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CONSTITUTIONAL GRAMMAR

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***1771** I. Introduction: The Grammarian's Dilemma

These days, the Academie francaise is increasingly worried about hot dogs. More correctly, it is worried about "le hot dog," an example of the increasingly prevalent phenomenon of "Franglais." The Academie, the official arbiter of the French language, has grown increasingly concerned over the use of American words and expressions by French speakers. Indeed, it is not only the denizens of the Academie who are expressing alarm. In an article suitably entitled "A Bas Anglais! From Now On, It's the Law!,"[1] the New York Times reported that not only had the French Parliament felt it necessary to add to the French Constitution the sentence "The language of the Republic is French,"[2] but that 300 leading intellectuals, including the playwright Eugene Ionesco and radical critic Regis Debray, had issued a statement decrying the infusion of alien words into pure French as a "process of collective self- destruction."[3]

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[1] Alan Riding, A Bas Anglais! From Now On, It's the Law!, N.Y. TIMES, July 11, 1992, ' 1, at 3.

[2] Lest there be any misunderstanding, the sentence actually reads "La langue de la Republique est le francais." CONST. art. 2 (Fr.).

[3] Riding, supra note 1, at 3. Soon after the amendment took effect, the French National Assembly passed a law banning the use of foreign words in broadcasting and advertising and prescribing official French translations for commonly used Franglais phrases. Decret du 30 Juin, 1994, Journal Officiel de le Republique Francaise 9480 (Fr.); Scott Kraft, Jacques Toubon: Defending the French Language Against All Interlopers, L.A. TIMES, July 10, 1994, Opinion Sec., at 3; Marlise Simons, Bar English? French Bicker on Barricades, N.Y. TIMES,

How should one describe what the Academie, the French Parliament, and scores of French intellectuals are doing? We might view them as ***1772** monitors of the purity of public language, a sort of cultural police. They seek to maintain French language and hence French culture against trespass by outside elements. The metaphor of trespass is used advisedly, for in this conception language and culture become a sort of property that can be stolen, squandered, or debased, and hence must be vigilantly safeguarded. Enoch Powell, a former member of the British Parliament well known for his xenophobia, made this comparison explicitly. He asserted that although "[o]thers may speak and read English— more or less— . . . it is our language not theirs. It was made in England by the English and it remains our distinctive property . . . ."[4] As the owners of the language, the English presumably have the right to regulate the speech of the millions of English speakers who live well beyond England's borders.

Powell and his counterparts are unabashedly normative in their focus, as, indeed, are most police. Many grammarians,[5] however, would define their task more descriptively: They seek merely to understand the existing structures of a language, including the inevitable changes that occur in any living system of communication. As a result, the grammarian inevitably faces a theoretical and practical difficulty. New meanings and usages arise all the time. Moreover, mistakes made often enough by enough people eventually become not errors, but examples of proper speech. Yet it is hardly the case that "anything goes" within a given language: There is always present a notion of mistake that allows one to recognize errors and suggest what would count as correct speech. Thus, the grammarian faces a dual task: She must faithfully reflect the positive norms of a

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Mar. 15, 1994, at A1. France's constitutional court, however, struck down most provisions of the law, ruling that constitutional provisions on freedom of expression and communication do not allow the government to impose official French translations on private citizens, companies, and the news media. Decision 94-345 DC du 29 Juillet, 1994, Le Conseil Constitutionnel, LEXIS, Public Library, CONSTI File (Fr.); Vive L'Evolution! French Council Weakens Law Banning Foreign Words, BOSTON GLOBE, National/Foreign, at 21, available in LEXIS, News Library, BGLOBE File.

[4] Sidney Greenbaum, Whose English?, in THE STATE OF THE LANGUAGE 15, 15 (Christopher Ricks & Leonard Michaels eds., 1990) (quoting Enoch Powell).

[5] "Grammar" in this article refers not only to basic rules of syntax but also to vocabulary itself. That is, we adopt the standard dictionary definition of "grammar" as, among other things, "knowledge or usage of the preferred or prescribed forms in speaking or writing" and the definition of "grammarian" as "a person who has established standards of usage in a language." THE RANDOM HOUSE COLLEGE DICTIONARY 573 (rev. ed. 1975).

changing language while simultaneously offering normative judgments about what usages are currently acceptable.

Often these directives are conflicting, especially when language is undergoing change—which, of course, it always is. For example, and much to the chagrin of many traditionally educated English speakers, the words "impact" and "interface" have left their appropriate role as nouns and become widely used (if ungainly) verbs.[6] As one who upholds the positive norms of language, the grammarian must denounce this linguistic disfigurement. Nevertheless, grammarians who protest such changes may find themselves as helpless and as irrelevant as King Canute ordering the ***1773** tides not to go forward. At some point, misuse becomes common use, and common use becomes accepted use.[7] Eventually, dictionaries and grammatical texts confirm and sanctify usages that would have horrified previous generations who spoke what was then regarded as proper English or proper French.

One solution to this difficulty is to abandon the prescriptive project entirely and simply to report, without comment, what has happened to the English language. This was the approach taken, for example, in 1961 by the compilers of Webster's Third New International Dictionary.[8] Their decision in turn triggered a great brouhaha in intellectual circles and produced accusations that the turn to "descriptive linguistics" represented a fundamental betrayal of the normative duty of lexicographers.[9] According to their critics, descriptivists wrongly identify what

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[6] We can only feel that such changes have impacted the English language for the worse, and we are more than willing to interface with anyone who needs to be convinced about the ugliness of the sentence you are currently reading.

[7] One might offer as examples the gradual acceptance of "hopefully" to mean "One hopes that" instead of "in a hopeful manner," see 7 THE OXFORD ENGLISH DICTIONARY 378 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989), and the collapse of the once important (and desirable) distinction between "disinterested" and "uninterested," see 19 id. at 67 (defining "uninterested" as meaning "unconcerned, indifferent" and noting that "[i]n this sense disinterested is increasingly common in informal use, though widely regarded as incorrect" (emphasis in original)).

[8] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 4a (3d ed. 1961) ("The basic aim [of the dictionary] is nothing less than coverage of the current vocabulary of standard written and spoken English.").

[9] See, for example Dwight MacDonald's classic critique, The String Untuned, in AGAINST THE AMERICAN GRAIN 289 (1962).

is with what should be. Popular might, rather than the tutelage of the learned, makes grammatical right.

Nevertheless, a strategy of pure description is equally problematic, both as a positive and as a normative program. First, as a positive matter, there is never a complete consensus on linguistic usage. Faced with variations in linguistic practice, the grammarian has to determine which usages are within the bounds of acceptability and which must be considered sufficiently "off the wall" to count as grammatical mistakes or linguistic misuse. In other words, the grammarian must inevitably fashion some kind of minimal rules from practice, and thus she must take a normative stance on what will count as normal and what will count as deviant. This process necessarily introduces important questions of judgment. If her views are too idiosyncratic—for example, if she insists that "thou" is the only correct second-person singular pronoun and that "you" is incorrect—she will be dismissed as a crank. However, if she is too latitudinarian and regards all sentences as equally grammatical— or each and every use or spelling of a word as equally legitimate—she basically ceases to be a grammarian at all. So the grammarian must make interpretive judgments about existing practices and about the popular consensus—or, failing this, the nature of the enlightened consensus— concerning proper usage.

***1774** Second, as a normative matter, the grammarian has the right, just as any other speaker does, to attempt to influence the course and development of the language she studies. Thus, one who hears people using "impact" as a verb and finds this usage unappealing has every right to offer her opinion that this is not how the English language should develop. Seen in their best light, such actions attempt to preserve the purity of a valuable common culture for the benefit of all. Viewed more cynically, they are efforts by self-appointed elites to gain cultural control over the masses through the invocation of invented traditions and spurious notions of "purity."

Although Americans may be amused by the pronouncements of the Academie francaise, and its fear about the invasion of "le hot dog," that is probably because we are at present net exporters of culture and language. Late-twentieth-century America currently enjoys a cultural hegemony that France believed it had in an earlier era. It is precisely this perception of American hegemony that led the aforementioned group of French intellectuals to warn that France faces the prospect of ending "in the same position as Quebec 30 years ago—economic dependence, loss of social status, cultural inferiority and linguistic debasement."[10]

Interestingly, similar pronouncements and gloomy forecasts appear increasingly within our own culture. For example, in debates about bilingual education or the status of "black English," many speakers of "traditional" or

[10] Riding, supra note 1, at 3.

"establishment" English take a decidedly worried tone,[11] sounding remarkably like the anguished Francophone opponents of the American cultural World invasion. The acceptance of "he be going" in popular conversation appears, if anything, to be at least as troublesome to traditionalists as "he ain't." Thus, we discover that far more than the forty "immortals" who populate the Academie find grammar worth fighting about. Moreover, these combatants are not mere pedants; they are self-consciously engaged in an ideological struggle at the deepest levels of culture.

II. Constitutional Grammar and Constitutional Interpretation

The idea that grammar is constitutive of culture, and hence worth fighting about, brings us to the subject of this Symposium—the constitutional theory of our colleague and friend Philip Bobbitt—and, more ***1775** particularly, his recent book, Constitutional Interpretation.[12] It is our thesis that Bobbitt is best understood as a grammarian of our constitutional culture, determined to identify—and to police—the boundaries of what counts as the particular (and sometimes peculiar) language of constitutional "law talk." After all, it is the ability to use law talk appropriately that constitutes the constitutional lawyer in the same way that the ability to employ French vocabulary and grammatical structures constitutes the French speaker.

