

Louisiana Law Review

Volume 45 | Number 3

The 1984 Revision of the Louisiana Civil Code's

Articles on Obligations - A Student Symposium

January 1985

The Moral Wish as Father to the Constitutional Thought - Constitutional Fate: Theory of the Constitution. New York: Oxford University Press, 1982. Pp. 285. \$22.95 (Cloth), By Philip Bobbitt. \$7.95 (paper).

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Repository Citation

Gary L. McDowell, *The Moral Wish as Father to the Constitutional Thought - Constitutional Fate: Theory of the Constitution*. New York: Oxford University Press, 1982. Pp. 285. \$22.95 (Cloth), By Philip Bobbitt. \$7.95 (paper), 45 La. L. Rev. (1985)

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BOOK REVIEW

THE MORAL WISH AS FATHER TO THE CONSTITUTIONAL THOUGHT

Constitutional Fate: Theory of the Constitution. New York: Oxford University Press, 1982. Pp. 285. \$22.95 (Cloth), By Philip Bobbitt. \$7.95 (paper).

*Reviewed by Gary L. McDowell**

Like the old gray mare, constitutional theory just ain't what she used to be. There was a time—not so long ago, really—when constitutional theory was primarily concerned with analysis of the text of the Constitution.¹ No longer is this an article of faith. Prompted by the Warren Court's willingness to extend constitutional protection to rights neither explicitly found in the Constitution itself nor granted by prior constitutional jurisprudence, a new generation of lawyers, judges, and law professors has dedicated itself to taking rights seriously. It seems beyond doubt that the true legacy of the Warren Court will prove to be not so much its decisions in specific cases as the jurisprudential attitudes it spawned and nurtured.²

Since the heyday of Warren Court activism, there has been a growing army of theorists whose efforts to bolster the intellectual integrity of Warren Court liberalism have all but cast the rest of the constitutional landscape in their moral shadows.³ Believing, as Ronald Dworkin has put it, that there can be no progress until there has been a fusion of moral philosophy with constitutional law, contemporary theorists have unrelentingly pursued in the pages of the leading law reviews and under

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1. See, e.g., *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); 3 C. Warren, *The Supreme Court in United States History* 470 (1922) ("However the court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the court.").

2. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 *Harv. L. Rev.* 769, 804 (1971).

3. See, e.g., A. Miller, *Toward Increased Judicial Activism* (1982); M. Perry, *The Constitution, the Courts, and Human Rights* (1982); L. Tribe, *American Constitutional Law* (1978).

the imprints of the most respected publishing houses what Alexander M. Bickel described as America's quest for moral self-government.⁴ As a result, those with an interest in constitutional jurisprudence have been forced to chop their way through a "jungle of moral philosophy theories."⁵

In the old days, constitutional theory was understood to move between the poles of "strict construction" and "loose construction," between what used to be called a Jeffersonian view of the Constitution and a Hamiltonian view. But all has changed. Now constitutional theory is understood to move between something called "noninterpretive" judicial review and "interpretive" judicial review. In the old school the question was how to read the Constitution; in the new, the question is whether to read the Constitution. As a result, contemporary constitutional theory has little to do with the explication of the constitutional text or its intention. Today constitutional theory is generally comprised of innovative constructions of moral theories that are then superimposed on the Constitution—if, indeed, the document is considered at all. Few writers display this modern proclivity as candidly as Philip Bobbitt. To those who endeavor to take the Constitution—both its text and its original intention—seriously, this is indeed a book, as one commentator has described it, that one "instantly dislikes."⁶

This is not to say that this is a book totally devoid of merit. It is of value for two reasons. First, Professor Bobbitt's typology of constitutional theories is helpful in sorting through a collection of writings that might otherwise strike one as imponderable if not simply impenetrable. The second value of *Constitutional Fate* is more substantive. This book shows just how far awry good intentions can go, and the danger to the Constitution that is the result of such murky moralizing and ideological meandering.

