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William W. Van Alstyne
William & Mary Law School

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Essay Review

The Fate of Constitutional Ipse Dixits

Philip Bobbitt, *Constitutional Fate*. New York: Oxford University Press, 1982. Pp. 285. \$15.95.

William W. Van Alstyne

The first third of *Constitutional Fate* introduces the reader to a serial review of five "styles" of constitutional argument. Essentially, these are differing (but not mutually exclusive) ways of what Philip Bobbitt describes as orthodox or conventional ways of testing the substantive constitutionality of some challenged federal or state law. Specifically, the typologies of argument he reviews are "textual," "historical," "doctrinal," "prudential," and "structural." This survey is generally instructive and interesting. It is quite similar in its own way to John Ely's critical restatement of different methods of attempting to "discover fundamental values" insofar as certain clauses—such as the due process, equal protection, privileges-and-immunities clauses, or the Ninth Amendment—appear to press that task upon us.¹

Indeed, *Constitutional Fate* is in one sense a sequel and a response to John Ely's book. Like Ely, Bobbitt seeks some defensible basis for the constitutional adjudication of awkward cases, i.e., cases usually litigated under the most normative clauses of the Constitution such as those just noted. While seeing the problem from a different perspective (namely one that first examines the adequacy of constitutional review when attempted on the basis of these five differing approaches), Bobbitt also concludes that none finally does the job of rationalizing the full scope of significant and legitimate judicial constitutional review. Each conventional form of argument (i.e., the "textual," the "historical") has something useful to contribute, the author says, but all come up short in the end.

The introductory chapter, however, is but a prologue. Its principal function is to provide the background for an additional type of constitutional argument; this type, Bobbitt suggests, has in fact been used in a large number of the Supreme Court's most significant constitutional adjudications, although (until now) not properly discerned, developed, and defended. This new type of argument he calls "ethical" argument, and this one he also relates to his view of appropriate Supreme Court role (namely the role of "expressive" function) which is quite close to the advocacy of Owen Fiss.² Ethical argument, Bobbitt proposes, succeeds in the crucial area that the conventional typologies of constitutional argument leave incomplete. It

William W. Van Alstyne is Professor of Law, Duke University School of Law.

1. John H. Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard Univ. Press, 1980).
2. Owen Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979).

takes over where they falter or do not work. It explains much that previously appeared to be obscure. It also purports to meet the difficulty that led Ely to urge courts to eschew "fundamental rights" jurisprudence in constitutional adjudication (except to the extent of forwarding Ely's own notion of "representation reinforcing" rights).

"Ethical" argument, Bobbitt writes, does not mean simply principled argument, i.e., it is not to be contrasted with "unethical" argument. Rather, it is argument that appeals to and/or draws from the "ethos" of the American polity. It is derived from some informed sense of the "sort of people we are" (p. 93), and in this respect it is (allegedly) grounded in something firmer, something more intimate to this particular culture, as it were, than other kinds of constitutional jurisprudence which simply appeal to some higher or better law at large. Allegedly, it is exogenous to any particular constitutional clause or to any combination of clauses, yet it is felt on the edges of many clauses and virtually presupposed in certain tacit assumptions of the whole Constitution. The greater part of Bobbitt's book is devoted to a combined illustration-and-persuasion that: (1) there is such a species of argument (i.e., ethical argument) embedded in a great deal of the best constitutional case law; (2) it is thoroughly legitimate; (3) it is not just a new way of imposing some amorphous "moralism" on the Constitution (pp. 94, 100, 108); and (4) its more systematic recognition by the Supreme Court would in fact contribute enormously to the appropriate function of that Court—an "expressive" function of this polity's ethos or ethology (wherein "ethology" is understood to refer more to a set of fundamental values reflected in the culture we have than to some merely anthropological definition of ethology).³

