

Michigan Law Review

Volume 101 | Issue 6

2003

The New Leviathan

Dennis Patterson
Rutgers University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Human Rights Law Commons](#), [International Law Commons](#), [Law and Economics Commons](#), [Law and Philosophy Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Dennis Patterson, *The New Leviathan*, 101 MICH. L. REV. 1715 (2003).
Available at: <https://repository.law.umich.edu/mlr/vol101/iss6/15>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE NEW LEVIATHAN

Dennis Patterson*

THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY. By Philip Bobbitt. New York: Knopf. 2002. Pp. xxxii, 919. \$40.00.

Good is an empty space into which human choice may move.

— Iris Murdoch¹

Reputation in any field is an elusive phenomenon: part notoriety, part honor, part fame, part critical assessment.² Even in legal scholarship it has an uneven, unpredictable quality. It is hard to imagine a book by a law professor that has had more immediate impact on world leaders than Philip Bobbitt's *The Shield of Achilles*.³ Much of the national-security strategy devised by the U.S. administration after the September 11 attacks expresses ideas Bobbitt conceived long before;⁴

* Distinguished Professor, School of Law (Camden) and Department of Philosophy (New Brunswick), Rutgers University; Visiting Fellow (2002-03), Department of Politics (Madison Program), Princeton University. J.D., Ph.D. (Philosophy) 1980, University at Buffalo, State University of New York — Ed. Thanks to Ari Afilalo, Michael Carrier, Anne Dalesandro, Mary Eckhardt, Kim Ferzan, Richard Hyland, Michael Livingston, Tom Morawetz, Andrew Moravcsik, Patrick S. O'Donnell, Ralf Poscher, Rand Rosenblatt, Ray Solomon, and Jefferson White for generous and helpful comments on drafts of this Review. Special thanks to Ron Collins. Thanks also to my research assistants, Alyson Jones and Daniella Gordon.

1. IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 97 (1970).

2. Consider: In 1940, with his reputation in eclipse, Scott Fitzgerald died in Los Angeles. The poet Stephen Vincent Benét wrote an appreciation, which ended: "You can take off your hats now, gentlemen, and I think perhaps you had better. This is not a legend, this is a reputation — and, seen in perspective, it may well be one of the most secure reputations of our time." Stephen Vincent Benét, *Fitzgerald's Unfinished Symphony*, 24 *SATURDAY REV. LITERATURE*, Dec. 6, 1941, at 10 (book review).

3. Professor of Law, University of Texas Law School.

4. The White House writes:

Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank.

THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* <http://www.whitehouse.gov/nsc/nssintro.html> (last visited July 22, 2003).

In *Achilles*, Bobbitt wrote:

For five centuries, it has taken the resources of a state to destroy another state: only states could muster the huge revenues, conscript the vast armies, and equip the divisions required to threaten the survival of other states. . . . We are entering a period, however, when small

and from a different point on the political spectrum is the Archbishop of Canterbury,⁵ whose televised nationwide address in January explicitly took the book as its text. The British Foreign Secretary, the E.U. Commissioner for External Relations, and the international security advisor to the Secretary General of the E.U. have all made speeches that draw on Bobbitt's ideas.⁶ In January of 2003, the *Guardian* newspaper stated that "among [the] powerful, one book has become required reading."⁷ This established British liberal voice echoed the suggestion by the American conservative *National Review* that "[t]his book — with its masterly reappraisal of modern history and subtle elucidation of today's geopolitics — should be on every desk in the State Department,"⁸ and its conservative companion the *Weekly Standard* recommended that it "should become required reading not only in the academy but for the military and civilian decision-makers of the industrialized world."⁹ For all this, Bobbitt's book is likelier to have more influence than renown; as with his earlier works, which

numbers of persons, operating with the enormous power of modern computers, biogenetics, air transport and even small nuclear weapons, can deal lethal blows to any society. . . . [and] the origin of these attacks can be effectively disguised Furthermore, an adversary state might well want to shield itself from retaliation by operating . . . through shadowy agents posing as terrorists or acting through the infinitely extendable arms of the Internet.

Pp. xxi, 811-12.

And the White House writes:

As we defend the peace, we will also take advantage of an historic opportunity to preserve the peace. Today, the international community has the best chance since the rise of the nation-state in the seventeenth century to build a world where great powers compete in peace instead of continually prepare for war. Today, the world's great powers find ourselves on the same side — united by common dangers of terrorist violence and chaos.

THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, *supra*.

In *Achilles*, Bobbitt wrote:

The September attacks on the US provide that country with an historic opportunity . . . the moment and the context in which to organize a grand coalition of states

. . . States that otherwise might find themselves in violent competition can take this opportunity to cooperate in a new security structure . . . : all are subject to attacks by a [global terrorist network] because [such a network] is the neighbor of all.

Pp. 819, 822.

5. Rowan Williams, Dimpleby Lecture (Dec. 19, 2002) ("This reading of our present situation is spelled out in great detail by the American strategist and historian Philip Bobbitt."), available at http://www.archbishopofcanterbury.org/sermons_speeches/021219.html (last visited July 22, 2003).

6. Jack Straw, Lord Mayor's Lecture (Nov. 13, 2002), available at <http://www.britainonline.org.pk/highcomm/downloads/13nov.pdf>; Robert Cooper, *Grand Strategy*, PROSPECT, Dec. 1, 2002; Chris Patten, *Friends Across Water*, GUARDIAN, May 18, 2002, at 8 (book review); Prime Minister Ranil Wickremesinghe, *Making Our People Rich*, HINDU, (Aug. 25, 2003), available at <http://www.hinduonnet.com/thehindu//2003/08/25/stories/2003082501601000.htm>.

7. Michael Howard, *Best Get Used to War*, GUARDIAN, Jan. 13, 2003.

8. Michael Knox Beran, *Soldiers of the State*, NAT'L REV., Sept. 30, 2002, at 45, 47.

9. Fred Siegel, *War Matters*, WKLY. STANDARD, Aug. 26-Sept. 2, 2002, at 36-37.

have reshaped a number of fields, he remains, in the U.S. at least, the most influential person of whom you have never heard.