Constitutional Fate sketches for the reader the current contours of constitutional theory. Beginning with what he calls the Historical Argument, or the intentions of the Framers, Professor Bobbitt leads his reader through the various other arguments that describe the ways people think about the Constitution. Through his analysis the author moves from the concrete to the more abstract. The Historical Argument, he concludes, is ultimately "more effective as rhetoric than as decision procedure."⁷ The Textual Argument—the present sense of the language of the document—holds out greater opportunities; it is a theoretical device that "provides a valve through which contemporary values can be intermingled with the Constitution."⁸ Moving still further along, one

4. A. Bickel, *The Least Dangerous Branch* (1962).

5. R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 181 n.1 (1982).

6. Agresto, *Book Review, Benchmark* 55 (Mar.-Apr. 1984).

7. P. Bobbitt, *Constitutional Fate: Theory of the Constitution* 24 (1982).

8. *Id.* at 36.

finds the Structural Argument, a belief that certain results are implicit in the institutional relationships created by the Constitution. This is a still looser way of thinking about constitutional law in that the conclusions one can reach do not depend upon the confining and peculiar facts of a particular case; rather, they "arise from general assertions about power and social choice."⁹ Even farther away from the morally shackling provisions of the literal Constitution, one can take solace in the Prudential Argument, the understanding that constitutional doctrines are best advanced by practical wisdom; cases are rightly decided by consideration not so much of the constitutional text as by reference to "the political and economic circumstances surrounding the decision."¹⁰ Finally, one bumps up against the Doctrinal Argument. The principal premise of this line of reasoning is "the notion that the judicial function with respect to the Constitution is essentially a common law function."¹¹

While Bobbitt finds each of the approaches helpful in thinking about the Constitution and constitutional law (a distinction not terribly important in his jurisprudential efforts), they are, taken both separately and collectively, deficient. What is missing is precisely what Bobbitt purports to supply: a line of constitutional reasoning that will "help justify particularly difficult and otherwise troublesome decisions."¹² What that means, at bottom, is a more amorphous constitutional argument that can be used on demand to justify decisions with which the commentator agrees but for which there is no clear support—be it historical, structural, textual, doctrinal, or prudential. What is needed is what Professor Bobbitt offers in his own name: The Ethical Argument.

The Ethical Argument the author has in mind is an argument advancing a particular view of constitutional meaning that is an attempt to free constitutional law from the cold, dead hand of the past. His quest is for a constitutional theory whereby "the present . . . [can] control the past."¹³ The crux of the Ethical Argument is that it seeks to advance, not sterile institutions or stale intentions or precedents, but nothing less than the "ethos of the American polity."¹⁴

The mechanics of the Ethical Argument are neither too complex, nor too new.¹⁵ In making an ethical argument, Bobbitt argues, the text is often used "not for its own force, but rather as evidence of a more general principle from which a nontextual argument was derived."¹⁶ For

9. *Id.* at 74.

10. *Id.* at 61.

11. *Id.* at 44.

12. *Id.* at 93.

13. *Id.* at 239.

14. *Id.* at 94.

15. See Fiss, Foreword—The Supreme Court 1978 Term: The Forms of Justice, 93 *Harv. L. Rev.* 1 (1979); Chayes, The Role of the Judge in Public Law Litigation, 89 *Harv. L. Rev.* 1281 (1976).

16. P. Bobbitt, *supra* note 7, at 142.

example, "the textual provision of the Eighth Amendment which forbids cruel and unusual punishment is evidence of a more general constitutional ethos, one principle of which is that government must not physically degrade the persons for whose benefit it is created."¹⁷ This is more than a mere leap of logic; it is a case of the moral wish being father to the constitutional thought.¹⁸

The ultimate object Bobbitt seeks to achieve by tapping this great American ethos is to transform constitutional law from mere litigation into a moral source for the development and articulation of a national constitutional conscience. At the most profound level, this is nothing more than an argument for the political resuscitation of the often maligned doctrine of substantive due process: not the old substantive due process rooted in a theory of property rights, but a new substantive due process rooted in what has come to be seen as a polar opposite of property rights—human rights.¹⁹ This new substantive due process is "necessary" given the "necessarily partial list of rights which is the Bill of Rights."²⁰ As Bobbitt puts it, "substantive due process is ethical argument by another name. That is, the attempt to require of states a process that yields fair legislation is in part a reflection of the constitutional ethos of limited government."²¹

Thus by Bobbitt's standards the Constitution is more than a constitution. It is, he argues, "our Mona Lisa, our Eiffel Tower, our Marseillaie."²² And in this spirit, our Bill of Rights is much more than a catalog of restrictions on government. "The particular Bill of Rights we have," Bobbitt suggests, "serves, and seems chosen to serve, as more than a text for exegesis. It acts to give us a constitutional motif, a cadence of our rights, so that once heard, we can supply the rest on our own."²³ Not only is the Bill of Rights the theoretical heart of the Constitution; the Bill of Rights exists less in its letter than in the spirit evoked by whatever moral mood happens to move a majority of justices. This is not a constitution designed to be a popular constitution of limited powers; this is an unlimited constitution with a moral vengeance.

