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Judicial Review and Constitutional Ethics

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CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION. By *Philip Bobbitt*. New York and Oxford: Oxford University Press. 1982. Pp. xii, 285. $22.95.

The scholarly debate over the legitimacy of judicial review in a democratic society has rapidly expanded over the the past few years, rendering any new attempts to contribute to that debate reminiscent of a popular song that has remained on the charts too long. The most common reaction to both is likely to be, "must we hear this *again*?" Philip Bobbitt's new addition to the already voluminous literature,[1] *Constitutional Fate*, must overcome the reader's natural presumption that, by now, little that is original remains to be said on the matter. The early parts of the book do not rebut that presumption. While later portions of the book do seem to develop an approach that is fresh and original in certain respects, the author's general failure to place his book within the universe of judicial review scholarship may obscure subtle differences between his approach and the methods used by scholars who have already ploughed the same ground. More important, the mere fact that an approach could accurately be characterized as "original" is, of course, no guarantee that the analysis is in any way compelling; indeed, there may be good reasons why no one has chosen to say the same things previously. In Professor Bobbitt's case, these caveats are unfortunately all too applicable.

I. THE TYPOLOGY OF CONSTITUTIONAL ARGUMENT

Bobbitt divides his book into three distinct subunits. Book I deals with what he calls "constitutional argument;" Book II concerns "constitutional ethics;" and Book III focuses on what Bobbitt labels "constitutional expressionism." Book I's "typology" represents little

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1. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982). In addition to being discussed in countless individual articles, the subject has also been considered in two significant symposia. *See* Symposium, 8 U. DAYTON L. REV. 443 (1983); Symposium, 56 N.Y.U. L. REV. 259 (1981).

more than a rehash of constitutional arguments already well-known to even the most casual professional observer, spiced with gossipy anecdotes.[2] It is almost as if the section were written for the pre-law student eager to learn the mysteries of judicial review: elaborate and oversimplified discussions of extremely basic material, with the anecdotal examination of personalities included to draw the uninitiated reader into the personal mystique of the judicial and academic greats of the past fifty years.

In this portion of the book, Bobbitt describes five basic types of constitutional argument: historical, textual, structural, prudential, and doctrinal. Before proceeding to discussion of Bobbitt's analysis of these somewhat artificially separated forms of argument, one must first ask what is the point of the endeavor (assuming, as seems likely, the author did not intend the book primarily as a primer for the reader unfamiliar with the fundamentals of constitutional analysis). While he asserts that his book represents an examination of the broad issue of judicial review's legitimacy (p. 3), Bobbitt openly eschews "the conventional tack of raising arguments that appear to define the scope of legitimate review" (pp. 5-6). Instead, he chooses to begin his work with "a typology of the kinds of arguments one finds in judicial opinions, in hearings, and in briefs" (p. 6). I am still not sure why he proceeds in this manner. At no point does Bobbitt adequately explain why an understanding of this typology is a necessary predicate to an understanding of the validity of judicial review. Indeed, an argument could be fashioned that an examination of the broad theoretical justifications for judicial review should logically *precede* a detailed analysis of the various modes of constitutional argumentation, since one's view of the acceptable justification for judicial review can substantially color how one views the various argumentative modes. For example, if one rejects the role of the unrepresentative judiciary as a developer of values for the

2. For example, Bobbitt reports that Alexander Bickel "was short and slight and dressed in a dapper, elegant way." P. 61. At another point, Bobbitt notes that in his last conversation with him, "Bickel's voice was strong and rapid even though he was largely paralyzed and blind and was dying that death whose agony is untellable." P. 92. In discussing the theories of Professor Henry Hart, Bobbitt reports that at the close of his Holmes Lectures at Harvard, Hart "said that his answers were, he now saw, less conclusive than he had hoped. And then, in a hushed and crowded Ames courtroom, he sat down." P. 57. In discussing the controversial William Crosskey, Bobbitt notes that he "was by all accounts an unusual, even an eccentric man" and recalls Crosskey's "portrait on the walls of the Yale Law Journal office — a balding head over a truculent scowl, his large heavy-set frame crammed into a small officer's chair. He obviously dominated that editorial board as he dominated the photograph." P. 14. Bobbitt also relates that "[a]t law school, Crosskey refused to keep notebooks and let it get around that he never read cases in preparation for class." P. 14. Unfortunately, this fact in no way distinguishes him from a substantial number of my classmates and students.

