Reflections Inspired by My Critics

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Reflections Inspired by My Critics

Philip Bobbitt*

The crucial idea in constitutional law is legitimacy; the crucial idea in jurisprudence is justification.

For some time, the academic debate about U.S. constitutionalism has looked for justifications for our practices, believing this would confer legitimacy on them. In my work, I have endeavored to derive legitimacy from the practices themselves, reserving the task of justification for other purposes.

By showing the way in which legitimacy is established and maintained in a constitutional system like ours, I hoped to derive solutions to a number of classical questions, all of which, I believe, are at bottom questions about legitimacy and legitimation.1 These questions were the principal subject of Constitutional Fate, although there are many views expressed there that bear on other contemporary legal issues. At the same time, I also wished to propose a way of understanding constitutional law that changed its relationship to jurisprudence, as practiced nowadays, rendering some

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1. Examples of these problems are the dilemmas posed by the constitutional assessment of the acts of democratically elected officials and sometimes, the reversal of those acts by an unelected judiciary, see PHILIP BOBBITT, CONSTITUTIONAL FATE 243-49 (1982) [hereinafter BOBBITT, FATE] (rejecting the attempt to legitimate judicial review on the grounds of any foundational political theory), by the necessity to give content to unenumerated rights while remaining within a written constitution, see, e.g., id. at 121-77 (showing how ethical argument can be used to limit the powers of government), and by the conflict between a government acting for the people but limited by law and a sovereign people bound by law but with unlimited control over the content of that law, see, e.g., Akhil R. Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 459 (1994), discussed infra text accompanying notes 137-59.

1869
jurisprudential questions far less insistent\(^2\) and some largely unexplored questions central.\(^3\) As such, this work is also thus directed to a description of how a constitutional system is evaluated, and how our responsibilities within that system are discharged—a system that depends so greatly on the exercise of conscience. This description, I believed, is mainly a matter of justification, and it is the principal subject of *Constitutional Interpretation*. If one believes, as I do, that justification does not assure legitimacy, whenever one evaluates a proposed system one must ask not only whether it is easier to justify, but also whether it will be able to achieve and maintain legitimacy.

A large part of *Constitutional Interpretation* is devoted to three constitutional cases: *Missouri v. Holland*,\(^4\) the confirmation hearings of Robert Bork, and the Iran-Contra Affair. The reader is asked to work through these problems using the techniques developed in *Constitutional Fate* and recapitulated in *Constitutional Interpretation*. Because the people of this country have an important legal role to play in constitutional law, these exercises are meant to teach the legal methods by which constitutional problems are addressed. And because understanding is the product of learning how to do something, these exercises provide an instance of the process I am claiming to be at work. The reader must judge.

Although I believe my work to be original, and would disclaim this vanity should its ideas belong to others, I hardly think my views are unprecedented. Indeed, I hold that our earliest American political ideas of the state have much in common with the perspectives I present. Let me give one construction of the ideas of my precursors and suggest that these anticipate the separation of legitimacy and justification that is so fundamental to my work.

It was once common to assert that our framers, Jefferson and Madison in particular, were American acolytes to European thinkers such as Locke and Montesquieu.\(^5\) This has led to much mischief, particularly with

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2. For example, what political or ethical theory is necessary to justify a constitutional system such as ours? See Philip Bobbitt, *Constitutional Interpretation* 181 (1991) [hereinafter Bobbitt, *Interpretation*] (arguing that attempts to justify the legal system through political theory “never exist outside the seminar room, in part because the values society labors to preserve are contradictory”).

3. For example, what sort of people must we be to make a system such as I have described function justly? See id. at 178-79 (arguing that one of the central implications of *Constitutional Interpretation* is how we might be better educated to make more just decisions).


5. See, e.g., Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 27 (1922) (“Most Americans had absorbed Locke’s works as a kind of political gospel; and the Declaration [of Independence], in its form, in its phraseology, follows closely certain sentences in Locke’s second treatise on government.”); Henry S. Commager, *Jefferson, Nationalism, and the Enlightenment* 84 (1975) (“[N]either Jefferson nor the American people invented [the] principles [contained in the Declaration of Independence]. . . . [T]hey were elaborated by the generation of Lilburne, Cromwell, Sidney, Milton, and above all John Locke in seventeenth-
constitutional concepts such as the separation of powers, as to which Madison's ideas may be said to be sharply opposed to those for which Montesquieu is most known, and with respect to the natural rights of man, as to which Jefferson's opinions are erroneously said to derive from Locke and (or) Hobbes. When Jefferson wrote that "[A]ll Men are created equal," it was once thought that he meant no more than that in the eyes of God (for Locke), or in the eyes of the rule of law (for Hobbes), all persons stood to be weighed by the same scales. Although Jefferson may have had these ideas in mind, I think he meant something more than this—something quite distinct—and I imagine the American relationship to European thought to have been far less that of a client than is usually supposed. I am inclined to believe that the framers were an authentically American, uniquely American, and uniquely lawyerly generation of thinkers who have as much in common with twentieth-century pragmatists as with seventeenth-century empiricists (or rationalists).

All men are palpably not created equal, in any practical way, being endowed with various deficits and advantages, except in this one respect: All may choose their moral commitments. All must choose. This right—to make a moral life—is "unalienable" because it cannot be sold or given away. Even if the chooser is in bondage, he is independent in this century England . . . ."

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7. Compare The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (arguing that all three branches of government must be "blended and connected" in order to prevent the abuse of power in one of the branches) with Max Farrand, The Framing of the Constitution of the United States 49-50 (Yale University Press 1962) (1913) ("Montesquieu, whose writings were taken as political gospel, had shown the absolute necessity of separating the legislative, executive, and judicial powers.").

8. See Garry Wills, Inventing America: Jefferson's Declaration of Independence 212 (1978) (arguing that while "Locke said man automatically and infallibly pursues pleasure," Jefferson's moral theory grew out of the Scottish Enlightenment's less cynical view that one's moral sense necessarily leads him to pursue the good of others); id. at 203-04 (distinguishing Jefferson's espousal of the natural benevolence of all moral agents from Hobbes's theory that self-love governs all action).


10. See, e.g., Edward Dumbauld, The Declaration of Independence and What It Means Today 56-58 (1950) (tracing Jefferson's idea of equality to Locke and arguing that in the phrase "all Men are created equal," Jefferson meant that all men are equal under the law of nature).

11. For a sympathetic point, see Bruce A. Ackerman, We the People: Foundations 3-6, 32-33 (1991).

respect. From this view flows the separation of church and state, the resolute refusal to give to the government power over the intimate rights of individuals, and the crucial role of conscience in our constitutional system.

Moreover, some of my claims are philosophical in nature, and so, in addition to having precursors, can naturally be placed in the philosophical period in which I have lived. Thus, Constitutional Fate asks, "What legitimates judicial review?" and proposes an antifoundationalist answer. That is, I located legitimation in a particular practice, rather than in a prior, external rationale. Constitutional Interpretation asks, "What makes the system of constitutional decisionmaking just?" The answer I offered was an antirepresentationalist one. Treating the issue as one in which "just" is a judgment of the system as a whole, I argued that the American system permits acts of conscience to be decisive, instead of determining that particular outcomes are just when correlated with the outcome hypothesized by a theory of justice. When I began writing Constitutional Interpretation, constitutional criticism (and jurisprudence) reflected the universalist ideals of empiricism and scarcely questioned the premises of autonomous human reason (if only on the part of the analyst), which were taken as unproblematic, indeed axiomatic. Since then, many movements have sprung up in the law schools that renounce such an epistemology, especially the hermeneuticist and the communitarian movements. I will say here only that there are many nonfoundationalist, nonrepresentationalist accounts one might give, and that these accounts may differ sharply, especially as to their prescriptive character.

13. Which would hardly have commanded the assent of Locke. See John Dunn, The Political Thought of John Locke 266 (1969) ("Rational action [for Locke] was tied logically to the strenuous discharge of a series of duties to God. Hence the disappearance of this framework of religious belief would dissolve the concrete structure of rational human action.").

14. Which would have seemed absurd to Hobbes. See Thomas Hobbes, Leviathan 115 (Ernst Rhys ed., 1940) (arguing that while a sovereign cannot prevent a person from feeding or protecting himself, other liberties are at the whim of the sovereign). On the issue of the protection of intimate rights of individuals, see Bobbitt, Fate, supra note 1, at 159-60.

15. Which plays no significant legal role in the European political theory of complete sovereigns. See Philip Bobbitt, Is Law Politics?, 41 Stan. L. Rev. 1233, 1309 (1989) [hereinafter Bobbitt, Is Law Politics?] (ascribing the American adherence to conscience to the liberal tradition of the Constitution). On the role of conscience in our system, see Bobbitt, Interpretation, supra note 2, at 168, 184-85; Bobbitt, Fate, supra note 1, at 169-75.

16. Bobbitt, Fate, supra note 1, at 237-40.

17. Bobbitt, Interpretation, supra note 2, at 170.

18. Cf. John Gray, Why the Owl Flies Late: The Inadequacies of Academic Liberalism, Times Literary Supplement, Oct. 15, 1993, at 10, 11 (criticizing Western political philosophy for its methods "of subjecting all human institutions to a rational criticism and of convergence on a universal civilization whose foundation is autonomous human reason—[methods] that are taken as unproblematic, even axiomatic").
Reflections Inspired by My Critics

The account I chose originated in these questions: How do we determine a proposition of constitutional law to be true? Are statements of law propositions about the world as, for example, statements in science are propositions about the world? My way of dealing with these questions was to take the customary constitutional assertions in support of a legal proposition—for example, because the text warrants the proposition or because the framers and ratifiers endorsed such a proposition—and show that, within the system of which they formed the structure, they themselves could not be shown to be true.19 For example, if the text of the Constitution itself provided for a textual interpretation of the Constitution, this would not establish the truth of the proposition that judges should interpret the terms of the Constitution according to the common understanding of the words, because it presupposes that such a textual warrant is valid. To see this, imagine that (as some originalists appear to think) the text said the contrary: “In no case shall the judges of any state be bound by the common understanding of the terms of this Constitution.” Only the judge that was already committed to obeying the text would face the dilemma of whether to disregard it. This, I believed, meant either that certain propositions of constitutional law functioned as modalities, determining the truth of other propositions, but were themselves indeterminable as to this truth, or that some external structure validated these propositions. If it was the former, then their legitimacy derived from their use alone, and from nothing else.21 If it was the latter, then what was the constitutional warrant for that external structure? For, on my view, a state of limited sovereignty could not rely on such an unauthorized source of law.22 On this important issue, some of the participants in this Symposium disagree with me.

If there is no external legitimating idea, then what does the decider do when the modalities conflict? What if an historical analysis leads to one conclusion—for example, that the ratifiers intended that states should not be sued without their consent—but the text suggests otherwise—as indeed

19. See BOBBITT, FATE, supra note 1, at 5; BOBBITT, INTERPRETATION, supra note 2, at 8-10, 114
17. See generally id. at 118-86.
20. Suppose the Constitution stated that “the judges in every state shall be bound by the common understanding of the terms of this Constitution.”
21. Wittgenstein makes a similar point about religious belief: rather than explaining exotic religious practices as products of ignorance, we should describe those practices in enough complexity to understand how the practices have their own internal grammar. Just as magic cannot be wrong-headed science, constitutional propositions cannot be wrong-headed moral or political theory. See Ludwig Wittgenstein, Remarks on Frazer’s “Golden Bough,” THE HUMAN WORLD, May 1971, at 18, 28-30 (A.C. Miles & Rush Rhees trans.).
22. For an opposing viewpoint, see Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 496 (1981) (“Some parts of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular . . . .” (footnote omitted)).
it was once held?23 I reserved the resolution of such conflicts for the conscience of the decider. Stevens captures the quality of this decision precisely:

The nothingness was a nakedness, a point

Beyond which thought could not progress as thought.
He had to choose. But it was not a choice
Between excluding things. It was not a choice

Between, but of.24

Of course, the decider had to be conscientious in the first place. A judge or a President eager to reach a particular result might think that the incommensurability of the modalities implied the following possibility:

If I can think of some argument for what I want to do that fits the forms of the modalities—some historical or textual or structural or ethical or prudential or doctrinal argument, any one will do, and I only need one—then I can resort to my own conscience, and it is legitimate for me to do whatever I want to do.

This confuses the legitimacy that is conferred by drafting a written opinion, using accepted arguments that support a decision, with the justification for that decision. "Doing what you want to do" is not a matter, in itself, of legitimacy. To put it differently: It is only when assailed by doubt—when nothingness prevails and there is no point to further legitimate judgment—that one resorts to one's conscience. A person like the one I have caricatured never reaches that point: he is not conscientious enough to reach that point when one would resort to conscience. Thus, the justice that is conferred on the American system by its reliance on conscience is sacrificed by a decider who "does whatever he wants." On the method of resolving conflicts among the modalities, there is considerable disagreement among the Symposium papers: some of the authors want to supply an additional decision procedure that would resolve this incommensurability problem.

The identification and explication of the modalities also served a second purpose in my work, viz., to provide a means of constitutional analysis in the absence of a prevailing doctrinal resolution. I had used Paul


Brest's casebook even before it was published,25 and was much attracted to its historical approach and use of extensive case text.26 Brest's important article, The Conscientious Legislator's Guide to Constitutional Interpretation,27 persuaded me that it was essential that nonjudicial officials exercise their role as constitutional interpreters, a role they had more or less abandoned to the judiciary. But how was this nonjudicial analysis to be done in answering questions about which there was little or no doctrine? Indeed, how could it be done when there was settled case law, but when the legislator was required to make up his mind independently? I believed that learning the modalities of constitutional analysis could provide this means; and I further believed that journalists, and citizens generally, could make use of these forms of legal argument, although they were not confined to legal argument in making constitutional decisions as were government officials. The constitutional discourse of which the people were an essential part could be enriched by legal argument, and judicial decisions need not be either ignored or passively accepted. This subject—the contrast between constitutional discourse and constitutional law—is also a matter of some debate in this Symposium.

Eventually, I came to believe that our entire constitutional discourse had been distorted by the search for a political theory to justify our legal practices. McCulloch v. Maryland,28 not Marbury v. Madison,29 was the foundation case for the legitimacy of American constitutional analysis. Darby,30 not Wickard,31 presented the paradox of an onmicompetent Congress working from a limited charter. Youngstown32 was best read modally, and not for its stirring concurrence (and certainly not for its holding). I read and taught the Federalist Papers from a constitutional point of view, not as an essay in political theory. Others wrote of the "search for something that was strangely missing in the Federalist and other documents of the founding generation, a search for the people as something more than an abstraction from individuals or a reference to the


29. 5 U.S. (1 Cranch) 137 (1803).


sum of factions and interests." I found in those documents, however, a role for the people that was precisely not an abstraction, and I came to think that our understanding of the framers' views as to questions like that of "factions" had been fatally distorted by treating these ideas in terms of political theory and not in terms of lawyerly practice. The fear of factions was not, I think, the fear of political parties, but of what we would today call interest groups. The idea of disinterested representation was taken from the lawyer's customary role, not the parliamentarian's. And so on.

Achieving this goal of giving the people the intellectual tools to conduct a richer constitutional discourse, should it ever be achieved, can have important effects outside constitutional law. The future of international law will, I think, be affected by the spread to other societies of the American idea of limited sovereignty. Should this happen, the constitutive nature of the international legal order itself may change, as an international society of limited sovereigns would embody different expectations from those of the current world order. There is an important role here, too, for an understanding of the modalities of American constitutional law because they show how other states might adopt limited governments, like the American form, without becoming other "americas." The very character of a society is uniquely determined by its moral commitments, and by these commitments it is defined. The modalities of American constitutional argument do not depend upon a moral justification to legitimate limited government. A society need not lose its cultural character, therefore, when it places its government under law.

As a consequence of these ideas, I am at present engaged in a rather large project. The first part of that project is a two-volume work tentatively entitled The Shield of Achilles: Studies in History, Strategy, and Law. The first volume, called States of War, explores the relationship between the historical development of the states in response to strategic innovation. The first part of this book argues that the war that ended in

34. See THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) (discussing the ability of the proposed Constitution to "control the violence of faction").
35. Jefferson Powell's remarkable book on the framers, LANGUAGES OF POWER: A SOURCE BOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY, supra note 23, is an important resource for anyone thinking about these questions, although I have no idea whether he would endorse the views I have expressed here. His contribution to this Symposium is, as is evident, an important essay standing alone. See H. Jefferson Powell, Constitutional Investigations, 72 TEX. L. REV. 1731 (1994).
36. "For it is in the choosing that enduring societies preserve or destroy those values that suffering and necessity expose. In this way societies are defined, for it is by the values that are foregone no less than by those that are preserved at tremendous cost that we know a society's character." GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17 (1978).
1990 began in 1914. The second part begins with a depiction of those European ways of governance that antedate the modern state just before its emergence in the fifteenth century and traces the evolution of states—each genetically endowed with unique historical circumstances, each mimetically copying those successful innovations that such circumstances forced on its competitors—to the present period. Thus, law, which begins when the state has achieved a monopoly on legitimate violence, undergoes change as a consequence of the violence among states. Law and violence and history are inseparable. The third part speculates about how the state would have to change its security structures if it were to be committed to maintaining a nonviolent world order among and within legitimate states. One might say it studies the constitutive changes in the state that result from interaction with other states.

The second volume, called *The Powers of War and Peace*, explores various intersections between international law and U.S. constitutional law. Relying on the description of the evolution of the state in the first volume, this book argues that international law—the law of the society of state—is made out of constitutional law, particularly the constitutional law of the European states. The first part of this book deals with war powers in American constitutional law. The second part takes up various anomalies that appear when the limited sovereignty of the American state confronts the complete sovereignty assumed by international law, specifically the anomalies generated by the issues of treaty interpretation and treaty succession. The final part speculates about the constitution of the international society of states and its future development as a consequence of the interplay between the law that structures a state, and that which reflects the structure among states.

None of the contributors to this Symposium has read these manuscripts. Yet, the maps they offer regarding *Constitutional Interpretation* and with respect to the methodological concerns that lie at the heart of my way of writing about constitutional interpretation, are abundantly rewarding for my new work. Indeed, all the papers that precede this Essay can be read with profit by anyone interested in a wide variety of topics, by no means confined to constitutional interpretation, or to my book of that title.

Every essay is a map.37 I wanted to map the American constitution, and so I largely neglected mapping the terrain of the current scholarly debate. “I have always been aware,” E.B. White once wrote in an introduction to his essays, “that I am by nature self-absorbed and egotistical; to

37. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 637-38 (1989) (illustrating “what social scientists call ‘cognitive maps’” by comparing Saul Steinberg’s map of the United States as seen by a New Yorker—in which “Manhattan dominates the map” and “everything west of the Hudson is collapsed together and minimally displayed”—to various “maps” of the Bill of Rights).
write of myself to the extent I have done indicates a too great attention to my own life, not enough to the lives of others."\textsuperscript{38} Fortunately, my colleagues have not been so self-absorbed, and in this Symposium my neglect has been repaid with generous consideration.

In the following Essay, I want to describe three sorts of maps of my work presented in this Symposium—maps of insight, description, and explanation. And I want to show the different patterns these maps reflect and to account for these patterns by discussing some of the formal aspects of \textit{Constitutional Fate}, \textit{Constitutional Interpretation}, and a book I am currently writing, \textit{Constitutional Analysis}, which further addresses issues raised in the first two.\textsuperscript{39} In what follows, I will be writing about the readings of my own writing. This is hard to do without seeming absurdly self-important. I accept this risk because of the high quality of the papers in this Symposium and owing to the admiration and affection I have for its organizers.

\section*{I. Maps of Insight}

\textbf{A. H. Jefferson Powell: Constitutional Investigations}

I should like to discuss two essays of Powell in my commentary: the fascinating \textit{Constitutional Investigations} included in this Symposium, and another essay recently published in the \textit{Virginia Law Review}, \textit{The Principles of '98: An Essay in Historical Retrieval}.\textsuperscript{40} Both are helpful to my current project, and both are examples of the map of insight I have been describing. The paper in this Symposium, moreover, has the distinction of showing the particular rhetorical strategies of such maps in a highly creative and unusual way.

\textit{Constitutional Investigations} begins with an extraordinary introduction, one that at first appears to be a sort of case note devoted to a concurrence of Mr. Justice Souter.\textsuperscript{41} In \textit{Church of the Lukumi Babalu Aye}, Souter, according to Powell, writes a concurring opinion to emphasize that the majority opinion in that case does not confirm the unfortunate "Smith rule," which held, regrettably, that facially neutral statutes do not implicate the Free Exercise Clause even if, their effect is to prohibit religious

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{38} E.B. White, \textit{Essays of E.B. White} at viii (1977).
\item \textsuperscript{39} Specifically, \textit{Constitutional Analysis} will address these questions: Is there a unique method of American constitutional analysis? What form does it take? How has it changed? How do we read the cases that changed it, in light of the basic constitutional assumptions of this method? What is the relationship between this analytical method and the forms of argument?
\item \textsuperscript{40} H. Jefferson Powell, \textit{The Principles of '98: An Essay in Historical Retrieval}, 80 VA. L. REV. 689 (1994).
\item \textsuperscript{41} Powell, \textit{supra} note 35, at 1731-35.
\item \textsuperscript{42} Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).
\end{enumerate}
\end{footnotesize}
Souter’s careful doctrinalism is reminiscent of Judge Friendly’s efforts to distinguish Warren Court precedents in habeas corpus: by meticulously confining the scope of the holding to those questions actually decided, Souter prevents infection spreading to the present case. *Church of Lukumi* does not depend on *Smith*. And *Smith* itself, the Justice’s concurrence argues, relies largely on precedent, making it vulnerable to a withering doctrinal assessment. The issue is an ancient one, portrayed by Sophocles and confronted by Thomas Beckett (and his successor, Thomas More): to what degree may government, in the pursuit of its secular goals, compel disobedience to what one believes religion commands?

Although it may appear to be a simple case note, which has strayed from the back of the law review where such notes are commonly kept, this intriguing, but obscure beginning is methodologically so sympathetic to my own style as to suggest that either Powell is writing a parody or that he understands and agrees with the purposes behind my own “oblique” narrative tactics. For, why else would one begin a book comment with a case note, not mentioning the book or its subject matter? Beginning this way draws the reader into familiar terrain—What is more common to a law review than a case note?—and then studiedly confuses her. The note is not about a majority opinion, or even about a concurrence regarding an issue of substance with the majority. The issue that appeared at first to be doctrinal—Does *Church of Lukumi* implicitly re-affirm *Smith*?—turns out to be about doctrinalism itself—What are its standards and what is the consequence for the particular precedential value of a case if the rationale of that case depends upon a distortion of the precedents on which it relies? In short, the very subject of the inquiry is changed from one about truth—Is the legal proposition “*Church of Lukumi* re-affirms *Smith*” true?—to one about meaning—How do we determine when such a proposition is true? Then, the already reeling reader is confronted by another unexpected turn in what began as a purely innocent case note. The author tells us that the issue is a profoundly moral question—an aspect that doctrinalism overtly and purposefully shuns—and then refuses to say what the correct moral view is. With that, the introductory section abruptly ends without mentioning the ostensible subject of the paper, and the body of the paper begins.

There are two main sections of the paper. The first section is a summary of the argument in *Constitutional Interpretation* leading to the

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44. See, e.g., Mitchell v. Scully, 746 F.2d 951, 955 (2d Cir. 1984) (Friendly, J.) (noting the Second Circuit’s conscious decision not to apply the Court’s liberal habeas standard in Fay v. Noia, 372 U.S. 391 (1963), in cases in which the facts differed from “the precise situation in Fay”).
45. See Powell, supra note 35, at 1735.
apparent impasse when the forms of argument (the “modalities”) conflict, noted earlier by Gene Nichol, and then by Mark Tushnet and Steven Winter in this Symposium, an impasse that I attempt to bridge by the “recursion to conscience”—“a rhetorical Band-Aid over a very real aporia,” Winter calls it. This section summarizes what Powell calls the part of the argument of Constitutional Interpretation that is actually written. The second section is a methodological analysis of Constitutional Fate and Constitutional Interpretation which concludes that, far from being a face-saving gambit, the move to conscience—and the way in which I present it that seems to some readers so abrupt and desperate—has been misunderstood. Powell demonstrates that this move is not resorted to but required by the epistemological point of view implicit in my work generally, and, far from re-opening the regress for which it is thought to be an ineffectual cure, it is instead a shift in strategy that reflects an unusual and profound difference in one’s understanding of the problem. This part, Powell believes, is implicit in the first part of my argument; it is, he says, “that part of Bobbitt’s argument that is not actually written in his book.”

Now, I might have put that differently—not so subtly nor so well. I think the argument described by Powell in his second section is written in Constitutional Interpretation—Powell himself quotes passages in support of his description—but I see exactly what he means, and how very illuminating his way of describing it is. As we shall see, the formal problem to which Powell draws attention is how to show something without saying it, not because one is coy, but because the analysis of the first section demands such fastidious refusal. Powell understands this perfectly and thus provides an explication that is faithful to my aims as well as to his own; that is, he gives an insightful rendering of my ideas in the context of criticism rather than narrative—an expository rather than didactic

49. BOBBI T, INTERPRETATION, supra note 2, at 184.
50. Winter, supra note 48, at 1828.
51. See Powell, supra note 35, at 1735-36.
52. Id. at 1745. Powell, with the graceful allusiveness of a poet, is referring here I believe to Wittgenstein’s celebrated letter to the publisher, von Ficker:

My work [the manuscript of the Tractatus] consists of two parts: the one presented here plus all that I have not written. And it is precisely the second part that is the important one. My book draws limits to the sphere of the ethical from the inside as it were, and I am convinced that this is the ONLY rigorous way of drawing those limits.

experience. (And he does this so artfully as to show how the map of in-
sight is itself an art form.) In the final section, he draws the entire piece
together, uniting his own introduction, an example of the methodology I
am attempting to develop, with the description of the underlying argument
I am pursuing. It is a tour de force by a young master.

In the next few paragraphs, I will recapitulate his argument; and
suggest how this fits into my larger project on American constitutional law;
and then draw attention to a recent piece of Powell's to show his harmony
with, and departure from, my views on the subject that I am at present
pursuing. I mean to make my comments more than just a "Reply to Crit-
ics." I want to point up the importance of these critical essays aside from
the purpose that has brought them together.