Bobbitt's credentials for delivering a work of such far-reaching influence are matched by few scholars. He worked for two decades in government and academia,¹⁰ and has written on topics as diverse as decision theory,¹¹ nuclear weapons strategy,¹² and constitutional theory.¹³ He has long been regarded, even by his severest critics, as a strikingly original thinker.¹⁴ Those who look to *Achilles* for examples of this originality will not be disappointed. Surprising analysis and discussion abound. Bobbitt shows the relationship between Hans Kelsen's work¹⁵ and Wittgenstein's *Tractatus*; he offers a theory of the origin of international law in constitutional law — contrary to that espoused by Kelsen (pp. 586-92); we are given a new definition of an old term, the "constitutional order," and Bobbitt describes the term's unique basis in legitimacy, which he also says accounts for the "speciation" of such orders (p. 346; *passim*); there is an original monograph on Colonel House, Woodrow Wilson's trusted friend and advisor (pp. 367-410); and he develops a new application in the area of foreign policy for social-psychology work done in the late 1960s. All this is in addition to his novel, central thesis that innovations in warfare and

10. In addition to university teaching in the U.S. and U.K., he has served both Democratic and Republican administrations and has held various posts at the National Security Council ("NSC"), the Department of State, and the White House, and served as Legal Counsel to the Senate Select Committee on the Iran-Contra Affair. See <http://www.utexas.edu/law/faculty/pbobbitt/> (last visited July 22, 2003). Until mid-June of 1999, he was the Senior Director for Strategic Planning at the NSC. Prior to holding that post, he was Senior Director for Critical Infrastructure having previously been Director for Intelligence at the NSC. From 1990-93, Bobbitt was Counselor on International Law for the Department of State. *Id.* He was Legal Counsel to the Senate Select Committee on the Iran-Contra Affair (1987) and the principal author of the report, COVERT ACTION AND THE CONSTITUTION; and Associate Counsel to the President (1980-81). *Id.*

11. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978) [hereinafter TRAGIC CHOICES].

12. PHILIP BOBBITT, DEMOCRACY AND DETERRENCE: THE HISTORY AND FUTURE OF NUCLEAR STRATEGY (1988) [hereinafter DEMOCRACY AND DETERRENCE]; US NUCLEAR STRATEGY: A READER (Philip Bobbitt et al. eds., 1988).

13. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984) [hereinafter CONSTITUTIONAL FATE]; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter CONSTITUTIONAL INTERPRETATION].

14. See Mark Tushnet, *Justification in Constitutional Adjudication*, 72 TEXAS L. REV. 1707, 1707 (1994).

Roughly speaking, scholars of constitutional law fall into two groups. First there are the celebrated scholars who either restate approaches taken by an earlier generation . . . or repackage ideas developed by other scholars . . . Then there are original scholars. Philip Bobbitt is an original scholar. Thus my dichotomy suggests that the insights in his work are likely to be ignored or transformed by the larger scholarly community.

Id.

15. P. 873 n.34 (citing Hans Kelsen, *Centralization and Decentralization*, in AUTHORITY AND THE INDIVIDUAL 210, 239 (1937)).

revolutions in the constitutional order interact such that neither occurs without fundamentally affecting the other — with all its implications for our current constitutional system.

There is a complex sensibility at work in *Achilles*¹⁶ consistent with that displayed in Bobbitt's previous works. It takes a certain cast of mind and temperament to go against the grain of received opinion. In every subject to which he has turned his attention, Bobbitt puts in question the terms of debate and recasts the discussion. It is this quality of mind that makes all his work — but especially *Achilles* — so instructive.

The simplest explanation for the wide interest in *Achilles* is the degree to which recent events fall in line with a scenario that was envisioned by Bobbitt years before they unfolded in New York, Washington, and the skies over Western Pennsylvania.¹⁷ Many said the world changed that hellish day. If Bobbitt is right, the world had already changed: September 11 was but a wakeup call.

Achilles opens with this statement of prologue:

We are at a moment in world affairs when the essential ideas that govern statecraft must change. For five centuries it has taken the resources of a state to destroy another state: only states could muster the huge revenues, conscript the vast armies, and equip the divisions required to threaten the survival of other states. Indeed, posing such threats, and meeting them, created the modern state. In such a world, every state

16. *Achilles* is composed of two Books. In Book I ("State of War"), Bobbitt makes three arguments. First is the thesis of the Long War, the epochal war of the twentieth century. Second, Bobbitt employs the concept of an "epochal war" to describe the evolution of the State over the course of the last five hundred years. The third argument is that we are entering a period where the constitutional order will be altered by new forms of warfare. The main themes of Book I are the relationship of law to strategy, the definition of a constitutional order, the idea of a market-state, and the notion of an epochal war. Book II ("States of Peace") describes the "society of states" about which Bobbitt also makes three arguments. First, the constitution of the present society of states was written at Versailles and is incapable of coping with twenty-first century challenges. Second, constitutions for the society of states are always written at peace conferences, which occur at the end of epochal wars. Finally, a society of market-states has multiple futures. Bobbitt explores three possible futures for the society of market-states. The book concludes with a poignant and moving Postscript, written after the events of September 11. Interspersed throughout the book are eighteen poems, including works by Homer, Philip Larkin, W.H. Auden, Joseph Brodsky, John Milton, Wislawa Szymborska, and two by Czeslaw Milosz, a favorite. See Philip Bobbitt, *Philip Bobbitt's Favourite Books on International Affairs*, GUARDIAN (noting Milosz as one of Bobbitt's favorite authors), available at <http://books.guardian.co.uk/top10s/top10/0,6109,743857,00.html> (last visited July 10, 2003).

17. Edward Rothstein, *Seeing the New Era Before 9/11*, N.Y. TIMES, June 1, 2002, at B9.

[N]o one could have guessed at the kinds of traumas and transformations that were about to unfold [after September 11th]. But judging from this book — which after a decade of work, must have been all but complete at the time — the historian Philip Bobbitt had a pretty good idea. . . . Mr. Bobbitt's evolutionary map of warfare's impact on the state foreshadows the kinds of events still unfolding. What has happened since — even last week's announcement that Russia is now affiliated with its onetime nemesis, NATO — fits eerily well with his speculations.

knew that its enemy would be drawn from a small class of potential adversaries. This is no longer true, owing to advances in international telecommunications, rapid computation, and weapons of mass destruction. The changes in statecraft that will accompany these developments will be as profound as any that the State has thus far undergone. (p. xxi)

The persuasiveness of Bobbitt's thesis — that the State as we know it is undergoing a fundamental transformation — is given convincing support by his analysis of the entire history of the modern State in relation to five “epochal wars” which give rise to five different constitutional orders. His analysis of the State's legitimacy and legitimation is “topological”; constant among the five changes in the constitutional order is an interplay between strategy, law, and history.¹⁸ This interplay has determined legitimacy over the course of the last five hundred years, periodically resulting in the demise of one form of the State and the institution of a new one.¹⁹ As each epochal war is concluded,²⁰ legitimacy is realized by the triumphant new constitutional order²¹ and is then ratified at a peace conference that settles the constitutional form for the newly constituted society of states. The question for our time is: What war — and what peace — will someday be seen as having accomplished the same sort of fundamental change in the constitution of contemporary international society by legitimizing the market-state?” (p. 484), which Bobbitt sees as the new emerging constitutional order.