More precisely, Bobbitt argues that the legitimacy of judicial review and constitutional interpretation is guaranteed by the use of six particular forms of constitutional argument, which he terms "modalities." These six forms are:

> historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).[13]

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[11] See Felicia R. Lee, Lingering Conflict in the Schools: Black Dialect vs. Standard Speech, N.Y. TIMES, Jan. 5, 1994, at A1. For analysis of the conflict surrounding language in America, see DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? (1990); JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF "ENGLISH ONLY" (1992).

[12] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

[13] Id. at 12-13.

For something to count as constitutional interpretation, it must, at least within the legal culture of the contemporary United States, proceed within one of these six modalities.

Arguments couched in one or another (or all) of these modalities are clothed with legitimacy, although they are not necessarily just.[14] "Legitimacy" in this sense means nothing more (or less) than that they are "well formed," grammatically appropriate and semantically meaningful within the linguistic system of law talk. Of course, pronouncing a sentence as well formed says nothing whatsoever about its justification. Justification is the assessment of whether a legitimate utterance is in fact justified. Just as "all Jews should be gassed" is a perfectly well-formed, albeit vicious and contemptible, sentence in the English language, so is the statement "Supreme Court cases hold that legislative majorities have a constitutional right to discriminate against homosexuals" a perfectly well-formed, albeit vicious and contemptible, sentence in the language of American law talk. The lay reader is apt to be confused by Bobbitt's use of "legitimacy," for there is an almost irresistible temptation to impute a moral valence to something that is "legitimate." However, Bobbitt insists that this ***1776** temptation must be resisted, at least if we want to understand how our constitutional grammar works.[15]

Bobbitt's constitutional grammar offers us a taxonomy of the paradigms of arguments about the Constitution. It explains the available sorts of interpretive arguments and how they are correctly deployed. In much of his book he plays the careful grammarian, explaining how particular arguments are correctly classified within one of his six forms and how positions offered by various scholars and judges misunderstand these modalities or offer confused examples of them.

Bobbitt's classificatory scheme is significant for two quite different reasons. The first is its potential for use by a wide audience. Bobbitt wishes to empower all the members of the legal system, including not only judges but also legislators, executive officials, and especially laypersons, to engage in constitutional interpretation.[16] To this end, Constitutional Interpretation is offered basically as a primer that will quickly teach ordinary citizens how to interpret the U.S. Constitution. Even if they know nothing of constitutional doctrine or the specifics of constitutional history, they can still participate in the

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[14] Id. at 8-9, 119.

[15] Id. at 118-20.

[16] Id. at 28-30.

practice of constitutional interpretation because they can make textual, structural, ethical, and prudential arguments.

This feature of his project shows that Bobbitt is, in more ways than one, deeply "protestant" in his approach to constitutionalism and constitutional interpretation.[17] He seeks to give each and every citizen the tools to participate in discussions about the meaning of the Constitution. The book attempts to contribute to the actual achievement of a "lawyerhood of all citizens" in a way that should be warmly embraced by all others who join him in a protestant approach.

Bobbitt's argument is also important for a second, more conventionally jurisprudential reason: He believes that his modalities demarcate the boundaries between legal argument and other kinds of argument,[18] for example, political and moral argument, in precisely the same way that one can distinguish a French speaker from an English speaker. If arguments do not fit into one of the six modalities, they are not legitimate—i.e., grammatical— forms of constitutional argument. To be sure, they may be ***1777** permissible forms of other kinds of arguments. However, they do not qualify as law talk concerning the interpretation of the Constitution. To use such arguments is to commit a sort of category mistake, to shift the subject of the conversation from law to something else that, however important or interesting, is not law. Hence, Bobbitt's constitutional grammar is important not only as a source of common constitutional culture but also as a way of demarcating the specifically legal from the larger political culture and separating law from politics or morals. In this sense, Bobbitt seeks to purify constitutional discourse of its political and non-legal aspects just as the Academie francaise hopes to purify French of its Americanizations.

One might compare Bobbitt's project with another one, "legal semiotics," begun by persons associated with the Critical Legal Studies movement.[19] Legal semiotics asserts that lawyers' arguments fall into recurring categories and that there are standard pro and con responses for each kind of

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[17] "Protestantism" in constitutional law involves the notion that the meaning of the Constitution is not entrusted to a hierarchical elite, such as the judiciary. Instead, the right and the duty to construe the meaning of the Constitution is entrusted to the other branches of government and indeed, to all citizens in a democratic polity. For a discussion of constitutional protestantism, see SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-30 (1988). One can be a protestant with respect to the sources of institutional authority or duty to interpret, with respect to the exclusivity of the meanings of the Constitution, or with respect to both. Id.

[18] BOBBITT, supra note 12, at 22.

[19] See Jeremy Paul, The Politics of Legal Semiotics, 69 TEX.L.REV. 1779, 1780-82 (1991).

argument that can be applied repeatedly in different doctrinal settings. Legal semioticians disagree among themselves about the point of this enterprise.[20] However, a few legal semioticians, like Duncan Kennedy and James Boyle, have argued that the goal of legal semiotics is to demystify the practice of legal argument—to show that it is an inauthentic discourse that does not do the work of deciding legal cases.[21] Moreover, they believe that this analysis demonstrates the close connections between legal analysis and political argument.[22]

Although Bobbitt is also interested in classifying various forms of legal argument, his purposes are quite different. He is attempting to explain the legitimacy of ostensibly standard practices of constitutional argument. He does so by making the basically Wittgensteinian point that the ground of legal discourse must rest in the practice of legal discourse itself, rather than in some other feature of the world.[23] For Bobbitt it is no difficulty that ***1778** all constitutional lawyers make arguments that fall into one of six categories. Indeed, if they did not do so, they would not be playing the language game of American constitutional

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[20] Compare Duncan Kennedy, A Semiotics of Legal Argument, 42 SYRACUSE L. REV. 75, 104 (1991) (viewing legal semiotics as an unmasking critique that robs standard legal argument of its authenticity and unselfconciousness) with J.M. Balkin, The Promise of Legal Semiotics, 69 TEX.L.REV. 1831 (1991) (viewing legal semiotics as a study of the cultural practices of legal argumentation that also reveals the constituitive and ideological nature of legal rhetoric).

[21] DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 20-21 (1983); Kennedy, supra note 20, at 104; see James Boyle, The Anatomy of a Torts Class, 34 AM. U. L. REV. 1003, 1052-53 (1985) (asserting that the paired cliches used in legal argument are a rhetorical device that fools the audience into believing that solutions are derived from legal reasoning when in fact the decisions are political or moral).

[22] For criticisms of these positions, see Paul, supra note 19; Balkin, supra note 20.

[23] BOBBITT, supra note 12, at 34-35. We use the word "explain," rather than "demonstrate" or "argue for," in the previous sentence because, as we will see, Bobbitt thinks legitimacy is not something that can be proved or established through argument; it merely occurs when a practice is in place. This makes the status of his own book unclear: Is Constitutional Interpretation itself an argument for the legitimacy of our current practices, or is it rather merely a description of a practice whose legitimacy is already and necessarily ensured by its existence? The tension between these two projects the book might have—one prescriptive and the other descriptive—will reappear continually throughout our discussion.

interpretation. Thus, what Kennedy and Boyle see as evidence of legal mystification and illegitimacy Bobbitt sees as the very conditions of legal reasoning and judicial legitimacy. Conformity with these conditions (and only these conditions) identifies a person as playing the language game of constitutional argument rather than doing something else.

We have described Bobbitt as a constitutional grammarian, setting forth the rules of the language game of American constitutional interpretation.[24] But, like all grammarians, his project is a curious combination of the normative and the descriptive. Thus, he may be offering a detached account of what our actual practices of constitutional argument are; on the other hand, he may be offering an account of what these practices should be in order to be counted as legitimate.[25] In fact, as we shall see, he offers both kinds of accounts. This dual enterprise, which creates tensions within the ordinary grammarian's project, proves even more problematic for Bobbitt's theory of constitutional grammar.

III. Legitimacy and Justification

The added difficulty arises because Bobbitt's theory also poses a fundamental distinction between the legitimacy of the practice of constitutional argument and the justification of decisions about what the Constitution means. Bobbitt argues that our practices of constitutional argument provide their own legitimacy because they are our practices and we live by and through them. This is the deeper significance of the title of his earlier book, Constitutional Fate.[26] The six modalities of argument have been bequeathed to us by our national history and our common law tradition; it is our constitutional fate to live and work within them. The historically generated language game of constitutional law provides its own norms of ***1779** practice and hence provides its own source of legitimacy.[27]

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[24] See id. at 24 ("If we want to understand the ideological and political commitments in law, we have to study the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture. A study of the modalities gives us such a description.").

[25] See id. at 27 ("Once we looked carefully at constitutional argument, it became apparent that the legitimacy of judicial review was maintained by adherence to these forms of argument. An opinion stated in these terms was accepted as legitimate and so also for briefs and oral arguments, whereas other forms of argument, some acceptable in other legal cultures, rendered a decision quite illegitimate . . . .").

[26] PHILIP BOBBITT, CONSTITUTIONAL FATE (1982).

[27] Id. at 233-40.

Legitimacy is ensured by playing by the rules of the language game of American constitutional argument.

