

1981

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Recommended Citation

Philip C. Bobbitt, *A Reply to Professor Ball*, 59 TEX. L. REV. 829 (1981).
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A Reply to Professor Ball

Philip Bobbitt*

I.

Although it has been observed that approaching an allegedly universalistic theory by asserting the time- and culture-bound nature of that theory is an attack of some sort,¹ Professor Ball does not take my lectures to be a rebuke to the enterprise in which he, Professor Tushnet, and others are engaged. Instead, he complains that I do not examine the relation between constitutional argument, on the one hand, and, on the other, social, political, and economic interests.² This is a mistaken reading of my work. It is nice to be told that Tushnet and Ball accept my formulation “that in our theories are our fates” and that they go on from there, but if they really accepted my formulation they would accept the bankruptcy of “going on from there.” For the point the formulation tries to achieve is that theoretical requirements have driven law; that judicial review is legitimated by these theoretical moves and not by what are thought to be more fundamental social and class motives; that the vocabulary of social and economic interest is itself just one more set of theoretical conventions, and, indeed, one of little relevance to constitutional decisionmaking; that the constitutional types of argument are not determined by political and economic theory.

It is interesting that Professor Ball (and others) assume that all boundaries and restraints are unintended, or at least are intended for purposes partly obscured, and that true causes can be found in socio-political constructions. Given this general view, it perhaps is to be expected that my painstaking efforts to clarify my lectures so that their outlines would clearly demark what was not being said should now be seen as a hopeless mask for a failure to do the really important work.

My lectures were written for those in sympathy with their spirit.

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1. Duncanson, *Legal Positivism as Ideology*, LONDON L. REV. 20 (1978).

2. Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEXAS L. REV. 787 (1981). Professor Ball correctly observes that his affinity lies with Professor Tushnet's work and not with mine, and yet I suspect that this is, rhetorically, a marriage of convenience—a term once defined as occurring when a couple shares the same bed but dreams different dreams.

This is not the spirit of the current vogue in American constitutional philosophy, which seems to believe that law is in need of a foundation constructed from political theory. I am not interested in constructing such a foundation, but instead in having a perspicuous view of the structures that make justification possible. To this aim *Tragic Choices*³ is directed; and so also *Constitutional Fate*.⁴ The latter explicitly discards the notion that law takes place within a framework independent of the structure of legal argument itself. It rejects the view that there exists a set of legal presuppositions that are discoverable in the absence of legal argument, upon which such argument is supposed to depend. The entire enterprise in which Tushnet and Ball and others are engaged seems to me based on a confusion between the justification for judicial review—which is the legitimation that results from the operation of the various conventions discussed in my lectures—and a hypothesized causal explanation for such review derived from socio-political theories. Those engaged in this enterprise believe that such theories exist on a privileged plane and are not simply other stylized moves within another convention-bound and largely irrelevant game.

Because the justification offered by the operation of constitutional argument does not even purport to rely on such a causal account, it will not be satisfying to those who suffer from the confusion I have described. At the same time, those who do offer such general causal theories will often be tempted to derive what are erroneously thought to be independent justifications from them.

I have presented constitutional law as a set of relations to argument. Accordingly, justification is that relation of legitimation among arguments advanced by advocates and other arguments from which the former may be inferred (*e.g.*, precedent, the text of the Constitution, and so forth). By contrast, one might think of the legitimation of constitutional law as a special state occurring when law and argument bear a certain relationship to social facts (or metaphysical ones) that are thought to underlie law. If we accept the approach I have offered, we will not feel the need to ground the potentially infinite series of arguments brought forward in support of other arguments: the very functioning of the argumentative models works to ensure that there is consensus among those persons operating within the conventions. But if we think of law in the second way, we will want to get behind arguments to causes. If we are captivated by this picture of law, we shall want to escape the argumentative structure to find causation from so-

3. G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

4. P. BOBBITT, *CONSTITUTIONAL FATE* (forthcoming).

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cial facts, measuring our arguments against the social or political realities that are thought to account for them in the first place. By this means it is thought that we may arrive at a situation in which further argument is not simply unnecessary but impossible, since an accurate appreciation of the social facts will determine the correct conclusion. This latter view accounts for Professor Ball's enthusiasm for the "self-evident truth of a political reality characterized by equality of care"⁵ and for Professor Tushnet's interest in "the incomplete hegemony of the ruling class."⁶ It is a view rejected, not simply ignored, in my work, as the student editor whom Professor Ball disparages clearly saw and as others, I fear, have not. To reiterate: it was my purpose to show that superimposing political theories on the doctrine of judicial review does not account for the doctrine and cannot offer a justification for it.