18. In his view, “there is no State without strategy, law and history, and . . . these three are not merely interrelated elements, they are elements each composed . . . of the other[.]” P. 6.

19. The Princely State (1515-1555) provides an example,

of a strategic imperative animating a constitutional innovation — an instance, that is, where the insistent question of security in a specific context (geography, wealth, small population) yields a new legal solution and requires a story to rationalize that solution. If the constitutional innovation of the Modern State was in part a response to the threat posed by mobile artillery to the walled cities of Italy, the precise shape of that response — the princely state — was not governed by strategic considerations alone, but also by the felt need to ensure legitimacy for the leadership that wedded its future to this new creation.

P. 83.

20. Five forms of the State and their accompanying epochal wars mark the metamorphoses of the State: Princely State (Habsburg-Valois Wars) 1515-1555; Kingly State (Thirty Years' War) 1618-1648; Territorial State (Wars of Louis XIV) 1667-1713; State-Nation (Wars of the French Revolution) 1792-1815; Nation-State (The Long War) 1914-1990. P. 346.

21. The legitimacy of the State has been the subject of philosophical speculation since antiquity. Legitimacy — the right of the State to command allegiance and exercise a monopoly on violence — is conventionally tied to sovereignty. Nowhere is this more evident than modernity where the first great theorist of the state — Hobbes — grounded the allegiance of individuals to the State in an irrevocable covenant between the State and its citizens. Bobbitt eschews a pure philosophical approach to the question of legitimacy and shows that legitimacy is best thought of as an historical achievement; a unique fusion of strategy and law. This is why bringing strategy together with statecraft and law marks a development in the theory of legitimacy. As Bobbitt puts it, “history is the medium by which the legitimacy of the constitutional structure is married to the success of the strategy of the state.” P. 207.

The last constitutional order achieved victory over its competitors in 1990, after the most recent epochal war that Bobbitt denominates the “Long War.”²² This ended with the demise of fascism and communism and the triumph of parliamentary democracy. Shortly after the collapse of the former Soviet Union, some claimed that with the triumph of democracy the history of the State ended.²³ Bobbitt thinks otherwise. It was the history of the *nation-state* that ended. The legitimacy of the current constitutional order — the nation-state — is in irreversible decline. But the nation-state is only the most recent constitutional order. Bobbitt is clear that the State will not go away, but its nature will change so thoroughly that its statecraft will be rendered obsolete.²⁴ Nation-states will be replaced by market-states,²⁵ and changes in the nature of the State will be accompanied by new forms

22. The “Long War” encompassed World War I, the Bolshevik Revolution, the Spanish Civil War, the Second World War, the Korean and Viet Nam wars, and the Cold War. One of the most thoughtful commentators on *Achilles* is Paul Hirst. He takes issue with Bobbitt’s Long War thesis. See Paul Hirst, *Hirst on Bobbitt*, OPEN DEMOCRACY, JULY 7, 2002, at <http://www.opendemocracy.net/debates/article.jsp?id=3&debateId=77&articleId=690> (“The long war only makes sense if, as Bobbitt claims, Germany was a fascist power before World War One — bent on world domination and controlled by an authoritarian regime.”). For criticism of Bobbitt’s account of the collapse of the Weimar Republic, see Gopal Balakrishnan, *Algorithms of War*, NEW LEFT REV., Sept./Oct. 2003, at 5, 18-20 (reviewing *The Shield of Achilles*).

23. This thesis is advanced in FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993). Bobbitt points out that Hegel made exactly the same sort of “end of history” claim for the state-nation at about the moment when its founding history was achieving consensus. See p. 215 n. Additionally, “Fukuyama got the end of ideology right, but he missed the resurgence of nationalism. He missed Islamic fundamentalism. He imagined that the end of the ideological world of the 20th century would bring a sort of stasis.” Philip Bobbitt, *Bobbitt on Bobbitt*, OPEN DEMOCRACY, Apr. 11, 2002, at <http://www.opendemocracy.net/debates/article.jsp?id=3&debateId=77&articleId=733> (last visited Sept. 18, 2003).

24. An interesting approach to the changing nature of the State — one which echoes themes in Bobbitt’s argument — can be found in Robert Cooper, *The Post-Modern State, in RE-ORDERING THE WORLD 11* (Mark Leonard ed., 2002) (comparing states in the modern and “postmodern” worlds along the lines of war, security, and statecraft). In his much-discussed article *Power and Weakness* (now the book ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003)), Robert Kagan places Cooper’s postmodern Europe in the larger context of U.S. power and global (especially European) security. See KAGAN, *supra*, at 74.

“The challenge to the postmodern world,” Cooper argues, “is to get used to the idea of double standards.” Among themselves, Europeans may “operate on the basis of laws and open cooperative security.” But when dealing with the world outside Europe, “we need to revert to the rougher methods of an earlier era — force, preemptive attack, deception, whatever is necessary.” This is Cooper’s principle for safeguarding society: “Among ourselves, we keep the law but when we are operating in the jungle, we must also use the laws of the jungle.”

Id. (internal citation omitted). This state of affairs is not without difficulties. According to Kagan, the United States must “play by the rules of a Hobbesian world . . . [here] it must sometimes act unilaterally, not out of a passion for unilateralism but only because, given a weak Europe that has moved beyond power, the United States has no choice *but* to act unilaterally.” *Id.* at 99.