First, Powell summarizes the thesis of Constitutional Interpretation:
"The theme of Constitutional Interpretation is that American constitutional
law, rightly practiced, makes moral decision concerning the political
'relationships in our constitutional democracy' possible." He then
proceeds to give what he regards as the explicit part of the argument of
Constitutional Interpretation in roughly the following terms: Powell asserts
that, on my view of matters, "to learn the law" is to become competent
at a variety of roles practiced by a particular group and directed toward
goals external to those practices. If one accepts this view of law as an
activity, then five propositions follow: First, legal decisions are not
politically or ethically neutral because in our society, the very purpose of
law is to allow persons to pursue their own political and moral goals by
means of law. Thus, the lawyer cannot be indifferent to the goals of her
client. Second, legal activity is not political activity. The former is
expressed and acted out through the various modalities of legal argument,
and the latter is expressed through law (among other means). Third, the
legal system, including the practice of judicial review, cannot be
legitimated by appeals to ideology; nor, owing to circularity, can it be
legitimated by appeals to ideologies that reify any particular modality
itself. Fourth, law is legitimated by adherence to practice; this occurs
when a decision is rendered according to law. Finally, the modalities
are the grammar of the law; thus, they do not necessarily dictate what the

53. Powell, supra note 35, at 1735-36 (quoting Church of the Lukumi Babalu Aye v. City of
Hialeah, 113 S. Ct. 2217, 2250 (1993) (Souter, J., concurring in part and concurring in the judgment)).
54. Id. at 1736. I might have said, "to understand the law."
55. Id.
56. Id.
57. Id. at 1737.
58. Id. at 1738.
59. Id. at 1739.
Two corollaries flow from these five propositions: First, the modalities can conflict; and second, legitimacy cannot be the same as justification because more than one way of expressing a proposition can be legitimate, but of two conflicting propositions with respect to a particular predicate—for example, justice—only one can be true. Powell observes that, to a certain sort of theorist, this argument seems willfully perverse. Such persons want constitutional theory to obviate choice so as to ensure justice. Constitutional Interpretation argues, on the contrary, that this “failure”—the failure to provide a decision procedure that will yield a unique result—is a great virtue. Whereas other theorists offer a “technology” by which moral decision can be converted into a technical inquiry, Constitutional Interpretation asserts that it is conflict, the clash of values, that enables justice, and that a decision according to conscience thus becomes a decision according to law. Quoting from the book, Powell notes, “The justice of the system lies in the extent to which it is able to confer legitimacy on the right moral actions of its deciders.”

There are, Powell writes, three fundamental criticisms of my views. First, in contrast to my denial of this position, some critics assert that the Constitution—apart from the Thirteenth Amendment—does in fact enshrine certain substantive moral commitments, though, Powell wryly observes, even these persons do not seem to be able to agree on what these commitments are. Second, some persons may believe that the results of the system are so awful that, if I am right in my standard of assessment, the system stands indicted for having legitimated such results. Here, Powell asks only that such persons agree that their criticisms are fundamentally destructive of the system itself. Finally, some may believe that the recursion to conscience is a kind of trick, too intuitionist, too individualistic, to be of any help. As Powell explains,

To what source, one might ask, does the constitutional interpreter turn when the forms of argument will permit her to reach either of two morally opposite conclusions? One reading of Bobbitt's book is that he is indifferent to the answer, or unable to provide one other

60. Powell, supra note 35, at 1739-40.
61. Id. at 1740.
62. Id. at 1740-41; see BOBBITT, INTERPRETATION, supra note 2, at 118-20.
63. Powell, supra note 35, at 1741.
64. Id. at 1742.
65. See BOBBITT, INTERPRETATION, supra note 2, at 168, 184-86.
66. Powell, supra note 35, at 1743 (quoting BOBBITT, INTERPRETATION, supra note 2, at 170).
67. All three, I might add, are represented in the papers for this Symposium.
68. Powell, supra note 35, at 1743-44.
69. Id. at 1744.
than the negative injunction that the interpreter must turn somewhere other than to the (morally agnostic) Constitution.\textsuperscript{70}

On this reading, the role of conscience is "unexplored and, perhaps, unexploorable,"\textsuperscript{71} one such critic has written, leading to the conclusion that there is a "disappointing inconsistency" between the book's masterful explication of the forms of constitutional argument and its empty invocation of conscience."\textsuperscript{72} To this objection, Powell's answer lies in the "part of Bobbitt's argument that is not actually written in his book,"\textsuperscript{73} the subject of the second part of Powell's paper.

Sometimes a map of insight must suggest readings of a text as to which the critic, the map provider, must speculate. This is so not because the text has eluded the critic, but because the writer being criticized has chosen—or feels required by other choices made—to provide a role for the reader that is open-ended; and the critic is, after all, a reader also. A critic of insight will often be able to make sense of this ellipsis by a careful reading of what is said, looking for signs that point beyond the text. Whether the speculation is in harmony with the writer's intentions, or is discordant, depends on the critic's abilities in determining whether the map is one of insight or its opposite, occlusion.

Powell suggests that \textit{Constitutional Interpretation} is an attempt to cultivate a certain sensibility in the reader, while preserving always the reader's decision whether or not to accept such a change.\textsuperscript{74} This explains a great deal about both \textit{Constitutional Fate} and \textit{Constitutional Interpretation}, but it does not explain why the author makes this choice; here Powell offers only my assertion that "the soul of one's conscience is not manipulable,"\textsuperscript{75} without saying why this is so (if it is). Instead, he merely quotes the following passage, which assumes the truth of the previous proposition: "I have no recommendations; I will make only this observation: there is no conscience without faith for without faith there is only expediency. Without faith, there are no tragic choices; there are only choices."\textsuperscript{76}

This passage raises very many questions that perhaps ought to be addressed before we encounter Powell's account of my narrative technique and its role in the argument about conscience. For if the animating force of one's conscience cannot be manipulated, why should I be so fastidious about specifying particular moral outcomes? Powell suggests that, fractal-
like, I am reproducing in my books the choices I believe the conscientious
decider faces\textsuperscript{77} (just as he, in turn, has replicated this structure in the
introduction to his essay). But why would one do so? And what does
Powell's observation have to do with the cultivation of the conscience?
Powell juxtaposes the sentences quoted above with the last sentence of the
book: "Decision according to law is an ideal, but it is also an art and
finally it is our piety, our 'service to God.'"\textsuperscript{78} These sentences taken
together, he argues, articulate the profile of the decisionmaker in a way
that retains the individualism of the person without the solipsistic,
intuitionist "black box"\textsuperscript{79} of the conscience gambit. First, let us examine
Powell's argument about my proposed articulation, this revolving and
turning around of the object of our study—the conscience of the decider.
Then I will return to some of the issues raised by that articulation itself.

Powell begins his reconstruction with \textit{Constitutional Fate}, and he
echoes many other critics by observing that the book must have seemed to
many readers "a very odd book indeed."\textsuperscript{80} I was not unaware of this.
I cautioned readers, "In this book I have been engaged in a study of the
legitimacy of judicial review. I have, however, gone about it in an odd
way . . . ."\textsuperscript{81} "The purpose of the book was not to present an analysis
of what constitutional law is 'really' about from the perspective of an
external observer," Powell argues.\textsuperscript{82} Rather, he concludes, \textit{Constitutional
Fate} was fundamentally "pedagogical" in intention.\textsuperscript{83} "My aim," I wrote,
"in this book is to plunge the reader into a world, the experience of which
will cultivate a particular sensibility toward the Constitution . . . ."\textsuperscript{84} I
ask the reader, Powell says, "actually to participate by sympathetic and
attentive reading in the practices [the book] describes, and by participating,
to be changed."\textsuperscript{85}

\textit{Constitutional Interpretation}, he argues, relies on the same sort of
method. The extensive case studies of constitutional decisionmaking are
not "second-order reflection on constitutional law but rather the actual

\begin{footnotes}
\item[77] Id. at 1749.
\item[78] Id. at 1745-46 (quoting BOBBIIT, INTERPRETATION, supra note 2, at 186).
\item[80] Id. at 1746.
\item[81] BOBBIIT, FATE, supra note 1, at 233.
\item[82] Powell, supra note 35, at 1747; see also Patrick O. Gudridge, \textit{False Peace and Constitutional
Fate is intended to be a provocation—its flaws [the narrative style] are part of its message.").
\item[83] Powell, supra note 35, at 1747. My colleague Scot Powe has also made this point in conver-
sation with me.
\item[84] BOBBIIT, FATE, supra note 1, at ix, quoted in Powell, supra note 35, at 1747.
\item[85] Powell, supra note 35, at 1747.
\end{footnotes}
doing of constitutional law." The arguments of Part II of the book persuade (if they do) "by the attractiveness of the activity displayed."

As with Constitutional Fate, Constitutional Interpretation is subject to a "profound misreading": if the critic takes me to be presenting the theory of constitutional law, providing the rhetorical tools by which judges can seek an ever-greater realization in our society of the norms of liberal (or republican) ideology, then he has mistakenly assimilated me into the ranks of Professors Michelman, Wellington, and others. That is, the conventional book of theory is concerned with establishing the truth conditions for legal propositions; "radical" approaches to this are books concerned with critical perspectives on what particular truth conditions are established—for example, why these particular doctrines prevail. My concern, however, has been with how such conditions come about. It is a shift in subject, it is sometimes said, from "truth" to "meaning." Constitutional Interpretation thus not only asserts that "[w]e do not learn the forms of argument by studying them as forms, but by legal practice." The book also actually asks the reader to do so.

In my view, the most important part of Powell's paper is his claim that, by declining to lecture the reader about the proper attributes of a constitutional conscience, I am portraying the conscience and faith of the constitutional decisionmaker "in the only truthful manner." It is consistent with this view that I should therefore offer the reader a moral choice about undertaking the activity I describe. As Powell notes, "Bobbitt remarks . . . that . . . I will ask the reader to work through three case studies . . . . The skills gained in these exercises amount to a sort of auto-experiment . . . . The reader can then judge for himself or herself as to the claims made for the various modalities of argument."

This is an invitation, as Powell rightly sees. It is not the conventional approach, as he also sees. Powell explains:

For example, in discussing the usefulness of understanding constitutional law through the modalities, Bobbitt claims that the modalities permit those who know them to "work through current problems on their own," and presents as an example the outline of "a good beginning to an answer" to an Eighth Amendment question.

86. Id. at 1749.
87. Id.
88. Id. at 1747 (emphasis omitted).
89. As I noted in the preface to Constitutional Interpretation, "One [reviewer] even complained that the subtitle 'Theory of the Constitution' had confused him; shouldn't it be 'The Theory of the Constitution,' he asked?" BOBBITT, INTERPRETATION, supra note 2, at xi.
90. Id. at 179.
91. Powell, supra note 35, at 1749.
92. Id. at 1749 n.111 (emphasis omitted) (quoting BOBBITT, INTERPRETATION, supra note 2, at xv-xvi).
Bizarrely (from the ordinary theoretical perspective), Bobbitt offers no clues as to how to resolve the issues his outline raises, remarking instead that "playing such a game ought to give one an idea of how to proceed to answer a constitutional question rather than simply shrugging one's shoulders." 93

But Powell's account does not explain why this is the only truthful manner in which to present such a case. Nor does it establish Powell's claim that "[t]he invitation of Constitutional Interpretation is . . . just that, and necessarily so." 94 Why, one wants to ask, is it necessarily so?

Constitutional Fate depended upon two limiting conclusions. First, it argued that the search for a grand theory was misconceived on logical grounds. Thus, I described this book as permitting one to translate all the asserted statements in a well-formed judicial opinion into a series of constitutional arguments. Using this system to characterize whether a particular proposition in constitutional law was true or false . . . , [it] then argued that there existed a number of constitutional propositions whose truth or falsity could not be determined. And the examples [given] . . . were the six interpretive [modalities] themselves. 95

This meant that no grand theory privileging any—or all—of these modalities could legitimize and justify their operation in any case. A theory that was comprehensive 96 and complete could not provide certainty, because the modalities could conflict. A theory that was comprehensive and provided certainty by privileging some modalities, as for example, by a hierarchical arrangement, could not be complete because it would require the inclusion of new principles to legitimate the hierarchy, and then new rules to legitimate the operation of these principles, and so on. A theory that was certain and complete (such as strict construction) could not be comprehensive because it excluded some modalities. One way to read Constitutional Fate is as an extended proof of this claim. The methodological consequence, however, is that the assumptions of a grand theory are dispensed with at the outset.

The second conclusion of Constitutional Fate was its rejection of an external legitimating criterion for law. The book described itself as

not interested in constructing such a foundation [based on political theory], but instead in having a perspicuous view of the structures

93. Id. at 1748 n.102 (citations omitted) (quoting BOBBITT, INTERPRETATION, supra note 2, at 28, 30).
94. Id. at 1750.
95. BOBBITT, INTERPRETATION, supra note 2, at x (describing Constitutional Fate).
96. By "comprehensive," I mean a theory that is capable of generating all well-formed legal propositions. For a similar discussion of this problem, see BOBBITT, INTERPRETATION, supra note 2, at 31.
that make justification possible. . . . [This book] discards the notion that law takes place within a framework that is independent of the structure of legal argument. It rejects the view that a set of legal presuppositions exists that are discoverable in the absence of legal argument, upon which legal argument is supposed to depend. The entire enterprise in which others are engaged seems to be based on a confusion between the justification [of the system]—which is that legitimation that results from the operation of the various [modalities]—and a hypothesized causal explanation for [law] derived from socio-political theories.97

This position also compelled self-restraint, for if one could not explain one state of affairs (law) by reference to another (politics or psychology) in the macro, as it were, then one ought not to do so in the micro by propositions that implied that they were outside the customary practices to which they were addressed. That is why Constitutional Fate was written as it was; that is why this was, as Powell puts it, the only "truthful" way to do it.98

Constitutional Interpretation is written in a similar manner for similar reasons. Powell is absolutely right in saying that my intention was "pedagogical,"99 that I wished to give the reader a certain experience, through the reader's own efforts, that was not the same as simply being told what the experience was like. "I have tried to replace the world of the thought . . . with the world of . . . decision."100 It is in the latter world, Powell reminds us, "that conscience is cultivated and faith embodied."101 So it is not exactly that Powell has relied upon that which is not written, but rather that he has correctly seen that which, on my view, cannot be written, and has seen also my reasons for believing so.

To demonstrate other links between our respective constitutional work, I would like to close this particular section with a brief reference to Professor Powell's latest law review article and indicate its relevance to Constitutional Analysis and The Powers of War and Peace. That article is entitled The Principles of '98: An Essay in Historical Retrieval,102 and it is a reminder of just how good constitutional history can be when written by a lawyer. This article focuses on the constitutional dispute that arose over the Alien and Sedition Acts103 enacted in 1798, and that culminated in the Virginia and Kentucky Resolutions and the Republican electoral

97. BOBBITT, FATE, supra note 1, at 244-45.
98. Powell, supra note 35, at 1749.
99. Id.
100. BOBBITT, INTERPRETATION, supra note 2, at 183.
102. Powell, supra note 40.
103. Alien Act, ch. 58, 1 Stat. 570 (1798) (repealed 1802); Sedition Act, ch. 74, 1 Stat. 596 (1798) (repealed 1802).
sweep in 1800. Powell argues that this dispute re-ignited the fundamental issues about the origin of federal sovereignty that had been smoldering since the Revolution. Indeed, Jefferson asserted that “the revolution of 1800... was as real a revolution in the principles of our government as that of 1776 was in its form.”

The debate arose over the fundamental question of the source of federal sovereignty. Did the Union derive its authority from the states, or the people acting through the states, or the people acting directly, or from its predecessor (the Confederation or the British Crown)? Historians have drawn the connection between the Republican and Federalist sides of this debate to the older Country and Court parties of eighteenth-century English politics, but it is Powell who, with characteristic legal insight, links this debate with the choice of constitutional interpretive modes. Republican partisans campaigned for a stringently textual approach to constitutional interpretation, construing grants of congressional authority narrowly vis-à-vis the states and more broadly against the Executive.

This may sound to a political scientist like mere ad hockery, but it is grounded in the text itself and in the principles of textual argument. From a textual point of view, the very explicitness of the text of Article I, compared to Article II, counsels for greater congressional powers when confronting the President’s vaguer powers, whereas the fact that all federal power is delegated power demands that, as a whole, the Constitution must be strictly construed.

When, as a concomitant of the war against France, the Federalist Congress enacted a series of statutes, known collectively as the Alien and Sedition Acts, Jefferson and Madison secretly drafted resolutions condemning the Acts. The Kentucky legislature adopted Jefferson’s draft in November 1798; Madison’s was endorsed by the Virginia General Assembly on Christmas Eve.

These are the famous resolutions that were used, perhaps unscrupulously, in the defense of slavery and as a basis for the doctrines of nullification and secession.

Jefferson and Madison disagreed as to the precise nature of the compact that delegated a limited sovereignty to the Union, Madison holding that the Constitution was the creature of collective action by the states, and Jefferson taking the view that the contract was between each individual state and the rest of the states as a body. Despite the language in the Virginia Resolution about interposition, Madison’s view did not in fact endorse any legally significant action by an individual state if the federal

105. Id. at 702-03.
106. Powell, supra note 23, at 130, 133.
government acted unconstitutionally. Because the authority of the states was collective, this action could be exercised only in concert, or by a revolution of the people at large from whom the states derived their powers. Jefferson believed, however, that, because each state was a party to a compact with the federal government, no collective, unconstitutional decision could be binding on a state. "[A]s in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."^{109} Although in his original draft Jefferson had confined the states to political remedies if the federal government abused its powers, he claimed for each state the right of nullification—the power to declare federal laws void within its borders.^{110} Kentucky did not adopt this language in any event,^{111} and there is some dispute as to whether Jefferson thought this right to be a natural right and not a constitutional right.^{112} In any case Powell concludes that the principles of 1798 did not give any individual state that right.^{113} More importantly for the work I am now doing on Constitutional Analysis, he suggests

that attempts to render definite [these concepts] mistake the fundamental point of the language of compact. The notion of the constitutional compact . . . was not a literal definition of the Constitution's metaphysical nature; instead, it served as a metaphor for the Constitution's ultimate subordination to the people and thus for the legitimacy of popular authority regarding the Constitution's interpretation.

. . . . The Republican definition of the Constitution thus was primarily an image or reminder of popular sovereignty and popular control over the government rather than a proposition about federal-state relations.^{114}

111. Powell, supra note 40, at 719.
112. See id. at 720 (noting that James Madison "consistently maintained that Jefferson did not intend to endorse 'any constitutional right of nullification' by an individual state" (emphasis in original) (quoting James Madison, Notes on Nullification, reprinted in The Mind of the Founder: Sources of the Political Thought of James Madison 417, 428 (Marvin Meyers ed., rev. ed. 1981))).
113. Id. at 720-21.
114. Id. at 721-22. There does not seem to have been any distinction between those laws that offended individual rights (like the Alien and Sedition Acts) and those that offended federalism—a modern distinction that makes most sense when the scope of rights is not held to be identical with the limits on the grant of power.
This is brilliant, and for my purposes, it is especially helpful to the work I am currently undertaking. First, regarding *Constitutional Analysis*, Powell establishes a crucial point about the DNA, as it were, of constitutional doctrine. I intend to argue that there is a fundamental structure to all doctrinal analysis; that every constitutional doctrine can be usefully understood when organized into this structure; and that the development of doctrine, in every area, is best understood as a set of replications, and mutations, of doctrine organized into this fundamental way. The basic parts of this structure have been perpetuated in an environment in which constitutional law has a unique existence beyond the party and policy preferences of the deciders called upon to construe it; indeed, I daresay this structure could not have persisted—through civil war, economic reconstruction, and international conflict—without this status. Usually, the dominance of this distinction between legal argument and political motivation is attributed to Marshall, and the first substantive section of *Constitutional Analysis* is a very close reading of *McCulloch v. Maryland*. Powell suggests that Republican efforts to put the state under close legal constraint more strongly accounts for this environment, in which law and polities were distinguished, than the nationalistic federalism with which Marshall was associated. This observation promises to be extremely fruitful for my description because it is the interplay between possibilities—Hamilton’s urging of something like a rational relationship test, Madison’s *Lochner*-like superstructure of rights, or St. John Tucker’s *Caroline Products* footnote—to take but three otherwise astonishing anachronisms—that identifies the fundamental structure and shows the limits of its permutation when that structure serves as the duplicating template for each generation’s needs and experiments. Powell’s work will help me, I

116. See Powell, supra note 40, at 729, 728-30 (pointing out that nationalistic Federalists, unlike Republicans, “generally treated constitutional argument as a species of political reasoning . . . with the specifically political and policy considerations of statesmanship”).
117. In discussing the general powers of the national government, Hamilton identifies a criterion of what is constitutional, and of what is not so. This criterion is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority.

118. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 11 *The Papers of James Madison* 297 (David B. Mattern et al. eds., 1991) (minimizing the need for a bill of rights because the limited powers of the federal government and the open-ended scope of personal liberties provided broader, more certain protection of “essential rights” than could a bill of rights).
120. The uncanny evidence of the framers’ generation of what appear, from a 20th-century perspective, to be examples of doctrinal clairvoyance is explored in *Constitutional Analysis*. 
hope, to unite the two strands of ideas—the modalities of argument and the fundamental structure of doctrine—by an historical association of the political dynamics of the American Republic with particular forms of legal argument. I have long argued that we have the modalities we do because the Anglo-Americans took the forms of argument at common law and superimposed these on the state when they imposed a written, limiting constitution on the state. 121 Powell, in passages like this one, offers proof: "The textualism of the principles of '98, by shaping public constitutional discourse, played a key role in creating the assumption that the Constitution [should be] something 'read' in a lawyerly fashion . . ." 122 Finally, this is important for my larger objective to bring to every citizen the means of looking at the problems from a constitutional point of view, and at constitutional problems from a legal point of view, beyond simply repeating whatever the prevailing precedent holds, or worse, abandoning the project altogether if the constitutional case is one that is not appropriate for judicial resolution. It is thrilling for me to read Powell's conclusion:

The teaching of the "Jeffersonian Doctrines" is that obedience to the Constitution which "We the People" have promulgated requires the people to address its meaning and its demands actively, in their roles as legislators, executive officials, jurors, voters, and citizens, not merely passively, as the recipients of authoritative judicial deliverances. 123

For those persons who agree with this, the issues of nullification and interposition are crucial: to what extent does the individual citizen have a legal duty to refrain from enforcing a law that he or she takes to be unconstitutional? I believe there is a clear answer to this, and it lies in attending to the legal nature of enforcement. A person who disagrees with Roe v. Wade 124 acquires no authority to perform any legal act on that account. That person is not called upon to perform any duty. But what about the government doctor called upon to perform an abortion? And what about the draftee who believes a war is unconstitutionally authorized? These questions have not gone away with the advent of judicial supremacy; they have merely been sleeping, waiting for the intellectual tools to grapple with these issues once the public is itself awakened.

In a second way, Powell's article is relevant to my work The Powers of War and Peace, 125 and its final part, a discussion of the constitution

121. BOBBITT, INTERPRETATION, supra note 2, at 120-21.
122. Powell, supra note 40, at 730.
123. Id. at 742.
125. See supra text accompanying note 36. This volume, the first part of The Shield of Achilles, originated in the Dean's Lectures at St. Mary's Law School in 1991 and 1992.
that empowers international law, and some possible futures of that constitution. In that part, I take up three subjects: the Wilsonian vision of a world made of law, in which states stand in relation to law roughly as individuals stand in relation to domestic law; an argument against substantive customary international law; and speculation about an international law based on American constitutional ideas of sovereignty, in place of the prevailing European assumptions. Powell joins the American framers with Michael Reisman\textsuperscript{126} in an implicit attack on the assumption that sovereignty inheres in the formal apparatus of the state. Powell writes that "[o]n the basis of the Constitution’s contractual nature, the principles of '98 endorsed a constitutional vision in which institutional power over constitutional meaning was counterbalanced by popular authority over institutions,"\textsuperscript{127} and he observes that, "[b]y denying finality to the constitutional interpretations of anyone but ‘the parties to the constitutional compact’—the people ‘in their highest sovereign capacity’—compact theory legitimized continuing constitutional debate and disagreement even in the teeth of consensus among the formal institutional loci of interpretative authority."\textsuperscript{128} For my purposes, this scholarship provides links between the constitutional and the international that are crucial to my argument.

Law review articles—be they maps of insight like Powell’s or the other sort of maps that I shall soon be taking up—are not, usually, examples of scholarship. They may be informed by scholarship, as is Powell’s work, but one should not read The Principles of '98 for a scholarly article by an historian. It is more, and less.\textsuperscript{129} Law review articles are examples of criticism, and it is by the standards of criticism that they should be judged. "The most impressive thing about the good critic," wrote one of the most impressive of them, "is the fact that he does respond to the true nature and qualities of" the work he is criticizing.\textsuperscript{130} In Powell, this is true whether that work is Constitutional Interpretation or the Virginia and Kentucky Resolutions.

\textsuperscript{126} See W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT’L L. 866, 871 (1990) ("[A] jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty.").

\textsuperscript{127} Powell, supra note 35, at 736.

\textsuperscript{128} Id. at 737 (footnote omitted) (quoting JAMES MADISON, The Report of 1800, reprinted in 17 THE PAPERS OF JAMES MADISON, supra note 120, at 303, 309).

\textsuperscript{129} "We are something different from scholars, although it is unavoidable for us to be also, among other things, scholarly. We have different needs, grow differently, . . . we need more, we also need less." FRIEDRICH NIETZSCHE, THE GAY SCIENCE 345 (Walter Kauffmann trans., 1974) (emphasis in original).

Reflections Inspired by My Critics

B. Akhil Reed Amar: In Praise of Bobbitt

I live on the side of a limestone hill, above the shoals of a limestone creek. So when I read the words “In Praise of . . .”,131 the first thing I think of is Auden’s poem, and I wonder if I am the best and worst, having stayed here long rather than seeking immoderate soils.132 And I sometimes wonder if this, my beloved Texas, is, as Auden writes, “not the sweet home that it looks,” but

... A Backward
And dilapidated province, connected
To the big busy world by a tunnel, with a certain
Seedy appeal . . . .133

I know that I, too, like the poet, am reproached: “Not to lose time, / not to get caught, not to be left behind, not please! to resemble . . . .”134

Professor Amar seems utterly free of all this in his generous tribute to my work. He sets sail and discovers continents, yet names them for the map-maker. I am grateful and appreciative, and I wonder: hasn’t he heard of Harold Bloom? Isn’t he tormented by the anxiety of influence?135

A critic of greatness, Bloom, and thus much concerned with reputation. The reputation that Akhil Amar seems most concerned with, however, is mine. Amar devotes his essay to documenting various influences in his own work that may be attributable to work of mine. And because Amar is a critic of insight, he is able to take notions of mine to places I might never go (such as “refined incorporation”).136 Amar is generous, gentlemanly—and as I would expect from the man who holds the chair that was Leff’s legacy—exciting and interesting to read.

But I will not dwell further on the appreciative remarks included in Amar’s paper in this Symposium—what can one say except “Thank you”—and will treat instead another example of a map of insight, Amar’s celebrated Southmayd Lecture, The Consent of the Governed.137 This essay is also of some importance to my current work.

Amar’s remarkable article asserts the proposition that a majority of the voters of the United States have the right, by means of a national referendum, to require Congress to call a Constitutional convention to propose

133. Id.
134. Id.
136. Amar, supra note 131, at 1706.
137. Amar, supra note 1.
amendments; and further that these (or other amendments—or a different Constitution entirely) would become law if a simple majority of the persons voting in a national referendum were to so direct therein. It is an awe-inspiring and perfectly awful idea, of that I have little doubt. But why do I feel this way?

In the first place, such a plan would make the Constitution a political football: no supermarket parking lot would be safe from petition-floggers, seeking signatures and handing out buttons. On every ballot, there would be a long list of referenda. The commercials that now are given over to candidates would be joined by thirty-second spots on constitutional amendments, and no sooner would one of these be adopted than its repeal would become the focus of the special group that finds its identity as the doppelganger of the group that proposed the amendment in the first place. The permanence that a constitution requires cannot survive in such an environment.