It would follow, however, that any conventions of constitutional argument, as long as they constituted a coherent practice, would also provide norms of proper argument for persons who define themselves (or wish to be perceived as) within the practice. Thus, if our practices were different, then so too would be the norms of proper conduct within the practice. Under this logic, it would be inappropriate to criticize the internal structure of a lived practice by reference to the norms of another, hypothetical one. Each lived practice of constitutional argument, because and to the extent that it is lived by us, is self-contained and self-justifying. To the question of why one should follow the existing practices of constitutional interpretation, the only answer would be because that is just who we are and the way we do things.

Within the practice itself, however, things are different. We can offer arguments within the practice as to why one position that can be articulated within the practice is better than another position. These are arguments of justification. Thus, one justifies an interpretation of the Constitution through the use of the sanctioned forms of constitutional law talk. However, one cannot prove or demonstrate the legitimacy of the practice through the use of arguments wholly within the practice. The legitimacy of the practice cannot be established by argument; it is guaranteed by the fact that we practice it.

Thus, one does not prove the legitimacy of a practice one is a part of; legitimacy rests on the lived acceptance of the practice. Nevertheless, a legitimate practice might be unjustified. We might believe that although the practice of constitutional argument is established, it is an unjust practice. Yet this is not an argument within the practice but about the practice. It is necessarily made outside the practice. Thus, there are two kinds of arguments of justification that one can make. The first are arguments of justification made within the practice; the second are arguments made about the practice from outside the practice, but within some other practice of argument.[28] The former would be arguments about whether one position or another is the best interpretation of the Constitution using the forms and practices of constitutional argument.[29] The latter would be arguments about

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[28] BOBBITT, supra note 12, at 163, 176.

[29] See id. at 169 ("[W]hen a constitutional decision is made, its moral basis is confirmed if the forms of arguments can persuasively rationalize the decision, and the decision is not made on grounds incompatible with the conscience of the decisionmaker. That is constitutional decision according to law.").

whether the practice of constitutional ***1780** law is justified, using arguments characteristic of some other practice such as moral or political argument. [30]

This distinction is a consequence of Bobbitt's general view that arguments are practice-bound. We use arguments within the practice to justify positions statable within the practice according to the criteria that the practice establishes. However, we cannot use arguments within the practice to justify the practice itself. Instead, we would argue about the justification of the practice of constitutional law using arguments internal to some other practice—for example, moral or political theory. Thus, to justify an existing practice, or to argue about how the practice could better be carried out, one must turn to a different practice and the arguments of justification available within it.

And here lies the problem. Although Bobbitt often speaks in the detached voice of the cultural anthropologist who is merely describing the elementary structures of legal life, we believe that this posture is seriously in tension with the stated motivations behind his theory of the Constitution. Bobbitt tells us that he wrote Constitutional Fate in response to "the assault on American constitutional institutions commenced by the American right wing in the 1950s and 60s."[31] Ironically, in Bobbitt's view, " t his attempt to discredit the legitimacy of our legal institutions was taken up by the cultural left in the early 1980's," and it inspired the present book, Constitutional Interpretation.[32] Bobbitt warns us that " a t present the activities of the left have had one significant political impact: they have enabled the right wing to lever a number of dubious propositions into respectability because they seem, by contrast, common-sensical and even unavoidable."[33] These left- and right-wing attacks have called the legitimacy of the institutions of American democracy into question. "To explicate and defend these institutions," Bobbitt proudly states, "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."[34]

Thus we see that Bobbitt's goal is not only to explicate, but also to defend the existing practices of constitutional discourse from those who would challenge or alter them, at least to the extent that these practices can be explained and defended. His is a dual enterprise of description and prescription. However,

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[30] Id. at 163.

[31] BOBBITT, supra note 12, at xii.

[32] Id.

[33] Id.

[34] Id. (emphasis added).

its duality poses serious problems with Bobbitt's distinction between justification and legitimacy. Before offering specific examples of this tension, we first discuss the general problem that he faces.

***1781** To the extent that Bobbitt is not merely describing the language of constitutional argument, but defending its proper contours, he is in the same position as the normative grammarians of the Academie francaise, who are not content to watch the language they love be degraded and debased by hordes of speakers who seek to convert the incorrect into the correct, or the unacceptable into the accepted. Like the Academie, Bobbitt seeks to intervene in the growth and development of the language of constitutional discourse and keep it on its proper course.

The problem for Bobbitt concerns what his arguments about the proper grammar of constitutional discourse seek to accomplish. At first glance, it might seem that these arguments are arguments of justification, because they explain how the language game of constitutional law should properly be carried out. However, at many places in the book—for example, in the above quoted passage— Bobbitt seems to claim that his goal is to explain how arguments should be formed if they are to be legitimate. The difficulty is that Bobbitt's theory of justification and legitimacy presupposes that one does not make normative arguments for the superior legitimacy of one hypothetical social practice over another. According to Bobbitt's own theory, the only legitimate practices are those that actually exist; the only legitimate language games are those that are currently being played, and their legitimacy in each case is established by the fact that they do exist and are currently being played.

If Bobbitt is explaining how constitutional arguments would have to be formed if they are to be legitimate, he cannot be arguing that one practice of constitutional argument would be more legitimate than another. He can only be examining existing examples of talk about the Constitution to see whether they match the existing forms of legitimate constitutional law talk he describes. In the same way, he can only dismiss competing accounts of what constitutional argument amounts to on the grounds that they do not match existing practice and hence are not legitimate.[35] Thus, he can be a normative grammarian only to the extent that he is enforcing what existing practices currently are, which is to say, he cannot be a normative grammarian at all, but only a descriptive one. As soon as he recognizes a change in a practice, he must pronounce it legitimate, even if he seriously opposes the change (and, by his own theory, he must oppose the change from outside the practice as it is currently constituted). Similarly, if his views about the proper forms of constitutional argument turn out to be wrong, because they are outmoded or idiosyncratic, he must immediately renounce them

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[35] See, e.g., BOBBITT, supra note 12, at 126-40 (criticizing Mark Tushnet for failing to understand the proper categorization of the six modalities of argument).

even if he believes that they are better. ***1782** Because his project is purely descriptive, he has no other basis for his views about what is grammatical and ungrammatical.

If Bobbitt held that one (hypothetical or existing) practice of constitutional law could be more legitimate (and more grammatical) than another practice, then legitimacy would not be something established by social practice. It would be something established by arguments about what is better and worse; it would be established by arguments of justification internal to some other practice. Bobbitt would have abandoned the argument that legitimacy is conferred by the mere existence of a shared social practice and would be asserting that legitimacy is also conferred by a practice being justified by (for example) considerations of moral or political theory. Conversely, it would be possible that the mere fact that a social practice was accepted would not be sufficient to confer legitimacy upon it; another practice, not yet accepted, or formally accepted, might have more legitimacy. A return to past practices might increase legitimacy, even if those practices had been superseded by later innovations.

There is, of course, a third alternative, and it is one we would press upon Professor Bobbitt. We believe that claims about grammaticality need not be established wholly by the fact of social practice, but that they can also have a normative component. This normative component, in turn, is partly derived from what the grammarian believes are the best and most worthy features of the practice, and partly derived from norms that may be wholly external to the practice. Indeed, the decision as to what are the best and most worthy features of the practice cannot be wholly internal to the practice, because it must make choices about what parts of the practice are better or worse.

Our judgments about what are the better and worse parts of social practice, in turn, can have feedback effects on our description of the practice, for they can affect judgments about what is normal and what is deviant within the practice. In other words, we may decide that certain parts of the practice should be regarded as deviant because they fail to conform as well with those parts we regard as most worthy of continuation, even if the former are prevalent to some degree. On the other hand, at some point, their mere prevalence will require us to accept that these portions can no longer be regarded as deviant but must be regarded as normal usage, and we must then acknowledge that the practice is not as desirable or defensible as it could be. At that point, we will argue that a better grammar would be an older one, or some combination of the old and the new.

From Bobbitt's standpoint, the problem with this third alternative is that it cannot maintain the strict separation between legitimacy (grammaticality) and justification that he insists upon. First, grammar becomes an interpretive and normative enterprise that may deviate from common ***1783** practice to a significant degree. Second, arguments about what is grammatical become infected with considerations that are not wholly internal to the practice. While taking the existing practice of constitutional law as a starting point for discussion, these arguments also contemplate the possibility that the practice could be improved if

it were changed slightly, and that significant portions of the practice are bad and should be discarded as illegitimate. In this way, the criteria of what is grammatical or legitimate and what is justified (from the standpoint of other language games) unavoidably overlap and, what is more, come to depend upon each other. Although they are by no means identical, they are interpenetrating and mutually dependent.