3. To the extent that the notion of "ethical argument" is meant to confine the field of ascertaining fundamental values in the adjudication of unspecified rights to those sorts of particular values rooted in examples strongly supported by the history of American (or at least western) culture, enabling the Supreme Court to take seriously some claims of privileges and immunities or of Ninth Amendment equally-implied rights on equivalent terms as certain specified rights (e.g., speech or the free exercise of religion), without simultaneously opening wide the door to a nonjusticiable parade of moral claims at large, Bobbitt's argument is an instance of an old and excellent idea dressed up in new words. It may well provide a useful suggestion, but it is a suggestion without novelty. The dilemma of the "higher law background" of portions of the Constitution is scarcely new, and even some of the most skeptical judges who have served on the Supreme Court have declined to ignore it or to resolve it by a simplistic "either-or" alternative (i.e., either it admits to the pantheon of preferred protection anything for which a convincing argument can be made that an enlightened society ought to respect, or, insofar as that test is too treacherous and subjective, it must be avoided and courts must reject all claims other than those based squarely on narrowly conceived, textually explicit rights). For example, though the dissent of Justice Holmes in *Lochner v. New York*, 198 U.S. 45 (1905), is routinely invoked as the most famous of all judicial expressions of unqualified rejection of permission to judges to roam at large in the universe of moral philosophy as the basis for second-guessing legislative preferences, Holmes himself quite explicitly qualified it with a much-neglected "unless" clause. With emphasis added, it admits the logic of permitting litigant reliance upon unspecified rights traditionally prized and generally respected in the past practices and preferences of this culture, as the appropriate field of external references in adjudicating such claims under appropriate parts of our Constitution. Thus, the full Holmes quotation reads: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, *unless* it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and

I

The author's attempt, however, to establish the free-standing credentials and clarity of this new thing—"ethical" argument—altogether failed for me as a reader, beginning with the author's own selected test case. ("The real test of ethical arguments," he declares, "is in their application to concrete cases" (p. 154).) That test case is *Roe v. Wade*,⁴ the Supreme Court's highly controversial abortion decision. Bobbitt first gives an extremely abbreviated summary of the case, dispatching the Court's effort to explain the outcome of *Roe* with what is now (in academic circles) obligatory criticism, and abruptly dismissing Justice Blackmun's best efforts as a "doctrinal fiasco" (p. 159). He then proposes to show, nonetheless, how the result would not be a doctrinal fiasco (but indeed would be utterly convincing) if Blackmun's opinion had instead employed "ethical argument." The demonstration begins (at p. 159) in this fashion:

I propose this rule Government may not coerce intimate acts

From that "I propose," it takes Bobbitt but six short pages to explain how much better *Roe* would have been had it proceeded from such beginnings. The entire *modus operandi* is breathtakingly simple. It yields a result much less equivocal than *Roe* itself. An "ethical" argument (which is what his "I propose" rule purports to be) provides an "absolute bar" (p. 163), and not merely a consideration to be taken seriously. Accordingly, if being compelled to continue carrying an unwanted fetus under threat of criminal sanction is something government may not require of a woman because it coerces an intimate act, then that ends the discussion. Whatever the state's interest, "our" view of what government may not do (namely, that it may not coerce intimate acts) has *already* closed it off from seeking to influence child birth decisions by criminalizing abortions. "The ethical argument I have given avoids the necessity," Bobbitt declares, of such unseemly tasks as balancing whether the fetal life being carried requires some constraint on the woman—including a constraint that may indeed "coerce" her in carrying the fetus longer than she wished (p. 163).

Some may find Bobbitt's own chosen example convincing. Some, even as I, may find the demonstration vastly more troubling than Justice Blackmun's

our law." The references to "our" people and to "our" laws is presumably deliberate. Of course it is ethnocentric as well, and in that sense it should be the logical source of Bobbitt's nonstandard definition of "ethical." It is Holmes—not William Douglas as is so commonly and wrongly supposed from the many and unfair disparaging references to the Douglas opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965)—who also employed the word "penumbra" to make a valid point about the uncertain margins of constitutional clauses: "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other" (*Springer v. Philippine Islands*, 227 U.S. 189, 209 [1982], dissenting opinion.) Thus, judges committed to the task of interpreting the Constitution we have (rather than some other that today's authors may deem better) nonetheless need not come to the task with a cramped or wizened view of what it does indeed provide. For a more elaborate discussion, see William W. Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. Fla. L. Rev. 209 (1983).

4. 410 U.S. 113 (1973).

different effort in *Roe*, whatever its own analytic shortcomings. Taken on its own terms, moreover, the Bobbitt technique of discovering constitutional "ethics" just seems to be hopelessly arbitrary as actually applied. The basic technique appears literally to be one of mere audience consent. The author first proposes a "rule" at an unobjectionable level of congenial abstraction; he then proceeds to elicit (tacit) audience concurrence that "we" agree to instances of its easy application, e.g., that public school teachers could not require "students to perform sex acts as part of a sex education" (p. 160); he pauses to ascertain by audience silence that we really *do* agree with the example; he asks (rhetorically) on what basis we can be so sure—and then declares that the "barriers must be constitutional it would seem to account for our sense of absolute prohibition." Then the device is to move at once to the observation that "whatever else may be an intimate act, carrying a child within one's body and giving birth must be a profoundly intimate act," from which it then follows, Q.E.D., that antiabortion statutes are unconstitutional.