Second, this would cause a vast diversion of political attention and resources in a country that is already too diverted from governance toward what one might call identity-issues. Would the debate on health-care reform, for example, really be enriched by a national referenda to enshrine (or forbid) the single payer? For this is just the sort of amendment—a statute by any other name—that occurs in states that have such mechanisms.

Third, the amendment process should be made more difficult, if anything. Just look at the amendments we have. Not one amendment in the last seventy years has been actually necessary, excepting possibly the Twenty-First Amendment, which was required to repeal the absurd Eighteenth. Some have caused more problems than the situations they were supposed to cure;\(^{138}\) some were of no appreciable effect;\(^ {139}\) one, once necessary, was not ratified until it had been overtaken by events that rendered it no longer necessary.\(^ {140}\)

Fourth, constitutional referenda are a profoundly antimajoritarian device, as counter-intuitive as that might seem. Take the Twenty-Second Amendment as an example: It prohibits a President from serving three terms.\(^ {141}\) The only time a President ever exceeded two terms occurred when a very popular President was returned by large majorities on four consecutive occasions. The amendment was adopted to stifle the people's

\(^{138}\) See, e.g., U.S. CONST. amend. XX (fixing dates for presidential and congressional terms and mandating annual congressional sessions); id. amend. XXV (specifying the procedures for succession in the event of the death or disability of the President or Vice President).

\(^{139}\) See, e.g., id. amend. XXIII (providing for electors from the District of Columbia in presidential elections); id. amend. XXVI (setting the voting age at 18).

\(^{140}\) See id. amend. XXIV (banning poll taxes in national elections).

\(^{141}\) Id. amend. XXII.
wishes, as is true of virtually all modern amendments. If there were no fear that majorities would act otherwise—either by acting\textsuperscript{142} or by refusing to act\textsuperscript{143}—there would be no need for a constitutional amendment in these cases.

Fifth, a referenda system would be profoundly divisive. It would permit a bare numerical majority of national voters in a single election to forbid the majorities in most of the states in the Union from varying the definition and sentencing of crimes, setting their own tax rates, deciding how to manage state-owned natural resources and parks, establishing standards for child custody and divorce, and deciding what languages or books are to be used for ordinary course instruction in the public schools. Is that such a bad thing? Not if you are sure that the majority will act wisely, so wisely in fact that the majorities in all the states they will have overridden would accept such hegemony. But many of the most innovative and progressive acts of government have come from states experimenting with systems long before a national majority could be mustered. Perhaps you are thinking all this could happen now by national statute; most of the examples given above could. But by bypassing the Senate, a referenda system gives a very few states command of the rest, and thus changes the mix of bills that would become national law.

Finally, such a system makes governance almost impossible. Do you think the first successful referenda would be on abortion rights, or prayer in the schools, or a balanced budget? I think it would be a bar on the imposition of the income tax. For all our folly, the system we have functions smoothly and strategically compared to a system whose finances do not have the bare protection of the biennial appropriation and representative government.

I could, as Professor Tushnet says, pile example upon example.\textsuperscript{144} And why shouldn’t I? Because this would utterly miss Professor Amar’s point. He is not suggesting that we should adopt such a procedure because it would be a good idea—although he may think so—but rather because he believes it is the law. It is his conviction that a careful examination of the classic modalities of argument\textsuperscript{145} will yield the conclusion that we have, and have always had, a constitution that is amendable by referendum.

We may disagree on this; I should like to give it much more thought. But it is very satisfying to know that we do agree on how to analyze the

\textsuperscript{142} See, e.g., \textit{id.} amend. XXII (preventing the act of re-electing a President to a third term).
\textsuperscript{143} See, e.g., \textit{id.} amend. XVIII (prohibiting the manufacture and sale of alcohol and thereby removing the possibility that some states might refuse to impose such bans); \textit{id.} amend. XXIV (invalidating poll taxes in those states that had not yet repealed them).
\textsuperscript{144} Tushnet, \textit{supra} note 47, at 1712.
\textsuperscript{145} See, e.g., Amar, \textit{supra} note 1, at 459-60 (examining the views of Jefferson—the historical modality); \textit{id.} at 461 (examining the entire text of the Constitution—a textual argument).
issue. I have been dwelling on the prudential aspects of the matter; doubtless there are arguments in favor of the proposal from a prudential point of view. I am inflamed rather than persuaded by prudential arguments such as the following:

Women today constitute a majority of . . . the . . . American polity[1]. They are today governed under a federal Constitution largely the making of men who died long ago, men who may not have had their interests foremost in mind. . . .

This is not popular self rule; it is rule from cold graves of dead men . . . and by small clumps of old men in ordinary government.146

Such arguments re-enforce, I think, the danger in transferring constitutional issues to the mercies of the group politics that have taken over our society much as regional politics did in the last century. The "dead men" to whom Amar refers are something we have in common, something that can bind us together; putting it as he does vividly illustrates how vulnerable such a heritage is to the fashionable slogans of the hour. For this reason, prudential argument should, as its great architect Justice Brandeis so often counseled, be used principally as a defensive measure to avoid miring the courts in political controversies,147 and I would not yet rely on the arguments I have made until I had canvassed all the forms. The mere fact that such a proposal comes from Professor Amar gives me pause and cautions that I should consult the various modalities of argument despite my initial reaction.

All of Amar's work with which I am familiar is characterized by a singular depth. He begins at a level that most are content to leave undisturbed. This is true here also. His fundamental inquiry can be phrased as follows: If the Constitution is a limited instrument endowed by the sovereign people, did they purport to give up the power of constitution-making when they ratified this particular constitution, and, in any case, how could they, since sovereignty inheres in the people and is not, as Jefferson reminded us, "alienable'?148 I will not try to summarize his detailed and rich argument; readers would be better off spending the time reading it. But I will take up three points of difference between us so that I may ultimately make some observations about the relevance of this work

146. Id. at 508.
147. See, e.g., Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (noting that judges should "shrink from exercising" the power to strike down legislation on prudential grounds).
148. See Amar, supra note 1, at 459 ("Article V nowhere prevents the people themselves, acting apart from ordinary Government, from exercising their legal right to alter or abolish Government via the proper legal procedures.").
to my own current projects, and to the work I have done that Amar has so generously praised.

Amar rightly begins by considering the text of Article V, which provides the mechanism by which the Congress can propose constitutional amendments, or by which the state legislatures may call a convention for proposing amendments, and by which such amendments are ratified by the legislatures (or in conventions) of three-fourths of the states. He then notes that the text of Article V "emphatically does not say that it is the only way to revise the Constitution." He quickly, and of course correctly, concedes that the constitutional text is exclusive as to the powers of the federal government. For example, one could not say that the Presentment Clause, which provides for the president's signature or an override of his veto before a bill becomes a law, emphatically does not say that it is the only way to produce a statute. Article V "enumerates the only mode(s) by which ordinary Government ... can change the Constitution." But this does not prevent the people, "acting apart from ordinary Government, from exercising their legal right to alter or abolish Government via the proper legal procedures."

This argument goes right to the heart of the matter. The people must have legal rights outside the Constitution or they could not have set it up—a legal act—in the first place. Moreover, if they granted to the government a monopoly on how that government is to be constituted, the government itself could thwart structural change, becoming in effect the sovereign rather than the agent. To these structural arguments, Amar adds an historical argument: Sovereignty in the people was, he claims, "universally understood in 1787 as majoritarian. A simple majority of the People themselves ... had a legal right to alter Government and change Constitutions."

This is the issue all right, but is there not more to say on the other side? Why do we not say that, for example, the electoral college is emphatically not the exclusive means of choosing a President? This is not an act solely of "ordinary" government, but is in fact an act of the people. Or is it? Let us look at this example clearly, because it is not an instance of federal power which must therefore be otherwise strictly construed.

149. U.S. CONST. art. V.
150. Amar, supra note 1, at 459 (emphasis in original).
151. See id.
152. Id.
153. Id.
154. Id. at 460.
155. See U.S. CONST. art. II & amend. XII (establishing the electoral college).
I think we must distinguish between the polity in 1787 (or now) and the persons empowered by that polity to elect the President, the electoral college, or, in some circumstances, the reconstituted House. Only the persons empowered by the polity and designated by them in the Constitution can elect the President of the United States. The polity can choose a Supreme Leader, perhaps, or they can even withdraw their consent from the Constitution so that no one can be President, but I do not think the polity can, acting outside the means it has designated, confer the legitimacy of that particular instrument on any person elected by means other than those specified in the instrument. For the same reason, a simple majority of the polity could not remove the President by means other than impeachment\(^5\) (though there are doubtless times when this might appear attractive). They may take the entire matter back into their hands because it has always been theirs, partly on loan to the voters and the government, but they cannot replace the voters and the government without taking it all back into their own hands.

Well, what difference does it make? Whether “voters” or “polity,” it is the People, or rather a majority of them, either way, is it not? No. Majorities are like nuclei; they only exist within a defined boundary. What will count as the relevant group of designated voters is determined by the polity. That is why the polity, and not the voters, are sovereign. By changing what counts as a constituency, “majorities” can vary widely. In our own history, this constituency has changed to include women, former slaves, and persons between the ages of eighteen and twenty-one. But the polity, because it is sovereign, cannot be parsed any more than a body—from which the idea of sovereignty derives—can be parsed.

Well, then, is not Amar right in saying that a majority of the polity, determined by referendum, can do what it pleases, being sovereign? Yes, with two significant qualifications: First, it can do what it pleases so long as it accepts what it does. There is no magical formula (even majoritarianism); there are only practices that are sufficiently acceptable to be accepted. And second, that means that the one thing a majority cannot do is masquerade as the constitutional government, whose legitimacy is axiomatic because it is derived from an original agreement on a fixed set of exclusive procedures. To put it in the terms of this Symposium: It would be a mistake to think that a political theory (like majoritarianism), which can justify a system, can also legitimate it. What Professor Amar appears to want to do is take the fruits of legitimacy and confer them on an untried practice (the national referendum) that is justified by a widely held political theory. It is true that the framers (and ratifiers) were widely and tenaciously committed to majoritarianism. It is equally true, however,

156. See id. art. I, § 3 (detailing the procedures for presidential impeachment by the Senate).
that they were sensitive to its dangers and erected many barriers to majorities in the system they presented for ratification. Indeed, the *Federalist Papers* advertised the Constitution as being especially sound on just this point, and thus we must be careful not to betray the understanding of the ratifiers by introducing elements that circumvent the promises once made. I sometimes fear that political scientists would like a world in which the people were more preoccupied with political matters than they are, whereas the Constitution was designed, I believe, by persons who did not believe in the primacy of politics, and who went to great and imaginative lengths to create a system that would harness the citizenry to responsibility without pretending that they were (or should be) as committed to public life in a democracy as were the aristocrats and monarchs they supplanted.

Professor Amar does not necessarily disagree with this. On the contrary, he accepts the important distinction between a "legal process provided for by our existing Constitution, and one that . . . bootstraps itself into existence by its own self-defined rule of recognition." Amar asserts that amendment by referenda is provided for in the present Constitution. He reaches this conclusion largely, but not exclusively, by relying on doctrinal argument—not the doctrine of court cases, but the precedent of the state constitutions.

This is a crucial part of his argument, and it is detailed in a masterly way. If I am not thus far persuaded, it is because the states, being creatures of plenary power, have a different relationship to the polity than does the federal government, which is an institution of enumerated powers. There is no constitutional reason why a state must even have a written constitution. I am inclined to think that Amar, by treating the states as if they were to the federal government what the counties are to the states—that is, bodies with no unique constitutional basis—errs in a way that is fundamental to his argument. But I have not reflected on his provocative piece and, in any case, offer these reactions to underscore a different point.

What is the use of *Constitutional Interpretation and Constitutional Fate*, which try to identify means of legal argument for the public at large, as well as for judges, law professors, and lawyers, if the public is denied the right to amend the Constitution by referenda? That is, what is the point of saying that the citizenry ought to have these constitutional techniques at their disposal if, in the end, there is no interpretive role for them to play? And if there is such a role, why does it not extend to deciding which

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157. See, e.g., *The Federalist No. 10*, supra note 34 (arguing that the proposed Constitution will protect against the dangers of the majority).
159. See *id.* at 469-87.
provisions of the Constitution—like Article V—are being misinterpreted? And if they so decide, should they not be able to validly and lawfully enforce their judgment, because all constitutional power derives from their consent in the first place?

In a way, this issue is also at the heart of the nullification and interposition problem with which Powell dealt in his essay, *The Principles of '98.* I take comfort in the fact that my solution seems to be in harmony with that of James Madison: The remedy is political rather than legal in nature. Madison insisted that the "states" that were parties to the Constitution were "the people composing those political societies, in their highest sovereign capacity." He believed that refusing to recognize the interpretive authority of the people would be "a plain denial of the fundamental principle on which our independence itself was declared." Nevertheless, Powell tells us, Madison contrasted the pronouncements on constitutional issues by "citizens [or] legislatures" with judicial decisions on the meaning of the federal Constitution: "The expositions of the judiciary . . . are carried into immediate effect by force." For Madison, Powell writes, "the interpretive authority of the [people] was political rather than legal in nature."

Amar and Powell address similar issues in ways that are intensely relevant to my current work. The questions of legal intervention in international security turn on matters of compact theory: whether the people of a state are denied constitutional avenues of redress, so that popular sovereignty cannot have a political effect, and thus can enlist foreign assistance (as the French assisted us) is a notion quite at odds with European ideas of popular sovereignty (in which the state embodies that sovereignty). Moreover, the vexing question of self-determination lies behind Amar's majoritarianism. The Serbian people have contrived to restore themselves to majority status in Bosnia on the basis of constitutional claims that, they tell us, would have pleased the Republican Party in 1860. And, viewed from Belgrade, the secession of Croatia, Slovenia, and then

162. Id. at 311, *quoted in* Powell, *supra* note 40, at 718 n.117.
163. Id. at 348, *quoted in* Powell, *supra* note 40, at 718 n.118.
Bosnia-Hercegovina must have looked—and was often portrayed—as leaving behind a federal Yugoslavia whose responsibility was to restore the unified state.\footnote{For a summary of the events and constitutional claims surrounding the dissolution of Yugoslavia, see generally Marc Weller, \textit{The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia}, 86 Am. J. Int'l L. 569 (1992). \textit{See also} Cass R. Sunstein, \textit{Constitutionalism and Secession}, 58 U. Chi. L. Rev. 633, 643 (1991) (noting that the Yugoslavian government has claimed the right to "use military force to ensure against secession").} Perhaps part of my anxiety about Amar's proposal arises from concerns over whose "majority" counts in a national referendum of a people who are increasingly fragmented and distanced from one another and their common heritage.

Maps of insight, like maps of ancient and varying states, intersect, as Powell's and Amar's do, and give us perspective on what is otherwise capable of becoming too familiar.

These modifications of matter
\ldots make a further point:
\ldots .
\ldots what I hear is the murmur
Of underground streams, what I see is a limestone landscape.\footnote{\textit{Auden}, supra note 132, at 187.}

\section{C. Dennis Patterson: Wittgenstein and Constitutional Theory}

It is fortunate that the editors have brought together three legal academics—Powell, Amar, and Patterson—whose work is also informed by history, political science, and philosophy, respectively. This greatly enriches this Symposium, and brings out more in the text with which the Symposium is concerned.

Patterson\footnote{Dennis Patterson, \textit{Wittgenstein and Constitutional Theory}, 72 Tex. L. Rev. 1837 (1994).} situates \textit{Constitutional Interpretation}, as does Stephen Griffin,\footnote{Stephen M. Griffin, \textit{Pluralism in Constitutional Interpretation}, 72 Tex. L. Rev. 1753 (1994).} by understanding it on its own terms first and then trying to associate it with the ongoing debate, instead of, as with a map of explanation, situating the work first as representing a particular camp in the debate, a tactic that can sometimes serve as a replacement for understanding. Thus, the map of insight is useful for the boundaries it limns, in a way that the map of explanation can never be, because the boundaries of the latter are inferred only, like maps of Atlantis.

Patterson divides his paper into three parts: a brief description of \textit{Constitutional Interpretation} in jurisprudential terms; an assessment of Balkin and Levinson's paper in this Symposium, mainly to give an example of some of the uses of the jurisprudence of \textit{Constitutional Interpretation}; and a more extended treatment of some of Ludwig Wittgenstein's ideas as
these have been drawn into the debate by the Symposium paper of Steven Winter.\footnote{Winter, supra note 48.}

Patterson begins by characterizing contemporary jurisprudence as dominated by two approaches. In one, a body of law is explained in light of various principles or insights (often drawn from collateral fields of study) to reveal a unity or underlying principles.\footnote{Patterson, supra note 169, at 1837-38.} In the second, an ideal structure of law is described, to which the law should aspire, and the present state of affairs is compared to that ideal.\footnote{Id. at 1837.} Both of these kinds of jurisprudence are efforts at explanation and understanding. With respect to the first approach, to explain the law in terms of a unifying theme, or from a unified perspective, is to make the claim that it can be usefully understood in this way and that this understanding can give us useful guidance, much as the identification of a particular pathogen gives us guidance as to treatment. The work in the field of law and economics of Judge (at the time, Professor) Posner has been of this type.\footnote{E.g., Richard A. Posner, Economic Analysis of the Law (4th ed. 1992).} With respect to the second approach, the effort to offer an ideal system for comparison is also an effort at explanation and understanding: The operations of the current system are appreciated by contrast, and their shortcomings are explained by the gap between the actual operation of these systems and their ideal functioning, much as we say the unusual appearance of a particular antigen, or symptom, indicates a pathology because this departs from the normal or ideal. The work in law and economics of Professor Coase has been of this type.\footnote{E.g., R.H. Coase, The Problem of Social Cost, 3 J.L. \\& Econ. 1, 15 (1960).} Patterson correctly concludes that, although I have a good deal to say about both the nature of explanation and the proper use of ideal systems, I neither provide such a system nor offer an explanation of the law.\footnote{See Patterson, supra note 169, at 1838-39.} Rather, I attack both of these approaches and argue that the meaning of legal practices inheres in the practices themselves, and accordingly that understanding is a matter of mastering the activities that comprise those practices. Whereas both approaches unify legitimacy and justification—the ideal system prescribing the justification and demanding that a legitimate system conform, and the explanatory system providing the understanding by which justification and legitimacy are linked—I argue that law must be seen as a set of practices that are legitimated, but perforce cannot be justified, by following rules embodied in, but not necessarily abstracted from, those practices. These practices, and these rules, have arisen contingently and have no a priori status. In my view, as Patterson characterizes it,
"Illegitimacy is not delivered to the law from outside, as virtually all contemporary theorists maintain." Patterson also sees why, in *Constitutional Fate*, I chose the problem of judicial review as the vehicle to make these arguments. Examining the role of the legitimacy of the forms of argument in that context is analogous to determining whether an arithmetical system is complete, consistent, and comprehensive by looking not at a particular well-formed mathematical equation, but by looking at the expression of the axioms themselves.

After providing a very brief summary, Patterson turns to a discussion of selected elements of Balkin and Levinson's and Winter's papers in this Symposium. With respect to both of these papers, I will offer my own critique; it would be captious, I think, for me to comment on Patterson's, although I will observe that his criticism is always lucid and serious. For similar reasons, I will not dwell at length on the reply by Winter, which does not, in my view, take as its subject the topic for this Symposium. As to that paper, I will confine my comments largely to the notes.

Patterson's discussion of *Constitutional Interpretation* begins with the point that

> [f]rom the left, the center, and the right, the debate is over the proper lens for interpreting the Constitution. If Bobbitt is correct, there is no lens—nothing between the Constitution and our understanding of it. When we understand how the modalities are used to show the truth of propositions of constitutional law, we understand how the Constitution has meaning. We do not grasp the meaning of the Constitution with the modalities; rather, the modalities are the means by which constitutional propositions are shown to be true or false.

One consequence of this view is that we can understand constitutional law by learning to use the various modalities, and this, rather than any particular interpretive "take" on that subject, can be a worthwhile enterprise, pedagogically. As Patterson puts it in a later section of his paper, "We do not interpret the Constitution with the modalities, for to put it that way assumes that the Constitution already has a meaning that is then interpreted." Patterson's discussion of Wittgenstein is illuminating, particularly as he ties Wittgenstein's comments regarding the sources of our anxiety about continuity and coherence—questions of how we ensure that we will all

177. Id. at 1839.
179. Patterson, *supra* note 169, at 1842 (footnotes omitted).
180. Id. at 1846.
follow the same rules in the same way and how we are enabled to do so over time—to Wittgenstein's rejection of mediating devices.\textsuperscript{181} This is a rejection of what Winter calls the "moment of objectification" that links the internal and the external, thought and behavior.\textsuperscript{182} Despite Winter's disclaimers to the contrary, Patterson has identified the chief source of difference between the two of them: Patterson denies that conceptual structures have the kind of autonomy that would allow their characteristics to outrun what can be ratified by human thought—he denies that such structures thereby provide an external, normative constraint on our cognition. Winter accepts what Patterson denies, perhaps because Winter sees no other way in which our thought can be made to grasp external reality. Otherwise, as Patterson quotes, "[w]hat they know is either inside them, or... beyond them."\textsuperscript{183}

To illustrate the difference between Winter and Patterson, let me offer the following conjecture about mathematical proof and the reactions of these two thinkers to some of the questions that arise about that subject. Patterson, following Wittgenstein, likely believes we are compelled to accept a mathematical proof, for example, not because it tells us what must be the case in the world, or because it commands our assent, but because we are induced to make a decision that is guided by the proof. I imagine that Winter, on the other hand, would take the view that mathematical propositions that are proved—like Euclid's Fundamental Theorem—enjoy a cognitive certainty because they match up something in the world with something in us. Accordingly, there must be a mediating device (the rules of mathematical proof, for example, might be the "objectified sedimentations" of which he writes) that accounts for this. I realize it is brazen of me to introduce a problem that neither of these scholars discuss (nor, as far I know, have even contemplated), and then imagine their views. I take this absurd risk because it may be a way to give the reader a handle on what they are arguing about. As it is, this is made difficult by Professor Winter's demurrer to Patterson's paper, which I suppose I must now discuss.

In his reply to Patterson, Professor Winter offers a compendium of things Winter has said about his own writing that are inconsistent, in Winter's view, with Patterson's characterization of Winter's opinions. Winter also makes the claim that Patterson, like the famous hedgehog, has

\textsuperscript{181} Id. at 1847-50.
\textsuperscript{182} Winter, supra note 48, at 1821, quoted in Patterson, supra note 169, at 1846 n.57.
\textsuperscript{183} Id. (quoting STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERACY AND LEGAL STUDIES 373 (1989)), quoted in Patterson, supra note 169, at 1847.
\textsuperscript{184} See id. at 1820 ("An important part of this process of institutionalization involves the phenomenon of 'sedimentation' which, among other things, includes objectification in language.").
but one big idea, and that his work consists in misconstruing writers so as to make their views vulnerable to this idea. He appears to be so enraged at Patterson that, as we shall see, he is driven to deny assertions of Patterson's that he himself gives support for.

Winter tells us that "[m]any have wondered about [his] sustained productivity over the past several years," questioning whether there might be two Steven Winters at work, and he offers us vignettes of his college life (he edited the same magazine as a cousin of the same name) and the subsequent careers of his namesake cousins (both are successful doctors, one gathers, and one is a cardiologist) by way of setting up the point that the "Steven Winter" described by Patterson must be someone else of the same name.

I dwell on all this because it actually reflects the fundamental error in Winter's approach to his rebuttal: Just because we see ourselves in a certain light, and take our arguments to reflect a certain position, other persons are not required to accept our characterization. Even in his short piece, Winter provides ample evidence, of his own choosing, that supports Patterson's description and criticism. Let us see.

Patterson describes Winter's argument as requiring Winter "to show that the fit 'between our thought and the world is determined independently of human cognition.'" In reply, Winter quotes himself from a piece in the *Pennsylvania Law Review* in which he states that "there is no objective description of reality separate from our conceptual schemes." But isn't that Patterson's point? Winter has the burden of showing that a conceptual scheme plays a necessary role when a human being follows a rule. Simply because Winter assumes that conceptual schemes are a necessary part of human cognition does not forbid Patterson from arguing that such a position implicitly maintains the need for mediating devices—conceptual schemes—as necessary for meaning.

185. Winter, supra note 178, at 1857.
186. Id. at 1857-59.
187. Id. at 1858 (quoting Patterson, supra note 169, at 1854).
188. Id. at 1859 (quoting Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1136 (1989)).
189. Patterson complains that Winter has not shown that "objectified sedimentations' give rise to meaning in the same way as human practices." Patterson, supra note 169, at 1850, quoted in Winter, supra note 178, at 1860. Winter replies: "Yet my claim was precisely that 'social experiences such as routine or habitual interactions between subjects give rise to mutual or reciprocal sedimentations.'" Winter, supra note 178, at 1860 (quoting Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1488 (1990) [hereinafter Winter, *Indeterminacy*]). Exasperatedly, he says, he has already "explained that the claim that cognition is grounded means that 'already existing social practices and conditions ... form both the grounds of intelligibility for and the horizons of our world.'" Id. (quoting Winter, *Indeterminacy, supra*, at 1452).

But saying that social experiences give rise to sedimentations is not to say, much less show, that sedimentations give rise to meaning. Nor does saying that social practices govern the ground of intelligibility show that "objectified sedimentations" govern the grounds of intelligibility (as Winter clearly believes), even if we assume that the grounds of intelligibility are the source of meaning.
Winter heatedly denies that he "believes that there must be 'something standing between the Constitution and our understanding of it . . . ." I have argued, in contrast, that . . . 'the meaning of [the Court's] constitutional interpretation is as much a matter of . . . our interpretive commitments, as it is a matter of the understanding of the Justices.'"190 And here one begins to see the problem: What exactly does Winter think this "understanding" consists in? If it is a matter of interpretive commitments, objectified sedimentations, and the like, then is Winter's outrage really justified?191

Patterson is asking questions such as, "What sort of structures does legal understanding have and how do these structures relate our understanding to legal practices in the world?" He is trying to get an account of such understanding, but he is not trying to answer such questions as, "How do they come to be what they are?" or "What makes them intelligible?" I am not even sure that Patterson would find the latter sort of questions meaningful.192

Patterson seems to me to be in the midst of an important career in our field. His fundamental insight has to do with the similar expectations, on the part of a very diverse group of writers, about the necessary epistemological role of mediating devices in rule-following.193 He addresses the question, and puts it at the center of jurisprudence: What do we need

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190. Winter, supra note 178, at 1860 (footnotes omitted) (quoting Patterson, supra note 172, at 1846, and Winter, Indeterminacy, supra note 188, at 1229 (emphasis in original)).

191. Patterson states that Winter believes that "objectified sedimentations" stand as "something outside ourselves" that "regulates what we do in law." Patterson, supra note 169, at 1854 (quoting Winter, supra note 48, at 94). On the contrary, Winter replies: "I have explained that 'the concept expresses the way meanings and assumptions build up within the subject and, once internalized, operate without the subject's conscious awareness.'" Winter, supra note 48, at 1859 (quoting Winter, Indeterminacy, supra note 189, at 1451 n.30). Surely this is precisely what Patterson had in mind: that some structure outside ourselves—which is, I assume, what something must be if it is to be "internalized"—plays a crucial role in determining our practices in law.