We think that Bobbitt's own arguments about the legitimacy of constitutional forms of discourse show that he cannot maintain the distinction between legitimacy and justification in practice. He cannot do so because he wishes to be a normative grammarian of constitutional law as well as a descriptive one. In the pages that follow, we offer a number of different but interlocking ways in which the tensions inherent in the grammarian's role surface in his work. Each of them, in its own way, shows the inevitability of an overlap between the considerations of legitimacy and justification that Bobbitt is so determined to avoid. Thus, we conclude that Bobbitt must either give up the fundamental separation he proposes between the two sets of considerations, or he must give up his stated project of "explicat[ing] and defend[ing]" our current practices of constitutional argument, "where they are explicable and defensible."[36] Because we think that the latter is a deeper and more important motivation behind his writings, we argue that it, and not the total separation between legitimacy and justification, is worth preserving. Indeed, under our suggested approach, the distinction between legitimacy and justification does not vanish, but merely becomes a "nested opposition"—a conceptual opposition in which the two terms have important relationships of mutual dependence even as they are also mutually differentiated.[37]

Thus, our point in suggesting this modification is not to argue that legitimacy and justification are the same thing, or even to advance the well- worn slogan that "law is politics." Our point is rather that legitimacy and justification, while mutually differentiated, are also mutually dependent. The language of constitutional law and the language of other forms of moral and political discourse are not hermetically sealed off from each other, nor can they be viewed as running on separate although parallel tracks. We cannot insist that the words that appear in one have no relation to the words that appear in the other, in the same way that we can insist ***1784** that it is only accidental that a piece in one board game resembles a piece that features in another. Language games are not closed in the way that chess and checkers are. Language games continually borrow from each other and poach on each other's territory. Indeed, that is one of the most important ways in which they change and develop over time. Thus, we believe that although the language game of constitutional argument is different from the

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[36] Id. at xii.

[37] J.M. Balkin, Nested Oppositions, 99 YALE L.J. 1669, 1671, 1676 (1990) (book review).

language game of politics or that of morality, the three language games (and indeed possibly others) are interpenetrating. They are not identical, but they have linkages and allegiances that cannot be fully and finally distinguished and separated.

IV. Bobbitt as a Normative Grammarian

The first difficulty with Bobbitt's approach is that there may be more than one way of characterizing and cataloguing the various forms of constitutional discourse, and not all of these systems are completely coextensive. For example, one of us (Balkin), along with Duncan Kennedy and others, has offered accounts of legal arguments that differ in significant respects from Bobbitt's. Kennedy and Balkin would classify arguments of institutional competence as a form separate from utilitarian arguments of social policy and social utility,[38] while Bobbitt would claim that these institutional and substantive arguments are all "prudential."[39] Kennedy and Balkin recognize a specific class of arguments about rights,[40] while Bobbitt has no category of rights arguments in his constitutional scheme. In his system, claims about rights are derivative from other forms of argument.[41] Thus, Bobbitt disagrees with these scholars as to how to divide up and classify arguments about constitutional law. Hence it is possible that certain arguments are accounted for in his system, while these arguments do not form part of theirs, and vice versa. If Kennedy and Balkin insist on their classification, are they beyond the legitimate practices of constitutional argument? The dispute here is partly factual, but it is not wholly so. Bobbitt's claims cannot be purely descriptive; they must rather be interpretive and normative claims about what the forms of argument should be in order for them to possess legitimacy.

A particularly interesting example of this problem is Bobbitt's denial that natural law arguments—appeals to transcendental reason—form a ***1785** legitimate modality of constitutional argument.[42] To argue—as do many civil law and even some British lawyers—that a given action violates the norms of natural

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[38] J.M. Balkin, The Crystalline Structure of Legal Thought, 39 RUTGERS L. REV. 1, 20-21 (1986); Kennedy, supra note 20, at 79-80.

[39] BOBBITT, supra note 12, at 16-17, 101, 139.

[40] Balkin, supra note 38, at 28-32, 83-89: Kennedy, supra note 20, at 79.

[41] See BOBBITT, supra note 12, at 12-22 (showing how the various modalities can be used to establish claims of constitutional rights).

[42] BOBBITT, supra note 26, at 94-95, 163; BOBBITT, supra note 12, at 20-21, 135-37, 168.

law is to place oneself outside the boundaries of acceptable constitutional argument within the United States. Bobbitt does recognize a modality he calls "ethical argument"; these are arguments that appeal to the ethos or character of the American people mediated through their commitment to limited government.[43] Bobbitt argues that ethical arguments infer "unenumerated rights . . . from the limits of the enumerated powers" in the Constitution.[44] Traditional natural law arguments do not depend on the content of the enumerated powers that happen to appear in the text of the Constitution at any particular time. By contrast, Bobbitt's ethical arguments centrally depend upon a relationship to enumerated powers; if these powers were different, so too would the basis of inference for ethical arguments. Thus, Bobbitt would assert, natural law arguments for decisions like Griswold v. Connecticut[45] and Roe v. Wade[46] are illegitimate because they are constitutionally ungrammatical, but ethical arguments for these decisions are perfectly grammatical and wholly consistent with the legitimate practice of constitutional argument.[47]

Unlike the other modalities of argument, Bobbitt's conception of ethical argument seems unfamiliar and contrived. We ourselves are divided as to its validity. One of us (Levinson) recognizes both natural law argument and a separate category of "ethical argument"; he links the latter not to enumerated powers, but to the idea of an "ethos" that exemplifies the deep structural norms of a given culture. Of course, because this definition differs both from natural law and Bobbitt's own notion of the "ethical," it suggests that there may be an eighth modality.

The other of us (Balkin) is more skeptical. He thinks that because the three types of arguments overlap so significantly in coverage, it is more likely that there is an interpretive disagreement over which characterization of these

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[43] BOBBITT, supra note 12, at 20-21.

[44] Id. at 103. Phrased this way, Bobbitt's "ethical argument" is very similar to Douglas Laycock's inference of unenumerated rights from textual argument. See Douglas Laycock, Taking Constitutions Seriously, 59 TEX.L.REV. 343, 360-93 (1981) (reviewing JOHN H. ELY, DEMOCRACY AND DISTRUST (1980)) (inferring unenumerated principles of "national unity," "individualism," and "personal autonomy").

[45] 381 U.S. 479 (1965).

[46] 410 U.S. 113 (1973).

[47] Indeed, one of the points of Constitutional Fate was to establish that ethical arguments for Roe v. Wade were legitimate forms of constitutional argument. BOBBITT, supra note 26, at 157-63.

arguments is the correct one. Moreover, this disagreement cannot be purely descriptive; it is unavoidably critical and normative. Balkin concedes that appeals to positive morality—including appeals to tradition—***1786** may form a class of arguments different from appeals to a transcendental morality, but he doubts that Bobbitt's version of ethical arguments derived from inherent limitations on enumerated powers forms a genuine category of argument. This category is more likely a means for Bobbitt to avoid recognizing the legitimacy of natural law argumentation.

Bobbitt defends his rejection of natural law argument as a legitimate category on the grounds that appeals to natural law argument are few and far between in constitutional decisions.[48] However, he reaches this conclusion only by refusing to recognize among his examples of ethical argument many cases that could just as easily be classified as natural law arguments.[49] Thus, he fails to find many natural law arguments simply because he has given them a different name.

It is ironic that Bobbitt makes his case for the paucity of natural law arguments by focusing only on the texts of judicial opinions of the U.S. Supreme Court.[50] This seems strangely in tension with his generally protestant approach to constitutional interpretation, which argues that constitutional interpretation is a practice open to and engaged in by not onlyjudges and lawyers but politicians and citizens alike. If constitutional interpretation is such a practice, then we should look for examples of the practice not merely in the language of judges but also in the language of politicians, citizens, lawyers, and laypersons who claim to be interpreting the Constitution. Therefore, the fact that natural law arguments feature so prominently outside the language of the judiciary should not be a reason to exclude them from the grammar of constitutional discourse, unless,

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[48] Philip Bobbitt, Remarks at Symposium on Recent Developments in Political and Moral Theory, The University of Texas School of Law (Feb. 4, 1994).

[49] See, e.g., BOBBITT, supra note 26, at 106-07 (characterizing Justice Johnson's concurrence in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143-48 (1810) as ethical argument).

[50] For example, among courts, one might want to look at the practices of lower federal courts and the state courts. Indeed, one might even want to look at the opinions of state courts construing their own state constitutions, which, in the 19th century at least, had a considerable influence on the development and growth of federal constitutional doctrine. For a discussion of the natural law tradition in state constitutional law, see generally Suzanne Sherry, Natural Law in the States, 61 U. CIN. L. REV. 171 (1992); Brian Snure, Comment, A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution, 67 WASH.L.REV. 669 (1992); Louis K. Bonham, Note, Unenumerated Clauses in State Constitutions, 63 TEX.L.REV. 1321 (1985).

contrary to Bobbitt's own stated views, we regard judges as the primary and defining actors in constitutional interpretation.

Indeed, we find it difficult to argue that natural law arguments have not been an important part of the American political and legal tradition since the Declaration of Independence. The Declaration's assertion of the self-evident truth that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights"[51] is as clear an ***1787** appeal to transcendental reason as one could wish for. Nor can one claim that the Declaration's political conception did not find its way into legal understandings and, in particular, legal understandings about the Constitution. As Edward Corwin noted in a famous article aptly entitled Ihe "Higher Law" Background of American Constitutional Law, natural law thought— much of it inspired by the Declaration of Independence or by the Lockean conception of natural law—has been prominent in constitutional discourse from the beginnings of the republic onward.[52] To give only one example, in his recent book, Lincoln at Gettysburg, Garry Wills has shown how Abraham Lincoln's interpretation of the Constitution was profoundly affected by the Declaration's natural law vision, as were the views of the American transcendentalists who in turn influenced Lincoln.[53] Indeed, one seriously distorts the constitutional views of antebellum abolitionists if one neglects the importance of natural law approaches.[54] So the denial of the natural law tradition is seriously ahistorical, a surprising oversight for a constitutional scholar as deeply interested in the historical traditions of American constitutionalism as

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[51] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[52] Edward S. Corwin, The "Higher Law" Background of American Constitutional Law (pt. 2), 42 HARV. L. REV. 365, 394-409 (1929) (describing early American controversies involving natural law and the natural law influence in the early American republic). But cf. Gary L. McDowell, Coke, Corwin and the Constitution: The "Higher Law Background" Reconsidered, 55 REV. POLITICS 393 (1993) (criticizing Corwin's use of Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1610)).