All of this is so peremptory, however, that one scarcely knows how it was permitted even to get underway. Specifically, there is no reason why "this rule" that Bobbitt proposed (and from which the rest issued with automatic ease) was the one he proposed, rather than some other that would yield an exactly opposite outcome. For instance, I suppose his audience would have equally agreed silently to concur if, instead, he had said:

I propose this rule: A compassionate government need not permit one person to kill another.

He would similarly "test" it with easy cases, check with the audience to see they agree with the easy cases, ask how they can be certain, suggest it must be because the rule must be constitutionally based to account for our confidence, show how it is in fact implicated when an unthreatening, dependent, unculpable fetal life may be killed, from which it then equally follows, Q.E.D., that virtually every kind of antiabortion statute is constitutional. The exercise involves reasoning from incomplete premises. It clearly is not serious philosophy, much less disciplined constitutional law. Insofar as its appeal is to the character, or ethos, of the American polity, or to hortatory resolutions that "comport with the sort of people we are," moreover, one would expect it would pay at least some *serious* attention to the complexity of that appeal. Here, for instance, in a most interesting state supreme court decision from 1907, are some perfectly lovely passages that purport to apply a more complicated orientation (i.e., the common-law orientation) in drawing distinctions as to when one may *not* act to worsen the condition of another, though in other circumstances one would have had no obligation to help:

Whenever a person is in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid danger. . . . *It protects the trespasser from wanton or willful injury.* It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use. . . . The rule stated is supported by a long list of authorities, both in

England and this country, and expressed in the familiar maxim, "Sic utere tuo," etc. . . . It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not merely sentiment, at least to refrain from any affirmative action that might result in injury to them. [Emphasis added]

These passages are excerpted from *DePue v. Flateau*,⁵ quite a famous tort case from Minnesota. They concern a man who failed to get home in his carriage on a cold January afternoon, after visiting several farmers from whom he bought livestock. At the last farm he visited, though feeling unwell after dinner, he was refused lodgings and assisted to his carriage. He subsequently sought to recover for the loss of several fingers frostbitten during the hours spent unconscious in a snowbank. The trial court, finding no duty on the farmer's part to have permitted him to stay, found accordingly no liability for the plaintiff's pain and loss. The Minnesota Supreme Court found otherwise.

All the pertinent comparisons for a different analysis of *Roe v. Wade* are available in these few dated passages. Though the visitor's presence was not the responsibility of the farmer initially, still when "it is obvious that, if one does not use due care in one's own conduct it may cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which one finds oneself." Note that the rule "protects (even) the trespasser from wanton or willful injury." Note that it imposes upon the "owner of premises" some obligation to continue to provide shelter to the unwanted visitor at least while the peril outside remains very great. Note, also, it applies with "greater strictness to conduct towards persons under disability, and imposes," too, "the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them." All these things, one might say, are bound up in the common-law "ethology" of this polity, i.e., they reflect (to quote Bobbitt) the "sort of people we are." They are but an explication of that more general maxim, *sic utere tuo, ut alienum non laedas*.

The clear analogical relevance of these passages for the counter-result of *Roe v. Wade* is obvious. Even as against a "trespassing" fetus (i.e., a fetus lodged in the "premises" by rape?), one must take care to avoid wanton or willful injury. The duty runs to the owner of the "premises" in which the dependent party finds itself. It applies most of all on behalf of persons under disability. We scarcely need amend the Latin maxim to read its rhythm and to apply its rhyme: *sic utere utero tuo, ut alienum non laedas*. So it seems that Bobbitt has himself adventitiously suggested at least as forceful an "ethical" argument for precisely the opposite conclusion as the one "proved" by his original formulation, in his own first-chosen test case of the clarity and excellence of this formulation.

II

But of course none of this will do at all. None of it simplifies *Roe v. Wade*. The case is very hard. A judge who (like Blackmun?) acknowledges the difficulties of the case invites abuse and derision. He will necessarily write an

5. 100 Minn. 299, 111 Nw. U. L. Rev. 1 (1907).

opinion that can be readily pushed around. But in comparison with what we have been offered here, at least, it is not necessarily worse on that account.