In fairness, it should be noted that after all of this frill, Bobbitt engages in a sophisticated, perceptive critique of Crosskey's theories. Pp. 15-22. However, this only makes all the more puzzling Bobbitt's bizarre decision to detract from his high-level analysis by including so much gossip.

majoritarian branches of government, one would be more likely to invoke what Bobbitt labels either "historical", "textual", or "prudential" arguments.[3] If, on the other hand, one sees the judiciary's role more broadly,[4] "ethical" argument would naturally be more attractive. Since Bobbitt's effort *begins* with an examination of the various modes of argument, however, much of the analysis contains a hollow ring, misleadingly conveying the impression that those approaches somehow exist divorced from a broader normative theory of judicial review. For example, Bobbitt starts his discussion of historical argument with the disingenuous observation that "one must notice how odd it is that the original understanding in any field of study should govern present behavior" (p. 9). If he had first discussed what has been generally referred to as the "originalist"[5] or "interpretivist"[6] theory of judicial review, it is doubtful he could have so cavalierly dismissed the view that our understanding of the Framers' intent must be the sole guide for modern judicial review.[7] To be sure, I agree with Bobbitt's contention that, for various reasons,[8] a strict historical analysis is both inadvisable and unworkable as a measure of the legitimacy of judicial review (though the same points have been made elsewhere, and, on occasion, considerably more effectively).[9]

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3. *See e.g.,* Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981).

4. *See generally* M. PERRY, *supra* note 1.

5. *See* Bennett, *Objectivity in Constitutional Law,* 132 U. PA. L. REV. __ (1984) (forthcoming).

6. *See generally* M. PERRY, *supra* note 1. I personally believe the term "originalist" more accurately describes the position, because one who believes that we are in fact bound by the rational limits of constitutional language even though we are not bound by the specific intent of those who drafted the provisions might well wish to characterize himself as an "interpretivist," at least if the only alternative label is "non-interpretivist."

7. This theory is associated with such respected scholars and jurists as Bork, *see* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971), Monaghan, *see* Monaghan, *supra* note 3, and Rehnquist, *see* Rehnquist, *The Notion of a Living Constitution,* 54 TEXAS L. REV. 693 (1976); *see also* R. BERGER, GOVERNMENT BY JUDICIARY (1977); Grano, *Judicial Review and a Written Constitution in a Democratic Society,* 28 WAYNE L. REV. 1 (1981).

8. As Bobbitt correctly puts it:

> We do not have an original commitment to a particular form of historical argument. To what source are we to refer for an authoritative understanding? To statements of members of the Convention who proposed a particular provision? To the debate surrounding its adoption on the convention floor? To earlier language which had been superseded? Or should we look, not to the Constitutional Convention, which we must remember was not authorized to propose a new constitution, but instead to the various ratifying state conventions?

P. 10. He adds that "[t]he records of the debates are so scanty that full discussion of any point has been lost; more importantly, the convention met in secret without official minutes in an atmosphere that concealed dissent and put a premium on achieving agreement to a document that was unglossed or unexplained in any way that might disclose or provoke fissures in the coalitions that proposed it." Pp. 11-12.

A number of years ago, I raised similar arguments. *See* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decisionmaking,* 70 NW. U. L. REV 486, 510-11 (1975).

9. *See, e.g.,* Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Demo-*

But by examining the originalist position solely as a part of an analysis of strategic argumentation, his discussion is inherently limited in its scope, and thus fails to examine in sufficient detail the justifications that respected commentators have advanced in defense of the originalist approach.[10]

The other forms of constitutional argument cited by Bobbitt are "textual," "structural," "prudential," and "doctrinal." I suppose it is true that, in one sense or another, each of these elements enters into constitutional argument, but to draw formal distinctions among them creates a certain degree of misleading artificiality by imposing rigid lines of demarcation that do not necessarily exist in reality. For example, "doctrinal" argument simply refers to "neutral principles of general application to a legal, rather than political, context" (p. 42).[11] But there is no logical reason why those "neutral principles of general application" cannot themselves be derived either from historical understanding, a structural approach, an ethical analysis, or textual construction.[12]

Problems beyond the imposition of artificial lines of demarcation plague the analysis contained in Book I. Even if we were to accept the validity of Bobbitt's categorizations, his individual examination of each of his categories leaves something to be desired. While he purports to analyze textual argument in Book I, he never considers the validity of the view that textual limits should bind the judiciary in engaging in judicial review,[13] nor does he adequately consider the troubling questions raised by an attempt to divorce constitutional

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cratic Theory, 67 CALIF. L. REV. 1049, 1071-73, 1090-92 (1979); Bice, *Rationality Analysis in Constitutional Law,* 65 MINN. L. REV. 1, 26-33 (1980); Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U. L. REV. 204, 214-15 (1980).