[53] GARRY WILLS, LINCOLN AT GETTYSBURG 99-120 (1992).

[54] See WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 21-23 (1988) (reviewing the role of natural law in the antebellum understanding of liberty in law and politics, and noting the particular importance of higher law ideas in the antislavery movement); William E. Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 HARV. L. REV. 513, 525-38 (1974) (describing how natural law served, along with evangelical religion and transcendentalism, to infuse the antislavery cause with principles of higher law).

Bobbitt. Nor is this tradition by any means exhausted: In modern times, constitutional scholars like Suzanna Sherry,[55] Philip Hamburger,[56] and Hadley Arkes[57] have emphasized the continuing importance of natural law in constitutional adjudication, as has Supreme Court Justice Clarence Thomas—at least prior to his confirmation hearings.[58] From the standpoint of cultural anthropology or descriptive ***1788** sociology then, natural law arguments are hardly exceptional or deviant; they are pervasive features of our shared constitutional culture.

In contrast, Bobbitt's vision of "ethical" arguments derived from the study of enumerated powers is sufficiently complicated and controversial that it is doubtful that many people share his belief that such arguments form a central part of our nation's discursive practices regarding the Constitution. If the prevalence of practice is any guide as to the existing forms of constitutional argument, it is much more likely that natural law arguments qualify as legitimate. Moreover, if the self-understandings of participants in the practice of constitutional argument have any relevance to the nature of the practice, there is something distinctly troubling about a characterization of ethical argument that is scarcely reflected in any of the writings of the participants themselves. Indeed, Bobbitt can only argue that individuals throughout American constitutional history who thought that they were making natural law arguments were simply deluded—they were really making ethical arguments without knowing it. Furthermore, to the extent that their arguments failed to match the template of ethical arguments, they were ungrammatical. Yet, if anything seems ungrammatical, at least in the sense of being unfamiliar and difficult to grasp and apply as a practice, it is Bobbitt's theory of ethical argument.

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[55] E.g., Suzanna Sherry, The Early Virginia Tradition of Extratextual Interpretation, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 157, 158 (Paul Finkelman & Stephen Gottlieb eds., 1991); Suzanna Sherry, supra note 50, at 171-73; Suzanna Sherry, The Ninth Amendment: Righting an Unwritten Constitution, 64 CHI.-KENT L. REV. 1001, 1008 (1988).

[56] E.g., Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907 (1993).

[57] E.g., HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994); HADLEY ARKES, BEYOND THE CONSTITUTION (1990).

[58] E.g., Clarence Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 HARV. J.L. & PUB. POL'Y 63 (1989); Clarence Thomas, Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation, 30 HOW. L.J. 983 (1987).

This raises a quandary for Bobbitt's theoretical project. If most people think and act and talk in natural law terms instead of thinking and acting and talking in terms of ethical arguments, does this mean that most people are mistaken about these matters and that they are not engaged in legitimate constitutional argument when they think and act and talk in this way? Does this mean that such arguments are ungrammatical—that they may be political or moral arguments, but certainly not constitutional arguments? If so, can he really be claiming to explain the actual practices of constitutional argument in this country, or is he rather offering an account of what the discourse should look like if it is to sustain legitimacy? If the latter is the case, then the mere fact that people do think and act and talk in a particular way about the Constitution does not confer legitimacy. Indeed, the presence of a historical tradition of natural law argument, handed down, like others, from the common law, does not bestow either legitimacy or constitutional grammaticality upon it. Legitimacy and correct grammar require something more. But what is this extra thing?

One might note as well that the example of natural law poses a greater problem for Bobbitt than other disagreements about the boundaries or definitions of various modes of arguments. In some cases, Bobbitt might happily concede that another system of description—for example, one that separated prudential arguments into institutional and noninstitutional arguments about consequences—would leave his basic system untouched. We would simply be dividing up the universe of available legal arguments ***1789** differently. However, the problem with replacing ethical arguments with natural law arguments is that Bobbitt believes that the former, but not the latter, are legal arguments. Bobbitt is insistent that one cannot equate the constitutional ethos with morality or cultural norms. One reason is that "ethical" justifications can justify completely immoral results.[59] A more important reason, however, is that even when ethos and morality appear on the surface to be coextensive, moral arguments belong to an entirely different language game.[60] The central point of Bobbitt's jurisprudential theory is that legal arguments cannot be justified either by facts about the world or by appeals to moral or political truth. Rather, legal justification must flow entirely from within the accepted forms of legal argument itself. The problem with natural law is that it seems to breach the boundary between the language game of morals and the language game of the purely and exclusively legal.

Bobbitt's second difficulty is that his theory assumes a basic homogeneity of argumentative practices not only among professional elites but also among the citizenry, who engage in constitutional law talk through call-in shows, letters to the editor, and other forms of public debate. Nevertheless, it has

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[59] BOBBITT, supra note 26, at 163.

[60] See BOBBITT, supra note 12, at 20-21 (arguing that one cannot equate the constitutional form of ethical argument with moral argument in general).

become more and more difficult to perceive such a consensus about practices of argument even among professionally trained lawyers, much less between laypersons and professionals. A case in point is Judge Harry Edwards's recent cri de coeur concerning the irrelevance of much academic scholarship to the judicial practice of constitutional law.[61] Moreover, as Judge Richard Posner has recently pointed out, there is increasing diversity on the bench that makes appeal to the conventions of craft, a la Henry Hart or Herbert Wechsler, increasingly strained.[62]

For better or worse, not everyone appears to be playing by the same rules of constitutional argument, and it is not only adherence to natural law that produces these problems. Some persons, especially lay citizens, may wish to inject references to what they believe to be the revealed word of God into constitutional discourse. For them, the list of six modalities is underinclusive (as it is for the devotee of natural law).

For others, on the other hand, the list is dangerously overinclusive. Raoul Berger, for example, insists that original intention is the sole ***1790** touchstone of constitutional legitimacy.[63] Bobbitt believes that orginalists make a fundamental mistake. They convert what is only one modality of constitutional argument into a criterion for all constitutional interpretation. Bobbitt calls this belief an ideology.[64] One subscribes to an ideology if one holds that one modality is superior to, supersedes, or explains all of the others. Thus, in Bobbitt's view, Mark Tushnet also is an ideologue, not because his views are far to the left of the political spectrum, but because Bobbitt characterizes Tushnet as holding that prudential considerations trump all others in constitutional adjudication.[65]

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[61] Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH.L.REV. 34 (1992).

[62] See RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 428, 424-28 (1990) (arguing that while it was possible to assert the autonomy of the law in the 1950s, such an assertion is not possible today because the philosophies of judges such as William Brennan and Antonin Scalia are "so distant from each other ideologically that there is little common ground for discourse"); RICHARD POSNER, OVERCOMING LAW 60-80 (forthcoming February 1995).

[63] See RAOUL BERGER, GOVERNMENT BY JUDICIARY 364 (1977) (arguing that original intent is so important because "a judicial power to revise the Constitution transforms tne bulwark of our liberties into a parchment barrier").

[64] See BOBBITT, supra note 12, at 22 (explaining how each modality can be used mistakenly to construct an ideology).

[65] See id. at 139 (criticizing Tushnet's "assumption that prudentialist thinkers do not merely offer yet one more form of argument").

In contrast to scholars like Berger and Tushnet, Bobbitt insists that all of the modalities are of equal importance and equal legitimacy. Hence he believes that ideologists are engaged in a deviant practice of constitutional argument. Of course, the reverse is also true: an originalist like Berger would hold that Bobbitt's embrace of ethical argument is fundamentally illegitimate. In terms of Bobbitt's theory, Berger and other originalists are claiming that ethical argument, however defined, is no more legitimate to the game of constitutional law talk than the attempt to move a pawn like a knight is legitimate in the game of chess.

Thus Bobbitt faces a dual problem. First, there may be no consensus on the legitimate forms of constitutional argument. Second, there may be no consensus concerning whether debates about the legitimate forms of constitutional argument are themselves a legitimate part of constitutional discourse. From Bobbitt's perspective, these debates should form only part of the constitutional metalanguage, rather than part of constitutional discourse itself. But as the Bergers, Borks, and Tushnets of the world multiply, they begin to introduce questions of "constitutional theory"—that is, questions of what types of arguments are legitimate—into the practice of constitutional discourse.

Are Berger's, Bork's, and Tushnet's practices normal or deviant, especially if from their standpoint Bobbitt's own practices might be regarded as deviant? In order to answer these questions, Bobbitt must explain and justify his criteria for identifying what counts as normal or deviant practices of constitutional argument. He must offer an account of what makes his account a better interpretation than proffered alternatives. In particular, he must show why one type of practice is better and another type is worse when both can be found within the spoken language of the ***1791** native speakers of constitutional law talk. Because a simple description of the actual practices of constitutional argument cannot achieve these goals, his project must become both interpretive and normative.