192. Patterson began his paper by describing two sorts of approaches in jurisprudence: One sought to bring to bear essentially collateral perspectives on law in order to explain its operations; the other hypothesized ideal formations in law and contrasted these with the status quo. See supra text accompanying notes 172-77. Some writers do both—for example, Marx or Mill. To this, Winter replies, "Now, I've written about law (a little), and nothing I have done fits into either of these categories. In fact, I have criticized both these approaches." Winter, supra note 178, at 1866. Winter describes his approach as an effort to map "the diverse cognitive and cultural infrastructures that animate legal doctrine and structure judicial decisionmaking. For this we need a new set of tools, which is why I have devoted so much effort to the elaboration of the new conceptual developments in cognitive science." Id. at 1867. This is, it would seem, a paradigmatic example of the first sort of approach described by Patterson. It is an effort to account for law by reference to an underlying explanatory system.

193. See Dennis Patterson, The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory, 72 Tex. L. Rev. 1, 21 (1993) (dismissing the common reliance on "interpretation" that scholars with otherwise differing viewpoints offer as a mediating device "between utterances and the understanding of them").
in order to know what to do, how to go on in the law? His insights into this question are coupled with work on the logical status of propositions of law—asking whether they are true or false, and if they are, what determines this. Patterson's work thus brings these two topics together, one novel, one classic. To charge that he levels a similar claim against many different sorts of thinkers is only a negative criticism if Patterson's claims are unwarranted; otherwise, it merely measures the scope of his achievement. It is always difficult, as both Winter and Patterson doubtless know, to argue philosophically in a law journal. My own view is that law has much to teach philosophy and that, until rather recently, jurisprudence has not exploited the epistemological advances of post-war philosophy.

I was surely not the first person to conclude that jurisprudence consists in the determination of what makes a proposition of law true. Formalism, legal realism, positivism, and critical legal theory all provide answers to this question. I think, ironically, that it has been a concentration on what renders a legal statement true that has misled us. We think that an understanding of a legal statement must consist in a grasp of what would make it true and that such a grasp must consist in a knowledge of how we could recognize that condition as obtaining. And therefore it is also widely held that only by having a conclusive recognition that the condition obtained could we give meaning to the statement itself, but this I deny. My account of how a proposition acquires meaning differs from the standard account, which is shared by all these schools, so that problems of indeterminacy, authoritativeness, et cetera, do not have the same significance for me that they do for the schools of thought mentioned above. It was in part to show this that I chose to analyze the situation of judicial

194. At the end of his rebuttal, Winter strips off his professorial shirt and declares (with respect to legal practices):

Now, I've been out there. I spent eight years representing convicted and condemned prisoners, parents whose children were shot by the police, and hard-working people who were treated as second-class citizens and second-class workers solely because of their race.... Patterson wants to leave the law as it is. I think we might do things a little better.

Winter, supra note 178, at 1867. There are many things one might say about this outburst, not the least of which would be that it comes at the end of a paragraph that Winter begins by charging that Patterson "mistakes my work for an attempt to justify law," when presumably the view that we should do things better is a matter of justification. Id. But the thing that strikes me most about it is how very unfair it is.

Patterson's wanting to leave law as it is is a reference, as Winter can't quite resist showing he knows, to Wittgenstein's observation that philosophy leaves everything as it is. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 124 (G.E.M. Anscombe trans., 2d ed. 1958). It simply means that jurisprudence clarifies but does not determine the law, just as we have now come to believe that the philosophy of science was misguided when it declared relativity to be impossible. It has nothing to do with law reform, or racism, or the personal biographies of the people who write law review articles. I can think only that Winter may have been goaded into this sort of thing because he himself feels unfairly treated, feels that Patterson has mistaken him for holding views—about the need for mediating devices—that he believes he has distanced himself from.
review. The demand for conclusive grounds—analogous to Descartes's *cogito*—is a source of confusion, and not a source of the firm foundation all were seeking.

Now my view is not that all legal propositions are neither true nor false, nor that they have no truth conditions, but rather that a grasp of their meaning cannot depend upon an ability to recognize those conditions as obtaining in cases in which they can be conclusively so recognized. What this implies, in turn, is that the meaning of the modalities of legal statements cannot be represented as given by a determination of their truth conditions. The account of meaning in terms of truth conditions has to be replaced by an account of meaning in terms of the conditions under which our practices legitimate our making such statements, including conditions under which the legitimation may be overturned. What legitimates a legal statement does so only in view of the facts of our common practices. This is very much in sympathy with Patterson's efforts to treat law, jurisprudentially, as a practice.195

Patterson's aim is to show that law is best conceived not as an object to be explained—for example, in terms of moral philosophy—but as a practice that is distinct from other practices while not wholly autonomous. For Patterson, a proposition of law is true when the reasons advanced in support of the proposition are such as to invite the assent of competent professionals. Consistent with this, Patterson denies that doing law correctly is a matter of correct "interpretation" because this would account for the truth of propositions of law by reference to something outside the legal discourse.196

At the same time, Patterson has been attempting to chart the course of postmodernism in jurisprudence, based on his views of the contemporary connections between law and the philosophy of language. In his article *Postmodernism/Feminism/Law,*197 he describes postmodernism as a development in analytic philosophy, principally the philosophy of language. To criticize the law from a normative perspective, the critic must now show not only how the language of legal justification could better cope with contemporary phenomena through the expansion of its discursive categories, but also that new vocabularies could in fact complement law and not merely serve as external points of criticism.198 Such an account of

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195. See, e.g., Dennis M. Patterson, *Law's Pragmatism: A Theory of Law as Practice and Narrative,* 76 VA. L. REV. 937, 940 (1990) ("[L]aw is an activity and not a thing. Its 'being' is in the 'doing' of the participants within the practice.").

196. See, e.g., id. at 944 (arguing that there is no interpretation that mediates between a rule and its application, but rather that reality and grammar are coextensive).


198. Patterson cites approvingly Catharine MacKinnon's effort to develop legal discourse that looks at rape from a woman's point of view. See id. at 259 (discussing CATHARINE A. MACKINNON, *Feminism Unmodified* 40-41 (1987)).
knowledge, Patterson argues, does not spell the end of feminism as an emancipatory discourse, but does require that the problem of normative critiques of law be reconceived.\textsuperscript{199}

In conclusion to these comments, I would like to rely on an important distinction in \textit{Postmodernism/Feminism/Law} that has significance for my own work in much the way that Powell's and Amar's other essays do. That distinction is the one Patterson draws between the "modern" and "modernism," and between the "postmodern" and "postmodernism."\textsuperscript{200} And I would like to speculate on what the postmodern will bring us.

Patterson's jurisprudence is built on foundations that modernism long ago abandoned, having assumed that skepticism had made them untenable. Ironically, it is precisely skepticism that has killed the project of the modern and that, along with self-reference, characterizes the faith of the postmodern. When we realize that skepticism itself is a part of the nature of belief, that the certainty on which modernism was founded and which it promised is in fact no more than a part of the nature of belief, then we will see that faith, which modernism felt forced to forsake, is satisfyingly fertile for us. But I think that because that world needs faith, and because we are so in need of faith-giving, a postmodern world will not be as brittle (or as ironic) as the postmodernists are inclined to portray it. What can be said of this world?

A postmodern era would be more ethical\textsuperscript{201} than meritocratic because it is self-conscious about the choices we make when we exalt one sort of trait above others. It will be more constitutional than democratic because it does not believe in the independent dimension of equality, being self-aware of the attributes by which equality is derived. It will be more spiritual than theocratic, having learned that the will to power is equally distributed among all institutions, including religious ones. And it will be less legalistic for the same reason. It will take up a problem that is as new to man's history as was the machine of the world for the premodern. That problem may be stated as follows: How can we live meaningful lives when the link between meaning and reality runs through ourselves—when there is no description or explanation that excludes us, our limitations, our perspective? This requires us to make decisions rather than follow procedures (unmathematical or otherwise), knowing that we are the architects of such decisions (though not of the requirement). It raises a host of subsidiary questions: How can we restore beauty when it has perished through our own efforts, which efforts are indispensable to the well-being

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\textsuperscript{199} See \textit{id.} at 256-57 ("The choice between feminism and postmodernism is a false one. . . . Postmodernism poses no threat to feminism.").

\textsuperscript{200} See \textit{id.} at 256 n.9.

\textsuperscript{201} Which is not to say it would be any more moral.
of ourselves, who nevertheless would perish without beauty? How can we ensure a peaceful world order when the state itself is a strategic instrument whose diplomacy is ineffectual without force and when states are indispensable to order? How can we decide to preserve the priceless value of life when we are all too aware of the decisions we make that depend on an implicit pricing and the very preservation of life requires such decisions?

Law in such a skeptical, self-conscious world would tolerate different visions not as "contradiction" but as a necessary function of man's finiteness, the situated nature of all our perceptions, and the requirement of choice-making imposed on us by our Creator. In international law, this may mean nonuniversality; in constitutional law it could presage a revival of federalism and the constitutional bases for nonjudicial governmental decisions; in jurisprudence, the complete abandonment of modern questions, like the search for a single explanatory superstructure. There are many possibilities.

One sad spectacle of modernity was the effort to try to make law a god, and politics a religion. In a letter to me, Patterson replies to my portrait of postmodernity by saying: What does a person like myself, who has no faith in God, do? I think he has in mind my claim that conscience plays a crucial role in the sort of decisionmaking we have built into the American constitutional system, and my further claim that "there is no conscience without faith for without faith there is only expediency." I will return to this question in my Conclusion.

II. Maps of Description

A. J.M. Balkin and Sanford Levinson: Constitutional Grammar

In their lucid and engaging paper for this Symposium, Professors Balkin and Levinson incorporate six common descriptions of my work, from which they draw conclusions with which I disagree.

First, they argue from internal evidence that my list of the six modalities of constitutional argument is incomplete without a seventh modality (a view they share with Richard Markovits and Frederick

203. Letter from Dennis Patterson to Philip Bobbitt (Oct. 17, 1994) (on file with author).
204. BOBBITT, INTERPRETATION, supra note 2, at xvii.
205. Professor Markovits distinguishes between two types of moral norms that are differentiated by the kind of moral discourse to which they are relevant. The type of moral norm that is found in discourse about moral rights and duties Markovits labels "moral principles." The type that is found in discourse about what the individual or the state "ought" to do, he labels "personal ultimate values." According to Markovits, arguments of moral principle are not only part of legal discourse but are the dominant mode of legal argument in that they control the appropriate definition, use, and even legitimacy of the other modes of argument that have been used in law. See RICHARD MARKOVITS, MORAL REASONING AND CONSTITUTIONAL INTERPRETATION IN THE AMERICAN LIBERAL STATE (forthcoming 1995 or 1996).
Reflections Inspired by My Critics

Schauer\textsuperscript{206}, although they derive this view in a unique and interesting way. The source of our disagreement might come about in either of two ways: First, they could believe, having surveyed the practices of American constitutional argument, that I have simply omitted one widely practiced form—that my list of six forms is not comprehensive because some arguments cannot sensibly be made to fit in any of the six categories I offer. Second, they could believe that my list is inadequate to decide cases, and thus they infer that there must be an additional modality. Insofar as it is the former, Balkin and Levinson simply dispute the accuracy of my list and imagine that another form, natural law, is widely used. I am dubious about that. Insofar as it is the latter, it means that they do not accept the incommensurability of the modalities because the addition of one (or a hundred) does not provide a rule for decision among them. And this means that Balkin and Levinson are actually saying that my list does not explain constitutional decision. But because I hold that it is an error to require that the arguments of an opinion explain how the decision was reached rather than how it can be rationalized, this is not an argument, on my terms, for an additional modality.

Second, they conflate constitutional argument (an activity confined to those persons whose decisions must be explained in terms of legal argument) with constitutional discourse (an activity that takes up the same subjects, and which may include legal argument, but which, though constrained by its own modalities of argument, is not confined to legal argument). This conflation arises, I think, because Balkin and Levinson believe discourse to be entirely undifferentiated, so that what counts as a legal argument is indistinguishable from nonlegal constitutional arguments. To illustrate, I invite the reader simply to compare a passage in the Federalist Papers with an argument in a judicial opinion relying on that passage from the Papers. That these borders may be disputed—that there is, in Balkin and Levinson's term, no "consensus"\textsuperscript{207}—rather proves my point. For there would be no reason for radicals to dispute the inclusiveness of legal argument if in fact all were permitted.\textsuperscript{208}

Third, they imagine, because I claim that the legitimacy of constitutional argument is maintained and assessed solely by reference to the practices of constitutional argument, that I am therefore disabled from judging any actual practices to be illegitimate, and thus that I cannot vindicate the American system of constitutional decisionmaking. Perhaps because Balkin and Levinson are unable to distinguish between constitutional argument and constitutional discourse, they find it difficult to

\textsuperscript{206} Frederick Schauer, Remarks at Symposium on Recent Development in Political Theory, The University of Texas School of Law (Feb. 4, 1994).

\textsuperscript{207} Balkin & Levinson, supra note 79, at 1790.

\textsuperscript{208} I have in mind "radicals" like Raoul Berger, for example, as well as the usual suspects.
extrapolate from actual practice to a determination of what sorts of arguments fall within customary practice. And perhaps this gives force to their conclusion that one who derives rules from practice must, perforce, accept novel or aberrant practices as establishing new rules. This, however, imagines that any act whatsoever is a “practice” within a field—a highly implausible claim.

Fourth, they read me as committed to a present system of practices that, insofar as it constitutes the standards of legitimate argument, cannot admit of change in the law (because “new” arguments are necessarily outside the current practice). Change, on Balkin and Levinson's view, escapes my analysis because the very act of defining what is novel, from an undifferentiated mass of acts, implies a legitimation by recognition, an interpretive act whose normative content—assessing whether each act is within the field of legitimate acts or not—is not permitted by my description. If I rigorously adhere to the view—as I do—that practice alone determines legitimacy, then any departure from that practice is illegitimate, and here, Balkin and Levinson claim, there is no possibility for change. Their conclusion, that I can neither account for nor admit change, rests on an important misunderstanding. It translates my view that “legitimacy is limited by practice” into “the acts that comprise practice limit legitimacy”\(^\text{209}\) when in fact many practices—legal argument among them—have built-in mechanisms for change. The very practice itself admits of, and indeed in some instances requires,\(^\text{210}\) change. Moreover, as practices change, they carry with them legitimation, conferring legitimacy on new acts. I think Balkin and Levinson take the view they do because they cannot shake the expectation that something must legitimate practice, or else we would be unable to draw lines between legitimate and illegitimate practices.

Fifth, they believe my refusal to concede a hierarchy of modalities implies a commitment to some sort of justification because one or the other—an internal hierarchy or an external standard—is necessary to specify a decisionmaking procedure by which conflicts can be resolved according to rules. This too is simply an insistence on a particular kind of explanation, namely, that following a rule always amounts to the same thing. When we follow the rule by which historical argument is constructed, for example, we have well-known parameters that can be used to construct a decision procedure.\(^\text{211}\) Similarly, it is thought, we must be

\(^{209}\) This translation is complicated by the use of “practice” to mean a language game and also an act within (or without) that language game.

\(^{210}\) Thus textual argument, which relies on the contemporary understanding of constitutional language, requires a constant up-dating of the meaning of the terms.

\(^{211}\) Cf. JOHN P. MEIER, A MARGINAL JEW 183 (1991) (eschewing simplistic criteria for judging the historical accuracy of Christian scriptures because “[t]here will always be some difficult cases in which no criterion applies or in which different criteria . . . point in opposite directions”).
able to construct that kind of procedure to resolve extra-modality conflicts. But here, Balkin and Levinson differ from me on what it means to follow a rule at all. I did not wish to maintain that, even as to the conflicts within modalities, the decider had to consult some parameter to make a decision; I argue only that the parameter can be derived. So the lack of a parallel parameter when the modalities conflict tells us something about the kind of decision being made—that it is among incommensurables—but nothing about whether a decision is possible or not.

Sixth, they take my reliance on the faculty of conscience as a kind of "gambit" or metaphysical "simple" that, like the deus ex machina in the playwright's arsenal, is deployed to extricate my analysis from an impossible situation. I will discuss this at length, but for now let me just label this the "Jiminy Cricket" fallacy. It takes the formal expectation about explanation discussed immediately above and combines it with a certain view of conscience ("Always let your conscience be your guide."212). But these expectations are unimaginative ones for two such versatile and creative minds as Balkin and Levinson and, in any case, are not compelled by the nature of either decisionmaking or conscience.

All of these readings can be found in other commentary on my work, but they are seldom made with the elegance and charity found in Balkin and Levinson's paper. Rather than further take up these points one by one, let me try to do justice to their paper by presenting them in the intertwined, mutually supportive way in which they appear.

The various sorts of criticisms I have just outlined above seem to me different, however, from the fundamental characterization that I will next take up and that links them all. This is the "Grammian" label that Balkin and Levinson wish to affix to my lapel. I describe six constitutional modalities. One can dispute the accuracy of my description by reference to standards of description, the norms of accurate description. Do American lawyers really argue this way? Is natural law prominent in contemporary Supreme Court opinions? Such inquiries form one normative basis for an assessment of the proffered description. It is a different matter to dispute whether my approach is useful—also a normative assessment. In my description of the modalities, the normative standards I use are those of description, but this very normativity misleads Balkin and Levinson into thinking that a larger evaluative mission is subtly at work. They say that "Bobbitt's claims cannot be purely descriptive; they must rather be interpretive and normative claims about what the norms of argument should be in order for them to possess legitimacy."213

To this,

212. This was Jiminy Cricket's advice to Pinocchio. PINOCCHIO (Walt Disney Pictures 1940). This view treats conscience as if it were an external guide to behavior, something we "consult."

213. Balkin & Levinson, supra note 79, at 1784.
I demur. As a claim, it has force only if one is locked into the view that legitimacy must consist in the validation of a practice by something external to the practice in order to be legitimated.

Balkin and Levinson view my books as contributions to understanding a constitutional grammar.\textsuperscript{214} I am flattered by this opinion, but the complement is one I must decline for, as Balkin and Levinson understand the term, I'm afraid I am no grammarian. It is true that, in my law classes, I spend a good deal of time with students practicing various kinds of argument. Every professor does this—every one must, although perhaps usually less self-consciously. In my case, I will sometimes correct an argument that is poorly formed. Or I may say, "That is a conclusion. Give me an argument." Or I may say, "That is not a legal argument. Give me an argument in law." And this practice, the way a golf pro at a country club might watch a club member hit tee shots, is meant to familiarize the student with the forms of constitutional argument. So it can be said that I am (tacitly, perhaps) approving certain forms of argument, but the reason I am doing so is because these forms of argument are the ones that are approved—are validated by their ever-presence in the practice. The "normativity" here is simply that the rules constituting a practice are norms. It is not the normativity of justification. I am not approving these forms of argument because I approve of them.

I do not legitimize these arguments, nor does my theory that they arise from the superimposition of the forms of common-law argument onto state action when the state was put under law by the American constitutional innovation of limited state sovereignty. Legitimation occurs when actors charged with deciding according to law frame their appeals and their explanations in the ways of which my sketch of the modalities is a description. To put it briefly: \textit{Practice legitimates because legitimacy is a matter of practice}. Some may take my obstinate refusal to provide a nontrivial validation of arguments as implying that legal propositions cannot therefore be true or false. I do not deny that legal propositions have truth-conditions. I deny only that these can be satisfied in any nontrivial way—in any way external to the practice itself. A proposition of constitutional law is true if it forms part of the rationale offered in support of a legal decision and if that rationale is composed of the kinds of arguments recognized in legal practice as legitimate.

Clausewitz remarks that war has its own grammar, but not its own logic.\textsuperscript{215} Used in this way, Wittgenstein might have said, "Law has its own grammar, but not its own logic," meaning that a particular form of

\textsuperscript{214} See \textit{id.} at 1775.

life is expressed in acts, the regularity and success of which are validated by repetition. Now that is not grammar as Balkin and Levinson, or as most people, understand the term. Their sort of grammarian is well described by Collingwood as follows:

A grammarian is not a kind of scientist studying the actual structure of language; he is a kind of butcher, converting it from organic tissue into marketable and edible joints. Language as it lives and grows no more consists of verbs, nouns, and so forth than animals as they live and grow consist of forehands, gammons, rump-steaks, and other joints.216

One can see how important consensus is for this sort of grammarian. He or she is not describing a practice, but is “converting” it into a different practice altogether, one that would be unmanageable without general agreement. Practices, however, consist in many kinds of uses. Practices differ in kind—unlike the undifferentiated slab of meat that arrives for the butcher’s work, practices are already differentiated.217 Some are evaluative, some are legal, some are aesthetic, pedagogical, political. Existing practices are subject to description—their contours, though often disputed, can be discerned. Practices are legitimate before they are described. They are bounded before their boundaries are drawn by the cartographer. A cartographer’s map may be adduced in a border dispute, but that is only because the boundedness at issue was already well understood.

Every language game has a certain grammar, by which I mean the rules that enable a person to participate and thereby to understand that language game. In even the simplest of human situations, there will be many language games, overlaid as it were. Imagine two parents watching their child play a little-league game. The rules that constrain the child from running from first base directly to third are not part of the same system of rules that constrain the father from shouting abuse at the opposing pitcher or that constrain the coach from selling tickets. It is difficult and artificial to separate out various language games, especially because they so often influence each other.218 Nevertheless, this is a task to which I have set myself, because the rules of different language games

217. An old friend describes how, when living in Paris and both hungry and impoverished, he went into a boulangerie and asked for just 200 grams of pâté. When the butcher gave him too much, my friend objected, knowing he could not pay for it. But when the butcher then gave him too little, my friend objected again, because he was so hungry. After several of these exchanges, as the butcher put more back on the thin paper, and then took less away, always getting closer to the maximum my friend could afford, the butcher finally said, in exasperation, “Monsieur, I am not a jeweler.”
218. See BOBBITT, FATE, supra note 1, at 239 (noting that the way concepts are used within legal conventions influences the uses of those concepts in other conventions).
are distinct from one another. Making these rules evident, and describing them scrupulously, is a task worth doing in its own right, and, as I will argue, has various important uses.

In my attempt at this, however, Balkin and Levinson see me as confronting the following dilemma: If a grammarian takes the legitimacy of a particular grammatical use to be determined by social practice, where does he derive his authority to take normative positions with respect to particular usages?219 How many persons have to "misuse" the word "hopefully" before the grammarian must concede that it has become a proper use?220

In my case, they see me playing a double game: While I profess to derive legitimacy for legal argument from the use of the modalities, I also want to be able to defend certain decisions and certain practices, and thus I play both a descriptive and a normative role. Balkin and Levinson conclude that I must either accept whatever is practiced or abandon my pose as simply a descriptive observer. These descriptions depend on several assumptions that I do not share, and especially on conflating the ideas of legitimacy and justification and ignoring the distinction between constitutional decisionmaking and constitutional discourse.

Thus, I am prepared to entertain a great many arguments I do not endorse as legitimate; and indeed, I am able to criticize such arguments precisely because the various modalities of argument give me standards by which to do so. If I refuse to accept a form of argument—such as natural law—as legitimate, it is only because I have not generally encountered it in the rationales offered for constitutional decisions made on a legal basis. I may be wrong, and I am perfectly willing to change my mind and add new modalities as they appear with sufficient frequency in legal opinions.221 But at present, at this moment in our history, there are six. Structural argument flourished in the first half of the nineteenth century, then languished during the next half.222 After three-quarters of a century of neglect, prudential argument steadily and methodically made headway, owing in great measure to the genius of Louis Brandeis, and that of his

219. See Balkin & Levinson, supra note 79, at 1781.
220. See id. at 1773 n.7. This is the point of Balkin and Levinson's Académie française analogy.
This point of comparison has also been raised by Professor Allesandra Lippucci:

Bobbitt's insistence on requiring obedience to an academically sanctified tablet of arguments is reminiscent of attempts by the stern grammarians of the early Académie française to legislate the forms and meters a poet could properly use in constructing a poem.


221. See BOBBITT, FATE, supra note 1, at 8 ("[N]ew approaches will be developed through time.").

222. See generally id. at 74-92 (discussing the history and application of the structural modality of argument); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3-32 (1969) (analyzing early constitutional cases from a structuralist point of view).
intellectual descendants, Frankfurter, Bickel, and Ackerman. Different talents would surely have taken this development in a different direction. It would not surprise me if some of the present forms should fall into desuetude.

Balkin and Levinson see various difficulties in my position, as a consequence of the misreadings I listed earlier. First, they suggest that there may be more modalities than the ones I offer (and therefore that I have applied a normative element in identifying the list I present). As an illustration, they say that my description of one form, ethical argument, strikes them as so contrived that it cannot be actually descriptive of current practice, a signal that a normative, and not descriptive, agenda is at work. Second, they assert that there is no consensus among practitioners as to what questions are really constitutional in nature and thus are up for discussion, and therefore that the very delimiting of a domain of activity as constituting the relevant practice depends upon a normative decision.

Third, Balkin and Levinson maintain that I cannot account for change because the notion of legitimacy based on description is as static as the description. All of these points, save the last one, serve as a basis for an indictment of disguised normativity. These objections are easily met once it is established what I actually assert and believe.

Of course, there is a normative element in my project of determining the ways of legitimation, and that element is the descriptive. I am still not persuaded that natural-law arguments are part of the list of legitimating modalities, not because I think there is something troubling about introducing this sort of argument into our jurisprudence—although I do—but because it simply is not there. Balkin and Levinson are able to find it only by adding in the Gettysburg Address and other examples of constitutional discussion that are not decisions according to law. It is telling that advocates of this position always end up by dragging out Justice Johnson's concurrence in *Fletcher v. Peck*, just as devotees of the dubious attack on judicial review always cite *Eakin v. Raub*, a dissenting opinion in a state supreme court case. Samuel Johnson is reported as saying that if one says, "There are no apples in that orchard," and is later shown two or

223. See BOBBITT, FATE, supra note 1, at 61-65 (tracing the historical emergence of prudential argument).
224. See Balkin & Levinson, supra note 79, at 1784.
225. Id. at 1785.
226. Id. at 1790.
227. Id. at 1791.
228. For this lack of clarity, I certainly do not blame Balkin and Levinson.
229. See Balkin & Levinson, supra note 79, at 1787.
230. 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring), cited in Balkin & Levinson, supra note 79, at 1786 n.49.
231. 12 Serg. & Rawle 330, 343 (Pa. 1825) (Gibson, J., dissenting).
three fugitive fruits on the orchard ground, he is not really wrong.\textsuperscript{232} There are no apples in that orchard; the fact that only two or three can be found confirms, rather than disconfirms, the assertion.