II.

Beyond the observation that my work is lacking in "reality-transcending elements,"⁷ there are many descriptions of my lectures in Professor Ball's article. Not all of these are wholly accurate.

Professor Ball writes,

Professor Philip Bobbitt discerns certain patterns in constitutional law which he organizes into categories of arguments. Because each kind of argument is associated with the choice of particular justification for judicial review, the typology of arguments gives rise to a typology of related functions. For example, historical argument belongs with a checking function for the courts; structural argument with a legitimating function. In addition to the five received categories Bobbitt identifies a sixth, ethical argument, with its related justification for judicial review, the expressive function.⁸

If the second sentence of this passage is to be taken as summarizing my views, rather than as proposing some causal correlation between justification, function, and argument, it is wrong. The typology of arguments does not, in my view, give rise to a typology of functions; one can easily imagine a judicial system that used these sorts of arguments in service of completely different functions. Furthermore, the various functions discussed in the lectures—checking, expressive, cueing, referring, legiti-

5. Ball, *supra* note 2, at 810.

6. *Id.* at 791; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307, 1346 (1979).

7. Ball, *supra* note 2, at 793.

8. *Id.* at 788 (footnotes omitted) (Because this reply was written in response to an earlier draft of Professor Ball's article, several quotations vary slightly from the published versions cited here.).

ming—are not names for various justifications, as the last sentence in the quoted paragraph suggests; nor do the lectures anywhere assert that a particular argument “belongs” with a particular function.⁹ Rather the lectures make the point that our appreciation of the functions of Supreme Court decisions is often enabled by the approaches we adopt among the typology of arguments.¹⁰ Thus, structuralists are apt to call attention to the legitimating function, prudentialists to the remanding function, and so on. Whether one thinks a particular function is actualized depends then on the possibilities created by the argumentative conventions. This does not mean that a particular function is served only by a particular argument or that the argumentative conventions are neatly paired with various functions.

Professor Ball is nonplussed by my treatment of what I have perhaps misleadingly termed ‘ethical’ argument. He writes,

At times Bobbitt seems to mean that ethical argument is but one of several equally valid forms of argument which can be isolated and identified in legal arguments and Court opinions, *i.e.*, a patch of text. At other times it appears that he is asking us not so much to look at a bit of text as at the white sheet underneath (agreeing with the results of some cases but finding they are wrongly explained and would be better re-drafted as ethical arguments), or at some object which lies behind the page and exerts a gravitational pull upon the writer. Also Bobbitt seems to present ethical argument as but one of several equally valid forms but then identifies it with the cases which “engage [students] the most.”¹¹

I should say at once that I not only “seem to mean,” “appear to ask,” and “seem to present,” but do actually mean, ask, and present the points suspected. Furthermore, I will continue to do so. For there is nothing inconsistent in saying that ethical argument, or for that matter any of the forms of arguments, is but one of several possibly valid types; that it can sometimes be found in court opinions and at other times in law reviews or in classes which urge a different approach from the one chosen by the court; and that even when not explicitly relied upon in an opinion, it can nevertheless be decisive in the decisionmaking that precedes opinion-writing. I also continue to think that ethical arguments are associated with the cases that engage the emotional and political commitments of my students.

Professor Ball implies that I hold the view that the state’s refusal to

9. See Bobbitt, *Constitutional Fate*, 58 TEXAS L. REV. 695, 767 (1980) (The Dougherty Lectures).

10. *Id.* at 756-57.