A third problem with Bobbitt's theory is that it has difficulty accounting for the possibility of changes in our constitutional grammar. If our practices of constitutional argumentation are legitimate because they are how we live and how we think, then if our practices change, they do not lose legitimacy, because this is how we now live and now think. However, this will not do for Bobbitt because he thinks that constitutional argument has changed for the worse because of the work of the left and the right from the 1950s onward.[66] These people have misunderstood the nature of constitutional argument and have misled everyone else. Thus, Bobbitt is worried that the discourse of constitutional law has been thrown off track, that our constitutional grammar has been debauched. Political considerations have leaked into the rhetoric of constitutional arguments made by academics and judges; the right wing has converted the modality of originalism

[66] See supra notes 31-33 and accompanying text.

into an ideology of original intention. This is not how things should be. Nevertheless, if this is what the practice of constitutional argument looks like circa 1994, then in an important sense Bobbitt has no grounds for complaint. To put it another way, he may have grounds for complaint, but these grounds cannot be fully internal to the existing practice of constitutional discourse. His project is a critical and normative one that must look beyond the confines of what has happened in order to separate out changes that are for the better and changes that are for the worse.

Bobbitt is, in short, in the perplexing position of the Academie francaise. He is arguing that, regardless of the infiltration of discursive practices like those of Robert Bork, Mark Tushnet, and countless other participants in constitutional discourse, these grammatical practices are mistaken practices that should be corrected, just as the expression "le hot dog" should be stricken forthwith from the French language. In a word, people like Bork and Tushnet are being ungrammatical, and if others follow their lack of grammaticality, the legitimacy of the constitutional order will be destroyed. Thus, Bobbitt believes that the order of constitutional discourse can change, and, what is more, that it can change for the worse. But if so, then the existence of particular practices of constitutional argument at a given time cannot, without more, constitute a sufficient account of their legitimacy. Otherwise, the impurities of discourse introduced by the left and right are not impurities at all—they are simply the direction in which constitutional discourse is flowing, and ***1792** hence, the direction in which the grounds of legitimacy are flowing as well.[67]

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[67] Note that Bobbitt cannot simply argue for a return to past custom. If past custom differs from current custom, then it is no longer how we live, and so he must explain why the past language game is better than the present language game. If one cannot make comparisons across language games, this becomes impossible.

Consider the claim that people speak English correctly only if they speak English as it was spoken in the 17th century. This seems ludicrous because we do not usually recognize trans-historical grounds of criticism for linguistic development. But this suggests that the practices of constitutional argument may be significantly different from those language games whose standards are wholly internal.

In fact, Bobbitt's practice deconstructs his theory. He does not accept that whatever practices of constitutional argument eventually develop are defensible, because he values our common law traditions and the traditions of constitutional argument, at least before their recent deformations by the left and the right. Thus, he necessarily invokes trans-historical comparisons of practices and believes that prior practices are better than later ones. Bobbitt can avoid acknowledging this directly only by claiming that no true changes have occurred and that any deformations have not yet altered the "real" practice, which remains fully intact. However, this is not a purely descriptive claim about the current grammar of constitutional argument. There is an important sense in which Bobbitt's work seems to privilege the past—what he calls our constitutional fate—

To argue that not all changes in our practices are legitimate, we must accept the possibility that our grounds for legitimacy are not purely descriptive but are also both interpretive and normative. Nor is this dispute fully separable from the practice of constitutional argument itself. This dispute is part of that discourse rather than anterior to it; it overlaps with the practice rather than being excluded by it. The moment that Bobbitt's categories do not command universal assent, much less seem idiosyncratic, he presages the mutual dependence between the concepts of legitimacy and justification that his system is designed to deny. He becomes a normative grammarian.

V. Modalities and Ideologies

Some of the tensions inherent in Bobbitt's approach are revealed if we imagine how a Senator Bobbitt might vote on nominations of persons appointed to the Supreme Court of the United States. If a prospective Justice accepted Bobbitt's rules of constitutional grammar and their centrality to the legitimacy of constitutional interpretation, would there be any reason for Bobbitt to refuse to vote for her? In particular, would her substantive views on constitutional issues be irrelevant? Conversely, if a prospective Justice failed to respect his modalities, or added ones Bobbitt did not recognize, would Bobbitt nonetheless be willing to support her if she were otherwise likely to reach substantively desirable interpretations of the Constitution?

***1793** Bobbitt partially addresses these questions in a chapter on the nomination of Robert Bork. One of his central theses is that the senators who interrogated Bork wrongly assumed, as Bork did himself, that Bork is an originalist. In fact, Bobbitt argues, Bork is best understood as a prudentialist.[68] When one studies his arguments carefully, they reveal that Bork believes that the Constitution should be interpreted so as to maximize the decisionmaking authority of politically accountable institutions.[69] Hence, Bork believes that any restraints on these institutions should be clearly ascertainable within the Constitution, or so enmeshed in long-settled practice and present-day expectations that it would be

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simply because it is our past. This in itself places upon us a duty to preserve and defend it. Ironically, this makes Bobbitt a sort of "originalist" with respect to the language game of constitutional interpretation.

[68] BOBBITT, supra note 12, at 95.

[69] One of us has described Bork as a "parliamentarian" who exhibits "relative disdain for enduring constitutional values that limit temporal majorities." Sanford Levinson, Parliamentarianism, Progressivism, and 1937: Some Reservations About Professor West's Aspirational Constitution, 88 NW. U. L. REV. 283, 284 (1993).

imprudent to disturb them. It goes without saying that Bork rejects the legitimacy of "ethical" arguments, however defined.[70] Bork is fundamentally concerned with the consequences of interpretation for majoritarian political power—and hence his philosophy is prudential under Bobbitt's classificatory scheme. In Bobbitt's view, Bork is also an ideologue, because he privileges prudential considerations above all others. Indeed, he is a self-deluded ideologue, because he privileges a different modality from the one that he thinks he is privileging.

According to Bobbitt, the senators who interrogated Bork were misled by Bork's repeated rhetorical invocation of the Framers and original intention.[71] Hence, they failed to focus on the real reasons why he should not have been confirmed. Nevertheless, Bobbitt believes that one person at the hearings did offer "the constitutional case against the nomination."[72] This is Professor Barbara Jordan, the former Texas Congresswoman who testified against Bork. In Bobbitt's view, Professor Jordan hit upon the central difficulty in Bork's jurisprudence. The problem "was not simply that he opposed the reapportionment, or the poll tax decisions of the Warren Court ."[73] Instead, the problem was that " f or fifteen years Robert Bork had been attacking the legitimacy of the means of judicial reasoning that undergirded the Warren Court decisions."[74] According to Bobbitt, " i t was one thing to disagree on the way the rationale for a decision played out; it was something else again to challenge ***1794** the very method of rationalizing itself."[75] Bork had suggested that decisions based on certain modalities of argument were per se illegitimate because they were based on those modalities. He believed that only some of Bobbitt's modalities of constitutional arguments were legitimate. This disqualified him in Bobbitt's eyes, for "an attack on those modalities is an attack on the legitimacy of the decisions they support."[76]

Bork sinned against the Constitution in a second way. Bobbitt holds that not only are there six and only six modalities but that each is the equal in its importance to its companions. No reader of Constitutional Interpretation can miss

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[70] See BOBBITT, supra note 12, at 103 ("I think it is fair to say that ethical arguments . . . are the sort of thing that revolts Judge Bork.").

[71] Id. at 98-99.

[72] Id. at 106.

[73] Id. at 107 (footnote omitted).

[74] Id. at 108.

[75] Id. at 107.

[76] Id. at 108.

Bobbitt's passion in arguing for the equality of their status. Although arguments for one modality can be stronger than arguments for another in a particular setting, there can be no privileged modality that is necessarily or even presumptively superior to all others in all cases. As Stephen Griffin points out, Bobbitt is thoroughly pluralist and insists, perhaps paradoxically, that everyone recognize and accept the central truth of constitutional pluralism.[77] One falls prey to ideology whenever one privileges one modality above the others, and a fortiori one is an ideologue if one completely rejects the legitimacy of any of the modalities. Thus, even had Bork not denied the legitimacy of ethical argument, his elevation of prudential argument above all other forms justified refusing to confirm his nomination to the Supreme Court.

Suppose, then, that a prospective Justice who otherwise showed good character and judgment did not accept Bobbitt's particular classification of constitutional modalities, whether because she thought them under- or over-inclusive. Would this, without more, constitute sufficient reason for rejection? Bobbitt's treatment of the Bork nomination suggests that he would look skeptically on any nominee who called into question the legitimacy of one of the six modalities of constitutional argument. Nevertheless, we have already noted that one of these six—ethical argument—may be somewhat idiosyncratic. Suppose then, that a nominee believed in the natural law tradition as an important source of constitutional argument but not in Bobbitt's conception of ethical argument. This would pose a dual problem for Senator Bobbitt. First, this nominee would be denying the legitimacy of one of the six forms. Second, she would be recognizing an additional form that Bobbitt does not consider legitimate. In such a case, one wonders if Senator Bobbitt would consider her more or less suitable than Judge Bork. The difficulty is that if failure completely to endorse Bobbitt's grammatical system in its entirety is disqualifying, ***1795** then it is likely that few people in the United States would be qualified to serve on the Supreme Court. This suggests that Bobbitt would perhaps be willing charitably to reinterpret certain types of arguments as falling within his system. But if so, under what conditions, and to what degree would or should Bobbitt invoke this charity?