10. Bobbitt does assert that "[t]here is a legal grammar that we all share and that we have all mastered prior to our being able to ask what the reasons are for a court having power to review legislation." P. 6. However, at no point in the book does he adequately make this important connection, save perhaps when he uses the last form of constitutional argument — his "ethical" variety — as a lead-in to his broader discussion of constitutional ethical analysis in Book II. *See* text following note 19 *infra*. Most of the other forms of constitutional argument which he describes, however, are largely left hanging.

11. Bobbitt takes an inordinately long time in his discussion of doctrinal argument before providing us with this important description. *See* pp. 39-42.

12. At one point, Bobbitt asserts that "[o]ne corollary of the textual approach is a disregard of precedent." P. 33. I fail to understand why that is necessarily so: why could not a court deem itself bound by precedent interpreting text? In National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), a divided majority of the Court (a plurality of three and four dissenters) concluded that it was bound by Chief Justice Marshall's opinion in Hepburn & Dundas v. Ellzey, 6 U.S. 226, 2 Cranch 445 (1805), interpreting the word "States" in the diversity clause of article III, section 2 of the Constitution so as not to include the District of Columbia, leading to the conclusion that suits between citizens of the District and those of a state did not fall within the federal judiciary's diversity jurisdiction.

13. In a sense, Book II deals primarily with this question, though only indirectly, and never in a way that adequately ties the earlier discussion to this subsequent analysis. This is a question to which Professor Perry has devoted an extensive analysis. *See generally* M. PERRY, *supra* note 1.

language from the understanding of those who drafted it, or the philosophical and linguistic issues raised by the inherent indeterminacy of language.[14] In his discussion of so-called "structural" argument, he describes, with what I consider an insufficiently critical eye, the theory that constitutional precepts may be derived from some unstated "structural" principles that law professors can somehow decipher without any real basing in text.[15] Bobbitt acknowledges that "[s]tructural arguments are sometimes accused of being indeterminate because while we can all agree on the presence of the various structures, we fall to bickering when called upon to decide whether a particular result is necessarily inferred from their relationships" (p. 84). Yet having raised the problem, he deals with it in only the most conclusory and superficial manner.[16] Simply put, expansive use of these so-called "structural" arguments, untied to specific constitutional language, invites total resort to modern political judgments as a substitute for constitutional analysis. Bobbitt never adequately comes to grips with this fundamental issue.[17]

By the time one finishes Bobbitt's discussion of structural argument, one remains unsure of the author's point in all this. One continues to ask, is his purpose simply to describe modes of strategic argumentation, or is it to propose — as have scholars of such renown as Ely[18] and Perry[19] before him — an overriding, coherent analysis of judicial review theory? The uncertainty largely stems from Bobbitt's commission of the cardinal sin of failing to provide at the outset a clear road map of where he intends to take us. But his discussion of the final form of constitutional argumentation — the "ethical" variety — sets the groundwork for what is by far the most stimulating and sophisticated portion of Bobbitt's work — Book II. "By ethical argument," Bobbitt writes, "I mean constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical

14. *See, e.g.,* Schauer, *An Essay on Constitutional Language,* 29 UCLA L. REV. 797 (1982).

15. Bobbitt asserts "that the structural approach, unlike much doctrinalism, is grounded in the actual text of the Constitution. But, unlike textualist arguments, the passages that are significant are not those of express grants of power or particular prohibitions but instead those which, by setting up structures of a certain kind, permit us to draw the requirements of the relationships among structures." P. 80. In effect, I suppose, this means that the "structuralist" latches on to several key words or phrases and gives them a meaning well beyond normal linguistic limitations.

16. "Indeed one good reason for adopting structural approaches is that they *are* more satisfying, being truer approximations of the interaction of actual reasons yielding actual results than are doctrinal or textual approaches. We share a constitutional sense and we use it." P. 85 (emphasis in original).

17. *See* p. 89.

18. *See generally* J. ELY, *supra* note 1.