My formal description of ethical argument is awkward, and it would strike most practitioners as unfamiliar. But that is only because they are unfamiliar with the terms in which I am expressing their activity, like the man who was surprised to learn that he had been speaking prose all his life.\textsuperscript{233} I doubt that most constitutional advocates would really have been so surprised to learn that they have written in briefs, or read in opinions, arguments "whose force relies on a characterization of American institutions and the role within them of the American people."\textsuperscript{234} I have attempted to ground, in unshakable legal sources, those decisions that are based on a constitutional ethos; to this end, I have identified certain constitutional texts—such as the \textit{Declaration of Independence},\textsuperscript{235} the Privileges and Immunities Clause of the Fourteenth Amendment,\textsuperscript{236} and the Ninth and Tenth Amendments—\textsuperscript{237}and constitutional rules, for example, that generally no state may use any means that is forbidden the federal government, that comport with the case law.\textsuperscript{238} I leave to the reader whether my redescriptions of \textit{Roe}\textsuperscript{239} and \textit{Skinner}\textsuperscript{240} are persuasive. But in any case, the decisive matter is whether my analysis fully accounts for the decisions and can be applied to new situations. That the persons making these arguments might identify them by different names or describe them somewhat differently does not affect the general view I am presenting.

Whether there is a consensus on what confers legitimacy is not a matter of the modalities. One of the important parts of my work (to me) is the identification of these forms of arguments as modalities—as accomplishing their legitimation by providing the ways in which the truth of any

\textsuperscript{232} I am indebted to Charles L. Black, Jr. for this point.

\textsuperscript{233} "For more than forty years I have been speaking prose without knowing it." \textit{Jean B. Molière, The Would-Be Gentleman, reprinted in Eight Plays by Molière 346} (Morris Bishop trans., Modern Library College ed., Random House 1957) (1670).

\textsuperscript{234} \textit{Boibitt, Fate, supra note 1, at 94.}

\textsuperscript{235} I take it that the \textit{Declaration of Independence}, by which the sovereignty of the American people was asserted against that of George III, is a constitutional act, in that it establishes the ground by which all subsequent constitutional acts are confirmed. Why else should ratification, for example, confer authority on the text of the United States Constitution, but for the \textit{Declaration}? And I take it that while some subsequent constitutional acts were superseded by the Constitution (for example, the Articles of Confederation), this is not the case with the \textit{Declaration}, which stands on wholly different grounds than the Articles, providing in fact the basis for the supersession of the Articles.

\textsuperscript{236} \textit{U.S. Const. amend. XIV, § 1, cl. 2.}

\textsuperscript{237} \textit{Id. amend. IX, X.}

\textsuperscript{238} See \textit{Boibitt, Fate, supra note 1, at 150-53.}

\textsuperscript{239} See \textit{id. at 157-65} (discussing \textit{Roe v. Wade}, 410 U.S. 113 (1973)).

\textsuperscript{240} See \textit{id. at 105-06} (discussing \textit{Skinner v. Oklahoma}, 316 U.S. 535 (1942)).
Reflections Inspired by My Critics

The proposition of constitutional law can be established, while not being either true or false in themselves. The issue of whether such modalities are the right ones—or whether we should have some other system of doing their work—is a matter of justification. I am not surprised that there is no consensus on this matter among academics, but fortunately, that is not necessary to uphold the present system of legitimation.

Does that mean, then, that my work is necessarily bound to the present system, that it cannot account for change, such as the development of new modalities or new standards of arguments within the modalities? Not at all. Because the constitutional system of establishing these forms is entirely descriptive of practice, any change that is sufficiently widespread becomes a legitimate participant. As I have remarked above, there have been and I expect there will be changes in the number and composition of the modalities. Change is built into the system because the forms of argument take their life from the general society. This is the idea of the participatory Constitution expressed in *Constitutional Fate*. The notion that my description of the constitutional process cannot account for change is so widely asserted that it must give me pause. This charge was made early on in an article in the *Harvard Law Review* with respect to *Constitutional Fate*, and then faithfully repeated last year in the same journal with respect to *Constitutional Interpretation*.

But there is really nothing to it. The static quality of my description, which intelligent critics such as these intuitively feel, inheres in the fact that it is a description. It is, however, a description of a process that is necessarily in transition all the time: the observers who characterize change are also necessary participants in giving meaning. I meant to convey this in the closing paragraphs of *Constitutional Fate*, in which I contrasted the ongoing improvisational choreography of constitutional law with a photographic snapshot, an image that seems to me expressive of the usual law review article.

See supra note 221 and accompanying text.

Bobbitt, *Fate*, supra note 1, at 239.

Gudridge, *supra* note 82, at 1985 ("Clearly, Bobbitt leaves out something important when . . . [he] does not even refer to the commerce clause transition or to the retreat from Reconstruction . . . ").

Book Note, *Legitimacy and Justice in Constitutional Interpretation*, 106 Harv. L. Rev. 1218, 1222 (1993) (reviewing Bobbitt, *Interpretation*, supra note 2) ("Linking the field of available arguments within this elite discourse to social stability therefore has a 'don't rock the boat' effect.").

In the afterword to *Constitutional Fate*, I stated:

Our teachers were wrong, captivated by a picture of a dancing class, ignoring the inseparable unribboning relationship between the motion that law must be and the participant-spectators whose presence makes the motion meaningful. In the work that preceded this Afterword, we follow the body of thought as we might that of a dancer. The Book is organized to make the reader attentive to the postures and attitudes learned at the mirror so painfully.

Bobbitt, *Fate*, supra note 1, at 249.
The press of the world is never far from Balkin and Levinson's questions; that is why, I surmise, they are so attentive to the importance and diversity of constitutional discourse. In what I take to be a particularly Levinsonesque passage, I am asked whether, in the unlikely prospect that I were to sit in the U.S. Senate, I would require that a nominee for the Supreme Court must endorse all the forms of argument to be acceptable to me as a Justice; and, if the nominee did so, whether or not I would feel bound not to make any further inquiries; and if, having given a prominent role to conscience in my work, I am not obliged to discuss a nominee's personal background. I imagine these concerns to be prompted by a chapter in Constitutional Interpretation in which I discuss the institutional jurisprudence of Robert Bork, and in which I say that his attacks on the legitimacy of Warren Court decisions—rather than attacks on their holdings—made him an unacceptable choice. It is true that I would be skeptically inclined toward any Justice who renounced whole forms of argument, although I would observe that Judge Bork, in his work on the United States Court of Appeals for the District of Columbia Circuit, used all six forms as the occasion arose, and that it was Professor Bork who was so contemptuous of certain forms. What, after all, is "judicial philosophy" if it is not the belief that certain forms of argument may provide a legitimate basis for a judicial opinion? But I am not willing to say this should always be the decisive factor; in any case, it is usually more a matter of emphasis and style (style for a judge being the preference for certain forms of argument over others) than complete rejection. Despite their rhetoric off the Court, Justice Frankfurter relied on textual arguments and Justice Black relied on prudential arguments, though not so often as the forms they preferred.

I certainly am not willing to say that simple acknowledgment of the prevailing forms is sufficient to earn the Senate's consent to appointment. The Bork chapter in Constitutional Interpretation begins with an extensive review of this question and relies on the superb analysis by Charles Black that, to my mind, conclusively established the requirement for a larger

246. It is rare in my experience that a political scientist is able to so adroitly mix issues of contemporary politics and constitutional law. For another example of this combination, see Jeffrey K. Tullis, The Rhetorical Presidency (1987).


248. See generally Bobbitt, Interpretation, supra note 2, at 88-108.

249. See generally id.

250. See, e.g., National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting) ("[W]hen the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation.").

251. See, e.g., Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (Black, J., dissenting) (arguing that legislatures should have the power to regulate the length of trains because of the danger to railroad employees).
Reflections Inspired by My Critics

inquiry beyond the merely judicial. Interestingly, Black—the supreme structuralist of our era—methodically addresses the question of the scope of senatorial inquiry by taking up each and every one of the forms of argument.

But I doubt that Balkin and Levinson would let me off so easily, for Black’s subtle argument appears to pose some peril for my position, as well as offering a harbor. Black argues that the Senate is obliged to inquire into the same matters regarding a nominee as does the President; how else could it give either its advice or its genuine consent to a decision, if the latter were based on considerations to which the Senate was barred?

Balkin and Levinson, in their hypothetical, implicitly ask: How can Bobbitt separate law and politics, as he so often seems to do, and accept Black’s position regarding the scope of inquiry for judicial nominees? (This point is analogous to other claims in their essay that de-limiting the availability of certain forms of argument is necessarily a normative, political act.)

This riposte overlooks, I believe, the textual command in the Constitution that animates the Senate inquiry. The Senate is directed not merely to approve, but to advise and consent. Black’s argument hinges on construing this command. But for this constitutional—this legal—directive, Senate inquiry might of course be a matter of politics alone. Instead, the Constitution virtually mandates, here as elsewhere, a political inquiry. Whereas Balkin and Levinson would portray my Constitution as one with the politics left out—a portrait that I disown—I often find a tendency in contemporary constitutional criticism to depict a Constitution with the law left out.

The available forms of argument are different for those deciders who are confined to legal argument—like government officials sometimes are—and those who are not. Sometimes, as in the confirmation example, the forms of legal argument (here, the text) will direct the decider to enlarge her list. And sometimes those deciders who are not so limited—the People, for example—will wish to consult the specifically legal forms, as I shall discuss below.

Balkin and Levinson misread me if they believe it is my mission to purify legal argument. The grammarian’s dilemma they describe is no different from the law professor’s dilemma that arises when a professor

252. See BOBBITT, INTERPRETATION, supra note 2, at 83-86 (discussing Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L.J. 657 (1970)).

253. See BLACK, supra note 222 (reintroducing structural argument to American constitutional interpretation).

254. See BOBBITT, INTERPRETATION, supra note 2, at 83-86 (discussing Black, supra note 252).

255. See id. (discussing Black, supra note 252).

256. U.S. CONST. art. II, § 2, cl. 2 (“[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

characterizes a decision of an authoritative court—say the construction of a state statute by a state's high court—as erroneous.\footnote{258} Insofar as the law professor is confining herself to legal argument, she is employing the same rules as the court she criticizes; that they may be in error in acting according to those rules is a necessary consequence of there being rules to follow. Insofar as Balkin and Levinson treat my discussion of the legitimating modalities, they confuse matters by depicting my approach as a dual enterprise of description and prescription,\footnote{259} when in fact the latter is wholly determined by the former. Prescription with respect to a form of life is detached from description only when it arises from another, collateral (and therefore not a legitimating) form—say, justification, which has, of course, its own description from which arise the standards of prescription that are then overlaid on the subject to be assessed. The word "normative" therefore becomes, in Balkin and Levinson's hands, a very obscuring term: It means the "policing" of a practice by standards wholly derived from that practice ("That's not how to play chess!"), as well as the assessment of a practice according to the standards of a collateral practice ("That's not how a gentleman would play chess!").

If this landscape is not kept clearly in mind, a number of conundra will quickly appear; thus, Balkin and Levinson are led to conclude that the question of whether a statement is grammatically correct must have a normative, nonpractice element, even though they must know that this sacrifices the legitimating force of grammar based on practice alone. A "bit" of external normativity is utterly spoiling because the decision of how much of a "bit" is required must also rest on external grounds.

The failure to keep these ideas distinct even infects the critical (as opposed to the legal) enterprise. Thus, Balkin and Levinson observe that there must be a normative element in my selection of the six modalities—in my identification of these as arising from practice. And of course, this is true. This normative element is not a legal matter, but rather comes from an anthropological, historical, and empirical assessment of what arguments appear to re-occur in legal texts and oral arguments. The normative element in one form of life arises from practices in that form, even if the purpose of this application is to determine the prevailing practices of another form. One example is Margaret Mead on Samoa, who was recording data according to a particular socio-anthropological school, with respect to practices that would have been, one may assume, exotic at the New

\footnote{258. This is a dilemma for the Legal Realist and the Positivist. If the Constitution is no more than "what the judges say it is," then how can an authoritative holding ever be wrong? But this is hardly my position. For me, it is the way that judges say what the Constitution means that determines whether the holding is right or wrong. That they might misapply their own forms, or ignore others, is inherent in the existence of rules to follow in the first place.}

\footnote{259. See Balkin & Levinson, supra note 79, at 1780.}
School of Social Research. Another example is the undercover agent who all the while is preparing for the arrest of his unwitting confederates.

Accordingly, when Balkin and Levinson argue that no set of linguistic practices can be self-legitimating (with which I disagree), they are really arguing that no set of linguistic practices can be self-contained (with which I agree). The latter, in my view, does not determine the former.

By ignoring this fundamental idea, Balkin and Levinson are led to the following depiction of my thesis: The role I reserve for conscience (as that faculty by which we choose among incommensurables) must be available to choose among competing arguments within a modality—for example, to choose which of two textual arguments is correct. This is a gross misreading. For, within a single modality, the arguments are entirely comparable; the standards for the better argument are supplied by the modality itself. For example, there are well-developed canons of historical assessment against which can be measured competing historical arguments in constitutional law. This, however, raises another issue: Is there no role for the conscience to resolve the conflicts that arise within a modality? My belief is that there is such a role, but it is distinct from that played when the modalities conflict. Suppose, for example, that there is conflicting historical evidence about the intent evidenced by a certain revision at the Constitutional Convention. Madison's notes suggest one set of facts; other accounts differ from this. Once the decider has conscientiously applied the canons of historical judgment to no avail, she must resort to conscience, by which I mean the unreasoning decision itself. The difference between this situation and that of a conflict between (or among) the modalities, rather than within a single one, is that some fact—in the example given, the discovery of clarifying notes that resolve the conflict—can always appear to bring harmony within a modality, whereas no fact can accomplish this among different forms of argument.

Balkin and Levinson's map of description plays itself out in the most pervasive theme of their paper, the conflation of constitutional argument and constitutional discourse. If we bear in mind that the normative assessment of one form of life (constitutional discourse) can be brought to bear on another form of life (constitutional law) without having to arise as

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260. See generally Margaret Mead, Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilization (1928).

261. Balkin and Levinson portray me as holding that "[e]ach lived practice of constitutional argument, because and to the extent that it is lived by us, is self-contained." Balkin & Levinson, supra note 79, at 1779.

262. Id. at 1798-1800.

263. See, e.g., Symposium, The Representation of Historical Events, 26 Hist. & Theory 1 (1987) (discussing the merits of various methods of representing history).

264. Of course, a fact—a new decision, for example, that affects doctrinal argument—may bring a recalcitrant modality into harmony with others.
a practice within the latter to be legitimate, then a number of problems dissolve. It becomes quite possible to admit moral arguments as relevant to our constitutional life without giving them a status as legal arguments; and their presence in our political discourse does not require us to deny them legitimacy or to corrupt our forms of decision according to law. American constitutional law can be a profoundly moral enterprise, but "Morality is not a Modality" in constitutional law; it clearly is in constitutional discourse. Similarly, I can claim that Tushnet's sole reliance on prudentialism is illegitimate as a matter of law, while not in the least denying its legitimacy as a matter of academic assertion and discussion.

Balkin and Levinson offer descriptions (even if they are sometimes misreadings), rather than mistaken explanations, because they provide a coherent overlay, an alternative description, of the territory I have been mapping, although it is one that does not always correspond to my particular understanding of the terrain. Whether Schauer and Markovits are right that there must be a seventh, moralizing modality to organize the others, is an interesting subject for debate. Similarly, whether the descriptive grammarian is actually discovering the structuralist necessities of a practice, and therefore is bound by whatever practices are found, or whether the descriptive grammarian is relying on normative assessments as to what counts as a legitimate practice, and therefore can never claim to merely reflect practice, is a debate that has been pursued for a long time among anthropologists. It is not a debate in which I have more than a passing interest because my own view is that the historical contingency of the observer both undermines the claim to discovery and makes the charge of normativity vacuous. The issue is not whether there are rules being applied in the description of rules. Of course there are.

One of the objectives of my work in developing this kind of grammar of constitutional law has been to enable constitutional decisionmakers to take up nonjudicial questions and to enable nonjudicial decisionmakers to take up constitutional questions generally, from a legal point of view. The chapters in Constitutional Interpretation on the confirmation hearings of Robert Bork and the analysis of the presidential actions in the Iran-Contra Affair, as well as my recent essay on war powers, contain

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265. See Bobbitt, Is Law Politics?, supra note 15, at 1241 (criticizing Tushnet for reducing theorizing to "tactical political maneuvering").
266. See E. ADAMSON HOEBEL, ANTHROPOLOGY: THE STUDY OF MAN 600 (4th ed. 1972) (expressing the difficulty some linguistic anthropologists have in divorcing their own attitudes from the study of language).
267. See BOBBITT, INTERPRETATION, supra note 2, at 83-108.
268. See id. at 64-82.
269. See Bobbitt, War Powers, supra note 6.
examples of the former—officials who, though not judges, are required to make constitutional decisions. In the absence of judicial precedent, it still ought to be possible for members of Congress and the Executive Branch to reach valid constitutional conclusions as to matters that may never be tested judicially. The same availability of constitutional argument must occur for citizens at large so that they can assess the validity of the decisions made in their name by officials. I think this is an important task.

But it is easy to be confused by it. Many have read me to believe that the general public is confined to legal argument alone in its discussions of, for example, an amendment to the Constitution. I do not believe this; rather, I think the modal grammar I have described is useful in crafting legal arguments by those who are so confined—constitutional deciders whose authority is delegated to them by the people under legal rules—and by the public at large in evaluating the work of their delegees, who include those who are so confined: the courts, the President, the Congress, and various state bodies and agencies. Moreover, the delegees themselves are confined to legal argument only when making legal decisions with respect to the application of the Constitution. Whether or not to have a balanced budget amendment is not an issue that the legal construction of the Constitution will settle.

It is a different kind of misreading to conclude that the role I have described for the conscience is a kind of trap door for a grammar of decisionmaking otherwise confined to decisions according to the rules of the various modalities. Here, the misreading occurs not out of an inattention to differences of nuance among similar things, but out of a severe expectation that everything can be analyzed in the same way.

By giving the role to conscience that I do, several points can be made perspicuous: first, how competing values, as described in Tragic Choices and Constitutional Fate, can come to prominence in cycles; second, how values are instantiated by choice and do not exist except as subjects for discussion in the absence of choice; and finally, how the constraint of practice as the sole legitimating force can nevertheless be harnessed to moral commitments that can be described by, but do not constitute, a practice. Our values are not forms of life, any more than a color is an attribute of an atom.

270. See Brest, supra note 27 (analyzing the issue of constitutional interpretation by federal branches of government other than the judiciary). For an excellent piece in this Review showing how this can be done, see Christine E. Burgess, Note, When May a President Refuse to Enforce the Law?, 72 Tex. L. Rev. 631 (1993).

271. See BOBBITT, FATE, supra note 1, at 248 (using as an illustration “the game of scissors/paper/stone with its circular hierarchy that brings different values to a decisive but momentary preeminence and is then replayed”); GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 196, 195-99 (1978) (“[T]he admission that cycle strategy occurs is an admission that society is attempting to preserve essential yet conflicting values.”).
There are, however, perfectly respectable views that all such human events—the acts of conscience as well as the legitimating of arguments—can be reduced to a common analysis. One such view is behaviorism. It is an interesting, though to my mind impoverished, map, derivative in its way of a Spinozistic determinism. Whatever its merits, however, it is not my view, not my map. Of the many excellent essays that depend upon the sort of descriptions I have noted, the paper by Balkin and Levinson in this Symposium is the most carefully argued and has a unity that is characteristic of the best law review articles.

B. Stephen Griffin: Pluralism in Constitutional Interpretation

For Dennis Patterson, the important point of the argument in Constitutional Interpretation is that the forms of argument are modalities—that they are not propositions of law, and are neither true nor false, but are the way in which propositions of law are determined to be true or false. For Stephen Griffin, the important point is that the forms of argument comprise a family of arguments, each distinctive in some respects, each bearing resemblances to the others, but all indisputably legitimate.

Constitutional Fate was the first book of which I am aware that identified the six forms of argument and argued that a general theory would have to accommodate all of these forms. Nineteenth-century scholars produced lists of legitimate forms of argument, but they did not appear to think that the constituent members of these lists are competing forms. Twentieth-century writers accepted the competition of the forms, but this led them to abandon a comprehensive list, instead isolating a favored form, which in turn led to the interpretivist-noninterpretivist and originalist-nonoriginalist debates. Stephen Griffin reminds us how this debate has ignored what he terms “pluralistic” theories of interpretation. Griffin’s paper has the mark of the map of description because it recategorizes ideas in a new and helpful way (as opposed to beginning with categories from which the writer’s ideas are said to derive and thus to which they must be made to conform). Griffin’s list of pluralists includes Robert Post and Richard Fallon, and I am pleased to be put in such company. Both of these talented and interesting thinkers were early supporters of my efforts and tried—as the editors of this Symposium have tried—to bring my work

273. See supra subpart I(C).
274. See Griffin, supra note 170, at 1761 (“Each theory of constitutional interpretation is grounded in a recognized source of law, drawing strength from the authority of that source.”).
275. See id. at 1753.
to light. Yet each scholar has his own distinctive views that do not derive from mine (or from anywhere else, I imagine). A critic like Griffin succeeds in grouping all of these writers together without erasing their differences.

Having identified a group that shares an idea, Griffin sets about assessing that idea: What do the pluralists offer? He accomplishes this by first asking: What would a general theory of the Constitution offer?

First, he argues that a general theory must provide a means by which all the provisions of the Constitution can be construed. Usually, the theorist focuses only on the Due Process Clause, or the Equal Protection Clause, or another of the majestic generalities. Griffin rightly argues that this is insufficient, and he suggests that focus on the clauses of the First, Fifth, and Fourteenth Amendments has distorted constitutional theory by making single-source theories look more useful than they really are.

One is more likely to be tempted by textualism, to the exclusion of all else, if the text one is construing is the awe-inspiring First Amendment, than if one had to make the theory work for, say, “Letters of Marque and Reprisal.”

Second, Griffin proposes that a general constitutional theory must be fully descriptive. That is, it must be comprehensive enough to account for all the rules that are followed in construing the Constitution. Because contemporary scholarship has so heavily concentrated on the normative, Griffin writes that it is not clear that the current debate even recognizes the descriptive requirement. With much insight, he observes that the very resilience of competing single-source theories testifies to the actual pluralism of reality: the advocates of a single mode can always find support in the cases even when they disagree as to what that mode ought to be.

One consequence of Griffin’s attentiveness to the descriptive is his acute remark that the Supreme Court has never ranked the forms of argument. This practice can be contrasted, by the way, with the canons of international law and with the methods of statutory

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276. Id. He also mentions Daniel Farber and Cass Sunstein, two of the most productive and exciting scholars in this field, although Griffin indicates more doubt as to whether they are properly grouped together with the others as “pluralists.” Id.

277. See id. at 1755 (noting that even if a single-source theory prevailed in the debates over these specific clauses, “we would still not have a general theory of constitutional interpretation”).


279. Griffin, supra note 170, at 1756.

280. Id.

281. See id. at 1761 (“Partisans of a particular theory of interpretation can always take comfort in the fact that their theory is used somewhere in American law . . . .”).

282. Id. at 1757.

interpretation, and I suggest that this practice has to do at bottom with the differing concepts of sovereignty and delegation that underlie these three types of construction.

Griffin appreciates that the radical idea of subjecting the state to law was extrapolated from subjecting persons to law; this idea would subject the officials constituting government, as agents of the people, to the familiar rules of agency. I think that in this way it may be said that American constitutional law grew out of international law. International law also arose as an extrapolation of the idea that individual persons were the subject of legal relations. The earliest international law simply replicates the forms of law persisting among princes—legal rules governing inheritance and descent (property), the law of treaties (contracts), the law of war (torts and crimes)—and applies them to the state apparatus that assisted and eventually supplanted princes. The American innovation simply takes this one step further by severing sovereignty (also a personal, anthropomorphic idea) from the state.

In Griffin's view, this sort of constitution requires general rules, which require interpretation, which requires normative judgments. Thus, disagreements over policy become disagreements over interpretation. I am sure that I do not entirely agree with the reasoning behind this conclusion—although Balkin and Levinson's paper in this Symposium draws on similar arguments—but there is no doubt that the American tradition puts legal questions in play in the political process in a way that does not occur in other Western democracies. Griffin points us to Damaska's important work in comparative law to support this assertion, and he is right to do so. On the other hand, his introduction of John Marshall's efforts to separate law and politics cuts against Griffin's claims, I think. Whereas Griffin concludes that "Marshall and the Justices who followed him did not attempt to develop a method of interpretation that squarely confronted the unique status of the Constitution," but instead

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284. See Bresgal v. Brock, 843 F.2d 1163, 1166 (9th Cir. 1987) ("In construing a statute ... the Court looks first to the language of the statute itself, then to its legislative history, and then to the interpretation given to it by its administering agency.").

285. Griffin, supra note 170, at 1758.

286. Id. at 1759.

287. See, e.g., Balkin & Levinson, supra note 79, at 1785 (noting that they have an interpretive disagreement over the content of ethical argument and that this disagreement is "unavoidably critical and normative").


289. Id. at 1760.
"enforced their understanding of the Constitution as law by employing methods of interpretation appropriate to the various sources of American law," I am inclined to read these developments in the opposite way.

The fundamental template for doctrinal argument, I will argue in *Constitutional Analysis*, actually arises from the unique American role for law governing the state and the consequent American separation of law and politics. When the state is an instrument of a politicized sovereign, such a separation makes no sense; but when the state is merely the politicized agent of a sovereign with many competing sources for law, including but not limited to politics, efforts at such a separation are fundamental and inevitable. This fundamental consequence of limited sovereignty irks political theorists, who are always complaining that European political theory is so much more interesting. And it may also be what makes their efforts so marginal in our political (and constitutional) life. Marshall's opinion in *McCulloch v. Maryland* gives us the clear statement of this doctrinal template: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." I believe every doctrinal schema can be derived from this statement, and I will endeavor to demonstrate this in *Constitutional Analysis*. Moreover, I will attempt to reconcile these two theories (the modal and the genetic) in that work, in a way that confirms Griffin's endorsement of pluralistic styles for a general theory.

Griffin's argument for the superiority of pluralistic theories on normative grounds is not fully developed in his piece for this Symposium. He recognizes this, and one is eager to see his future papers on this subject. After comparing various pluralistic theorists, Griffin concludes with a fascinating argument to which I should like to draw attention. Arguing that such theorists should not be embarrassed by the obvious conflict in the modes of argument, and the fact that there is no implicit way of resolving such conflicts provided by the modalities themselves, he accuses those who demand such a resolution of a kind of category mistake. Resolving the conflicts between and among arguments drawn from competing modalities is the job of judges, not theorists, he maintains. Scholars should not aspire to be judges and decide cases

290. *Id.*
292. *Id.* at 421.
293. Griffin, *supra* note 170, at 1757 ("I will postpone inquiry into whether pluralistic theories are normatively superior . . . .").
294. *Id.* at 1767.
295. *Id.* at 1768.
through their scholarship. They should be interested, instead, in pursuing truth.

This puts Griffin firmly on the side of my distinguished colleague Sanford Levinson in his debate with Judge Harry Edwards. To my chagrin, I find myself disagreeing with Griffin and Levinson, though I am honored by the company of Judge Edwards. I do not mean that legal scholarship ought to transform itself into the memoranda of an academy of clerks. But I do think that the pursuit of truth requires the theorist to account for the remarkable phenomenon of the resolution of conflict when the means of determining truth conditions—the modalities—continue to conflict and resist coming to closure. For one thing, I may be wrong: It may be that there does exist a hierarchy or other external rule for resolution that does not compromise legitimacy, and if this is so, it is a worthwhile task of the critic to describe this. For another, the fact that decisions get made is a truth itself worth understanding.