11. Ball, *supra* note 2, at 789 n.13.

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subsidize abortions is coercion to carry to term. This is not my view.¹² Rather, I have said that criminalizing abortions is a form of state coercion that forces a pregnant woman to give birth. Although this distinction is hardly minor, I would not draw attention to the correction but for the fact that it perhaps reveals the basis for the absurd reconstruction of my argument on *Roe v. Wade*.¹³ Professor Ball's reconstruction is:

The issue can be stated, à la Bobbitt, as follows: Ours is a limited government. Its choices are confined. One essential limitation is that government may not refuse to protect the lives, health, safety, and general welfare of the people. Government may also not withhold due process of law from a person to be deprived of life nor deny to any person the equal protection of law. Government has no choice in these things. The choice is especially circumscribed when the person involved has no voice in government or depends upon government for a voice. If an embryonic form is a child, and Bobbitt refers to the fetus as both, then he or she is a person from whom the government is powerless to withhold the protection of law. The critical decision to be made is whether a human life is at stake.¹⁴

I am not certain how close a resemblance to my own analysis the phrase "à la Bobbitt" is intended to convey. But if there is any chance that any reader will conclude that Professor Ball has applied my approach to the *Roe* problem, I should correct that impression.

When I wrote that the state governments are constrained in their choices by constitutional restrictions that originally could have been derived from the negative implications of limited, affirmative grants of power to the federal government, I did not mean to suggest that federal or state governments "may not refuse to protect the lives, health, safety, and general welfare of the people,"¹⁵ nor that "[g]overnment has no choice in these things,"¹⁶ nor that this lack of choice is "especially circumscribed when the person involved has no voice in government or depends on government for a voice."¹⁷ This view, these opinions, have no foundation whatsoever in my lectures.

Indeed, the quoted passage above ignores my analysis and replaces it with a bizarre caricature in which limitations on the means that a

12. Indeed, the fact that a refusal to provide abortions may, from some perspectives, be the moral equivalent of criminalizing them simply underscores the distinction between moral argument and constitutional argument.

13. 410 U.S. 113 (1973).

14. Ball, *supra* note 2, at 790.

15. *Id.*

16. *Id.*

17. *Id.*

state may choose to further an unlimited set of goals are transmuted into affirmative state obligations. The caricature ignores my construction of the privileges and immunities clause and the ninth and tenth amendment restraints, from which "ethical" arguments take form, in favor of lifting the derived construction and placing it as a gloss on the grants of due process and equal protection. This permits Professor Ball to introduce the familiar assertions regarding the affirmative requirements of these clauses. Whatever these requirements may be, I hope it is obvious that this superimposition has nothing to do with the approach proposed in my lectures. As a collateral response to Ball's argument in this context—parts of which, *e.g.*, "when the person involved depends on government for a voice," are obscure—I should think one need only consider a great many laws that might tend to protect human life that the Constitution would not permit the state to enforce: for example, statutes providing for the detention without trial of terrorists such as those currently in force in Northern Ireland.

Finally, Professor Ball concludes, "Indeed one has the feeling that for Bobbitt the perfect marriage of expressive function and ethical argument drawn from the limitedness of government would be the total silence of the courts."¹⁸ Readers who are unfamiliar with the lectures would perhaps be perplexed to learn that my discussions of ethical argument focus on a series of cases in which courts have acted quite vigorously to upset legislative acts and executive practices, and that my criticism of these cases extended only to their failure to offer forthright and convincing rationales—namely, ones using ethical, constitutional argument.¹⁹

III.

Two kinds of activity remain to be done in constitutional law. First, there is the ongoing "normal science," the exchange of arguments within the conventions I have discussed, the game of scissors/paper/stone with its circular hierarchy that brings different values to decisive but inomentary preeminence before being replayed. To this the law reviews, the professional lives of the members of the bar, and the intellectual energies of our judges are devoted.

Second, there will be essays depicting individuals and societies responding to the theoretical requirements of the legal conceptions with which they have to cope. These essays, whether historicist or anthropo-

18. *Id.* at 790 n.19.

19. *See, e.g.*, Bobbitt, *supra* note 9, at 731, 732, 733-49, 750.

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logical or economic, may show theories working through the actions of individuals or institutions, but they will not purport to offer meta-theories about the basis of law in political philosophy. Such essays, even if fictive, can heighten our awareness of the force field of constitutional law and will, by their example, rid us of the illusion that a social or theological mechanics *explains* our constitutional life.