19. *See generally* M. PERRY, *supra* note 1.

argument as the source from which particular decisions derive" (p. 94, emphasis in original).[20] But making ethical arguments is often a dangerous enterprise; one is often tempted to reject another's approach on the ground that it does not truly engage in ethical argument, when in reality it simply employs an ethical structure different from one's own. Bobbitt seems to fall into this trap, thus underscoring — albeit perhaps unwittingly — the dangers in employing an ethical approach to constitutional interpretation.

The problem can be discerned when Bobbitt contrasts the Supreme Court's decision in *Moore v. City of East Cleveland*,[21] striking down an Ohio zoning ordinance that limited occupancy of a dwelling unit to members of a single, narrowly-defined "family" as it was applied to a woman who lived with her son's nephew, with its earlier decision in *Village of Belle Terre v. Boraas*[22] upholding a zoning ordinance that prevented more than two unrelated persons from living together. In *Moore*, Justice Powell, speaking for the plurality, relied upon the value of extended kinship[23] — what Bobbitt refers to as "a clear and . . . persuasive exposition of an ethical argument" (p. 97). On this basis, Bobbitt sees an easy and obvious distinction between this case and the earlier decision in *Belle Terre,* which of course did not involve family relationships, either immediate or extended. While this is of course a tenable rationalization of the two cases, Bobbitt criticizes Professor Tribe's attempt to distinguish the two on the ground that *Belle Terre* did not involve an "enduring relationship" while *Moore* did.[24] He labels Tribe's rationalization of the two decisions "extraordinary doctrinal pyrotechnics" and suggests that it is "because he has elected a different constitutional approach than that taken by the Court that so able a reader as Professor Tribe is led to so profound a misconstruction" (p. 97). Tribe may well have misread the Court's distinction between the two cases, but why does it follow that he has "elected a different constitutional approach"? Presumably Bobbitt means that Tribe is employing *doctrinal* argument, while the Court is using *ethical* argument. This points up again the artificial nature of Bobbitt's typology — why is Tribe's principle (valuing "enduring relationships") any more "doctrinal" or less "ethical" than Bobbitt's (valuing "extended" family relationships)? Bobbitt contends that "[t]here is nothing clearly discernible in the American ethos that relies on the value of endur-

20. Bobbitt notes that "ethical arguments are not *moral* arguments. Ethical constitutional arguments do not claim that a particular solution is right or wrong in any sense larger than that the solution comports with the sort of people we are and the means we have chosen to solve political and customary constitutional problems." Pp. 94-95 (emphasis in original).

21. 431 U.S. 494 (1977).

22. 416 U.S. 1 (1974).

23. 431 U.S. at 504-06.

24. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 990 (1978).

ing relationships generally, except possibly magazine subscriptions and appeals from one's old college" (p. 97), but at best this establishes only that Tribe's ethical principle is incorrect, not that it is not an ethical principle at all. At worst, the point simply underscores the highly subjective nature of most of these ethical judgments. For I, at least, would not be so willing to dismiss Tribe's asserted principle as necessarily any less ethically valid than Bobbitt's. But with all its problems, Bobbitt's discussion of ethical argument at least paves the way for the more challenging and controversial analysis that follows. For it is in the book's next section that he comes closest to putting forward a coherent, rationalized theory of an expansive form of judicial review, under which the courts may test the constitutionality of legislation by ethically-derived principles not explicitly embodied in constitutional text.

II. Justifying the Use of Ethical Arguments in Constitutional Analysis

The most dubious aspect of Bobbitt's broad discussion of "Constitutional Ethics" is his contention that he is somehow breaking important new ground in constitutional thinking by even suggesting that ethical arguments are important, and, indeed, even controlling, in constitutional analysis. This approach, he asserts, "has not been well-defined by scholars" (p. 125), though he puzzlingly makes not a single reference to the far more sophisticated discussion of similar questions in Michael Perry's work.[25] He suggests that "[b]ecause of the wariness with which ethical approaches are treated . . . it is not easy to find direct evidence of their use in constitutional law" (p. 125), though one would be hard pressed to describe such well-known decisions as *Griswold v. Connecticut*[26] and *Roe v. Wade*[27] in any other manner. Nevertheless, Bobbitt ultimately puts forth an interesting — if seriously flawed — attempt to rationalize the Supreme Court's use of ethical principles in its constitutional decisions.

The most obvious questions about the use of purely ethical analysis in judicial decisions interpreting the Constitution are (1) from where does the judiciary derive authority to interpose ethical principles not found directly in the text and/or history of the Constitution into its decisions purporting to interpret the Constitution, and (2) assuming use of such an ethical analysis is deemed legitimate, how is the Court to derive these ethical principles? While Bobbitt's answer to the second inquiry is disappointingly disingenuous (as illustrated by his discussion of Tribe's position on *Belle Terre*),[28] his answer to

25. *See generally* M. Perry, *supra* note 1.