25. I discuss three possible versions of the market-state. See *infra* notes 34-35 and accompanying text.

of warfare.²⁶ War is an inevitable feature of human existence, Bobbitt argues.²⁷ We cannot change this fact but we can, with careful planning, choose our wars.²⁸

Why is the legitimacy of the nation-state in decline, and why does Bobbitt believe the market-state will take its place? To see this, one must appreciate the basis for legitimacy in both these forms, for that is what distinguishes constitutional orders from each other. The nation-state promised to improve the material well-being of its nation and made this promise its *raison d'être*. Bobbitt identifies five developments that will make this promise increasingly difficult to fulfill. First is an international system of trade and finance that promotes exchanges of goods, and talent, and the free movement of capital.²⁹ As capital moves from place to place around the globe, seeking the high-

26. Al Qaeda illustrates this development. Bobbitt sees Al Qaeda not as a rogue gang but a malignant form of market-state:

The multinational mercenary terror network that Osama bin Laden and others have assembled is a malignant and mutated version of the market-state. Like other emerging market-states, it is a reaction to the strategic developments of the Long War that brought forth cultural penetration, the liberalization of trade and finance, and weapons proliferation, on an unprecedented scale. Like other states, this network has a standing army; it has a treasury and a consistent source of revenue; it has a permanent civil service; it has an intelligence collection and analysis cadre; it even runs a rudimentary welfare program for its fighters, and their relatives and associates. It has a recognizable hierarchy of officials; it makes alliances with other states; it promulgates laws, which it enforces ruthlessly; it declares wars.

This network, of which Al Qaeda is only a part, greatly resembles a multinational corporation but that is simply to say that it is a *market-state*, made possible by advances in international telecommunications and transit, rapid computation, and weapons of mass destruction. Lacking contiguous territory, Al Qaeda is a kind of virtual state, which means that our classical strategies of deterrence based on retaliation will have to be rethought. That is another way of saying that when Afghanistan is conquered and pacified, the war against terrorism will go on. P. 820.

27. War, Bobbitt writes,

is not a pathology that, with proper hygiene and treatment, can be wholly prevented. War is a natural condition of the State, which was organized in order to be an effective instrument of violence on behalf of society. Wars are like deaths, which, while they can be postponed, will come when they come and cannot be finally avoided.

P. 819 (emphasis omitted).

28. In this regard, Bobbitt describes our choices this way:

The epochal war we are about to enter will either be a series of low-intensity, information-guided wars linked by a commitment to re-enforcing world order, or a gradually increasing anarchy that leads to intervention at a much costlier level or even a cataclysm of global proportions preceded by a period of relative if deceptive peace. It is ours to choose.

P. 342.

29. One harbinger of the transition to the market-state is the phenomenon of "globalization." P. 469 ("[G]lobalization has undermined the collectivist values represented by the nation-state and turned attention to the benefit of individuals."). Globalization acts as a catalyst in "[t]he real shift . . . from public purposes to private purposes, from a state that takes its legitimacy by assuring the common welfare to one that instead relies on providing the broadest possible opportunity for the satisfaction of individual interests." P. 470. For Bobbitt, "globalization" is merely an epiphenomenon of deeper developments; not a fundamental driver but a symptom.

est return, financial markets and national currencies are subject to violent upset, removing from the nation-state the power to control the value of its currency.³⁰ Second are threats that do not observe national boundaries. Examples of these are environmental threats and diseases such as AIDS and SARS. No nation-state alone can protect its nation or hide from these transnational threats. Third are threats to the national culture. We often hear that with the advent of the Internet came a world culture. It is a fairly safe bet that no nation-state can limit or meaningfully control citizen access to foreign cultures. The fourth development is one of which we need no reminder — weapons of mass destruction. Like the threat posed by mobile artillery to the walled cities of fifteenth-century Italy,³¹ the ballistic missile, the suitcase bomb, and chemical and biological weapons are engendering a new constitutional order. These weapons of mass destruction make it impossible to defend the nation by defending the perimeters of the nation-state. As a result of this development and the increasing dispersion of this technology, no nation-state can promise to increase the security of the nation by increasing its offensive capabilities: at most it can decrease its vulnerability. Fifth, and of particular importance, is international law³² and the global system of human rights,³³ which

30. George Soros, who has profited (and lost) mightily wagering against currencies, has written three books arguing for reform of global markets. See GEORGE SOROS, *THE CRISIS OF GLOBAL CAPITALISM: OPEN SOCIETY ENDANGERED* (1998); GEORGE SOROS, *ON GLOBALIZATION* (2002); GEORGE SOROS, *OPEN SOCIETY: REFORMING GLOBAL CAPITALISM* (2000).

31. P. 80 (“Machiavelli, writing in 1519, said that after 1494, ‘[n]o wall exists, however thick, that artillery cannot destroy in a few days.’ Suddenly, walls, towers, moats — all were rendered obsolete.” (internal citation omitted)).

32. There are conceptual problems with the current approach (the “universal view”) to international law:

The universal view of international law is flawed in two important respects (neither having much to do, however, with the common criticism that such universal scope must await a universal morality). First, it mixes the equality of states, a legal concept, with the decision to use force, a strategic concept, in a way that is fatal to both, and thus eerily recapitulates the early prehistory of the State, which was first constituted out of the separation of these two concepts. Thus it treats the society of states as if it were a society of individuals.

P. 361.

33. The United Nations, Bobbitt argues, is part of the problem.

The U.N., a second generation of the League [of Nations], has given us a second generation of . . . failures, that is, a new wave of crimes shielded by sovereignty

. . . It is instructive . . . to look closely at how the U.N. has actually managed to succeed when it has acted to wage war. It may surprise some to learn that its successes have come only because the ideal of a world covenant enforced by a military force has been quickly, if quietly, abandoned.

P. 472 (discussing the U.N. Security Council’s handling of the North Korean attack on South Korea).

According to Bobbitt, this will lead to the delegitimation of the U.N.:

Though the Charter, interpreted as a world covenant of superior law, has been of doubtful utility in preventing armed conflict, its most troublesome aspect may lie in peacetime. Very

impose legal rules on the nation that have not been ratified by the nation-state. But the State will not wither away under these pressures. Rather, the basis of its legitimacy will change. Market-states will claim power on the grounds that they are the means by which opportunity is maximized.³⁴ In the future, our statecraft “must reflect the emergence

simply, it is not obvious that a universal law-creating system actually based on democratic majoritarianism and self-determination is either acceptable or desirable. Nor is the U.N. wholly consistent with such a system in any event, owing to the privileged role of the permanent, veto-bearing members of the Security Council. Yet a universal system that professes allegiance to the sources of authority of the parliamentary nation-state but denies them in fact is of doubtful legitimacy.

Pp. 474-75.

And what will take the place of the U.N.?

When it is replaced by a constitution for a society of market-states, this problem will disappear because that constitution will resemble those of corporations, which allow for weighted voting based on wealth. But to adopt such a constitution, we will have to abandon the pretense of a world sovereign: corporations, after all, do not make law.