Blackmun's opinion, unlike Bobbitt's, did confront the obvious conflict. It recognized that the protection of dependent human life is suitably "compelling" as a sufficient, superordinating justification of state anti-abortion statutes. It recognized, too, that since the death of the fetus is an immediate and certain consequence of the usual early abortion medical procedure, there are not in fact a lot of "less intrusive" alternative means by which the state might cope with the dilemma. Thus the collision of a woman's intensely personal choice with the most conventional of all police power concerns was forthrightly admitted in Blackmun's presentation of the case. To his credit, moreover, Blackmun did not pull from the air some casually handy epigram; he did not dispatch the conflict between the woman's interest and the asserted social interest (in fetal-life protection) as though it were resolvable by some self-evident syllogism, some single-minded "I propose" rule, or some obvious Euclidean proof.

The problem was, rather, the problematic sufficiency of fetal life under the circumstances of the case. The problem was, as well, the *bona fides* of the State of Texas's assertions about its anti-abortion statute. Each claim (by Texas) was in fact seriously questionable. A brief review of each matter will help us remember why.

In respect to the sufficiency of fetal life, this matter could hardly be resolved merely by "deciding" (or, rather, deferring *uncritically* to a state's decision of) "when potential human life begins," whether one's emphasis is on "potential," or on "human," or on "life." For, as to that matter, not only are unmated sex cells (gametes) a variety of "potential human life" (the prevention-of-mating of which had been dealt with as a matter of precedent in *Griswold v. Connecticut*,⁶ which holds invalid an anticontraceptive statute), but so, of course, are mere random cells from the human body. The DNA necessary for complete replication of the host human lies coiled within *every* cell; in that interesting sense, one may allow that a vast number of double-helixed homunculi reside in potential populations of billions in each person. In cloning (now already successfully undertaken with mammals as well as with amphibians), merely the cytoplasm of a single sex cell is used. The sex cell nucleus is taken out and thrown away. In its place, the nucleus from a random blastular cell is inserted, and the process of asexual reproduction at once commences, with the adult constituting a genetic copy of the single parent.

Equivalently, although some religions think it dispositive, the initial merging of sex cells (whether in fallopian tubes or in glass dishes, "in vitro"), could hardly impress a judge as familiar with this subject as Blackmun had become, as *the* critical event within the state's dispositive discretion. For what in fact is going on here? Initially, the opening detectable event (the meeting between crowding, flagellating, microscopic sperm and an ovum) appears as but a trivial chemical modification at the surface of the ovum membrane: an alteration signaling merely that the other

6. 381 U.S. 479 (1965).

crowding sperm are closed out, and that none can additionally penetrate (a phenomenon with the name of "refractory halo"). Additional trivia follow which we categorize by words that mislead; each separate word thereby suggests a distinctive state whereas in fact we innovate words to have something in common to say to one another (although the actual flow of events is more subtle, more continuing): "prophase," then "anaphase," and "metaphase," the drifting of chromosomal material toward ends of a spindle, an alignment, and then, with "telophase," a beginning in the cellular wall marking the preliminary, still microscopic dichotomy into two conjoined cells.

These two, conjoined, apparently identical cells are just that, nothing less, nothing more. Yet, Texas asserted that the very first detectable chemical alteration (the sealing of the ovum membrane) was at once more than enough to apply *DePue v. Flateau*, as it were, with criminal intensity. The host must provide incubation, nutrition, carrying, delivery (and presumably support obligations to adulthood) for the mitotic zygote, *whatever* the circumstances of the incident (including rape), *whatever* the damaged condition of the single cell (or its teratological aftermath), *whatever* the mental or economic status of the "host," whatever the number already dependent upon her, and assuming only that her own bare life would not be jeopardized by the compulsory state service to which she is thus conscripted. (Under this Texas view, incidentally, IUDs would be criminalized—IUDs may work by precluding lodgment of the blastula in the uterus, rather than by precluding mated gametes—as of course would any "morning after" pill or the like.) The harsh benignity of Texas, in the "welfare" of every zygote, is the state's asserted compelling justification. This is a harsh view indeed—a severe and peculiar idea of the right way of distributing criminal punishments.