26. 381 U.S. 479 (1965).

27. 410 U.S. 113 (1973).

28. *See* text at notes 21-24 *supra*.

the first represents the high point of what is generally a disappointing book.

Bobbitt's explanation of why the Court may incorporate ethical argument into its decisionmaking is a ninth amendment-like analysis that emphasizes the inherently limited nature of federal governmental power. The point, in other words, is that the Bill of Rights does not exhaust the list of constitutionally protected liberties; in Bobbitt's words, "one way we may understand the Bill of Rights is as a collection of those examples of power denied the federal government which simply happened to occur to Madison and others as requiring reinforcement, perhaps on account of the historical experience with respect to unlimited government" (p. 146). This is because "[g]iven the limited nature of the government that the body of the Constitution describes, the retained rights of persons . . . would necessarily constitute an infinite list. Both the unspecified rights and the enumerated prohibitions derive from the general constitutional ground of enumerated and implied powers" (p. 144).

He is of course correct in asserting that "[t]he Constitution establishes a government of limited powers. Those means not fairly implied from affirmative grants of authority are inferentially denied the government" (p. 144). This is what Dean Ely has called the "checklist" approach to constitutional construction:[29] Any federal legislation not authorized by one of Congress' enumerated powers in article I,[30] read in conjunction with the necessary and proper clause,[31] is unconstitutional, not because it invades some separate constitutionally-defined enclave, but simply because Congress lacks power to legislate in a way not authorized by the Constitution. Bobbitt seems to imply that if we characterize our interposition of ethical principles as merely a finding that the legislation in question is unauthorized by the constitutional grant of power, we are freed from any need to confine our ethical principles to those described in the text of the Bill of Rights: "The Constitution — indeed the body of the Constitution standing unamended — need not declare these prohibitions because the affirmative power to accomplish such acts does not exist" (p. 145).[32]

As intriguing as this analysis may at first seem, its fatal defects

29. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 701 (1974).

30. U.S. CONST. art. I, § 8.

31. U.S. CONST. art. I, § 8, cl. 18.

32. Bobbitt summarizes his position when he writes:

> Constitutional ethical argument cannot be generated solely by analogies to the Bill of Rights. To do so would be to treat the Bill of Rights as the generative constitutional mechanism (a role it does have, of course, with respect to doctrine) and would ignore the fact that it has no greater claim as a limit on power than have all the other rights that can also be generated by the ethos of limited government.

Pp. 146-47 (footnote omitted).

rapidly become noticeable. One significant difficulty is that the concept of a government of limited powers contained in the Constitution is inherently confined to actions of the *federal* government. In structuring the Constitution, the Framers in no way attempted to undermine the assumption that *state* governments were repositories of general governmental authority. Indeed, their care in emphasizing the limited nature of *federal* power only serves to highlight their understanding of the generally[33] unlimited nature of *state* authority. Thus, even if Bobbitt were correct in all of his reasoning described to this point, at most it would seem to authorize the use of ethical principles solely as a constraint on *federal* power.

Bobbitt recognizes the problem, and attempts to deal with it:

> With respect to the states, who are not creatures of limited, delegated purposes, one may say as a general matter that those means denied the federal government are also limitations of the states, by virtue of the integration of federal constitutional norms into the contours of state authority produced by the Civil War. That is to say that states, in the pursuit of their quite different ends, are denied those means which are not necessary and proper to the achievement of federal ends. [Pp. 150-51].

Bobbitt thus has developed what he calls a "photo-negative paradigm" (p. 151) for measuring state authority to contravene ethical principles. Relying on the privileges and immunities clause of the fourteenth amendment[34] as "textual support" for his approach, Bobbitt suggests that "[w]e need only ask: is this legislative means (whether federal or state) one that is fairly inferable from one of the federal enumerated powers?" (p. 152). In so doing, he in effect attempts to place a square peg in a round hole. There is no basis on which to believe that either the Civil War itself or the post-Civil War amendments so radically restructured our federal system as to transform the state governmental powers into a carbon copy of enumerated federal governmental powers. At most, those amendments established new constitutional *enclaves* to protect citizens from otherwise unlimited state power; there is no historical or philosophical basis — and Bobbitt does not attempt to provide one — on which to transform these amendments into the establishment of federal-like *checklists* for state authority.

