idealized terms: "The space for moral reflection on our ideologies is created by the conflict among modalities, just as garden walls can create a space for a garden" (p. 177). The strong turn to conscience leaves us mystified as to what occurs inside the garden.

38. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 26 (1975).

After such compelling descriptions of the walls, that's more than a little disappointing.³⁹

III. CONSTITUTIONAL CHOICE

Despite these shortcomings, *Constitutional Interpretation* provides strong bases for optimism. Decisions in American constitutional law do oscillate between plausible, often even equally plausible, rationales. Almost all constitutional scholars accept this indeterminacy as a fact of modern decisionmaking. Some claim, as a result, that the foundations of constitutional law are illegitimate examples of judicial policymaking; some attempt to provide yet another new theoretical Rosetta stone that will render constitutional law comprehensible, consistent, and predictable; others turn their attention away from the application of legal norms altogether. Philip Bobbitt, on the other hand, welcomes the choice that has always been present in constitutional determination.⁴⁰ Decisions according to law, in his view, "inevitably require conscience — that is, they require a *decision*, not a calculation or an interpretation, or even a passionate conviction" (p. 183). Ours is an incomplete institutional morality, a morality that requires choice in implementation, and we are better off for it.

In this sense, Bobbitt's journey mirrors that of Justice Holmes in "The Path of the Law."⁴¹ For Holmes, the danger in constitutional interpretation was the assumption that results "can be worked out like mathematics from some general axioms of conduct."⁴² Behind the "logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, [but one that lies at] the very root and nerve of the whole proceeding."⁴³ "[J]udges themselves," Holmes wrote, "have failed adequately to recognize their [inevitable] duty of weighing considerations of social advantage."⁴⁴ Rather than leave the foundation of judgments inarticulate, Holmes demanded that we "get the dragon out of his cave on to the plain and in the daylight, . . . count his teeth and claws, and see just what is his strength."⁴⁵

The power of Bobbitt's work lies in his embrace of choice, of judgment. Far too much legal scholarship overreacts to the existence of discretion — panting that one choice is as good as another, that, con-

39. See Dennis Patterson, *Conscience and the Constitution*, 93 STAN. L. REV. 270, 301-07 (1993) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991)).

40. I have explored the role of choice in our history of constitutional decisionmaking elsewhere. See Nichol, *Constitutional Law*, *supra* note 7.

41. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

42. *Id.* at 465.

43. *Id.* at 466.

44. *Id.* at 467.

45. *Id.* at 469.

trary to Hamilton, judgment is impermissible in the judiciary,⁴⁶ or that, absurdly, everything can be defended and convincing arguments can always be found to support an opposing claim. Those charged with exercising responsibility, of course, have ample respect for the demands and the rigors of choice. Judges stake their very professional lives on the belief that wise choices further the aims of our social and political communities. To evade choice, or even to think that the quality of their choices does not have a decided impact upon the lives of their fellows, is not open to them.

Bobbitt understands this well. As a result, he emphasizes the role of judgment — both its dangers and its possibilities. One of those possibilities is that the exercise of judgment will help to “actualize” our values (p. 166). Constitutional norms do not necessarily precede our choices, full blown and free standing. Until made concrete, they may be only vague attractions or attitudes. *Brown v. Board of Education*⁴⁷ did not simply dust off an earlier political rule; it created a societal commitment, launching a value that was before, in every meaningful sense, unreal.

Bobbitt’s exploration of constitutional argument — even if it cannot capture the entire process of decisionmaking — moves the “dragon” a step or two “out of the cave.” His multifaceted examinations of constitutional problems, including Iran-Contra and the Bork hearings,⁴⁸ clarify the stakes and reveal the assessments made. He claims that “the study of the modalities of constitutional argument makes the analysis of legal reason-giving more perspicuous,” (p. 30) and his own example proves him right. It is heartening to be reminded how ground-gripping, and simultaneously enlightening, constitutional inquiry can be.