In the end Bobbitt's enterprise is highly undemocratic. The judiciary is often morally obligated to push the constitutional ethos in the face of "the largely inchoate notions of the people generally."²⁴ The point

17. *Id.* at 143.

18. See R. Berger, *supra* note 5, at 194.

19. See generally B. Siegan, *Economic Liberties and the Constitution* (1980).

20. P. Bobbitt, *supra* note 7, at 147.

21. *Id.* at 168.

22. *Id.* at 185.

23. *Id.* at 177.

24. *Id.* at 211.

of judicial power is not to define constitutional lines and limits but to give "concrete expression to the unarticulated values of a diverse nation."²⁵ Not that these values are in any way permanent; the constitutional ethos itself changes.²⁶ There are two problems with this logic that instantly float to the surface of such an argument. First, it is not clear, as Bobbitt seems to believe with Owen Fiss and others, that judges are possessed of a "special substantive rationality" that enables them to discover unarticulated values. They are, after all, only lawyers who usually find their way to the bench, not by moral or intellectual virtue, but by their political attachments and ideological inclinations. Second—and this is the deeper problem—it is not clear that the form of popular government which our Constitution creates and empowers can logically be understood to rest on unarticulated values that are discerned and applied by officers of that government. The first presumption of the legitimacy of popular government is that it has something to do with popular opinion. That is not to say that popular opinion can never be wrong or never be tyrannical; at least since James Madison penned the tenth essay of *The Federalist* we have known better. But it is to say that there is a great distance between a court that says what government cannot do on the basis of the terms of a written constitution and a court that says what government should do to give moral vent to unarticulated values. The judges, no less than any other officials or even the people, were not expected to be "the philosophical race of kings wished for by Plato."²⁷

At its deepest level *Constitutional Fate* is a rhetorically shimmering attempt to argue for the notion of a "living" constitution. It is an argument that holds that a written constitution of limited powers and clearly drawn rights can only be given proper effect by ignoring it. It is an argument, not for a constitution of fixed principle deemed by its creators as fundamental and designed with the hope that it would last, if not forever, then surely for ages and only alterable by the "most solemn and authoritative" act of amendment,²⁸ but for a "participatory Constitution"²⁹ whose meaning is understood to rest on nothing firmer than time, circumstances, and the shrewd insights of a judge bent on doing justice for the people in spite of themselves.

25. *Id.*

26. *Id.* at 221.

27. *The Federalist* No. 49, at 340 (J. Madison) (J. Cooke ed. 1961).

28. McDowell, *On Meddling with the Constitution*, 5 *J. Contemp. Stud.* 3, 4 (Fall 1982).

29. P. Bobbitt, *supra* note 7, at 235.

This approach of taking rights seriously—an approach of “considerable passion and conviction”³⁰—serves in the end only to take the Constitution frivolously.³¹ To view rights as a matter of judicial beneficence rather than as the result of limited government is to ignore what most threatens rights. Bobbitt and others of his jurisprudential persuasion like Laurence Tribe and Michael Perry too easily dismiss the hard-earned wisdom of the founding generation, certainly a generation that knew something about rights. To them rights would not be secure if they depended simply on public officials—any public officials, judges included—for their protection. Nor did they think rights could only be secured by a bill of rights.³² The Founders were deeper than that; their theories reflected a far more profound appreciation of human nature than do those of our contemporary theorists.³³ To the Founders, the Bill of Rights was not much more than a “fitting close to the parenthesis around the Constitution that the preamble opens.”³⁴ The substance of their constitutional design lay in “a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not in its preamble or its epilogue, that the security of American civil and political liberty lies.”³⁵

“In our theories,” Professor Bobbitt concludes, “shall be our fates.”³⁶ With constitutional theories such as Professor Bobbitt’s, there is greater cause for concern than for comfort.

30. *Id.* at 94.

31. See Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 *Sup. Ct. Rev.* 49.

32. See *The Federalist No. 84* (A. Hamilton) (J. Cooke ed. 1961).

33. See, e.g., Diamond, *The Federalist*, in *History of Political Philosophy* 631 (L. Strauss & J. Cropsey 2d ed. 1972).

34. Storing, *The Constitution and the Bill of Rights*, in *Taking the Constitution Seriously: Essays on the Constitution and Constitutional Law* 266, 280 (G. McDowell ed. 1981).

35. *Id.*

36. P. Bobbitt, *supra* note 7, at 242.