I wonder if, instead, Griffin may be urging theorists to avoid prescribing decisions. If this is the case, then his paper must be associated with Powell’s *tour de force* in this Symposium, and he has ended his contribution, as Powell began his, on a most profound note.

III. Maps of Explanation

An essay on *Constitutional Interpretation* (or any other subject) may be said to rest upon explanations, rather than descriptions, when it goes beyond the misunderstanding of an argument—as for example, by adding in speculation about motivation. Thus, Martin Redish’s 1984 essay in the *Michigan Law Review* is description, though a complete misreading of *Constitutional Fate*. There is something hilarious, even Feydeau-esque, about such a reading, in that it so relentlessly misses the point, as a

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297. Let me illustrate. In my office in Austin, I have a wonderful cartoon by the brilliant and mordant artist, Tom Kleh. At the right hand side of the picture is depicted an easel, holding a portrait of a sitting man, who is balding and middle-aged, dressed in a suit. At the left side of Kleh’s picture sits the subject, just as he has been portrayed. In front of him stands the painter, besmocked, his palette in his left hand. In his right hand is held a paintbrush, with which the painter appears to be carefully putting the finishing touches on the man himself. This is a typical flaw in the map of explanation, and I think it is what usually happens when the critic attempts to infer ideas from a biography.

298. Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 Mich. L. Rev. 665 (1984) (reviewing BOBBITT, *FATE*, supra note 1). Redish writes that the book is little more than a rehash of constitutional argument and that there is little point in the book’s typology of constitutional modalities. *Id.* at 665–66. Redish also views as unoriginal the suggestion that ethical arguments are compelling. *Id.* at 671.
character in a farce just enters the room when the person who would clear matters up has exited by another door. Because Professor Redish's formal expectations were so entrenched, he was apparently disabled entirely from even suspecting that something was going on in a book other than the failure to do the only thing he thought could be done with the subject. As the distinguished philosopher Mark Sagoff put it,

readers may think Constitutional Fate presents a theory of the Constitution or of judicial review when it does no such thing; rather it is a book about theory and the relation of theorizing to history. The book ought to be read as a philosophy of constitutional history, as if history had a certain epistemology that could be understood by looking at the theories people have used to justify what they do on constitutional grounds. Everybody has a theory of judicial review on these days, so it is inevitable that people would read the book as another theory.299

The expectation that Sagoff identifies is the source, I think, of some of the descriptions to which some of my work has been subject.

But a map of explanations takes us into a different terrain altogether. It is the second prong of the unfortunately ubiquitous characterization in legal criticism that the author to be criticized is either a fool or a knave. For the misreader who offers a description, the writer being described is sometimes merely foolish. For the critic drafting a mistaken explanatory guide, the writer to be explained is personally flawed, motivated by corrupt intentions, or self-deluded. The watermarks of this sort of criticism are the cropped quotation, and the string of out-of-context phrases, and the wounding or supercilious personal characterization. In the present Symposium, there are regrettably two candidates for this abrasive but often entertaining style.

A. Mark Tushnet: Justification in Constitutional Adjudication

To have your work assessed by Mark Tushnet is a little like having your biography written by Robert Caro. In previous pieces, Tushnet has accused Laurence Tribe of twisting his constitutional analysis to position himself for appointment to the Supreme Court300 and has doubted in print the honesty of one of my colleagues for no greater an offense than relying on historical argument (“in [his] hands, it is simply a lie”).301 This is unfortunate, I think; Tushnet correctly notes in his piece for this

Symposium that I was “appalled” at this sort of thing.\textsuperscript{302} It is particularly sad because he happens to be building one of the most significant bodies of work in constitutional scholarship today. Moreover, Tushnet is not one of those hypocritical spirits who damns others while ignoring the mistakes in his own work; he is, it seems to me, refreshingly self-critical and always willing to listen to (and even to hear) adverse comment, even to the point of publicly confessing error and changing his mind in print\textsuperscript{303} A person of such moral stature has more to lose than most when he stoops to speculation about the motives of those with whom he disagrees. I can only speculate myself that this is a consequence of the facile psychologizing that so saturates the social sciences and journalism in our era.

Three kinds of mischaracterization of my views seem to me to mar Tushnet's paper. First, he crops quotations from my books in a way that distorts my views, and then, relies on the view that does emerge as the basis for criticism of my opinions as a whole. Second, he imagines me to have discreditable motives based, it happens, on a false and misleading account of my nonacademic work (though I am certain this is inadvertent). Finally, he gives partial accounts of my opinions that are not consistent with my views taken as a whole. I will take up each of these practices, not because I must deflect any animus towards me—I don’t think there is any—but because they are characteristic of a certain kind of criticism.

Tushnet reports that I say that my conclusions in \textit{Constitutional Fate} “precipitated other questions . . . [that] are the next frontier for constitutional jurisprudence,”\textsuperscript{304} so that he may, understandably, indict me for pomposity. In fact, I wrote:

It was the attempt to meet this Objection that generated my description and discussion of six modalities of constitutional argument. These, I argued, maintained the legitimacy of judicial review in the United States. None of the modalities I identified, taken singly or together, justify judicial review. . . .

My conclusions precipitated other questions. How was legitimacy then distinguished from justification? For if the modalities of argument could not justify judicial review, then surely arguments and opinions that followed these modalities could not justify their

\textsuperscript{302} Tushnet, supra note 47, at 1708 n.7.

\textsuperscript{303} \textit{See}, e.g., Mark Tushnet, \textit{Constitutional Interpretation, Character, and Experience}, 72 B.U. L. REV. 747, 747 (1992) (admitting the flaws in his earlier understanding of \textit{Constitutional Fate}). I cannot cite this generous reference to my work without ruefully noting that the author wrote this after having been subjected to my rather remorseless review of his \textit{Red, White, and Blue}. \textit{See} Bobbitt, \textit{Is Law Politics?}, supra note 15 (reviewing \textit{TUSHNET, supra note 301}). It is hard not to appreciate such generosity.

\textsuperscript{304} Tushnet, supra note 47, at 1712-13 (quoting BOBBIT, \textit{INTERPRETATION, supra note 2, at 9}).
outcomes. Were there other practices of constitutional review outside the judiciary that might also employ these modalities to reach legitimate constitutional decisions? And above all, what if the conscientious adherence to these modalities resulted in contradictory outcomes? . . . If both were legitimate, as it seemed, which was right? These sorts of questions are the next frontier for constitutional jurisprudence.305

If my choice of language really is, as Tushnet charges, “characteristically inflated,”306 and if though I have “materially advanced constitutional scholarship . . .[ ] still claim[ ] for what [I] did more than” he thinks is warranted,307 then why is it necessary to enlarge my assertions by erasing their qualifying context? It is embarrassing to be thought to be so self-aggrandizing.

Even though Tushnet notes that Constitutional Fate was misunderstood as presenting another brief for a single form of argument, he taxes me with responsibility for this misunderstanding and reports that I have conceded as much.308 He supports this charge by quoting me: “I came to realize that I had, to some extent, perhaps incited the very errors that so grated on me . . . .”309 But, in fact, the quoted passage refers to other sorts of errors, specifically the tendency on the part of my critics to rely on a single form, as a fuller quotation makes clear:

And I came to realize that I had, to some extent, perhaps incited the very errors that so grated on me, for in my description of the six modalities of argument as legitimating, I had not addressed the issue of what to do if the forms disagreed . . . . By invariably adopting one of the forms to criticize the others subsequent critics had inadvertently focussed on this dilemma.310

When Tushnet attempts to portray me as denying a constitutional role to the public, he crops my complaint that the Iran-Contra hearings failed to awaken the public to the grave constitutional crimes committed by the Executive Branch. Drawing attention to a cropped quotation, he writes, “[i]n particular, [Bobbitt’s] phrase ‘listened but . . . did not really hear’ suggests, and possibly endorses, a passive role for ‘we the people.’”311 In fact, the entire passage aims at the opposite conclusion:

305. BOBBITT, INTERPRETATION, supra note 2, at 8-9 (emphasis in original).
306. Tushnet, supra note 47, at 1714.
307. Id. at 1730.
308. Id. at 1713.
309. Id. at 1713 n.37 (quoting BOBBI'T, INTERPRETATION, supra note 2, at xi).
310. BOBBITT, INTERPRETATION, supra note 2, at xi.
311. Tushnet, supra note 47, at 1721 n.91 (quoting BOBBITT, INTERPRETATION, supra note 2, at 82).
But why were the constitutional dimensions of this supremely constitutional issue missed despite weeks of televised hearings? Partly this was the result of the mass of information being declassified . . . .

Partly the lawyers were to blame. By treating the hearings as if they were a trial, by looking for individual venality . . . , and subordinating constitutional subjects, the lawyers reflected their practices . . . .

Partly it was the media. Relying too heavily on less complex scenarios than the facts warranted, the media naturally turned to the fascinating personalities involved . . . .

Partly it was the Congressmen . . . . The model of a joint hearing . . . was . . . a fiasco.

But finally, it is we the people who are responsible . . . . Throughout that summer, we listened but we did not really hear. The basic constitutional structures we have labored for two centuries to preserve are so little a part of our understanding that we could watch them compromised without even noticing. 312

These are minor examples, and are interesting only as evidence for a particular technique. The map of explanation proceeds by assessing the person of the writer—not his work, per se—and then reading back into the work the portrait that has been assembled. Let me show you what I mean. First, see what happens when he addresses the following passage from the preface to Constitutional Interpretation:

For it was the assault on American constitutional institutions commenced by the American right wing in the 1950s and 60s that had prompted my reaction in the late 1970s. This attempt to discredit the legitimacy of our legal institution was taken up by the cultural left in the early 1980s and . . . the current work is a reaction to this development . . . . These assaults are a depressing aftermath to the great triumphs of American law that brought civil rights and civil liberties within reach of all the American people . . . . To explicate and defend these institutions, where they are explicable and defensible, is a duty I inherited, as most of us come into title with things, partly by the obligation of background and partly by the obligation of training. 313

Tushnet crops this passage and writes:

Bobbitt says that he inherited “a duty” to “explicate and defend” the institutions of “American law that brought civil rights and civil liberties within reach of all the American people.” I can understand

312. BOBBITT, INTERPRETATION, supra note 2, at 82.
313. Id. at xii (emphasis added).
that scholars of constitutional law have a duty to explicate those institutions, and Bobbitt's treatment of legitimacy and the modalities of constitutional argument is the best explication available. What I do not understand, however, is why we must defend them unless (and to the extent that) they satisfy the requirements brought out by the standard form of justification. 314

Nor do I, as the complete quotation makes unmistakably clear. We are to defend our constitutional institutions when they are worth defending, but his omission of this qualification provides support (by providing a motivation) for what he then concludes is a complacent view of our constitutional institutions.

Let me give a second example of this distinctive move from distorted biography to erroneous, substantive conclusion. It is my contention that this kind of method—the map of explanation—can virtually disable the critic from actually taking in the argument that is being made. Consider my description of the Iran-Contra Affair. I argued that the constitutionally significant crime in the Affair was the reliance of the Executive Branch on nonappropriated funds, the receipt of which had not been ratified by statute. 315 These funds were used to endow the "Enterprise," as General Secord called it, 316 so that it could perform various covert activities on behalf of the government. This, I contended, went to the very heart of our constitutional system, which depends upon the authorization of federal expenditures—even if they come from gifts—by the elected officials of the Congress. This authorization scheme links the public with—and commands the public's attention to—governance. It was the framers' way of connecting popular sovereignty and responsibility with the acts that are committed in its name. The famous "diversion" of funds from the Iranian arms sales to the Contras was, I claimed, itself a kind of diversion because it distracted from the constitutional issue and diverted attention to what was little more than an accounting mechanism for the Enterprise, the activities of which embraced many regions. 317

Tushnet misunderstands this profoundly and seems to think that my point was that it is unconstitutional for quasi-private entities to use public funds, when in fact my point was that it is unconstitutional for quasi-public entities to use private funds without congressional authorization. As a

314. Tushnet, supra note 47, at 1718 (footnotes omitted) (quoting BOBBITT, INTERPRETATION, supra note 2, at xii).
315. See BOBBITT, INTERPRETATION, supra note 2, at 67-69.
316. Id. at 67 & n.12.
result of this misunderstanding, he points out that Congress could authorize a controlled subsidiary (like the Postal Service or Amtrak) to carry out a policy specified by the Congress, thinking this to be a counter-example to my argument, and then asks: Is foreign policy different? Was secrecy the problem? And if it is the latter, he thinks my emphasis on the self-sustaining and self-financing aspects of the Enterprise—aspects which permitted the National Security Council group to dispense with congressional authorization—would seem to be "irrelevant." How could so adept and serious a critic as Mark Tushnet go so far wrong? Look at what follows:

Why [then] does Bobbitt focus on the Enterprise? ... By accepting North's Enterprise as a real organization ..., Bobbitt actually makes North and Secord appear to be better public servants. ... I wonder whether a scholar less connected to the administration in power from 1987 to 1990 would have evaluated the Iran-Contra Affair in quite the same way.

It is true that I served in the government in 1987 and in 1990. But in 1987, I was working for Arthur Liman as Legal Counsel to the Iran-Contra Committee and had no connection whatever to the "administration in power" (unless it was an inquisitorial one). I returned to Austin at the end of the hearings and the drafting of the report, and remained at the University of Texas until 1990, when I became the Counselor on International Law at the State Department.

I cannot bring myself to believe that Professor Tushnet, who is actually a rather decent fellow, really intends the calumny on my academic opinions that such allegations of tainted scholarship by virtue of political association would suggest. On the contrary, I think he is misled by the peculiar demands of the map of explanation. Still, I confess that I am grateful that he got his facts wrong. Suppose they had been right! Suppose I was a ... Republican!

Having derived a certain picture of a writer, the critic is inevitably led to small carelessnesses, because it no longer seems necessary to attend to the detail of the writer's work. Let me give three examples. First, Tushnet says, "Bobbitt's work exemplifies the most basic characteristic of constitutional scholarship—it is oriented to Supreme Court decisions." Not exactly. Rather, I derive the modalities that determine the truth status...
of legal arguments from an examination of Supreme Court opinions, oral arguments by lawyers, presidential papers, and congressional hearings because these incidences of constitutional decisionmaking are constrained by their status as decisions according to law. It is my aim to make these forms of argument familiar to a much wider audience than those academics and judges who are primarily concerned with the jurisprudence of the Supreme Court.

A second example is Tushnet's characterization that "[f]or Bobbitt, [ethical] arguments 'deriv[e] rules from those moral commitments of the American ethos that are reflected in the Constitution,' although too often he suggests that the only such commitment is one to 'the idea of limited government.'" 323 Not quite. I cannot really say if I seem to think this too often, but I do not in fact think that the commitment to limited government is the only ethical commitment of the Constitution. Indeed, the chapter on Iran-Contra is devoted to the ethos of self-government. 324

My third example is Tushnet's claim that, "according to Bobbitt, 'Holmes . . . confirm[s] . . . that Missouri v. Holland is to be a doctrinal opinion.' The attitude expressed is that opinions must 'be' in one mode or another." 325 While I do believe, as I wrote in Constitutional Fate, that the preference for one form of argument characterizes the style of a judge, 326 I certainly do not believe that an opinion has to be in a single dominant mode. Indeed, the most satisfying opinions deploy a multiplicity of modes.

My point is not that, in these three examples, Professor Tushnet has simply misconstrued my texts. Rather, the views attributed to me are views I hold—but only partially, only in conjunction with other views, and without these accompanying views, the attribution amounts to a mistake (and not simply a misreading).

This takes us to a final type of explanation that occurs when the critic actually changes the object of the work being discussed. This too is evident in Tushnet's paper. In Constitutional Fate, I made the following

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323. Id. at 1716 (footnotes omitted) (quoting BOBBITT, INTERPRETATION, supra note 2, at 13, 20).
324. See BOBBITT, INTERPRETATION, supra note 2, at 64-82.
325. Tushnet, supra note 47, at 1724-25 (alterations in original) (emphasis in original) (footnotes omitted) (quoting BOBBITT, INTERPRETATION, supra note 2, at 59).
326. As I note in Constitutional Fate,

I would emphasize that no sane judge or law professor can be committed solely to one approach. Because there are many facets to any single constitutional problem and . . . many functions performed by a single opinion, the jurist or commentator uses different approaches as a carpenter uses different tools and often many tools in a single project. What makes the style of a particular person . . . is the preference for one particular mode over others.

BOBBITT, FATE, supra note 1, at 124 (emphasis in original); see also id. at 8 ("[W]hat is usually called the style of a particular judge . . . can be explained as a preference for one type of argument over others." (emphasis in original)).
argument about judicial review and the counter-majoritarian argument: Insofar as the counter-majoritarian objection is a legal objection, it must be—and can be—resolved by reference to the various modalities of legal argument. But insofar as it is an extra-legal objection, it conflates two ideas, legitimacy and justification. The counter-majoritarian objection then maintains that unless judicial review is justified by reference to a justifying theory (as the acts of executive or legislative bodies are justified by their support by majoritarianism), the practice of judicial review is not legitimate. This is why the objection is “counter-majoritarian.” This is vacuous, however, because the forms of argument that can legitimate judicial review cannot justify it. If they were able to do so, they would presuppose their own justification. For example, if it were sufficient to say that the framers’ intention to rely on courts for constitutional review justified that review, we would already have assumed the very legitimacy for historical argument for which we sought a justification in the first place. Grounding legitimacy in extra-legal justifications leads to an infinite regress: Each justification must be independently legitimated, and that legitimacy in turn demands a fresh justification. My solution is to claim that legitimacy flows from following various legal rules. These rules depend upon modalities of argument—ways in which particular arguments are assessed, rather than arguments themselves—and the legitimacy of executive and legislative bodies also comes from following their modal rules. There is nothing more to legitimacy than that. Justification comes from external sources and does not establish or undermine legitimacy.

Tushnet understands this very well, of course. But he goes on to note “that it is entirely unclear that this distinction between legitimacy and justification actually concerned the constitutional scholars on whom Bobbitt directs his fire.” This is a very important point. In my view, the counter-majoritarian objection has been kept alive so long because constitutional scholars played a kind of shell game—they questioned the legitimacy of judicial review by demanding justifications. Had they been willing to concede the legitimacy of the practice and simply asserted that, though legitimate, they believed it lacked an appealing political theory, I doubt there would have been much fuss about the matter. But when the Supreme Court began handing down very controversial decisions in the 1930s, and again in the 1950s and 1970s, academic arguments about legitimacy really caught fire.
I have discussed the reactions of one generation of scholars and judges in *Constitutional Fate.*[^31] I might have added another generation—John Ely, Thomas Grey, Harry Wellington, Archibald Cox, Michael Perry, Laurence Tribe, Jesse Choper, and Ronald Dworkin—all of whom addressed the question of what political theory would legitimate the exercise of judicial review, and each of whom provided a partial, modal answer. To take one of the most distinguished of this distinguished set, Ely offers a structural argument for judicial review.[^32] By transferring a legal argument to an encompassing political theory, Ely (and the others) hoped that justification could provide legitimacy.

Tushnet is well steeped in this body of discussion. His remarkable book, *Red, White and Blue,*[^33] is in large part a dissection of this literature. But, he now says, had these writers known that legitimacy was a matter of legal argument, they would have abandoned the object of legitimacy and simply turned their attention to justification.[^34] I wonder if this is so.

Walt Kelly once did a series of Pogo strips illustrating Mother Goose rhymes.[^35] In one of these, Pogo, playing Mother Goose, recites the famous nursery puzzle about St. Ives to a rapt Albert, his alligator friend and companion in the swamp that Kelly immortalized. At the end of the story, Pogo asks, “Kits, cats, sacks and wives, / How many were going to St. Ives?”[^36] After some complicated arithmetic, Albert slyly asks to compare his answer with Pogo’s. Pogo replies, “One”—an answer that at first perplexes and then enrages the alligator.[^37] Pogo patiently explains that the rhyme actually specifies the destination of only one person, the speaker (“As *I* was going to St. Ives.”).[^38] “Where was [the others] goin?” Albert demands. Finally, Pogo relents and says, “Who knows? . . . Mebbe . . . to Altoona.”[^39] The series closes with Albert, now himself dressed as Mother Goose, reciting the rhyme to a group of eager children:

As I was going to St. Ives,
I met a man with forty wives
Every wife had forty sacks,

[^31]: See id. at 3-4.
[^32]: See JOHN H. ELY, DEMOCRACY AND DISTRUST 135-36 (1980) (arguing that the Court must ensure that representative processes are not thwarted and it must provide special protection for those groups that even perfect process will not protect).
[^33]: Tushnet, supra note 301.
[^34]: Tushnet, supra note 47, at 1714.
[^36]: Id. at 123.
[^37]: Id. at 126.
[^38]: Id. at 131 (emphasis added).
[^39]: Id.
Every sack had forty cats
Every cat had forty kits!
Kits, cats, sacks and wives
How many were going to Altoona?240

This is Tushnet’s move in the debate about the counter-majoritarian objection to judicial review. I have given an argument that shows that what we thought were issues crucial to legitimacy were not so; and that the objection itself, insofar as it implicates legitimacy, can, I think, be decisively answered. My answer does not require one to count up, as it were, the many reasons for and against judicial review. Instead, it asks that we stick to the actual question being asked. Like Albert, Mark Tushnet is distressed by this and wants to re-orient the question so that it fits the calculations that make the problem so bedeviling in the first place. This is, I believe, the crucial move of the map of explanations. It changes ground, and then claims for itself the primacy of the original discussion. In such maps, one invariably encounters such phrases as, “What we’re really talking about here is . . . ,” or “What the writer was really doing was . . . ,” or “What really motivated him was . . . .” And that is why it is so mortifying when it turns out that the casual causalist has got the facts wrong. But is that the trouble with such “explanations”? I doubt it. I think, instead, that they are vulnerable to an irremediable flaw. If, as is asserted, the causalist can discern, beneath the surface, an otherwise hidden mechanics, how can we know that he, too, is not motivated by something as obscure to himself as he believes the true motives of others are to them? When, exactly, is Freud’s cigar not just a cigar?

Tushnet is one of the most accomplished constitutional scholars of our period. He combines a commitment to utter honesty with a voracious intellect and an indefatigable pen. Surely, if there is anyone capable of overcoming the customary assumptions of explanation that are so much a part of our contemporary intellectual life, it is he. When he comes to believe that the unquestioned aspects of our lives are not the petty stylistics of class, but are the profound tyrannies of unreflectively ascribing psychological dynamics to other people, I should not be surprised if his iconoclasin turns to attack the very shibboleth that currently casts a shadow on his work.

B. Steven Winter: The Constitution of Conscience

But Tushnet’s is only one sort of map of explanation. There is another, equally ambitious critical overlay that draws on some of the same assumptions about motivation, but is nonetheless different. Whereas the
kind of mistake at which we have been looking derives from an ascription of motives to the person whose writings are being discussed, this second sort of explanation arises from typing the writer to be discussed, and, usually, responding to that "type" with the program of another type. One unfortunate effect of this sort of mapping is that it imports into the stony landscape of legal prose the jargon-yard clutter of a style of writing that is best confined to American sociology. When the writer is as well read as Steven Winter, this kind of essay is leavened with interesting and often amusing observations.  

Of course, I am not suggesting that critics dispense with archetypes, or typing generally, in their criticism. The very maps I have been discussing are types. But I would distinguish three different sorts of uses of types, only one of which is objectionable. First there is the archetype—a useful tool for any writer. Consider this passage:

One classic position is that judicial review is legitimate only if the holding is logically true, that is, if it follows necessarily from the Constitution. . . .

Another view is that the holding in a constitutional case is true because the Court said so, and no other authoritative decisionmaker contradicted it. . . .

Yet another reply is to say that the holding will become true as it becomes legitimate in the eyes of the public.  

Here, the categories are abstracted from a number of different writers, no one of whom is the embodiment of the type, and a great many of whom would doubtless be surprised to find themselves lumped together for the purposes of a discussion. These types have no more reality than the class of classes has in logic, and one must be correspondingly careful about treating them as if they were the constituent members of a group in the way that, say, the signers of the Declaration of Independence compose a group.

Second, there are types that arise from a discussion—are created for the purposes of the discussion—and perish with the end of the article, having no more life than a mayfly that dies with the summer day that brought it into being. These sorts of typing can also be useful to the critic. When I write that there are three sorts of maps, or that the map of explanations is composed of two kinds of errors, I am simply indicating common traits, as one might point to the repetition of similar musical motifs in a number of different symphonies. The "relaxed cadence," or in

341. See, e.g., Winter, supra note 48, at 1814 (incorporating a story about the colorful baseball manager Earl Weaver); id. at 1812 (employing Merleau-Ponty's image of a person in a phone booth to make a point about meaning and communication).

342. BOBBITT, FATE, supra note 1, at 236.
poetry, "sprung rhythm," are types of moves shared among disparate artists. The Hudson River School never met for class.

Rather, it is a third sort of typing to which I object. This places the individual within an archetypal class (reversing the first kind) and then abstracts traits (reversing the second kind). This kind of typing is a useful foundation for irony because it sets up an easy contradiction between the expectation typified by the class trait and the departure from that expectation that is everywhere present in individual life. Thus, we may hear someone say, "Why I thought you were a Catholic! And yet you say you paid for your goddaughter's abortion?!" Or, to take a more elegant example from Dr. Johnson, one might recall his attack on the American revolutionaries of 1776: "[H]ow is it that we hear the loudest yelps for liberty among the drivers of negroes?" 343

Let me say at once that I do not wish to "purify" the law review article as a genre by purging it of this sort of typing. Rather, I simply want to call attention to its pitfalls, which are amply illustrated in Steven Winter's paper, The Constitution of Conscience. This paper has four parts—two of which, an introductory overture and a reiterating coda, I will leave for a moment. Of the central two sections, one takes up Ludwig Wittgenstein's allegedly naive view of language and the proposal by Winter that this view can be corrected by supplementing it with the work of two distinguished sociologists. The other section addresses my view of law and the Constitution.

Wittgenstein, Winter has decided, is a naturalized behaviorist and thus, we are told, is guilty of two familiar philosophical sins that arise from the behaviorist's conviction that all language is embodied in action. Bobbitt, Winter has decided, is a Wittgensteinian and thus is guilty of these same sins as they are committed in jurisprudence. 345

At first, it appears difficult to determine the content of the beliefs of Winter's Wittgenstein. The difficulty is that though Winter builds his explanation mainly with quotations from Wittgenstein, he does not do so exclusively. Some of these passages are more relevant to his enterprise than others, and some are contradictory when taken together, and some he appears to rely upon but clearly does not altogether take on board. Thus, he says that the problems with a Wittgensteinian understanding "stem from Wittgenstein's claim that all language and thought are embedded in action." 346 In a footnote, Winter adds, quoting Wittgenstein, that "the

344. See Winter, supra note 48, at 1814 ("The fundamental Wittgensteinian move might be characterized as a naturalized behaviorism . . . .").
345. Id. at 1814 & n.28.
346. Id. at 1813.
term ‘language-game’ is meant to bring into prominence the fact that the speaking of language is part of an activity, or of a form of life.”