P. 475.

There is, perhaps, no finer example of the U.N.'s continuing inability to solve security crises than its handling of Saddam Hussein. Bobbitt writes:

Saddam Hussein has spent the last twelve years breaching every provision of the Ceasefire Agreement that ended the Gulf War. Though required to “unconditionally accept” disarmament of his weapons of mass destruction under UN supervision, he has actively sought to acquire such weapons, expelled the inspectors and hidden the WMD he already had. After the defection of the head of his biological weapons program in 1995, Saddam Hussein was compelled to acknowledge that he had produced no fewer than 183 biological weapons in violation of the Agreement. Since 1998, he has repeatedly attempted to acquire weapons-grade uranium. He has replaced the original design for a nuclear warhead with a new design that could accommodate a Scud missile. Nine such missiles are still unaccounted for in the Iraqi inventory.

When Saddam Hussein attacked the unprotected Kurds in violation of the Agreement, the Coalition should have acted, immediately and decisively. But for the same reasons one hears now — concern about post-Saddam governance, anxiety among local allies over domestic reaction, fear of retaliation — the US could not marshal support for action at that time or at any time during the following decade in which Saddam Hussein flagrantly violated the Agreement that had allowed him to maintain his dictatorial power over Iraq. Indeed the US was barely able to keep the sanctions in place even after Saddam had threatened and expelled the inspectors. During those years, nothing changed — until 11 September 2001. What happened on that day had little to do with Iraq — but a great deal to do with the willingness to respond to the ongoing situation in Iraq.

So those who are looking for a “smoking gun,” or for something new in Saddam Hussein's behavior that would compel us to act now, or for some link between al-Qaida and Iraq in order to justify a change of regime by force are looking in the wrong place. It is not new evidence that is driving the response now: I for one pray he hasn't been able to get nuclear weapons, despite his best efforts. Rather there is a new resolve, and a new urgency.

Philip Bobbitt, *Time to Act*, OPEN DEMOCRACY, Jan. 12, 2003, at <http://www.open-democracy.net/debates/article.jsp?id=2&debateId=88&articleId=882#11>; see also Philip Bobbitt, *Today's War Is Against Tomorrow's Iraq*, N.Y. TIMES, Mar. 10, 2003, at A19 (discussing the question of military action in Iraq in the light of “Parmenides' Fallacy”).

34. Bobbitt sees one option of the E.U. — the super-state option — as a pathetic attempt to cling to the nation-state:

It is a failure of imagination . . . to assume that the only thing that will replace the nation-state is another structure with nation-state-like characteristics, only larger. It is in some ways rather pathetic that the visionaries in Brussels can imagine nothing more forward-looking than equipping the E.U. with the trappings of the nation-state.

of a society of market-states in which law and strategy have begun to merge — where war often looks like crime and vice-versa, where borders have less to do with defining the State than do more intangible perimeters like language and technological compatibility”(p. 354).

What will life be like in the market-state? The legitimating premise of the market-state is the maximization of opportunities enjoyed by members of society. The market-state uses market incentives to a far greater degree than the nation-state, preferring economic incentives to the nation-state’s reliance on legal regulation. The market-state recognizes no distinctions of class and is “indifferent to race and ethnicity and gender” (p. 230). In matters of justice, the market-state is agnostic: any conception of justice is fine, so long as it “does not act as an impediment to economic competition” (p. 230). Opportunity, efficiency, and consumer choice are the central organizing features of the market-state.

Just as the parliamentary nation-state emerged from three possibilities for that constitutional order, so too will the market-state offer several variations. The first possibility is an *entrepreneurial market-state* (Bobbitt calls a society of such states “The Meadow”). Under this model, deregulation and privatization are key features of government. These go hand in hand with other policies, which include reduced rates of taxation, lower welfare benefits, free trade, and relaxed immigration rules. Security issues are likely to be a paramount concern. Life in The Meadow might be best characterized as a permanent state of impermanence when it comes to questions of government policy, as ad hoc decisionmaking replaces broad and long-range policy agendas.

A society of states following the second model of the *mercantile market-state*, “The Garden,” is more concerned with supporting industry and preserving national and cultural identity. In The Garden, strong alliances are forged between government and industry — capital rather than labor is the focus of domestic fiscal policy. Protectionism has a place as well. In matters of culture, ethnic homogeneity and welfare are core values. These policies, Bobbitt speculates, will lead to less international cooperation between states on matters of security and, alarmingly, the proliferation of nuclear and other forms of weaponry.

Lastly is “The Park,” devoted to *managerial market-states*. Life in The Park is a high-maintenance affair, akin to contemporary life in the Federal Republic of Germany. The economy will be slow to innovate and grow: economic efficiency will be sacrificed in favor of social cohesion and equality. Aggravating this situation will be continuing resistance to liberalization of labor markets in order to protect high-wage jobs. This could end with no high-wage jobs to protect, but

managerial market-states are more concerned with the quality of life than with growth (entrepreneurial) or market-share (mercantile).³⁵

The market-state is not a market, and whatever form of governance develops will entail a diminishing supply of “public goods.” Doubtless there will be continuing support of institutions without which the market cannot function effectively; tangible and intangible infrastructure (e.g., education and health) will be even more important to the market-state than the nation-state. Nevertheless, market-states will have inherent, but unavoidable, weaknesses: among them a lack of community, extreme meritocracy, “essential materialism and indifference to heroism, spirituality, and tradition” (p. 290). To combat these shortcomings, some public goods must come from another source. From where will such goods come?

This precise question was raised by the Archbishop of Canterbury who, in a nationally televised speech, suggested that we are living in a transitional period, “where the basic assumptions about how states work are shifting.”³⁶ Taking *The Shield of Achilles* as his starting point, the Archbishop stated that, in his view, “we are witnessing the end of the nation state, and the nation state is being replaced in the economically developed world by what some call the ‘market state.’”³⁷

The Archbishop’s televised address was met with considerable comment and some criticism. Most critics focused on the Archbishop’s remarks about the State,³⁸ misunderstanding him to be saying that the State is withering away. Bobbitt entered the fray and offered a defense of the position, answering critics who missed the most important point in the Archbishop’s speech: the need for nonstate enterprises to provide the public goods no longer nourished by the State.³⁹

35. David Runciman ties together the problematic aspects of international security and Bobbitt’s three possible futures for the market-state. See David Runciman, *The Garden, the Park and the Meadow*, LONDON REV. BOOKS, June 6, 2002, at 7-8.