More importantly, as a purely practical matter it would be absurd to suggest that the states can do no more or less than can the federal government. A state can, it is traditionally assumed, regulate

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33. There were, in fact, a few direct limits on state power placed in the body of the Constitution. The primary example is the contract clause. U.S. CONST. art. I, § 10, cl. 1. The primary limitation on state power embodied in the Constitution is, however, in the supremacy clause, art. VI, cl. 2. Even the Bill of Rights, it should be recalled, had no applicability to the states. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

34. U.S. CONST. amend. XIV, § 1.

intrastate commerce. If we superimpose the federal checklist on the scope of state power, does it now follow that a state can only regulate *interstate* commerce, as can the federal government? Does it now mean that the federal government cannot preempt state action, because their powers, being identical, are forever in stalemate? Does it mean that a state can raise armies? Bobbitt himself recognizes the absurd possibilities. He therefore acknowledges that "in applying the ethical approach against state action we may not limit the inferred means merely to a restatement of the federal end, since the ends of state power are by definition largely different from those of national government and such a limitation would amount to the imposition of a test for federal ends . . ." (p. 155). Instead, Bobbitt, using as an example a state statute making robbery a criminal offense, suggests that

> we may ask whether, at least on the basis of ethical approaches, a state statute making robbery a criminal offense is constitutional by looking at the specific method used — the trial of the offender and his imprisonment for stealing another's possessions — that does not embody a federal objective. We may then test this means against a similar federal means for constitutionality — for example, the federal bank robbery statutes. [P. 155].

He seems to be saying that we can discern whether a state statute is a proper means to attain an authorized end by seeking *analogies* in the federal system. But even if such an approach were workable, it still highlights the awkwardness of testing state authority by means of limitations established solely for the purpose of testing federal power. Often, however, drawing such analogies will be a most difficult task. For the simple fact is that state governments may deal with day-to-day matters of governing of a type for which the federal government just was not designed.

There is, however, an even more difficult problem with Bobbitt's assertion that ethically-derived freedoms not found explicitly in constitutional text may be inferred to have constitutional status from the absence of direct constitutional authorization of the government to invade those freedoms. The inquiry into whether the government has been granted authority to take certain action is, by its nature, a non-ethical process. In other words, in undertaking such an inquiry, the Court is not in a position to question whether Congress *should* have been given the authority to collect taxes or regulate interstate commerce or raise armies or conduct wars or protect patents; the Court necessarily takes these as a given. Therefore, in deciding whether governmental action is authorized by the enumerated powers, the Court is not undertaking an ethical inquiry into that action; rather, it is simply deciding whether the action somehow reasonably furthers the goals of the particular constitutional grant of power — in other words, whether the action is truly "necessary and proper" to

the exercise of that enumerated power. To be sure, the Court may scrutinize the governmental action with extreme care, as was once done,[35] or it may provide the majoritarian branches of government with considerable flexibility in deciding for themselves what is in fact necessary and proper, as is generally the modern practice.[36] But in neither event is the Court really called upon to examine the ethical implications of the government action in question. The point, in other words, is that the checklist limitation on federal power is by its nature concerned solely with whether or not legislation can rationally be deemed to further one or more of the powers delegated to the government; if in doing so the law may be thought to violate some ethical principle, that fact is not a matter of concern under the checklist analysis. It becomes so only if the law — though authorized by the delegation of enumerated powers — simultaneously invades a separate constitutionally established enclave.

For example, if Congress were to enact a statute providing that no one may criticize our military activities in Lebanon or Grenada, the checklist analysis would ask only whether the law furthers (*i.e.*, is "necessary and proper" to) the exercise of Congress' enumerated war powers under article I.[37] In fact, a strong argument could be made that the law does just that, because Congress could rationally conclude that widespread criticism could undermine the morale of our soldiers and give our enemies encouragement in their hopes that public pressures will force our government to withdraw our troops. However, there can be little doubt that the law also violates the enclave established in the first amendment protection of freedom of expression. To the extent that the interest in protecting individual rights is implicated in judicial review, then, it is not as a result of the comparison between the legislation in question and the list of enumerated powers. Bobbitt's inquiry focuses exclusively on the rationality of the means-ends connection. This is simply an inquiry into efficiency, not ethics.