Winter compares this statement with a remark of Tom Grey’s that the “distinctive feature of recent reinterpretations of pragmatism is . . . the idea that thought is essentially embedded in a context of social practice.” As one can readily see, the passage from Wittgenstein does not support the characterization Winter gives it: Wittgenstein did not write that all thought is imbedded in action, and he did not conclude that, therefore, every form of life composed a language game. Winter’s characterization seems more in harmony with the observation of Grey’s about pragmatism.

Similarly, Winter writes, “[f]or the Wittgensteinian, meaning does not derive from something (like a practice); rather, meaning inheres in practice.” In asserting this, Winter cites a passage from me in which I say that law (not meaning) “is something we do, not something we have as a consequence of something we do.” And he ignores his own citation shortly thereafter to Wittgenstein, who says, “[f]or a large class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.”

Winter has apparently become aware of these inconsistencies, for in his reply to Patterson, composed after his principal paper, he attempts to distance himself from the reader’s understandable conclusion that he intends to portray Wittgenstein’s views when he gives us, in his first paper, long quotations from Wittgenstein, and numerous citations to texts of Wittgenstein. When, Winter says, he referred to “‘the Wittgensteinian,’ the careful reader will have discerned, I trust, that this was not old Ludwig himself but a composite of Bobbitt, Rorty, and Fish as documented by my citations.” I will return to this bizarre alibi in a moment, but for present purposes it really does not matter whether Winter is providing his understanding of Wittgenstein or of Wittgensteinians. It is the type in which he is interested. Bobbitt, Rorty, and Fish are Wittgensteinians, we are told. “The fundamental Wittgensteinian move might be characterized as naturalized behaviorism. . . . The Wittgensteinian [asserts] an

347. WITTGENSTEIN, supra note 194, § 23 (emphasis in original), quoted in Winter, supra note 48, at 1813 n.26.
349. Winter, supra note 48, at 1814 (emphasis in original).
350. BOBBITT, INTERPRETATION, supra note 2, at 24, quoted in Winter, supra note 48, at 1814 n.28.
351. WITTGENSTEIN, supra note 194, § 43 (emphasis in original), quoted in Winter, supra note 48, at 1815 n.35.
essentially performative view of meaning . . . .”\textsuperscript{353} For the latter
statement, Winter cites Wittgenstein, a rather dirty trick on the discerning
reader if one is to credit Winter’s slightly embarrassing afterthought.\textsuperscript{354}

And what does it mean that a Wittgensteinian (one type) is resolved
into a behaviorist (another type)? It means that the familiar shortcomings
of the behaviorist in accounting for meaning can be attributed to the
Wittgensteinian. For Winter, these are termed the “particularist fallacy”
and “practice fetishism.”\textsuperscript{355} The particularist fallacy is “the assumption
that every practice or discourse is a matter of understandings and
conventions specific to that activity—for example, that judging is judging
and folklore counselling is folklore counselling and never the twain shall
meet.”\textsuperscript{356} To maintain this, Winter must ignore that Wittgenstein (and
even Bobbitt) repeatedly give examples of practices that consist in the
comparison of other practices.\textsuperscript{357} In any event, the “Wittgensteinian”
view is not compatible with Winter’s opinions of the matter: he cites his
own work at this point to show, he says, “that, in rebuking the husband
who abandoned her, Medea employs ostensibly ‘modern’ legal arguments
premised on doctrines such as performance as consideration, quantum
meruit, detrimental reliance, and rescission for impossibility of
performance.”\textsuperscript{358} I do not doubt that a law professor might actually
experience a performance in this way—though I do not envy him for that—but
I would account for the phenomenon by claiming that he brings to the
theater a sensibility that is external to that of Euripides’s, and, I daresay,
Diana Rigg’s.\textsuperscript{359} There is nothing “ostensible” about it. Only a
behaviorist could appear to be disabled from showing how different persons
can have different takes on the same experience, because the behaviorist—if
any such persons actually exist—is said to believe that all psychological
entities are matters of observable behavior.

The other Wittgensteinian vice, practice fetishism, is defined by
Winter as the “tendency to regard a practice as an irreducible, elemental
quality that is the virtual embodiment of the understanding that it makes
possible.”\textsuperscript{360} This is his description of such views (for which he cites
Wittgenstein):

\begin{quote}
\textsuperscript{353} Winter, supra note 48, at 1815 (emphasis in original).
\textsuperscript{354} Id. at 1815 n.35 (citing WITTGENSTEIN, supra note 194, § 43).
\textsuperscript{355} Id. at 1816.
\textsuperscript{356} Id.
\textsuperscript{357} In my case, justification is no more than the assessment of various legal practices when
measured against external norms—it is itself a practice that is not composed of a practice, but that
studies other practices from a point of view that is not theirs, but is its own.
\textsuperscript{358} Winter, supra note 48, at 1816 n.40.
\textsuperscript{359} Diana Rigg played the title role in the London production of Medea.
\textsuperscript{360} Winter, supra note 48, at 1816.
\end{quote}
A practice is a dynamic pattern of performance under varying circumstances. Consequently, it cannot be reduced to a set of rules because no such set could be both explicit enough to give adequate guidance and comprehensive enough to cover [new situations]....

On this view, there is little or nothing one can say about the content or structure of a practice, except perhaps to describe the step-by-step process of rote initiation.\(^\text{361}\)

The first and second points are certainly views I hold. The first is I think widely agreed upon, these days, and the second is explicitly stated in Constitutional Interpretation.\(^\text{362}\) But the third point is absurd. Here, Winter quotes Wittgenstein: "[I]f a person has not yet got the concepts, I shall teach him to use the words by means of examples and by practice.—And when I do this I do not communicate less to him than I know myself."\(^\text{363}\)

This scarcely is support for the view that there is nothing one may say about the content or structure of a practice. Indeed, the quoted passage is a profound example of just the sort of thing one might say about virtually all practices: it recapitulates the first two points in Winter’s argument and asserts that understanding is a matter of being able to do something. Moreover, much of Wittgenstein's work shows that rote initiation cannot, logically, account for meaning. Such a characterization can seem persuasive only to a person who thinks that the refusal to accept the cosmology of mediating devices (like Winter’s “objectified sedimentations”) amounts to a confession that “little or nothing” can then be said.

Winter also cites Richard Rorty for this point, and supplies a quotation:

\[\text{[I]f we understand the rules of a language-game, we understand all that there is ... save for the extra understanding obtained from inquiries nobody would call epistemological—into, for example, the history of the language, the structure of the brain, the evolution of the species, and the political or cultural ambiance of the players.}\(^\text{364}\)

Now we know what the third point actually is meant to say: that on this view, there is little or nothing, as an epistemological matter, one can say about the content or structure of a practice, except the way it is learned and performed. That is perfectly true, it seems to me, and I am mystified as to why it eludes Winter unless it is because that statement will not support

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361. Id. at 1816-17.
362. See, e.g., Bobbitt, Interpretation, supra note 2, at 16.
363. Wittgenstein, supra note 194, § 208 (emphasis in original), quoted in Winter, supra note 48, at 1816 n.43.
the charge of practice fetishism that Winter wishes to press. The charge is that practice "thus becomes fetishized in two senses. First, it is treated as a kind of conceptual primitive; a practice is seen simply to embody the knowledge that it enables. Second, practice is fetishized in the sense that it tends increasingly to be represented as an autonomous, active agency." 365

But nowhere of which I am aware does Wittgenstein claim that practice is a conceptual primitive, except as to the epistemology of some kinds of language games, which are, of course, only some kinds of forms of life. Winter confuses understanding how to play a game, for example, with understanding how to comment on it, or understanding how to depict it. Only if Wittgenstein claimed that a practice was an island, unconnected with any other practice, could such an absurd conclusion be maintained. I think this is exactly what Winter has in mind, however, when he suggests that Wittgenstein presents practices as autonomous, active agencies. This is what leads him to say that Wittgenstein's view "eclipses" the sociology of how concepts are institutionalized and "effaces the role of reflection" by persons engaged in the practice. 366 And this is why, having frog-marched two perfectly respectable sociologists on the stage—Berger and Luckmann—he insists that they, unlike the Wittgensteinian, "recognize that a certain amount of reification is integral to the process of institutionalization." 367 How does Winter think the practice of justification, for example, takes place without reification? The issue is not whether reification takes place, but precisely what it consists in.

Perhaps to appreciate my sense of distress at this caricature of Wittgenstein and his thought, wherein Winter presents Wittgenstein as a behaviorist and then contrasts his work, to Wittgenstein's detriment, with that of Berger and Luckmann, one has to recall Wittgenstein's labors during the decade after the Tractatus when he struggled against the general, causal account of meaning of which behaviorism is a variant. Consider this passage from his notebooks of the period:

> It would be characteristic for a specific erroneous view if a philosopher believed a sentence would have to be printed in a red colour, since only in this way would it completely express what the author wants to say. . . . I believe that to the causal theory of meaning one can simply answer that if someone received a push and fell, we don't call the fall the meaning of the push. . . . The sense of language is not determined by its effect. Or what one calls the sense, the meaning in language is not its effect.

365. Winter, supra note 48, at 1817.
366. Id. at 1818.
367. Id. at 1819.
What we investigate is actually the "meaning of meaning": namely... the grammar of the word "meaning."  

Wittgenstein’s views thus contrast with the common, causal view—a view that I imagine most persons (including Berger and Luckmann, by the way) still hold—that was prominently expressed in the works of Bertrand Russell during the period Wittgenstein composed the above passage. That view accounts for meaning in terms of the psychological results that signs have on the mind. It considers the purpose of language to have particular effects on the mind, "as a drug might produce certain hallucinations or feelings." Thus, words (signs) produce mental impressions. One uses a sign correctly if the hearer (or reader) experiences the mental impressions that the speaker (or writer) intended to convey. Such a view is behind the claim that the world is "constituted by an ongoing, three-way dialectic in which externalization... objectification, and internalization are each necessary moments." As Russell put it, "If a complex stimulus A has caused a complex reaction B in an organism, the occurrence of a part of A on a future occasion tends to cause the whole reaction B."

This view can, obviously, serve as a basis for behaviorism, and Russell at various times embraced behaviorism. But it has certain shortcomings that must have particularly troubled Russell—for example, the account of logical connectives. What "experiences," for example, do the words "or" or "not" convey? This was his reply:

We wish to know what are the occurrences that make the word "or" useful. These occurrences are not to be sought in the facts that verify or falsify beliefs, which have no disjunctive quality, but are what they are. The only occurrences that demand the word "or" are subjective, and are in fact hesitations. In order to express a hesitation in words, we need "or" or some equivalent word. "[N]ot" must derive its meaning from experiences of rejection, and "or" from experiences of hesitation. Thus no essential word in our vocabulary can have a meaning independent of experience. Indeed any word I can understand has a meaning derived from my experience.

369. Id. at 109 (quoting Wittgenstein’s notebooks from 1932-34).
370. See BERTRAND RUSSELL, THE ANALYSIS OF MIND 198 (1921).
371. Winter, supra note 48, at 1821 (footnotes omitted).
372. RUSSELL, supra note 370, at 86.
373. See, e.g., BERTRAND RUSSELL, AN INQUIRY INTO MEANING AND TRUTH 14 (1940) (recognizing that his theory of knowledge uses behaviorism as a starting point).
374. RUSSELL, supra note 370, at 264-65.
In contrast to this "psychological view"—which has had such profound effects on Western education and politics—Wittgenstein developed a "logical" account. Far from being a behaviorist, Wittgenstein was attacking the very basis for Russell's behaviorism. By the early 1930s, he was writing that the expressions, "I understand [a sentence]" and "I mean something [by a sentence]," should not be viewed as proof that the sentence had produced something within us—that it had taken hold of us, that we imagined something as a consequence—but rather could simply mean that the sentence is "part of a system familiar to me. I play the game of which it is a part."\(^{375}\) Wittgenstein stated that he was not interested in the sign "in so far as it influences the mind by suggestion, thus in so far as it has an effect," but rather was interested in a sign "only as a move in a game; term in a system, that is autonomous."\(^{376}\)

Remarks like the last may have thrown off readers like Winter. These remarks do not mean that signs have no effect on the mind, nor do they mean that every language game is an island without connections to the rest of language. If this were so, one could never learn a language. Rather, passages like this are attempts to locate Wittgenstein's purpose: He is attempting to work out a theory of meaning from a logical point of view, one that does not depend upon any particular empirical stimulus to account for its function. He is not denying reality to psychological effects; he is denying they have any necessary role in meaning. And, as Wittgenstein's most interesting and successful elucidator has urged, Wittgenstein was reacting to "causal theories of language" in general, including those of a behaviourist inclination. . . . [W]hatever the effect of a word, whether unconditioned (for instance, we might discover some incantation that \textit{causes} our enemies to suffer severe bouts of sneezing or perhaps some other more sinister affliction) or conditioned (whatever sort of conditioned response, be it a "neurological reaction", a "mental image" or a gross "behavioural reaction"), we would not \textit{call} the effect the meaning of the word. And this, of course is neither a denial that words might have such effects, nor a denial of the "law of mnemic causation" \textit{per se}. Rather, it simply is an attempt on Wittgenstein's part to point out that such effects and the laws which govern them are not what we mean by "meaning."\(^{377}\)

I venture to say that Steven Winter must be the only literate person of whom I am aware who would say that Wittgenstein's views ignored the

\(^{375}\) HILMY, \textit{supra} note 368, at 121 (brackets in original) (emphasis in original) (quoting Wittgenstein's notebooks from 1932-34).

\(^{376}\) Id. at 122 (quoting Wittgenstein's notebooks from 1932-34).

\(^{377}\) Id. at 276 (emphasis in original).
social context of meaning, because drawing attention to this relationship is the achievement for which he is best known to the public. It is therefore clear that Winter, who is terribly widely read, must have something special in mind when he makes this charge. Having taken us through his summary of Berger and Luckmann who argue, quite irrelevantly for Wittgenstein's epistemological purposes, that "the social world [is] constituted by an ongoing, three-way dialectic in which externalization—that is, ongoing human activity—objectification, and internalization are each necessary moments," Winter then announces: "We are now in a position to see exactly why the Wittgensteinian approach is prone to the problems and distortions identified earlier." And it turns out that the reason is that Wittgenstein goes straight from externalization—that is, ongoing human activity—to internalization without any mediations whatsoever. Thus, even in the hands of its most subtle proponents, the Wittgensteinian account is necessarily impoverished by its elimination of the middle term of the dialectic. Without a moment of objectification . . . , it has no alternative except to reduce meaning to a[n] . . . inexplicable dimension of practice. . . . [W]e can also see why, for the Wittgensteinian, reflection necessarily drops out.

It may be helpful to remind the reader that Wittgenstein's account of meaning begins in an attack on the very idea of internalization—that there are internal mental entities that necessarily accompany meanings. I doubt that Wittgenstein, who wrote in an indescribably beautiful and powerful prose, ever actually wrote something like Berger and Luckmann's phrase that intersubjective meaning becomes "truly social only when it has been objectivated in a sign system of one kind or another, that is, when the possibility of reiterated objectification of the shared experiences arises," but Wittgenstein's unforgettable description of the builders assumes this truism. It is not that Berger and Luckmann have nothing of importance to say; it is that they could be thought relevant in the first place only if you completely misconceived Wittgenstein's project, if you believed that Wittgenstein was a very doctrinaire behaviorist, one who maintained that there was no role for reflection because, having denied the necessity of "internal" events, he then was forced to conclude that, in Winter's words, there was "nothing—that is, no 'thing'—for practitioners

378. Winter, supra note 48, at 1821 (footnotes omitted).
379. Id.
380. Id.
382. See WITTGENSTEIN, supra note 194, §§ 2-21 (imagining the possibility of a language with only four words: "block," "pillar," "slab," and "beam").
to reflect upon" and no practice (call it reflection) capable of meaningfully occurring.

Winter announces, in conclusion, that Wittgenstein ignores two things: "The first is the ordinary capacity of humans to use language to encapsulate, communicate, and conserve shared social experience. The second, closely related thing this view ignores is the ineradicably imaginative nature of human rationality."

Yet, there is scarcely a page of Wittgenstein's work, including his work on the foundations of mathematics, that is not devoted to an attempt to rescue our understanding of meaning by linking it to the ordinary practices of human beings using language; and the many striking examples of Wittgenstein's imaginative anthropology are testimony to his commitment to the imaginative nature of rationality. Practice fetishism and particularism may indeed culminate in the denial that human beings can conserve and transmit shared experiences and in a related refusal to recognize the imaginative elements in human rationality. But because these very ideas—how human beings learn a language, how imagination plays a crucial part in that learning—are so much at the center of Wittgenstein's work, it casts some doubt on whether Winter's charges of fetishism, among others, are accurate. For the devotee of the "type," however, the reasoning runs the other way: if the subject is part of the type of offenders, then he must take the positions that such offenders take.

It tries one's patience when Winter insists that "[t]he importance and ubiquity of imaginative processes such as metaphor undermine the Wittgensteinian claim that there is no more to meaning than its performative significance within a social practice." Is the use of "metaphor" not a social practice? But worse is yet to come. In the final two paragraphs of this section, Winter announces that the "Wittgensteinian understanding of a practice becomes untenable once we appreciate that we regularly use knowledge from one experiential domain to structure our understanding of another," and, patronizingly, that the Wittgensteinian assumption of professional independence "is quite fantastic once one appreciates the many

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383. Winter, supra note 48, at 1821.

384. For this reason, I am not greatly tempted by Winter's invitation to "see Steven L. Winter" for an "extended argument for the possibility and importance of reflection by situated practitioners, what I call 'situated self-consciousness,' [which] requires a full-fledged account of the role of imagination." Id. at 1821 n.73 (citing Steven L. Winter, Bull Durham and the Uses of Theory, 42 STAN. L. REV. 639, 644, 686 (1990)).

385. Id. at 1822.


388. Id. at 1824.
ways, though complex and nonlinear, in which meaning is dependent on social experience.\textsuperscript{389}

Indeed, Winter's entire essay is structured around such small \textit{coup}s \textit{d}e \textit{theatre}, which culminate in announcements of such banality that they are made ludicrous by the portentous, jargon-ridden analysis that precedes them. Does anyone think that Wittgenstein would be shattered to be informed of such revelations? Or that it is really "news" that we use knowledge from one domain in assessing another? Or that meaning is dependent on experience? To maintain otherwise would turn autonomy into autism.

But then, of course, Winter is not writing about Wittgenstein, but about the Wittgensteinian account, which I fear must mean me. This takes us to the second part of his critique. Winter is far more generous to me than to Wittgenstein. I especially appreciate his apt use of quotations and paraphrases to present the views he attributes to me. And yet, because he must fit me in the Wittgensteinian indictment (the particularist fallacy and practice fetishism), and because of his own agenda (to bring the insights of social and cognitive science to jurisprudence), every important treatment of my views arrives at a terminus that is inconsistent with them. Sometimes this is comic, for example when, as he does with Wittgenstein, Winter dramatically unveils a clinching finding that turns out to be in error. Sometimes it is unsettling, as when he attempts to work out a constitutional problem using the modalities. But in each case it serves to justify Dennis Patterson's caustic remark that, despite the accurate quotations and paraphrases, Winter really "has no idea what Bobbitt is doing."\textsuperscript{390} It is clear enough that Winter thinks I am doing with law what Wittgenstein did with language. But his ideas about my work and the Constitution are as formulaic and mistaken as his ideas about Wittgenstein's views of language.

Before we begin this section, therefore, it may be helpful to review some of the opinions I have expressed earlier in this Paper, as well as in \textit{Constitutional Fate} and \textit{Constitutional Interpretation}: Constitutional interpretation by formal decisionmakers committed to confine their decisions to legal bases is not the same practice as constitutional discourse, which, among other things, evaluates those decisions.\textsuperscript{391} Constitutional argument is available to the public at large (which constitutes the largest group of constitutional deciders) only because the language and means of such argument have a resonance in the rest of our cultural life.\textsuperscript{392}

\textsuperscript{389} Id.
\textsuperscript{390} Patterson, \textit{supra} note 169, at 1843.
\textsuperscript{391} See BOBBITT, \textit{INTERPRETATION}, \textit{supra} note 2, at 111-13.
\textsuperscript{392} As I wrote in \textit{Constitutional Fate},

The concepts which occur in Constitutional law must also occur and have a meaning in everyday life. We must argue in everyday life. We must arrive at decisions by
Justification is a practice that is of immense moral and political significance, but it does not confer legitimacy. And similarly, the various modalities of constitutional argument do legitimate, but they do not justify. Confusing justification and legitimization occurs, among other times, when we attempt to legitimate legal decisions by claiming that they were made because of the legal reasons that are adduced in their support.

As he does with Wittgenstein, Winter intends to indict me for the particularist fallacy and for practice fetishism, though in my case it is not because I am a behaviorist, but because I am a Wittgensteinian. The first charge is supported by evidence of a contrived conflict with Karl Llewellyn—I scarcely mention him in my two books, though he is much admired and revered by me. This drives Winter to write what might be one of the classic lines in mystery work: "The evidence is as revealing as it is terse. Bobbitt makes just two references to the Llewellyn piece . . . ." It turns out that I have a “conflicted reaction” to Llewellyn’s great article, The Constitution as an Institution, because his thesis “cuts uncomfortably close to the bone.” Winter says, “Although both Bobbitt and Llewellyn claim that the legitimacy of constitutional law is a matter of ‘practices,’ they have strikingly different things in mind. (There is no lack of irony here . . . , Bobbitt and Llewellyn simply do not intend the same real-world referents.)” How true. For me, the use of the six forms of constitutional argument is the way we decide constitutional questions in the American legal culture. The use of these six forms maintains the legitimacy of judicial review. Llewellyn was interested in the practices of not just legal deciders, but also interest groups and citizens at large. “A national constitution . . . involves in one phase or another the ways of a huge number of people—well-nigh the whole population.” The practices on which we have each focused may overlap, but they are different because the institutions we are examining are different. The whole population is rarely called upon to make legal decisions with respect

way of arguments. It is the use of these concepts outside law (and this use is of course influenced by the reports of legal decisions, opinions, and so forth) that makes their use within constitutional law meaningful. . . . The rules of constitutional law are not derived from these everyday uses, however, but result from the operations of the various modalities.

Bobbitt, Fate, supra note 1, at 237 (emphasis in original).
393. Id. at 245.
394. Bobbitt, Interpretation, supra note 2, at 114; see also supra text accompanying note 215.
395. Winter, supra note 48, at 1824.
397. Winter, supra note 48, at 1825.
398. Id. at 1826.
399. Llewellyn, supra note 396, at 18, quoted in Winter, supra note 48, at 1827.
to the Constitution, although they are involved in constitutional discourse almost continuously, a distinction that this Symposium has underscored as important to my work.

Missing this distinction, Winter seizes on what must have seemed a decisive piece of evidence. Not only do I disagree with Llewellyn in the way Winter has identified, my disagreement is confirmed by a neurotic manifestation: I unconsciously rewrite the very title of Llewellyn’s essay in my own terms. Winter writes:

Interestingly, Bobbitt refers to Llewellyn’s article as “The Constitution as Construction/Creation.” That this is a parapraxis, and not a mere mistake, is clear when one considers that Bobbitt’s reformulation of the title recapitulates the fundamental theoretical difference between him and Llewellyn: Bobbitt approaches constitutional law as a matter of lawyers’ argumentative practices; Llewellyn, in contrast, sees it as an institution.\(^{400}\)

Now that really would be screwy. On Winter’s view of Llewellyn and myself, it would be as if Jung were to cite to Freud’s *Civilization and Its Discontents*\(^{401}\) by writing the title as *Civilization and Its Myths*, or as if Ronald Reagan were to refer to Lyndon Johnson’s domestic program as “The Great No Free Lunch!” These are beyond conflicted reactions; they would evidence dementia. Actually, the title I cited comes from the original typescript of Llewellyn’s Storrs Lectures, a copy of which I was fortunate enough to come across when I was a law student (and I kept Llewellyn’s journal photo over my small desk). And no, I’m not going to tell you what a “parapraxis” is—I had to look it up too—except to say that Winter’s is the sort of embarrassing mistake that occurs when you are so very sure of the “type” of writer you are recreating in your criticism—here, both Llewellyn and myself.

In the second of these arranged confrontations, I am to encounter Roberto Unger. Unger maintains that “every branch of doctrine must rely . . . upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.”\(^{402}\) This picture, Winter summarizes, does not take its form from a “‘coherent, richly developed normative theory’ because there is none that can account for all the conflicting legal doctrines it is offered to explain.”\(^{403}\) For Unger, it follows that law can only be the product of a myriad of political and ideological conflicts.

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Now we are told:

[C]onsider how a Wittgensteinian such as Bobbitt might respond to Unger's argument. First, he would exhort us to abandon the question of justification precisely because it precipitates this kind of all-or-nothing conclusion. Second, and relatedly, he would deny that there are any such "pictures." He would argue that law does not consist of representations of social life. On his view, law is the activity of decisionmaking within the existing modalities. 404

Not at all. First, I would acknowledge Unger's focus on justification, which can only be the product of political and moral debate. Second, I would agree that there are an infinite number of mental pictures we hold that guide us in writing, interpreting, and applying law. And I would agree that these are, in the main, representations of social life. Some of these—like the picture of economic competition enshrined in the Sherman Act, 405 or the picture of the family depicted in Moore v. City of East Cleveland, 406 or the extrapolation to international affairs of the role of neighbor expressed in Roosevelt's Lend-Lease message—407—are explicitly written into law. I deny only that the outcome of a justificatory debate legitimates the actions of those deciders bound to govern according to law or that the mental images of social life must be consulted, as a logical and epistemological matter, when such decisions are made.

Thus, when Winter discloses that "[i]n effect, then, Bobbitt concedes that law faces the very predicament that Unger identifies"—408—that legal decisions are sometimes indeterminate—he discloses nothing because I "concede" nothing. Rather, it is a fundamental part of my views that the modalities may conflict, that they are incommensurable, and thus that no decision-procedure can determine the outcome in advance without sacrificing legitimacy. Winter writes that I believe I have "solved this problem with the resort-to-conscience gambit"—409 because he thinks there is a problem to be solved. He thinks my conclusion that such conflicts must be decided—but are not perhaps resolved—by the conscience is a gambit, a ploy, that must lead to an infinite regress. For what, after all, legitimates or justifies the resort to the conscience? All of this is in Constitutional Interpretation: The resort to conscience is legitimated by our

404. Id. at 1828.
407. See Franklin D. Roosevelt, Presidential Press Conference (Dec. 17, 1940), in 16 PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 354 (1972) (defending the proposed Lend-Lease Act, ch. 11, 55 Stat. 31 (1941) (expired on July 1, 1946), by comparing America to a homeowner whose neighbor's house is burning).
408. Winter, supra note 48, at 1828.
409. Id.
practices, which compel such a resort.\textsuperscript{410} There is no regress precisely because the conscience is not in need of further legitimating. It is justified to the extent that it produces results that can be justified—can be judged according to the prevailing moral sense of the day. The system as a whole, however, is justified because it has a role for the conscience within a legitimate system, though it is not the only conceivable system that can be justified on these grounds.