Bobbitt wants to remind us that in a world of states like ours the greatest dangers remain the confrontations between the most powerful states, though these in turn should not blind us to the possibility of allowing small-scale disputes to escalate into the kind of conflicts that overwhelm us. Because this is a world of states, the choice is not between war and peace, but between wars that we have anticipated and can manage, and wars that we haven’t and can’t.

36. Williams, *supra* note 5.

37. *Id.* at 2.

38. On this point, the Archbishop stated:

This new form of political administration has in some ways crept up on us, and we need to do some hard thinking about how it has happened and what changes are involved for the whole idea of being a citizen — not to mention the whole idea of being a politician too. And if the analysis I want to offer is right, and these changes are indeed irreversible, we need to look at what kind of vacuum is left in our social imagination as a result.

Id.

39. Bobbitt wrote:

The state is not going away, and in some respects it will be more powerful than ever. Nor does the nation state have a monopoly on nationalism; far earlier constitutional orders reflected intense nationalism. Rather, Dr. Williams is arguing that the emergence of the mar-

And what of war? Can we hope that the market-state will usher in a new state of peace? Constrained by his reading of historical evidence, Bobbitt offers no comfort here. War is a constitutive feature of politics:

There is a widespread view that war is simply a pathology of the State, and that healthy states will not fight wars. This view ignores the role strategy plays in the formation and continuance of states. War, like law, sustains the State by giving it the means to carry out its purposes of protection, preservation, and defense.⁴⁰

In a Postscript to *Achilles*, Bobbitt speaks of the attacks on New York and Washington from the point of view of one who had, for some time, anticipated such events. He writes:

For five centuries only a state could destroy another state. And for five centuries, states have developed means of defeating other states. Entire worlds of diplomacy, international law, alliances, and naval, air, and land warfare are all predicated upon conflicts among states. Only states could marshal the resources to threaten the survival of other states; only states could organize societies to defend themselves against such threats. Only states could bring about peace congresses.

We are entering a period, however, when very small numbers of persons, operating with the enormous power of modern computers, biogenetics, air transport, and even small nuclear weapons, can deal lethal blows to

ket state will see the state evacuate areas of responsibility that it had, in the last 150 years, undertaken. When the Left argues for affirmative action, and the Right for criminalising abortion; when the Left wants to make hate speech a crime and the Right wants to criminalise drug use; when the Left seeks to create "hate crimes" and the Right wants to ban non-national languages: all are regarding the state as a nation-state, employing law and regulation to enforce moral positions. But when the Left urges the deregulation of reproductive choice, and the Right the deregulation of industry, they have moved to a market-state perspective. Phenomena such as the replacement of conscription with an all-volunteer force, welfare reform that attempts to replace unemployment allowances with education and training to help the unemployed to enter the labour market, and the use of non-governmental organisations and private companies as adjuncts to traditional government activities, reflect elements of the barely emerging market state.

And this is the Archbishop's point: that a state that is, owing to these new forces, relatively (compared to the nation-state) indifferent to loyalty, civility, trust in authority, respect for family life, regard for privacy, reverence for sacrifice, equality and solidarity will require that the society it governs promotes these qualities through non-state agencies. As the Archbishop put it: "It is inevitable that governments can no longer deliver in terms of setting out a moral basis in law — other institutions will have to take up a new role." This is why he focuses on "the willingness of the market-state government to engage with traditional religious communities in a new way."

Philip Bobbitt, *The Archbishop Is Right: The Nation-State Is Dying*, TIMES (LONDON), Dec. 27, 2002, available at <http://www.utexas.edu/law/faculty/pbobbitt/shieldofachilles/archbishop.html>.

40. P. 780. Bobbitt goes further, asserting that looking at war as a pathology disables us from shaping future wars, as we search, fruitlessly, for the wonder serum that will banish war once and for all (or as we plan to fight wars we know — or believe — we can win). Yet we can shape future wars, even if we cannot avoid them. We can take decisions that will determine whether the next epochal war risks a general cataclysm.

any society. Because the origin of these attacks can be effectively disguised, the fundamental bases of the State will change. (p. 811)

The Long War, which established the strongest model of the nation-state, was won with three innovations: weapons of mass destruction,⁴¹ globalized communications, and international integration of finance and trade (p. 713). It is a bitter irony that these very developments now threaten the peace achieved by the conclusion of the Long War. If we are to find our way in what Bobbitt calls a “new age of indeterminacy” (p. 816) we must realize that we cannot meet the demands of this new age with the nation-state’s tools (including the international institutions).⁴²

I mentioned at the outset that *Achilles* exhibits habits of mind and temperament unusual in the academy today. The frame of mind exemplified in *Achilles* also finds expression in Bobbitt’s earlier work. For example, in *Achilles* Bobbitt offers us a method of scenario planning that is crucially different from the model widely used by corporations.⁴³ Bobbitt’s model eschews the four matrix design of the classic prisoner’s dilemma,⁴⁴ which has an optimal decision point, in favor of holding all facts constant across the scenario suite, varying only for human decisions at particular crossroads and offering largely incomensurable — but not incomparable — outcomes. This adamant refusal to select an optimal point derives directly from *Tragic Choices*.⁴⁵

41. Bobbitt argues that the use of nuclear weapons against Japan was necessary to win the peace.

I have never been persuaded of the moral position of those who would have urged continued nonnuclear bombing of the Japanese people for an extended period of months, accepting also the American casualties that would have ensued in such an invasion, as preferable to the atomic attacks on the two Japanese cities. The only alternative to this carnage would have been a half-life for fascism, in a kind of negotiated twilight. And that is precisely what the Long War was fought to eliminate.

P. 678.

42. One example is the conduct of future wars.

If we wish to avoid cataclysmic war and invisible, silent war, we shall have to learn how to wage wars like the ones in Yugoslavia and Afghanistan, using the tactics of relentless airstrikes, special forces teams, and indigenous allies. This means, pre-eminently, that we shall have to develop rules for intervention. Out of this new epochal conflict can come, some day, the consensus that will provide the basis for a constitution for the society of the new form of the state.

P. 782.

43. See GILL RINGLAND, *SCENARIO PLANNING: MANAGING FOR THE FUTURE* (1998). Bobbitt’s model is more akin to that pioneered by Royal Dutch Shell Corporation. See SHELL INTERNATIONAL PETROLEUM CO., *GLOBAL SCENARIOS 1992-2020*, at 2 (1992) (preferring comparison of alternative scenarios to reliance on forecasts or predictions), available at http://www.shell.com/static/royal-en/downloads/globalscenarios_1992_2020_part1.pdf.