Unlike almost any other sophisticated modern constitutional scholar, Bobbitt turns from the sky to the practices of judging.⁴⁹ Judging is, fundamentally, what matters most in our constitutionalism,⁵⁰ and the work of judges, obviously, is not driven by metatheory, but by

46. In *Federalist No. 78*, Hamilton defended judicial review by claiming that judges would exercise judgment, not will. THE FEDERALIST NO. 78 (Alexander Hamilton).

47. 347 U.S. 483 (1954).

48. Bobbitt offers a nonconventional description of Judge Bork’s trials. Pp. 83-108. He frequently praises Judge Bork and concludes that the “[j]udiciary Committee appears to have rejected Robert Bork’s nomination on the basis of an erroneous assessment of his judicial philosophy.” P. 105. In Bobbitt’s view, Judge Bork “was a highly principled, courageous nominee even if some of his principles were not precisely as they were taken to be.” P. 106. Bobbitt assumes, therefore, that Bork fundamentally misunderstood many of his own positions — no high compliment. See Gene R. Nichol, Jr., *Bork’s Dilemma*, 76 VA. L. REV. 337 (1990).

49. Bobbitt accomplishes this in two primary ways. The first, of course, is through the study of constitutional argument. The second, and less obvious, is through the use of history and biography. The lessons of the past can tell us a good deal about good and bad judicial decisionmaking. Again turning to Holmes, “[t]he rational study of law is still to a large extent the study of history.” Holmes, *supra* note 41, at 469.

50. I do not deny the strong role in constitutional decisionmaking that other governmental

competing demands of justice and constraint. As Judge Mikva has written, "judges don't weave theories. . . . Judges decide cases."⁵¹ Academic attention to the "art of deciding" (p. 170) can illuminate the practice of seeking justice.

* * *

I began this review with an exaggerated portrait of the dilemmas of recent constitutional scholarship. I end with an illustration of the demands of judgment. In the November election the voters of Colorado passed, by initiative, a constitutional amendment entitled, harmlessly enough, the "Taxpayers Bill of Rights."⁵² The provision removes the power to tax from the legislature and imposes spending and bonding limitations upon state and local governments. The amendment is an 1800-word masterpiece that very few voters read and literally no one understood. Buried within its almost indecipherable paragraphs are a number of other proscriptions on government power. The new amendment is now beginning to wreak its intended havoc upon public services in Colorado.

Apparently a challenge to the validity of amendment one under the state constitution is possible. The Colorado Constitution, like that of California and some other western states, distinguishes between "amendments" and "revisions" of the charter. The initiative process is available to adopt "legislation and amendments to the constitution."⁵³ Constitutional conventions, on the other hand, may be employed to seek "revisions, alterations [and] amendments."⁵⁴ The California courts — no doubt experts on the initiative process — recognize substantive distinctions between amendments and revisions.

In 1990, for example, the California Supreme Court invalidated one provision of an enacted ballot initiative requiring that a laundry list of state procedural guarantees "not be construed . . . to afford greater rights to criminal defendants than those afforded by the Constitution of the United States."⁵⁵ The proposition was said to "unduly restrict[] judicial power" and to "severely limit[] the independent force and effect of the California Constitution."⁵⁶ Such "comprehen-

and private actors frequently play. But even in nonjudicial fora, the patterns of argument and decisionmaking mimic those developed in the judicial system.

51. Abner J. Mikva, *The Role of Theorists in Constitutional Cases*, 63 U. COLO. L. REV. 451, 452 (1992).

52. COLO. CONST. art. X, § 20 (adopted at Nov. 3, 1992 general election). A second amendment passed by the Colorado voters in 1992 has received more attention. Amendment two prohibits public entities in Colorado from enforcing policies against discrimination based on sexual orientation. COLO. CONST. art. II, § 30b. This provision has sparked a boycott against the state and has been challenged in the Colorado courts. See, e.g., Dirk Johnson, *A Ban on Gay-Rights Laws Is Put on Hold in Colorado*, N.Y. TIMES, Jan. 16, 1993, § 1, at 6.