Conversely, suppose that a prospective Justice agreed that Bobbitt had identified an exhaustive set of modalities and agreed as well that each was of equal normative status. Would there be any remaining reason for Bobbitt to oppose her? Would it matter, for example, that the nominee had exhibited a propensity for arriving at politically obnoxious results while using constitutional arguments that were in all respects grammatically unexceptionable?

This second problem brings us to another important aspect of Bobbitt's theory. This is his treatment of conflicting interpretations of the Constitution. Suppose that, in a particular case, textual arguments and prudential arguments

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[77] Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 TEX.L.REV. 1753, 1762-65 (1994).

point in opposite directions. In Bobbitt's view, the equal status of the modalities means, by definition, that there is no way, within the modal structure itself, to resolve conflicting interpretations across modalities. Instead, Bobbitt argues that only the interpreter's conscience can resolve conflicts between the modalities.[78] Hence only our own individual consciences can tell us whether a textual argument is more persuasive in a given case than a prudential argument.

Bobbitt's invocation of conscience seems deeply tied to his generally protestant view of the Constitution. Just as the protestant must decide for herself what scripture means, so too the protestant interpreter must search her conscience for the best interpretation of the Constitution. Yet one wonders how this attitude intersects with the duties of senatorial inquiry.

In fact, Bobbitt's appeal to conscience suggests two quite different ways that a Senator Bobbitt might characterize his constitutional duties in regard to a prospective nominee. One possibility, already mentioned, is that if a nominee assented to Bobbitt's system of legitimate constitutional argument, there would be no reason to vote against her, because her constitutional decisions should be left to her individual conscience. A second possibility, in contrast, would make this conscience central to the Senate's investigation. Bobbitt might argue that because all arguments within the six modalities are necessarily legitimate, a senator should focus primarily on whether she believes that the prospective Justice has a good conscience—that is, whether the Justice has good moral character and possesses signs of goodmoral, legal, and political judgment.[79] This ***1796** position in turn leads to all sorts of complexities—for example, could one look at past behavior as demonstrating a more- or less-informed conscience? Although Bobbitt speaks of the importance of conscience, he does not tell us very much about what it is or how it works. Conscience for Bobbitt seems to be largely a black box; the heart may have its reasons, but they are not otherwise subject to rational examination, or so it appears. In any case, if Senate hearings were to become dominated by this approach, they would, we do not doubt, look and sound considerably different from the ones we are used to.

VI. Intra-Modal Conflict and the Role of Conscience

In fact, Bobbitt's appeal to conscience raises, in yet another way, the central difficulty with his theory—the ostensible separation of legitimacy and justification. To see why this is so, we must return to Bobbitt's views about conflicting interpretations of the Constitution. Under Bobbitt's system there are actually two ways in which interpretive conflicts might arise. First, there can be

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[78] BOBBITT, supra note 12, at 168.

[79] See Mark Tushnet, Constitutional Interpretation, Character, and Experience, 72 B.U. L. REV. 747 (1992).

conflicting arguments from different modalities. For example, suppose that Justice X argues that prayer at public school graduations is unconstitutional because the relevant precedents require it, while Justice Y argues that these decisions should be overruled or limited and the practice held constitutional because the Framers supported public prayer and never imagined that it would conflict with the First Amendment. We might call this a cross-modal conflict, because doctrinal arguments and historical arguments point in opposite directions.

Second, there might be conflicting arguments within a single modality. Suppose that Justice Z responds that Justice Y's history is incomplete or mistaken, or that his interpretation of the Framers' intentions is pitched at too narrow (or too broad) a level of generality. Instead, Justice Z argues that when historical practice and intentions are correctly interpreted they point to the unconstitutionality of the practice. This is an intra-modal conflict: Justice Z is making a historical argument that conflicts with Justice Y's historical argument.[80] For Justice Z at least, there is no cross-modal conflict because there is no conflict between X's doctrinal argument and the proper understanding of history.

Bobbitt's argument in Constitutional Interpretation about the role of conscience is addressed only to the problem of cross-modal conflicts. Nevertheless, intra-modal conflicts, to which Bobbitt's book devotes virtually no attention, can be every bit as perplexing as cross-modal conflicts. They are certainly every bit as frequent. For example, much ***1797** constitutional argument in the Supreme Court—and virtually all in the lower federal courts— involves conflicting claims about precedent.[81] The various briefs of amici routinely offer contrasting prudential considerations. Constitutional historians often offer contrasting historical interpretations, and so on. Although there are surely cases in which a given modality can plausibly point in only one direction, often one can make plausible arguments within a single modality for more than one result.

The presence of intra-modal conflicts greatly complicates Bobbitt's theory of cross-modal conflicts. At the very least, it becomes much more difficult to be confident that such conflicts are truly present. Once we recognize the possibility of intra-modal conflicts, many cross-modal conflicts turn out to be illusory. For example, if there are historical arguments for and against the constitutionality of school prayer, and doctrinal arguments for and against its constitutionality, we cannot really say that the modalities of historical and doctrinal argument conflict. That is because within each modality there is an argument that agrees with an argument within the other modality. Rather, all we

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[80] This example is taken from the opinions of Justices Scalia and Souter in Lee v. Wiseman, 112 S.Ct. 2649 (1972).

[81] See Sanford Levinson, On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation, 25 CONN.L.REV. 843 (1993).

can say is that some (but not all) arguments within one modality conflict with some (but not all) arguments in another modality.

Because Bobbitt does not focus on intra-modal conflict, this problem escapes his notice. He simply talks as if there were a single "textual position" that conflicts with a single, equally clear "historical position" or "prudential position." But this is false to ordinary experience. Very often one can find a prudential argument to support a given historical argument, and vice versa. In such cases, there will be no cross-modal conflict.

Perhaps Bobbitt is really claiming that one must turn to conscience when the best argument from one modality conflicts with the best argument from another modality. Cross-modal conflicts, therefore, would be conflicts between the best arguments within two different modalities. To return to our school prayer case, it may be true that there are historical arguments that point in opposite directions. But some of these arguments are better than others. If the best historical argument is in accord with the best doctrinal argument, we do not really have a cross-modal conflict, and so we do not need to turn individual conscience. Quite the contrary: the best arguments from these two modalities reinforce and support each other. There is true cross-modal conflict only when we are quite sure that the best historical argument conflicts with the best prudential argument, or the best ethical argument, and so on.[82]

***1798** However, this reasoning has a curious consequence. We do not know whether an appeal to conscience is even necessary until we know whether we have located the best argument within each modality. In other words, cross-modal conflict—the major concern of Bobbitt's book—is parasitic on the prior resolution of intra-modal conflicts, about which he has almost nothing to say. However, without attention to the problem of intra-modal conflict, he cannot be sure how important or widespread is the central problem he is concerned with in Constitutional Interpretation. For example, suppose it were the case that for a given constitutional problem there was no best historical argument and no best prudential argument, but only competing and plausible arguments within both modalities. Then we never even face a cross-modal conflict. Thus, perhaps surprisingly, Bobbitt's approach must presume the existence of a "right answer thesis"—at least within each modality—if his theory of cross-modal conflict is to have any practical interest. Put another way, his theory of cross-modal conflict has little importance for constitutional questions when there is no single best answer to a constitutional question within a given modality. [83]

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[82] See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189, 1239-40 (1987) (arguing that the best arguments in different modalities often reinforce each other).

[83] We should add the caveat that it is theoretically possible that a cross-modal conflict could exist even if there were no best answer to a given constitutional question within a given modality. Suppose that, in the historical

Because Bobbitt tells us nothing about the resolution of intra-modal conflicts, we cannot be sure whether he believes that there is always, sometimes, or never a best answer to constitutional questions within a given modality. Furthermore, if there is a best answer, it is possible that individual conscience plays a role in determining what that best answer is. If so, the best answer for one individual might not be the best answer for another because their consciences will lead them in different directions.

There are three possibilities we might consider: The first is that resolving intra-modal conflicts never requires recourse to individual conscience. The second is that resolving intra-modal conflicts always requires recourse to individual conscience. The third is that some intra-modal conflicts, but not others, require recourse to individual conscience.

The first alternative would argue that, in intra-modal conflicts, resort to conscience is unnecessary: one merely appeals to the standards of textual argument to resolve textual disputes, to the standards of historical argument to resolve historical disputes, and so on. However, this argument seems ***1799** unpersuasive. Often the very question of how history and text should be used in proving propositions of law is itself a matter of considerable dispute within a community. For example, a historical situation or practice or the intentions of the Framers can be described in different ways and at different levels of generality. The choice of level of generality is particularly important, for the concrete intentions of the Framers may be in conflict with their more general commitments to liberty, equality, and democratic self-government.[84] If so, which intentions are

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modality, we could not tell whether A, B, or C was the best argument, and in the prudential modality we could not tell whether D, E, or F was best. Here we assume that A, B, and C represent mutually inconsistent positions, as do D, E, and F. We further postulate that there is no equally good or better argument within each modality. If all of the positions A, B, and C are inconsistent with each of the positions in D, E, and F, we would still have a cross-modal conflict. All of the candidates for the best historical argument take positions inconsistent with each of the candidates for the best prudential argument, and vice versa.