44. For discussion, see Stephen Kuhn, *Prisoner’s Dilemma*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2001), available at <http://plato.stanford.edu/entries/prisoner-dilemma/> (last visited July 22, 2003).

45. See *TRAGIC CHOICES*, *supra* note 11, at 17-28 (describing the methodological approach of mixing allocation methodologies).

Bobbitt also gives us an alternative to the economic determinism so evident in Paul Kennedy's *The Rise and Fall of the Great Powers*.⁴⁶ As Richard Overy observes, "[m]uch of *The Shield of Achilles* is devoted to demonstrating that the modern age really has been shaped by war and law, which flies defiantly and deliberately in the face of a century of Marxist and sub-Marxist belief in the historical force of class conflict and systems of production."⁴⁷ In *Achilles*, Bobbitt offers an account of decisionmaking diametrically opposed to deterministic modes of explanation so prevalent in the social sciences. *Democracy and Deterrence* also asserted that economic factors were not fundamental drivers of nuclear strategy and that constrained choices could nevertheless be crucial to outcomes.⁴⁸ In *Democracy and Deterrence*, Bobbitt argued that, contrary to conventional understanding, "extended deterrence" (the protection of Germany and Japan) and not "central deterrence" (the protection of the American homeland) had driven the evolution of U.S. nuclear strategy.⁴⁹

Constitutional Fate, Bobbitt's first book on constitutional theory, presented a fresh approach to the jurisprudence of constitutional law.⁵⁰ There, Bobbitt described six forms of constitutional argument.⁵¹ Like *Democracy and Deterrence*, this book's thesis turned things upside down. Against the grain of the entire academic debate over the legitimacy of judicial review, Bobbitt demonstrated that nothing "grounds" our constitutional practices, and that efforts to do so create artificial problems that, when the debate is understood, simply go away or are dissolved. The search for foundations was, he argued, simply without

46. PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1989).

47. Richard Overy, *The New Leviathan?*, LITERARY REV., July 2002, at 23.

48. DEMOCRACY AND DETERRENCE, *supra* note 12, at 3-6.

49. *Id.* at Book I *passim*.

50. Many commentators on the book misunderstood Bobbitt's argument. One reviewer dismissed it, concluding that "Bobbitt never adequately provides an underlying structure that ties his assertions to the other portions of his analysis to form a coherent theory of judicial review." Martin Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 679 (1984) (reviewing CONSTITUTIONAL FATE, *supra* note 13). The irony is that one could read *Constitutional Fate* and fail to realize that not only was Bobbitt not advancing a new theory of judicial review, he was arguing that the entire debate over the legitimacy of judicial review is a pointless enterprise. This misunderstanding continues. *But see* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 166-69 (2000) (elaborating upon Bobbitt's critique of the problematic presuppositions of the debate over the legitimacy of judicial review).

51. The six forms of argument 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 understood by the average contemporary "man on the street"); structural (inferring rules from 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). *See* CONSTITUTIONAL FATE, *supra* note 13, at 3-136.

foundation. The only legitimacy our constitutional practice can have, or needs to have, is in the continued employment of the forms of legal argument to show the truth and falsity of propositions of constitutional law. Like *Tragic Choices*, *Constitutional Fate* is highly influential: there can scarcely be a law school where the forms of argument are not now self-consciously taught.⁵² Casebooks and judicial opinions frequently speak of “structural” or “prudential” arguments as Bobbitt described them, or distinguish between historical and textual arguments in the way he taught us, even if the source of these ideas is not always apparent.⁵³

In *Constitutional Interpretation*, Bobbitt developed a more capacious view of constitutional decisionmaking.⁵⁴ There he took the forms of legal argument, now referred to as “modalities,”⁵⁵ beyond the confines of judicial argument; and showed how other governmental actors, for example the President and the Congress, must employ the modalities to discharge their constitutional responsibilities,⁵⁶ whether it be for purposes of impeachment, war powers, secession, the purchase of Louisiana, or the confirmation of a judge. His clarification of our practice of constitutional law also enabled him to show how a case can be wrongly decided even by the highest authoritative court, an explicit challenge to Legal Realism, which held that law was what the highest court declared it to be. More importantly, he demonstrated that precedent can be legitimately overruled through modal argument. His position thus posed a challenge both to Legal Positivism and Dworkinian Constructivism.

In *Constitutional Interpretation*, Bobbitt wrote: “Every society has a constitution. . . . the Holy Roman Empire, and the Boy Scouts, la Cosa Nostra and the Quakers, the inmates of a prison and the local garden club all have constitutions.”⁵⁷ He gives this idea new applica-

52. See Akhil Amar, *In Praise of Bobbitt*, 72 TEXAS L. REV. 1703, 1704 (1994) (“Bobbitt’s modalities are key tools . . .”).

53. See, e.g., THOMAS E. BAKER & JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS: IN A NUTSHELL 307-336 (2003). *But see* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 33 (2000) (citing CONSTITUTIONAL FATE, *supra* note 13, and CONSTITUTIONAL INTERPRETATION, *supra* note 13, and enumerating the modalities).

54. I argued for the general jurisprudential implications of Bobbitt’s approach to constitutional law in Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993) (reviewing CONSTITUTIONAL INTERPRETATION, *supra* note 13). I show how the modalities are part of a larger jurisprudence of legal argument in DENNIS PATTERSON, LAW AND TRUTH 170-79 (1996), and Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325 (2001).

55. For Bobbitt, the modalities are neither true nor false: they are the means by which lawyers show the truth of propositions of constitutional law.

56. See CONSTITUTIONAL INTERPRETATION, *supra* note 13, at 64-108 (discussing the Iran-Contra affair and Robert Bork’s confirmation hearing to illustrate the various nonjudicial uses of the modalities).

57. CONSTITUTIONAL INTERPRETATION, *supra* note 13, at 64-108.

tion, arguing that the society of states has a constitution that achieves consensus through epochal warmaking and is memorialized in the constitutions written by the great congresses that follow such wars.⁵⁸ This allows him to argue that the international order is progressively given greater definition as it draws on the content of a newly established constitutional order, that is, when a particular form achieves dominance.⁵⁹

Constitutional Fate left an important question unanswered. Given the possibility that the modalities used to show the truth and falsity of propositions of constitutional law may conflict, what means do we have for deciding which modality should prevail? Bobbitt's solution to the problem of choice posed by modal conflict makes two conceptual advances: he both solves a theoretical problem in constitutional theory and, at the same time, constructs a completely original account of choice in law.