53. COLO. CONST. art. V, § 1.

54. COLO. CONST. art. XIX, § 1.

55. *Raven v. Deukmejian*, 801 P.2d 1077, 1086 (Cal. 1990).

56. 801 P.2d at 1088.

sive changes” in governmental structure, the court agreed, are “revision[s]” rather than mere “amendment[s],” thus necessitating “more formality, discussion and deliberation than is available through the initiative process.”⁵⁷

Under Colorado’s amendment one, tax increases can be accomplished only by statewide vote. The legislature can no longer impose new taxes. The taxing and spending powers are effectively dislodged. Surely then, under the California line of cases, there is a reasonable doctrinal constitutional argument that we Coloradoans have “revised” our republican form of government — a step beyond the scope of the initiative process. That the convoluted amendment is laden with essentially undiscovered alterations of state and local authority lends credence to the California courts’ line of reasoning that revisions to the constitution require a deliberative process not triggered through initiative.

But, not surprisingly, the doctrinal strands in the California decisions run in conflicting directions. For example, in upholding proposition 13, which required a supermajority for, but did not prohibit, legislative tax increases, the California Supreme Court noted that the “power of initiative must be liberally construed . . . to promote the democratic process.”⁵⁸

If amendment one were to be challenged in the Colorado courts, then a familiar dilemma would arise. Doctrinal and textual arguments would suggest that the amendment could be invalidated. The drawing of a line between amendments and revisions may well be essential, given the occasional efforts to rewrite an entire state constitution through a simple and possibly uninformed majority vote in the initiative process.⁵⁹ Prudential arguments would support that result as well, if I am right that the new provision will visit significant and unanticipated harms on the state’s public sector. But the case for invalidation would be far from compelling. The Colorado courts are not “bound” to accept California precedents, and, as I indicated, those decisions are hardly overpowering. More importantly, amendment one was embraced by a majority of the Colorado electorate. The vote reflected a marked unhappiness with “business as usual” in state government. For one set of government officials, judges, to protect the rest from perceived accountability to the electorate would lead to strong and renewed public opposition. Furthermore, the people of my

57. 801 P.2d at 1085-86 (noting that the quoted parts of petitioners’ argument were “well taken” with regard to one provision of the initiative in question).

58. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1283 (Cal. 1978) (quoting *San Diego Bldg. Contractors Assn. v. City Council*, 529 P.2d 570, 572 (1974)), overruled by *Los Angeles County Transp. Commn. v. Richmond*, 643 P.2d 941 (1982).

59. See, e.g., *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948) (invalidating California initiative adding a new article to the constitution and altering 15 of 25 of the constitution’s articles), cert. denied, 336 U.S. 918 (1949).

state are surely entitled to presume that their electoral decisions will be given full recognition in the courts. Absent some federal mandate, a state tribunal treads on thin ice when it rejects the clearly expressed will of the people.

How then should a constitutional challenge to amendment one be measured? Text, doctrine, history, and structure may well set the outer bounds of permissible decisionmaking. But, as is often the case, those helpful inquiries will not provide final solace. They will indicate, finally, that a judicial choice must be made — a choice among supportable alternatives; a choice that is, inevitably, “legal”: a choice that is, in nature, “constitutional.” That does not mean that the decision reached will ultimately be illegitimate. Quite the contrary. An answer to the proffered structural question must be provided, and I have little doubt that some answers would be far more conducive to the effective operation of Colorado government and to the premises of our democracy than others.

It is not too much to hope that such an exercise of judgment can be explored, articulated, and evaluated. For judgment is not merely a declaration of individual conscience — a statement of internal, personal, and subjective preference. It looks outward to the world around us. It is the life of the judge, and a basis for optimism in our constitutional regime.