We are (at *this* stage) even far short of the mere blastula, i.e., the multiplication of yet undifferentiated cells, in somewhat gelatinous appearance, to the stage of shaping in roughly tubular form. We are still months short of "ensoulment" (the time—approximately the eightieth day—the nineteenth century Catholic church somehow "knew" that a soul was infused into the homuncular form). We have not yet even come to "nidation" (usually between the eighth and the fourteenth day), when possible fixing of the developing blastula may occur in the uterine wall. We are months short of the time any detectable electrical activity will occur in the specialized cephalic region (usually about the fourth month, coincidentally about the same time as "quickenings," at which sensations of movement can be felt). There is even an additional irony of oversight in the last fact. The same state's laws may regard one as "dead" upon the cessation of discernible electrical activity in the brain, but nonetheless conscript every woman's body at the opposite end of the process upon the mere penetration of a flagellating sperm into the chemically-sensitive but (evidently) otherwise indifferent ovum.⁷

7 The comparison and an excellent discussion is provided in a recent student note, Ken Martyn, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 U.C.L.A. L. Rev. 1194 (1982).

The constitutional criminalization of woman's choice on such a foundation (of zygoted sanctity) was radically unconvincing. The Supreme Court (in *Roe*) resolved the quandary neither by deferring wholly to Texas nor by deferring wholly to each woman. Rather, it resolved the quandary by noting that the one "person" *indubitably* affected by the outcome was the woman carrying the now-gamete, now-zygote, now-blastula, now-embryo, now-fetus, now-infant. The state's hubris in foreclosing her own resolution of her own pregnancy was disallowed prior to that date later-than-which a very substantial consensus could reasonably maintain that it (i.e., the exclusivity of her own choice) would indeed be too heedless of others. On quasi-historical grounds, the Court settled that date as the date of fetal viability, roughly the seventh month following the original gametic conjunction. One may well believe that that date ("viability") is unduly permissive (e.g., there may be a strong case that significant brain activity in the fetus may mark the line the state might draw). Nonetheless, the way Texas had drawn it, unless one frankly wants to concede to the state an authority to enact a religious bias, had virtually nothing to say for itself. In a larger sense, *Roe v. Wade* was a case of *DePue v. Flateau* made extreme: the state enacting a rule conscripting the utmost private premises for the gestation of zygotes and blastulas. Against the combination of countervailing constitutional clauses (they may include the Thirteenth Amendment as well as the Fourteenth, the Fourth, and indeed the Ninth, as well as the establishment clause of the First), the rationale of Texas was inadequate. That in the particular case (albeit *not* in the record and *not* a feature of the Court's opinion) the pseudonymous plaintiff was pregnant by rape, merely underscored the essential melodrama of the dispute.

III

Additionally, however, there was also an extremely strong reason for doubting the *bona fides* of the principal ("life-saving") defense Texas claimed for its antiabortion statute. The point is not obvious from Blackmun's opinion for the Court, but it is readily discoverable by reading principal briefs and the oral arguments in the case.⁸ It turned out that in fact Texas had not actually criminalized the abortion decision of women in Texas. Rather, Texas had criminalized only acts by doctors in Texas, i.e., it forbade them from assisting any woman in effecting an abortion except when the woman's life was in jeopardy. It enacted that restriction on medical practice, moreover, in 1845. The evidence was highly suggestive that the reason for doing so (in 1845) was because of misgivings respecting the medical safety of abortion procedures and *not* because of any view respecting the abortion of blastulas, embryos, or fetuses as such. The woman could travel out of the state and secure medical assistance in a different jurisdiction to effect an abortion. If she could get medical assistance within Texas to effect an abortion, moreover, she was not chargeable even as an accessory to the physician's (medical) wrongdoing. As observed in the briefs and oral

⁸ See, e.g., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, eds Philip B. Kurland & Gerhard Casper, vol. 27 (Arlington, Va.: Univ. Publications of America, Inc., 1973).

argument as well, thousands of women residents of Texas in fact had traveled to New York for abortions, without risk of prosecution (or of "blame") under the presupposition of the Texas statute. That statute forbade only a certain kind of in-state medical service.

As a statute enacted because of misgivings respecting the professional safety of abortion procedures (in mid-nineteenth century), the premises of the statute have been virtually overwhelmed. No similar basis for such misgivings existed more than a century later. As a practical matter, the statute operated to foreclose lawful abortions principally to women too poor and/or too ignorant to travel lawfully to New York, North Carolina, Colorado, or elsewhere.