The problem of choice is the occasion for the exercise of the distinctly human faculty of conscience.⁶⁰ As Bobbitt wrote in *Constitutional Interpretation*: "The recursion to conscience is the crucial activity on which the constitutional system of interpretation . . . depends."⁶¹ The system of constitutional interpretation depends on conscience because it is through the exercise of conscience that we show our values.⁶² It is by creating a space for conscience — not banishing it in the face of a particular theory of justice — that a system is just.⁶³

58. P. x. For example, the treaties of Versailles, Utrecht, and Vienna.

59. Bobbitt even sorts out the various schools of contemporary international law into the "modalities" of constitutional law that he first described in *Constitutional Fate*. Pp. 660-61.

60. Bobbitt discusses conscience in *Achilles* in connection with the thought of Hobbes and Carl Schmitt. P. 596.

61. CONSTITUTIONAL INTERPRETATION, *supra* note 13, at 184.

62. *Id.* at 183-86.

63. *Constitutional Interpretation* is the first account of legal practice from a religious point of view. The parallel with Wittgenstein's argument in the *Tractatus* is clear. Wittgenstein once said "I cannot help seeing every problem from a religious point of view." M. O'C Drury, *Some Notes on Conversations with Wittgenstein*, in LUDWIG WITTGENSTEIN: PERSONAL RECOLLECTIONS 79 (Rush Rhees ed., 1984). In the *Tractatus*, Wittgenstein set out to describe a certain metaphysical relationship between language and reality. For Wittgenstein, truth is something that is "shown" rather than "said." He regarded the most important part of his endeavor to be that about which he said almost nothing: the mystical. This is indicated in the final, cryptic passage: "What we cannot speak about we must pass over in silence." LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 7 (David Pears & Brian McGuinness trans., 1961). For Bobbitt, the most important aspect of constitutional practice is neither how it is conducted (i.e., the modalities) nor our attempts to theorize it. Rather, the existence of conscience shows God's presence in the world. This is the most significant dimension of modal conflict (seen from the religious point of view).

From *Tragic Choices* to *Democracy and Deterrence* through *Nuclear Strategy*, to two sublime works in constitutional theory⁶⁴ and now *The Shield of Achilles*, Bobbitt has consistently returned to the same territory (albeit from a variety of vantage points): human choice.⁶⁵ Whether it be that of the solitary individual (e.g., a judge deciding a case) or a nation considering its options in a time of crisis, it is the defining characteristic of human existence. However one understands the meaning of Bobbitt's conception of conscience, it cannot be a matter of applying a moral calculus or decision procedure of one kind or another. We do not choose our values; we make choices and, in doing so, exhibit our values.⁶⁶ In this sense, choice is the matrix from which we discover and recreate the ethical.⁶⁷

Achilles is a brilliant and astonishing book. As the European Union's Commissioner for External Affairs wrote: "We are all about to have our way of looking at the world turned upside down by a superb book."⁶⁸ To describe Bobbitt's accomplishment, it is tempting to invoke Bernard Bailyn's insightful definition of "the modern creative historian" as someone who provides "a whole area of historical investigation by redirecting it from established channels into new directions, unexplored directions, so that what was once dark, vague or altogether unperceived is suddenly flooded with light and the possibilities of a new way of understanding are suddenly revealed."⁶⁹ Bobbitt has done so with admirable skill and daring.

It will be decades and more before we know the answer to Paul Kennedy's surmise that "*Achilles* may . . . become a classic to later

64. When asked by the legal affairs columnist Stuart Taylor to recommend the best book on judicial review in the last twenty years, Laurence Tribe wrote, "There are two, and they're both by the same author," recommending Bobbitt's *Constitutional Fate*, and *Constitutional Interpretation*. E-mail from Stuart Taylor, to Dennis Patterson (Feb. 18, 2003) (on file with author).

65. In explicitly religious language, Bobbitt wrote: "Decision according to law is an ideal, but it is also an art and finally it is our piety, our 'service to God.'" CONSTITUTIONAL INTERPRETATION, *supra* note 13, at 186, *citing and quoting* FRIEDRICH NIETZSCHE, *Preface to Second Edition*, THE GAY SCIENCE (2d ed. 1887).

66. For Bobbitt, one of these values is faith. He once wrote: "It seems that whenever I sat down to write about making decisions, I found I was writing about faith; and when I wrote about faith, it became something about making decisions." Philip Bobbitt, *What I Write*, Lecture at the Johnson Library (Jan. 21, 2003) (transcript on file with author).

67. Wittgenstein expresses a similar view. See Ludwig Wittgenstein, *Lecture on Ethics*, in PHILOSOPHICAL OCCASIONS 37, 38 (James C. Klagge & Alfred Nordmann eds., 1993) ("Now I am going to use the term Ethics in a slightly wider sense, in a sense in fact which includes what I believe to be the most essential part of what is generally called Aesthetics."); see also SØREN KIERKEGAARD, 1 CONCLUDING UNSCIENTIFIC POSTSCRIPT TO PHILOSOPHICAL FRAGMENTS 33 (Howard V. Hong & Edna H. Hong trans., 1992) ("All decision . . . is rooted in subjectivity.").

68. Patten, *supra* note 6, at 1.

69. BERNARD BAILYN, HISTORY AND THE CREATIVE IMAGINATION 4 (1985).

generations.”⁷⁰ For now, we are already assured by none other than Sir Michael Howard that it will become “[o]ne of the most important works on international relations [in] the last fifty years.”⁷¹ But if you ever wonder what works from our era will be read as *The Prince*⁷² or *Leviathan*⁷³ are read, think of *The Shield of Achilles*.⁷⁴

70. Paul Kennedy, *The Modern Machiavelli*, N.Y. REV. BOOKS, Nov. 7, 2002, at 52, 55.

71. Michael Howard, *Advance Praise* (back cover) for *Achilles*.

72. Kennedy, *supra* note 70.

73. See Overy, *supra* note 47.

74. See Caryl Haskins, *Advance Praise* (back cover) for HENRY KISSINGER, *NUCLEAR WEAPONS AND FOREIGN POLICY* (1957) (calling it “the work of authentic genius”), which addressed for the post-World War II generation how statecraft would have to come to terms with nuclear deterrence.