Having "problematized"\textsuperscript{411} my alleged conflict with Unger, Winter offers a solution. We could, he proposes, "accept the Wittgensteinian's first response without buying into the second; we could abandon the notion of justification without relinquishing entirely the concept of representation."\textsuperscript{412} Of course for me, this is the worst of both worlds: we should certainly not abandon the important enterprise of justification, nor should we return to the correspondence view of meaning, wherein it is claimed that we understand words and sentences when they represent (or stand for) our thoughts, feelings, or intentions. In law, this amounts to the claim that legitimation occurs when a decision can be said to accord with something in the world. This I have decisively rejected.\textsuperscript{413} Winter wishes, however, to indict me for practice fetishism and must therefore both ignore my remarks about the social setting within which law occurs\textsuperscript{414} and refute my arguments about a practice's being understood simply by those who are able to do it.\textsuperscript{415} His argument to the contrary can be quoted almost in full:

A principal point of Wittgenstein's concept of a language-game is to emphasize that a language or rhetorical system like law is always "part of an activity, or of a form of life." . . . But, as

\textsuperscript{410. See BOBBITT, INTERPRETATION, supra note 2, at 168, 184-85; see also BOBBITT, FATE, supra note 1, at 169-75.}

\textsuperscript{411. Winter, supra note 48, at 1811.}

\textsuperscript{412. Id. at 1828.}

\textsuperscript{413. I have noted that [Constitutional Fate] explicitly discards the notion that law takes place within a framework that is independent of the structure of legal argument. It rejects the view that a set of legal presuppositions exists that are discoverable in the absence of legal arguments, upon which legal argument is supposed to depend. . . . In contrast to my approach, one might think of the legitimation of Constitutional law as a particular state occurring when law and argument bear a certain relationship to social facts (or metaphysical ones) that are thought to underlie law. . . . [I]f we think of law in the way contrasted to mine, we will want to get behind arguments to causes. If we are motivated by this idea, we shall want to escape the argumentative structure with its inevitable choices to get to a compulsion from social facts, measuring our arguments against the social and political realities that are thought to account for them in the first place. . . . It is a view rejected, not simply ignored, in my work.}

BOBBITT, FATE, supra note 1, at 245-46; see also BOBBITT, INTERPRETATION, supra note 2, at 179-83.

\textsuperscript{414. See BOBBITT, FATE, supra note 1, at 239.}

\textsuperscript{415. See id. at 245; BOBBITT, INTERPRETATION, supra note 2, at 23-24.}
Bobbitt himself recognizes, constitutional law is not an abstract forensic exercise; it must also connect with our day-to-day affairs. It follows that a practice like constitutional law cannot be understood apart from the larger social practices—the form of life—in which it participates.\textsuperscript{416}

This is not an argument. It is a complete misconstruction of Wittgenstein’s thought, and my own, to say that it “follows” from the relationship between a language game and a form of life that one cannot understand a practice without first understanding the “larger social practices,” whatever they may be. But perhaps my own unfamiliarity with Winter’s use of these terms concealed some consistency with my own convictions. Perhaps the “larger social practices” were not political and social movements, which are as irrelevant to being able to practice law legitimately as is an understanding of mortgage interest rates to being able to build a structurally sound house. My concern that I was not interpreting this passage fairly was allayed when I encountered the example Winter next gives us.

Consider, he invites us, the right to travel. He tells us:

It is easy enough to imagine the historical, textual, structural, doctrinal, ethical, and prudential arguments in support of the constitutional right to travel. . . . Still, the Supreme Court has been remarkably casual about the nature of this right—noting, for example, that “[w]e have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”\textsuperscript{417}

From this fairly straightforward textual remark, Winter concludes, rather than relying on any of the other legal modalities of argument—I would have thought the structural argument to be the soundest, and the Court has largely relied on doctrinal argument\textsuperscript{418}—that

it seems at least equally likely—and more consistent with the (absent) forensic evidence—that the legitimacy of the right to travel arises from the fact that it’s deeply implicated in the cultural and historical life of a nation forged in the experience of immigration and westward expansion [and now so] dominated by the automobile.\textsuperscript{419}

If this means, as it says, that the legitimacy of the right to travel arises simply from the historical facts of migration and westward expansion, then

\textsuperscript{416} Winter, supra note 48, at 1829 (footnotes omitted) (quoting Wittgenstein, supra note 194, § 23).

\textsuperscript{417} Id. at 1831 (brackets in original) (quoting Shapiro v. Thompson, 394 U.S. 618, 630 (1969)).

\textsuperscript{418} See Shapiro, 394 U.S. at 630 (“It suffices that . . . 'It is a right that has been firmly established and repeatedly recognized.'” (quoting United States v. Guest, 383 U.S. 745, 757 (1966))).

\textsuperscript{419} Winter, supra note 48, at 1831. When Winter mentions “forensic evidence,” one is tempted here to believe that Winter has again found the data as terse as it is telling. See supra text accompanying note 395.
it seems to me plainly wrong. How would an historical fact *simpliciter*
confer constitutional status on a proposition entirely apart from any legal
basis? If it means that the Justices may have been motivated by the
importance of the freedom to travel to the American experience, I imagine
this may have been so (although consistency with "absent forensic evi-
dence" moves again close to the mystery genre). But the relevance of this
point depends upon confusing motivation with causality. The mere wish
to celebrate interstate travel does not write an opinion. If we revisit *Shapiro v. Thompson*, we will find a series of legal arguments—not as
good perhaps as the Court's arguments for such a right in *Crandall v. Nevada*, but actual modal arguments that lead to the legal proposition
that is the holding.

Winter concludes that I am a legal ethnocentrist, this being my par-
ticular type of the "practice fetishism," the crime for which he has indicted
Wittgenstein generally. And he calls to my attention that, in an "earlier
encounter with" me, he had stated that "the practice of a truly 'constitu-
tional' politics must struggle with the much more difficult task of making
constitutional meaning and that this task *requires* social action," a
lesson I had evidently failed to heed. To bring home the point, he ends his
essay with this helpful summary:

1. The justice we can achieve is constrained by the forms of life
   in which we find ourselves.
2. It follows, therefore, that the justice we can imagine is attained
   only in the construction of new forms of life.
3. If we think otherwise, we are just fooling ourselves.

Winter's first point confirms that, at least as Wittgenstein used the
term, Winter means something unexplained by the use of "form of life." We do not find ourselves in a form of life anymore than we find ourselves in life itself. I think Winter must mean something like an "institution."

Winter's second point simply does not "follow" as claimed. One can
easily imagine justice that is achieved acting through institutions that
already exist.

The third point is the last example of Winter's stylistic inclination to
work in the climactic mode. Interestingly, it is an apt illustration of the
reliance on "typing" to which I have drawn attention because it fits nicely
within a genre that depends on typecasting. Do you recognize the

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421. See BLACK, supra note 222, at 27-28 (discussing Crandall v. Nevada, 73 U.S. (6 Wall.) 35
(1867)).
422. Winter, supra note 48, at 1835 (emphasis in original).
423. Id.
424. I recall that somewhere Scott Fitzgerald observes that, if a writer creates a character, he
inevitably creates a type; but if he creates a type, he creates nothing.
familiar pattern? A “type” of intellectual response is identified, much as a detective might explain an otherwise esoteric sort of criminal behavior. A list is drawn up of suspects, then the detective explains “the one thing they always overlook.” Having set the stage, all the characters are summoned to a meeting in the drawing room. Then, the fatal flaw in the criminal’s approach is exposed, and an arrest is made. A few wise reflections on the vagaries of mankind close the scene.

In The Constitution of Conscience, the detective is not Basil Rathbone’s Holmes, but rather Michael Caine’s, not David Suchet’s Hercule Poirot, or even Peter Ustinov’s, but rather Peter Sellars’s. Where else does one find the exquisite examples of aggressive blundering—quotations deployed as rapiers that turn out to be spring-loaded umbrellas, aerosol cans of mace fired only to reveal the nozzle has been reversed, spraying the person holding down the button, obtuse characterizations of great authors, opaque and delphic quotations from lesser ones, all expressed with a sublime tenacity and a rigid smile, and then, the dramatic unmasking that discloses . . . a misquotation, a misunderstanding, the detective’s own (dare I say?) parapraxis. Finally, of course, we have the epigrammatic observation without which the play would be incomplete. It is almost too much. How, one wonders, can the detective have the self-control, the utter lack of self-doubt, to be able to pull this off? But there it is: “Detection,” he reminds us, with a half-smile playing beneath his worldly mustache, “detection is not just a game; it is an activity!” And thus, Winter ends his paper with the dramatic, culminating caption: “Forms of Justice? Forms of Life.”

It will be recalled that I deferred a discussion of Professor Winter’s introductory analysis, which set the terms for his paper. With the dramatic paradigm in mind, let me now review, in closing, that structure.

1. The Setting.—Winter begins with a hypothetical taken from Jeremy Paul that posits a society that uses counsellors much as we use lawyers. These counsellors study maxims and precedents before advising clients on important life-choices. “Inevitably, however, some brash young scholar at one of the elite university schools makes a startling discovery: Every maxim appears to have a counter-maxim that, in any given case, could be applied with equal plausibility.”

425. Sherlock Holmes, not Oliver Wendell Holmes, Jr.
426. Winter’s essay begins with this epigram: “Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time.” Winter, supra note 48, at 1805 (quoting KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 44 (2d ed. 1951)). This is an admonishment that is almost uniquely well suited to his own efforts to bring cognitive theory to bear on legal problems.
427. Id. at 1833 (emphasis in original).
428. Id. at 1806.
2. The Cast of Types.— "Traditionalists" maintain that this body of maxims is an authoritative repository of the objective wisdom of the culture and claim that counsellors properly trained in their craft are able to resolve problems entirely by resort to the body of maxims.\textsuperscript{429} "Critics"—whom Winter refers to as adherents to "counselling lore semiotics" or "cls"—maintain that the system of contradictory proverbs cannot itself generate solutions and accordingly accuse Traditionalists of mystifying their profession in order to advance their claims to power and wealth.\textsuperscript{430}

"Wittgensteinians" also appear in the cast. They are summoned to point out that both Critics and Traditionalists assume that the legitimacy of counselling depends upon establishing sufficient truth conditions for the maxims: Traditionalists believe, because the maxims correspond to objective states of affairs (for example, the facts of a case or the holding of a precedent), these maxims can be verified. Critics contend that there are no independent, external referents and regard truth conditions entirely as a matter of convention. Both thus assume that counselling maxims are representational, that is, they can have meaning only insofar as they correspond to the facts about the world. "Consequently, they think that the maxims stand in need of justification."\textsuperscript{431} But the Wittgensteinian, Winter says, holds that maxims are actually "constitutional...[they] are not statements about the world, but a means of engagement with it."\textsuperscript{432} Thus, legitimacy is measured by the conformity of the practice to the traditions of the practice itself; justification is irrelevant to legitimacy."

3. The Crime.—Someone in the house party is concealing the matter of indeterminacy, while claiming the problem of legitimacy has been resolved.

4. The Investigation.—The likeliest suspect, the Traditionalist, is examined first. His long record of hiding behind allegedly objective rules is paraded before the assembled party. He defends himself by relying upon claims about "proccss" and is dismissed. He has the motive, perhaps, but, since the days of Legal Realism, he has not had the opportunity. Next, the Critic is questioned. Is her exposé of the system merely a ruse? But the Critic is dismissed too. She may be guilty of other things, but hiding indeterminacy is not one of them.

Finally, the Inspector turns to the Wittgensteinian. When questioned, the Wittgensteinian claims that indeterminacy is built into the system, necessarily, and that furthermore, it is a good thing because it ensures the

\textsuperscript{429} See id. at 1807.
\textsuperscript{430} See id.
\textsuperscript{431} Id. at 1808. Here, we have to assume that Winter is using a shorthand and that he means that the "legitimacy of the practice stands in need of an external justification."
\textsuperscript{432} Id. (emphasis in original).
role of moral decision by the individual conscience. But the inspector
points out that this alleged excuse is often offered by suspects, that it is
"boringly familiar." Moreover, the question of justification now arises
again: "[W]hat justifies the choices of the individual conscience?"

Whereas the Wittgensteinian had earlier managed to elude the problem of
infinite regress by discarding the question of justification, he has now
recreated it.

5. The Scene in the Drawing Room.—Under this close examination,
the Wittgensteinian confesses that "[J]ustification comes after deci-
sion", it is always a matter of applying an external standard to the
decision (as opposed to recapitulating the process by which the decision
was reached).

Aha! The Inspector explains:

The move is predictable because there is nowhere else ... for a
Wittgensteinian to go except to some other, entirely distinct practice.
And it is telling precisely because it can tell us so little about what
it means for an individual conscience to decide. If the conscience
does not engage in moral theorizing, then in what language-game is
it engaged when it does decide? If that language-game is the lore
itself, then what is added by the resort to conscience? And if the
conscience is engaged in some language-game other than the lore,
then what is the form of life that characterizes that activity? What
... is the form of life that constitutes conscience? Here, "one is left only with silence"!

Muffled applause. Perhaps the exits are sealed to prevent the
Wittgensteinian from escaping.

But hold on. Does this histrionic summation really make sense? For,
one's conscience is not engaged in any language game at all when one
decides. Not every form of life is a language game—remembering a pas-
sage in a concerto, for example, or deciding to go to sleep. It is not the
clinching moment of detection to show that the Wittgensteinian does not
identify the conscience as part of the reciprocal moves of a language game.
It is simply the Inspector's mistake to expect otherwise: the sort of critic's
mistake—the map of types—that arises from faulting the writer for not
meeting the expectations inhering in the type. In fact, Wittgenstein wrote,
on this very point,
[g]iving grounds . . . justifying the evidence, comes to an end; but the end is not certain propositions striking us immediately as true, i.e., it is not a kind of seeing on our part; it is our acting, which lies at the bottom of the language game. 438

Now, all eyes shift back to the Inspector who coughs nervously. He then explains that “[w]ith respect to ‘the Wittgensteinian,’ the careful reader will have discerned, I trust, that this was not old Ludwig himself but a composite.” 439 There is some disenchanted muttering among the guests. Now, characters begin to drift from the room. Finally, only the Inspector remains.

“If they think otherwise, they are just fooling ourselves,” 440 he says bitterly. Someone turns the lights out. For that is the ultimate consequence of this kind of map of explanation: it simply doesn’t illuminate. Rather, with its neologisms, its stock characters, it actually obscures.

Good night, Inspector.”

IV. Concluding Reflections

A. Why This Reply Is the Way It Is

Writing a paper for this Symposium presented some formidable methodological choices. I have been urged by everyone who has considered the issue to write an essay generally discussing the themes in my work and referring to the Symposium papers as exemplary of various interpretations, misunderstandings, divisions of opinion, and areas of overlap and agreement. “I would not feel obliged to say something on every author in the symposium,” wrote one of my colleagues. This seems wrong to me, as it appears to treat the other papers as significant only when they are illustrative. Moreover, it sacrifices the opportunity for me to demonstrate the value I place on the understanding of my work by exhibiting a willingness to try to obtain it from my critics. Finally, it underrates the


440. See Winter, supra note 48, at 1835 (If we think otherwise, we are just fooling ourselves.”).

441. With apologies to Professor Winter, I recall that Randall Jarrell once observed:

Since I have complained of the style and method of much of the criticism that we read, I ought to say now that I know my own are wrong for this article. An article like this ought, surely, to avoid satire; it ought to be documented and persuasive and sympathetic, much in sorrow and hardly at all in anger—the reader should not be able to feel the wound for the balm. And yet a suitable article might not do any more good than this sort: people have immediate and irresistible reasons for what they do, and cannot be much swayed by helpful or vexing suggestions from bystanders.

Jarrell, supra note 130, at 86.
excellence of the criticism itself. I fear that I have naturally tended to
write this Reply as if all the answers to my critics were perfectly obvious
in the text on which they are commenting, and my only job has been to
draw attention to these answers. In fact, I have learned a lot about what
I think in the course of drafting this Essay and am grateful for that
experience.

Randall Jarrell once lamented that "[o]ur universities should produce
good criticism; they do not—or, at best, they do so only as federal prisons
produce counterfeit money: a few hardened prisoners are more or less
surreptitiously continuing their real vocations." And yet, in the same
essay, he also said, "I do not believe there has been another age in which
so much extraordinarily good criticism . . . has been written. . . . This
criticism has been extremely catholic and extremely acute; there has been
no analysis too complicated, delicate, or surprising for these critics to
undertake."

I believe I must endorse both these observations. A glance at the law
reviews dishearteningly confirms that the universities produce an enormous
amount of legal criticism—really commentary on criticism—that exhibits
little fresh insight, and little appreciation for what insights it encounters.
The general avoidance, broken only rarely by astonished applause, of the
work of my colleague Richard Markovits is a particularly striking example.
The faddishness and mesmerized presentism that is so characteristic of con-
temporary American life generally is nowhere more in evidence than in
academic criticism.

When Jarrell condemned the poetry criticism of his age as "not only bad or mediocre, [but] dull[,] . . . an astonishingly
graceless, joyless, humorless, long-winded, niggling, blinkered, method-
ical, self-important, cliche-ridden, prestige-obsessed, almost-autonomous

442. RANDALL JARRELL, Contemporary Poetry Criticism, in KIPLING, AUDEN & CO.: ESSAYS AND
REVIEWS 1935-1964, at 58, 62 (1980). I have in mind those healthy spirits like my colleagues
Professors Wright, Anderson, Weinberg, Baade, and others who are not distracted by fads.

Erik Erikson once observed:

In the evaluation of the dominant moods of any historical period it is important to
hold fast to the fact that there are always islands of self-sufficient order—on farms and in
castles, in homes, studies, and cloisters—where sensible people manage to live relatively
lusty and decent lives: as moral as they can be, as free as they may be, as masterly as
they can be.


443. JARRELL, supra note 442, at 62.

444. This brings to mind a passage from Roy Campbell:

Who forced the Muse to this alliance
A Man of more degrees than parts
The jilted Bachelor of Science
And Widower of Arts

ROY CAMPBELL, On Professor Drennan's Verse, in SELECTED POEMS 197 (1955).
criticism," it is hard not to imagine that he had law review criticism in mind.

At the same time, there has never been so much good work of such ambition and scope. Compared to the legal criticism of a century ago—or even half a century ago—the work of American critics and writers since the Second World War is vastly superior (and far more vast), and simply more interesting. Its very diversity alone would engulf the work of earlier eras, work which seems pathetically narrow by comparison. At such a time, how could I refuse to give as much attention to the criticism in this Symposium as these critics have given to my work?

Anticipating this decision, my colleague wrote me, in that case “I suspect almost no one will read [your essay] except those who are reading the entire Symposium. That will presumably be a small number of readers.” Then so be it. To those few, and to the participants in this Symposium itself, and to its organizers, I offer my gratitude and this Essay.

B. What We Are All Writing About

Each essay in this Symposium addresses the same problem in its own way, a problem that was also the subject of *Constitutional Interpretation*. That book began by calling on its readers to

see what a seriously American problem is faced in this book, and placed right in the center of American hopes, as a vortex and turning point. Some will be unable to take seriously ideas that implicitly disavow the most fundamental assumptions of our age about progress and justice on what might be sarcastically called *philosophical* grounds. But others will learn how to work with constitutional materials for the first time to reach a validation, or instance, of the very point of view I am urging."

Sometimes the centrality of this problem is more obvious than at other times.

This problem is: How does a society that has decided to take moral responsibility for its fate actually make decisions that fulfill that responsibility? Powell is perhaps the one most obviously concerned with this question because he is attempting to place the moral element in American judicial decisionmaking in an environment that is self-consciously an autonomous practice. But this is no less true of Amar’s paper, which points the way to how the methods of teaching that practice would be different (they would focus consciously on the modalities) and how

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445. JARRELL, supra note 130, at 65.
446. BOBBITT, INTERPRETATION, supra note 2, at xviii-xix (emphasis in original).
scholarship would be different (the focus of political theory would be relevant in a different way—for example, the legitimating force of our practices would liberate us to contemplate changes in advance of, and indeed without reference to, a justificatory ideal and at the same time constrain us when contemplating such ideal systems). Mark Tushnet, though I criticized him at length in the *Stanford Law Review* for taking a unitary, prudential point of view in constitutional theory, graciously shows in the very piece published here (and in others) that he is willing to address the “change in subject” I have been attempting to bring about.

One way to characterize this shift is as a shift from truth to meaning. This is the shift from the modern to the postmodern. Jack Balkin wittily, and with easy erudition, sets the context for my claims that the modalities use conflict as a way of creating values. He is the clearest example of the postmodernist addressing the postmodern in these pages. Stephen Griffin is the first, as far as I know, to group a set of contemporary thinkers together around the proposition that constitutional law acts to hold opposite views in tension in a way that requires agreement on the practice itself. Steven Winter, in his efforts to make us aware of the meta-narratives that he believes guide and structure our understanding, is a postmodernist of obviously high intelligence and broad learning. He would be impossible not to take seriously, and stakes out a unique interest, as far as I am aware, in the application of cognitive theory to law. Dennis Patterson seems to me to oppose the postmodern to the postmodernist, but I may be reading my own hopes into this ambitious and powerful writer. At any rate, I am sure, regardless of his position on the debate I have sketched here, that he sees the understanding of law as accessible without mediating or justificatory devices, a key move to the postmodern. I would not be surprised to find that, in the future, we come to look to his writings as the basis for a postmodern jurisprudence, just as we will look to Balkin’s to understand postmodernist jurisprudence, whatever his ultimate assessment of that movement.

For Sanford Levinson, these developments must be seen, in part, as a natural outgrowth of his work on American attitudes toward the Constitution as a scriptural document and his original description of

447. *See* Amar, supra note 131, at 1704. This view of American institutions is captured by Owen Fiss’s observation, in an article rather courageously entitled *Against Settlement*, that adjudication “American-[I]-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment” because it provides the way by which constitutional adjudication is made a means to achieving justice. Owen M. Fiss, *Comment, Against Settlement*, 93 *YALE L.J.* 1073, 1090 (1984).


449. *See*, e.g., Mark V. Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 756 (1992) (“I no longer believe that constitutional theory constrains or is supposed to constrain Justices. Rather, as Bobbitt argued, it serves primarily to provide a set of rhetorical devices that Justices can deploy as they believe effective.”).
American jurisprudence, so often adopted by many other writers, as radically "Protestant." It is as if the law, which functions as a means of precipitating our values, also works in the opposite direction: reassuring us of commitments that constitute us as a people. This is not a "modern" idea, so much as a "postmodern" idea, and I should observe that, in addition to so much else in my field, Levinson was the first to provide a volume collecting and describing the hermeneutic turn.

C. Which Map I Provided

The map I offer is this kind of map: like the famous graphic that represents the London underground, it is not topographically representative, though it aims to be topologically accurate; it is not a depiction, though it can help clarify things on the surface. Its greater value (if it has value) lies when it is followed to a destination you may have often visited but were unsure of properly locating once you thought about it. The maps in this Symposium show what destinations I have made the object of my rendering, which routes I have chosen. They are not paths. One might say my critics' maps provide transparent overlays, rich with insights and descriptions and explanations, that re-imagine the maps I have myself drawn. For this, and to their authors, I am greatly indebted.

D. One Purpose of My Map

Constitutional Interpretation concerns the relationship between constitutional law and jurisprudence. The standard view is that the latter determines the former. The revisionist view is that the former determines the latter. I wish to sever any necessary—any but the contingent—historical connection between the two.

E. What My Map Is Not

One common transmutation of my argument goes like this:

Accepting the description of constitutional law as composed of arguments drawn from the modalities—historical, textual, structural, prudential, doctrinal, ethical—it nevertheless occurs that such
arguments conflict. When they conflict, the judge must decide among them. In so doing, she relies on her moral convictions. Call this a seventh modality with a trumping role, call it the socio-political ideology of the judge, call it background morality, call it conscience if you want (Bobbitt does), but this is what happens.

Now my view, on the contrary, is that "conscience" is a name for the act of deciding among incommensurables. It is not a language game (as both Winter and Patterson appear to believe), and it is not an algorithm (as Markovits may believe). It does not, therefore, depend upon the availability of a private language, nor does it induce a regress of legitimation, because the very structure of the forms of argument require it. That an act of conscience may be motivated by many conscious and unconscious cultural, historical, political, and moral convictions is probably true. But these convictions cannot legitimize the act, nor is it necessary that they do so, so long as the decisions can be retrospectively explained in terms of the accepted modal arguments. This contrary view is analogous to the empiricist claim that an image must accompany a thought. It may, of course, but it need not. The idea that it must is a consequence of the theoretical needs of a certain kind of explanation. The decider may be motivated by many virtuous or base motives—it does not matter here because these kinds of motives cannot cause a legal decision to issue. Whether you accept this view, you can see that it does not fit in the current galaxy of theories.

F. One Reader Writes

In a letter to me, Patterson asks: If he cannot believe in God, must he question, therefore, whether he can have the sort of faith that is necessary for conscience, because he wishes to have the sort of conscience that is necessary for just acts in the American system?55

Does Patterson believe in the pricelessness of human beings because, of all earthly things, human beings are capable of love? To maintain this belief in the face of the inevitable pricing of human worth requires faith. Does Patterson believe that our decisions are impossible to explain causally because they are the products of free will? To maintain this belief in the face of the usual modern explanation requires faith. Does he believe that our legal decisions are inevitably moral because—not in spite of—the fact-laden, culture-laden nature of legal judgment that cannot be captured by an external moral calculus (because the decider is also the critic, the observer is the participant) and thus requires an account be given in its own terms, which alone can satisfy the conscience? As I read Patterson, he does believe these things; I doubt that he would deny that such a position

455. Letter from Dennis Patterson to Philip Bobbitt, supra note 203.
requires faith, whereas the explanatory view requires only conviction—the firm belief that you are right because you know better, because there is something about knowing that you know. You know, or think you know, that it can all be explained.

However he may achieve this faith, whatever his religious views, if any, is Patterson’s business and his affair. The more it is needed, the more that grace aboundeth.

G. The First Voice

When Mark Tushnet alludes to my isolation from the community of critics, he has it right. Surely Goethe speaks for me when he counsels, “Against criticism we can neither protect nor defend ourselves; we must act in despite of it and gradually it resigns itself to this.”

Professors Balkin and Levinson, however, are not such fatalists. For my good, they proposed and became the architects of this Symposium. I hope they already know what I gratefully acknowledge here: that their considerable efforts, and those of their colleagues, to bring my work to light, and to bring their own light to it, are appreciated and treasured, for if scholars such as they are interested in my work, then it may perhaps have real value.

*The light work sheds is a beautiful light which, however, only shines with real beauty if it is illuminated by yet another light.*

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457. Tushnet, supra note 47, at 1707.

458. RANDALL JARRELL, Poets, Critics, and Readers, in KIPLING, AUDEN & CO., supra note 442, at 305, 310-11 (quoting Goethe).

459. LUDWIG WITTGENSTEIN, CULTURE AND VALUE 26e (G.H. von Wright ed. & Peter Winch trans., 1980).