In context, however irrelevant these matters may now seem (or how they have been made irrelevant by the Supreme Court's gratuitously sweeping opinion), they nonetheless bore directly on the matters we have been reviewing. Recall that the "quandary" was framed in terms of the extent to which the Supreme Court should presume to interpose interpretations of rather vague constitutional provisions against the apparent consensus of a state legislature in asserting when protectable-third-party-life is sufficiently involved to exact a strong view of the common-law principle involved in *DePue v. Flatau*. But the record in the case strongly suggests that in fact no such quandary was present; Texas had not made any such judgment. Accordingly, the idea that the woman's interests should have been set aside in favor of the Texas statute on the basis of "deferring" to "majoritarian" notions of protecting zygotal-blastular-embryonic-fetal "life," would have been mistaken. The essence of the Texas statute was that (1) it effectively limited medically-safe abortions to the reasonably well-to-do residents of Texas on (2) a currently-counterfactual predicate of medical procedures concerned with women's safe treatment.

The frailties of the Blackmun opinion, such as they were, were thus not that he eschewed Bobbitt's preference for "ethical" argument. Rather, they were almost entirely in their arguably-inappropriate "advisory" features: the opinion went exceedingly beyond the very compelling context of the case at hand and the facial weaknesses of the Texas statute, it addressed considerations not present at the time, and it has accordingly provoked enormous reaction to the manner, in which it thereby presumed generally to "legislate" the constitutionality of antiabortion laws at large. Probably the temptation to compose a broad and categorical opinion was very strong at the time (to provide "guidance," to "clear the air," to discourage subsequent attempts to distinguish and limit *Roe* itself?), but its sheer sweep does leave it critically vulnerable as so much of the subsequent academic comment reflects.

On the other hand, the opinion did not presume to resolve the basic case by recourse to mere epigram, or by recourse to such audience-consensus bromides as this sort of here-is-the-answer "ethic" (namely, "I propose this rule. Government may not coerce intimate acts"). To the contrary, in major portions of his opinion Blackmun faced the collision of conflicting views with an admirable directness. Doubtless that extreme candor invited some of the criticism he (and his opinion) have since received. But it was also a degree of candor which commands respect. Bobbitt's alternative attempt to

“write” a better opinion, in his own selected test case, seemed to me to be a substantial failure.

IV

Others may find it best just to disregard this one example of misapplied ethical argument, of course, and to judge the balance of the argument (on “ethical argument” and “expressive judicial function”) without tying into the example at all. The thought might well be right for the same reason that few of us necessarily want our general propositions to stand or fall simply on the strength of one example, even when the example is one we ourselves have composed. But I tried this too, and again it just did not work out. In those portions of the book where the example of “ethical argument” seemed to work well, my own conclusion was that it worked well solely by the accident that it had the benefit of reinforcement from additional and much stronger considerations that either had not occurred to the author or, for whatever reasons, were left out of account.⁹ Similarly, in virtually all instances in which the case under discussion lacked the reinforcement of considerations not noted by the author, i.e., cases in which the “ethical argument” had to stand unaided, it just failed. It appeared to collapse into constitutional adjudication-by-mere-audience-consent.

Nonetheless, a very great deal of current book writing, ostensibly on constitutional law, is substantially of this sort. Much of it (Bobbitt’s book included) has been very favorably received. There appears to be a nominal consensus that this is indeed productive and useful constitutional scholarship—that somehow its basic approach is sound, whether or not any particular author has got THE theory that will sweep the field clean. I am extremely doubtful that anything of the sort is at all likely to occur however, and there is little in *Constitutional Fate* that will shake the doubts of those not already convinced to the contrary.

9. The author, for example, suggests at p. 101 that “ethical argument” best explains how we can be certain that a president may not establish a national church by simple executive order, although the establishment clause of the First Amendment lays no such restriction upon the president and is, rather, addressed *in haec verba* only to Congress. But a president would find it very hard indeed to find any executive power in Article II—either express or implied—enabling him to attempt by mere executive order that which the First Amendment forbids Congress to do by enactment of any kind. Unless, then, something very odd is meant by the phrase “establishing a national church,” the president is simply out of luck. Consistent with determining the proper separation of powers pursuant to Articles I, II, and III, and consistent also with a sensible interpretative use of the First Amendment, the proper conclusion would be that if a national church were to be established it would have to be done by Congress—and Congress is itself forbidden to do so either directly (i.e., on its own account) or indirectly (i.e., by authorizing the president to do so).