[84] See J.M. Balkin, Tradition, Betrayal, and the Politics of Deconstruction, 11 CARDOZO L. REV. 1613, 1618(1990). For a version of this argument coming from an unexpected source, see Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess., pt. 1, at 284-86 (1987), in which Judge Bork argued that Brown v. Board of Education, 347 U.S. 483 (1954), was correctly decided because the Framers' more abstract commitment to equality proved historically incompatible with their more concrete commitment to the constitutionality of separate-but-equal institutions.

to control in a given case? Faced with these difficulties, we might wonder whether conscience does not have an important part to play in their resolution.

This point has even greater force in prudential argument. Prudential arguments concern which rule would have the best consequences.[85] But this judgment requires a number of collateral judgments. We must first discern which individuals, groups, institutions, or parts of society we are concerned with: are we concerned about consequences to the institution of the Supreme Court, the federal government, the poor, or the nation as a whole? We must decide how far in the future consequences are to be considered. We must decide how to deal with our lack of knowledge about consequences and who should bear the burden of proof on matters that cannot be known for certain. Finally, and perhaps most importantly, in order to assess whether consequences are good or bad, we must decide what our "ends" are: We must decide whether our goal is to maximize pleasure, or happiness, or human dignity, or wealth, or the international competitive position of the steel industry. Surely, in making these judgments, individual conscience must play a significant role.

In short, although Bobbitt assigns conscience to the role of arbitrating between modalities, there are good reasons to believe that it would have to play a significant role in disputes within a given modality. If so, we might consider the second alternative: perhaps individual conscience is necessary to resolve all intra-modal conflicts, just as it is necessary to resolve all cross-modal conflicts.

Nevertheless, this position has its own difficulties. When two plausible arguments are offered within a given modality, conscience may be necessary to decide between them. But some arguments are not even remotely plausible. Imagine a judge who claimed that the text of the ***1800** Constitution guarantees three senators for each state, insisted that the Framers believed that the death penalty was in all cases cruel and unusual punishment, or argued that New York Times v. Sullivan[86] allows the states to proscribe negligently defamatory statements about public officials. Although these legal arguments might seem grammatical on their face, they are so wrong that we might seriously doubt either the honesty or the competence of the person who made them. It is hard to believe that these arguments can be rejected only on the grounds of individual conscience.

This brings us to the third alternative: some intra-modal conflicts require resort to individual conscience, but others involve arguments that are so poorly made that they can and must be rejected on grounds other than those of conscience. However, what is this ground? It cannot be simply that these arguments are wrong, for plausible arguments can also be wrong. Must we

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[85] BOBBITT, supra note 12, at 17.

[86] 376 U.S. 254 (1964).

determine their incorrectness through the use of our consciences? A better explanation might be that these arguments do not really follow the rules of the practice of constitutional argument. An "off the wall" precedential argument fails to use the rules of precedent correctly, an "off the wall" historical argument violates accepted practices of historical accuracy, and so on. If this accurately describes the situation, then the problem is not that these interpretations are bad arguments, but that they are illegitimate ones. They arepseudo-arguments that only pretend to be within a modality, but are not in fact really within it. A person who makes them simply does not understand how to make arguments within the modalities, as evidenced by the fact that she makes them while simultaneously claiming to play the rules of the game. Thus, we would say that a person who claims that the text of the Constitution guarantees each state three senators simply does not understand what a textual argument is.

Thus, some intra-modal conflicts are pseudo-conflicts, and others are real conflicts. The former involve opposing arguments, some of which can be rejected because they are not even part of the language game of constitutional law. No appeal to conscience is necessary because the rules of the relevant language game resolve the matter. The latter conflicts involve a choice between legitimate, grammatical legal arguments. In this case, the choice between opposing arguments requires justification and an appeal to conscience. [87]

The division between pseudo- and real conflicts within a modality recapitulates the distinction between legitimacy and justification in yet ***1801** another way. Some arguments are sufficiently bad that they are simply ungrammatical, while other arguments, though unpersuasive, are not so bad that they are beyond the boundaries of the language game of constitutional argument. Some arguments can be dismissed because they are not even legal arguments, while others can be refuted only through a process of justification that invokes the aid of individual conscience.

We have argued repeatedly that Bobbitt cannot maintain a strong distinction between legitimacy and justification and that the nested opposition between them will reappear continually despite Bobbitt's best efforts to distinguish and separate the two.[88] We can see the problem emerging once again in the context of intra-modal conflicts. We might pose the problem this way: Is there a clear boundary between arguments that are merely unpersuasive yet clearly recognizable exercises in constitutional interpretation, and arguments that are "off the wall," defying the accepted norms of constitutional argument and the

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[87] Hence, our second alternative might be rehabilitated in the following way: all real intra-modal conflicts, like all cross-modal conflicts, require the use of individual conscience to be resolved. Stated in this fashion, the second and third alternatives become essentially identical.

[88] See supra notes 36-37 and accompanying text.

existing grammar of constitutional law talk? Is there a bright line that separates the unpersuasive from the ungrammatical—a line recognized and recognizable by all members of the law-language community? Or do these categories fade into each other at the margin, so that there are contested and contestable examples over which equally competent members of the community might disagree?

However many cases fall clearly and unmistakably into one of these two categories, we believe that there is also a gray area in between, in which reasonable persons can differ about whether a particular argument is competent albeit unpersuasive or is truly "off the wall." A good analogy is the difficulty federal judges have faced in devising a clear-cut boundary between frivolous legal arguments that may be sanctioned under Rule 11[89] and non-frivolous arguments that, no matter how unpersuasive, draw forth no sanctions or accusations of disqualifying ineptitude.[90] The difficulty of distinguishing the ungrammatical from the merely unpersuasive at the margins is consistent with our stated view that, although legitimacy and justification are not the same thing, considerations of legitimacy will almost inevitably fade, at the margin, into those of justification.[91]

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[89] FED. R. CIV. P. 11.

[90] See Sanford Levinson, Frivolous Cases: Do Lawyers Really Know Anything at All?, 24 OSGOODE HALL L.J. 353 (1986); cf. Sanford Levinson, Accounting for Constitutional Change (or, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) > 26; (D) All of the above), 8 CONST. COMMENTARY 409, 411-15 (1991) (noting the difficulty of drawing clear-cut distinctions between interpretations and amendments of the Constitution, a distinction that depends in part on what kinds of arguments are considered "off the wall").

[91] One way to avoid the problem of disagreements at the margin is to assert that if some people think that particular argument is grammatical while others do not, perhaps the latter but not the former are not really competent members of the law-language game. Thus, Bobbitt might insist that only professionally trained lawyers—as opposed to lay persons, who seem too fond of natural law or religious arguments—determine what is in the language game of constitutional argument. Of course, this simply raises new difficulties. First, it begs the question as to how the grammarian defines the criteria that determine membership in the relevant language game. These judgments quickly leave the realm of the purely descriptive and are often just another form of grammatical policing. Second, this solution does not solve the difficulty of disputes between members of the newly defined language community. If Robert Bork—a former federal judge, Solicitor General of the United States and Yale Law School professor—disagrees with Philip Bobbitt—a former member of the Office of Counsel to the President and legal counsel of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition— over what constitutes a well-formed constitutional argument, how much more can the linguistic community be pruned in order to create a consensus?

***1802** Nevertheless, it is by no means clear that Bobbitt himself could accept such a view. For him, legitimacy is not something that one argues about, or something that could be a matter for interpretation. Legitimacy is something that happens because and to the extent that individuals are engaged in a language game of law talk. Hence, considerations of legitimacy cannot fade into those of justification because there are no such things as "considerations of legitimacy." In Bobbitt's view, legitimacy and justification are two completely different kinds of things, and to confuse them is to make a category mistake—the jurisprudential equivalent of mixing apples and oranges. Thus, the distinction between legitimacy and justification is not like the distinction between day and night—which fade into each other—but more like the distinction between a day and a metric ton. In this sense, there really are no close cases between merely bad or unpersuasive arguments and illegitimate arguments, any more than there can be close cases between what is a legal move in chess and what is not. For if there were close cases, then it would mean that there could be reasonable arguments on both sides of the question whether a given argument was within the language game or not. But in Bobbitt's system, one does not argue about or demonstrate legitimacy—legitimacy simply occurs by playing within the rules of the language game.

VII. Conclusion

All of the difficulties we have identified in Bobbitt's project flow from his insistence that the concepts of legitimacy and justification be kept separate. We think this insistence is unnecessary to his more general project of offering a grammatical study of constitutional law—a project that we heartily endorse. Moreover, we think that it is false to how languages and practices grow and develop over time. Language games lack purity: they refuse clear-cut boundaries, they borrow and steal from other sources, they overlap with other language games, and their governing rules are always in a state of flux and disputation. Lived language games are unruly and unkempt, untamed and untidy, much as life itself is. We do not doubt that Professor Bobbitt, like his mentor Wittgenstein, would fully agree. ***1803** Yet in his moments as normative grammarian, Bobbitt still longs to preserve a certain purity within the language game of constitutional argument. We think this attempt is doomed to failure. Living language games are the products of history: they are motley and variegated, often chaotic, and always jerry-rigged. Their heterogeneity continually reasserts itself, especially when, as with constitutional legal argument, they are both a means and an object of intense political dispute. Such language games are both a terrain of cultural struggle and a potential prize in that struggle; they always frustrate the attempts of grammarians, normative and descriptive alike, to police their asserted boundaries and preserve their imagined purity. We think this lesson has general significance beyond the

confines of American constitutional law; in any case, it is at least something to muse on, quand on mange le Big Mac avec les fries.