Bobbitt apparently fails to see this fundamental distinction in the mechanisms of judicial review. For example, as part of his "absence of authority" analysis, Bobbitt attempts to restructure the rationale for the decision in *Roe v. Wade*,[38] recognizing a constitutionally protected right to an abortion. He begins his analysis with the following ethical principle: "Government may not coerce intimate acts" (p. 159). On the basis of this constitutional/ethical principle, Bobbitt reasons that "[w]hatever else may be an intimate act, carrying a child within one's body and giving birth must be a profoundly intimate

35. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

36. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

37. U.S. CONST. art. I, § 8, cls. 11. 12, 13.

38. 410 U.S. 113 (1973).

act" (p. 160). He acknowledges that arguably "a woman who voluntarily consents not merely to sexual intercourse . . . but also to carrying a child for a period long enough so that she can both be presumed to be aware of her condition and to have had the time to reflect on it, has by her acquiescence waived any claim against the state's coercion" (p. 161). He concludes, however, that "[b]ecause the mode in which the *Roe* argument I have given is ethical . . . it cannot yield to waiver. . . . No 'waiver' on the part of a woman can augment the government's authority. Indeed, she has such a right because government has no power to begin with" (p. 162). I fail to understand a logic that asserts that because a principle is ethical, it is not subject to waiver. Perhaps that conclusion is self-evident to Bobbitt; it certainly is not to me. The more important questions about Bobbitt's rewriting of *Roe*, however, concern both the validity of his ethical principles and his assumption that his ethical principle is transformed into a *constitutional* rule (despite the absence of any explicit textual reference) by means of his "absence-of-delegated-authority" analysis.

Bobbitt attempts to establish the moral validity of his principle inductively by pointing to concrete illustrations of governmental actions that violate his ethical directive, and then assuming our moral repulsion to those actions. He rhetorically asks, "[d]oes anyone reading this page even entertain the possibility that the state might be able to order errant husbands or wives to rejoin the families they have abandoned?" (p. 160). I guess I had not really thought about the question before, but I must say the answer does not seem as clear to me as it apparently does to Bobbitt. That fact once again underscores the never-adequately-answered question of exactly how we discern what principles are ethical and what are not. But the more important question for present purposes, assuming the validity of Bobbitt's ethical assertion, is where — if anywhere — in the Constitution is such activity on the part of the state prohibited?

Bobbitt initially assumes that such governmental action is prohibited *somewhere* in the Constitution: "The barriers must be constitutional, it would seem, to account for our sense of absolute prohibition" (p. 160). For the moment, I will disregard this logical non sequitur. For Bobbitt's most significant error is his assumption that it is an "absence-of-authority" — or checklist — analysis that gives us this answer. Since it is at least conceivable that compulsion of an intimate act might be rationally thought to further one or more of the federal government's enumerated powers, it is difficult to see how a constitutional rule prohibiting governmental compulsion of intimate acts derives from the lack of a grant of authority to do so.

For example, assume that Congress has enacted a statute that provides that in order to improve the morale of soldiers in battle,

civilians of the opposite sex are required to have sexual relations with soldiers who are about to be transferred to battle.[39] Can it be doubted that such legislation — though it clearly compels the performance of an intimate act — rationally furthers the performance of Congress' war powers under article I? A court might have difficulty questioning the congressional conclusion that (1) a soldier's morale is directly relevant to his or her success in battle, and (2) governmental provision of members of the opposite sex for sexual relations will likely raise a soldier's morale.

This does not mean that I necessarily believe such a statute either would or should be held constitutional. True, as morally monstrous as the law seems to be, there appears to be no specific enclave in the Bill of Rights that prohibits it. But the important issues for constitutional analysis would be (1) do either the fifth amendment's protection of "liberty" or some "penumbra" derived from an amalgam of various amendments[40] provide an enclave against such action, and (2) if not, is the Supreme Court empowered to find such an enclave as a matter of its power of "non-interpretive" review, perhaps subject to reversal by Congress through use of its power under the Exceptions Clause of article III.[41] John Ely, I think, would answer "no" to both questions. His theory, in his own words, "is one that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."[42] He responds to the parade of statutory horribles that every imaginative mind could create (a list that would quite comfortably accommodate my rather extreme hypothetical) by asserting, simply, that "that law couldn't conceivably pass."[43] Michael Perry, I believe, would probably answer the first question in the negative, but would just as likely answer the second question in the affirmative.[44]

But Bobbitt does not concern himself with these matters or with what leading theorists would say about them. Indeed, his virtually uniform failure to discuss the views of other theorists and contrast

39. The hypothetical statute is purposely made sexually neutral, in order to avoid problems of discrimination against women. Thus, the statute would equally require male civilians to have sexual relations with female members of the armed forces as it would female civilians to have sex with male soldiers.

40. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

41. U.S. CONST. art. III, § 2, cl. 2 provides that the Supreme Court's appellate jurisdiction is given "with such Exceptions, and under such Regulations as the Congress shall make." *See generally* Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination,* 27 VILL. L. REV. 900 (1982).

42. J. ELY, *supra* note 1, at 181.

43. *Id.* at 182.

44. *See* M. PERRY, *supra* note 1 at 91-145.

them with his own[45] is a significant structural defect in the book. Instead, he attempts to circumvent all of the important issues concerning the legitimacy of an unrepresentative court's invalidation of an ethically repulsive statute enacted by an electorally-accountable legislature when the ethical principle violated is neither expressly nor implicitly embodied in a constitutional enclave. He does this by assuming that the Framers either would not nor could not have chosen to delegate to Congress the authority to violate an ethical principle. But when the dust settles, all Bobbitt has done is to create constitutional enclaves to protect ethical principles when no such enclave exists. This may or may not be a valid conclusion but if it is valid, it is certainly not because the Court is properly performing its traditionally-accepted function of ascertaining whether particular legislation actually falls within the federal government's enumerated powers. It would simply be because we have decided to allow the Court to act as a moralizing force, perhaps, as Perry would argue, for the very reason that it is in fact unrepresentative.[46] But such a view is an extremely controversial one in a democratic society, for obvious reasons. Thus, Bobbitt's attempt to avoid this difficulty of democratic theory by transforming the infusion of ethical principles into a form of traditional judicial review ultimately fails.

III. CONCLUSION

I have chosen not to discuss in detail the substance of Bobbitt's "Book III," in which he purports to examine "some of the functions of judicial review" (p. 181). The section contains some interesting insights concerning the Court's role in "expressing" important constitutional values, even where it cannot or will not command their enforcement.[47] Ultimately, however, this section also fails, in part because of defective analysis of the rationales in specific cases[48] and

45. Michael Perry's name never appears in the book. John Ely is referred to briefly in two places, pp. 231, 238. Paul Brest is given one brief reference, p. 231, and the same is true of Ronald Dworkin, p. 23.

46. *See* M. PERRY, *supra* note 1, at 100:

> Our electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution or, therefore, to our religious understanding of ourselves. . . .
>
> Executive and especially legislative officials tend to deal with fundamental political-moral problems, at least highly controversial ones, by reflexive reference to the established moral conventions of the greater part of their constituencies.

47. *See* pp. 196-219.

48. Most troubling in this regard is Bobbitt's unperceptive discussion of the opinions in School Dist. of Abbington Township v. Schempp, 374 U.S. 203 (1963), holding the required reading of the Bible in public schools to be an unconstitutional establishment of religion. He attacks the decision for employing a "doctrinal" approach, one that "itself is inadequate to decide this case." P. 208. That is because both the majority and the dissent rely on a so-called "neutral" doctrinal principle, and "relying on the principle each asserts provides us with no way to choose between them." P. 208. What Bobbitt fails to recognize, however, is that one

in part because — as is true of much of the book — 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.

The last two portions of the book demonstrate that Bobbitt is capable of sophisticated legal and theoretical analysis, whatever the merits of that analysis. He is a scholar with many years ahead in which to refine and develop his capabilities, and he has demonstrated enough to make me believe it possible that his later work will make significant contributions to the already rich constitutional literature. However, scholarship on the subject of judicial review is already substantial, and while it may at some point benefit from future contributions — perhaps by Bobbitt himself — his *Constitutional Fate* fails to further significantly the level of inquiry.

"neutral principle" or "doctrine" may make more sense than another, in terms of logic, constitutional language, and societal values.

Equally important in Bobbitt's discussion of *Schempp* is the continued evidence of his poor organizational structure. The case discussion begins his chapter entitled "Expressive Function." However, through the first thirteen pages of his analysis, he emphasizes — to the virtual exclusion of all else — the weaknesses in the use of doctrinal argument, as demonstrated in *Schempp*. Yet that was his subject some eleven chapters earlier. It is not until he completes his extended, substantively dubious analysis of the use of doctrinal argument that he even raises the role of the decision as an illustration of the Court's so-called "expressive function." By the eleventh page of the chapter, I was saying to myself, "for heaven's sake, what is the point of all this?"