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Symposium on Philip Bobbitt's Constitutional Interpretation

***1703 IN PRAISE OF BOBBITT**

Akhil Reed Amar [\[FN1\]](#)

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Although I have never sat in his classroom, Philip Bobbitt has been one of my greatest teachers. His book *Constitutional Fate* [\[FN1\]](#) is one of a handful of truly towering works of constitutional theory in the last half-century. On my shelf, it sits exactly where it belongs--alongside other classics such as Hart and Wechsler's *The Federal Courts and the Federal System*, [\[FN2\]](#) Charles Black's *Structure and Relationship in Constitutional Law*, [\[FN3\]](#) Larry Tribe's *American Constitutional Law*, [\[FN4\]](#) John Hart Ely's *Democracy and Distrust*, [\[FN5\]](#) and Bruce Ackerman's *We the People*. [\[FN6\]](#) In my view, Bobbitt and this inspiring book have yet to get the praise they deserve.

I choose the words "constitutional theory" advisedly. They track the subtitle of Bobbitt's book: "Theory of the Constitution." And Bobbitt's is one of those rare works that has taught me about both the Constitution and theory--about both the law (substantively) and law (methodologically). I *1704 also choose the word "inspiring" advisedly, for Bobbitt's book has--in quite concrete ways--inspired me and inspired ideas in me; it has helped me see how the law game is played and (I hope) has helped me play it better and teach it to my students. Bobbitt's modalities are key tools for me in the classroom. [\[FN7\]](#) Bobbitt's book has also inspired quite concrete substantive insights about our Constitution and about the work of other students of the Constitution, both judicial and academic. These substantive insights have also featured prominently in my classroom. In short, in every class I teach, and in everything I write, Bobbitt's book is in my mind, influencing and inspiring me.

Now all this praise is not just so much hot air--the kind of cheap stuff one says but does not mean. And to prove this, I shall briefly canvass my own scholarship to date to trace my debt to Bobbitt's work.

In my first work as a professor, published in 1985, I set out to definitively resolve the classic debate over congressional power to strip jurisdiction from federal courts. [\[FN8\]](#) (Ah, the brashness of youth!)

As both the text and the footnotes of that article make clear, I was acutely selfconscious about interpretive methodology--about how textual, historical, structural, and doctrinal arguments might cohere or diverge. In particular, I pointedly sought to avoid reliance on secret history that left no textual trace, and this theme ran throughout my article. In my final footnote, [\[FN9\]](#) I identified the source of this methodological self-consciousness: an article in the Texas Law Review, by Philip Bobbitt, entitled Constitutional Fate. [\[FN10\]](#)

Two years later, I wrote a short bicentennial essay titled Our Forgotten Constitution. [\[FN11\]](#) One of its central themes was that reliance on secret history should be distinguished from, rather than equated with, textual argument in constitutional theory. Once again, my debt to Bobbitt should be evident.

The following year, I wrote an essay on the constitutional amendment process. [\[FN12\]](#) My only citation to Bobbitt was for an important empirical proposition about the average length of tenure for senior congressmen compared to the average tenure of Supreme Court Justices. [\[FN13\]](#) But *1705 Bobbitt's modes of argument were very much in mind when I crafted my arguments, as I noted in a letter to Bobbitt that year:

I describe my arguments on [pages 1043-72] as based on "text, history and structure" [page 1072]. I don't identify the arguments at [page 1073] ("There is no principled stopping point . . .") as "doctrinal;" or the discussion of the People's "definition of itself" at [page 1075] as, "ethical"; or Section V as "prudential." Nevertheless, I think you will recognize these modal arguments as such. [\[FN14\]](#)

In 1989, I published a book review of the third edition of the classic

Hart and Wechsler casebook. [\[FN15\]](#) Bobbitt's ideas on the nature of doctrinal argument [\[FN16\]](#)--and his brilliant exposition of the legal process school and the work of Henry Hart--were utterly indispensable to me. I wrote in a footnote:

See P. BOBBITT, CONSTITUTIONAL FATE 43 (1982) ("This extraordinary work [HART & WECHSLER] is perhaps the most influential casebook ever written. It is the book most frequently cited by the Supreme Court both generally and in constitutional opinions."). It should be noted that Professor Bobbitt's book is itself an extraordinary work that has deeply influenced the general ideas and approach of this Review. [\[FN17\]](#)

Later that year, I reviewed Sandy Levinson's wonderfully thought-provoking book, Constitutional Faith, in the Texas Law Review. [\[FN18\]](#) Once again, I found Bobbitt's teaching particularly illuminating: "I am not sure that Professor Philip Bobbitt--whose own brilliant book, Constitutional Fate, Levinson cites at this point--would agree with his colleague's conclusion as to the hopeless inconsistency of the modalities of constitutional argument." [\[FN19\]](#) I again cited to Professor Bobbitt in making a similar point in a 1991 essay: "There is no magical constitutional genie that breaks my kneecaps when I misinterpret. There are, however, generally accepted interpretive conventions that render some readings better than others." [\[FN20\]](#)

In 1992, I wrote an essay trying to definitively resolve the classic debate over incorporation--whether and how the Bill of Rights applied to *1706 the states. [\[FN21\]](#) (Ah, the arrogance of middle age!) Though my article seemingly cited Bobbitt only in passing, [\[FN22\]](#) his insights into that debate were absolutely formative in my own thinking. It was no coincidence, Bobbitt argued, that the most

prominent modern advocate of incorporation, Justice Hugo Black, was a textualist, or that his brand of incorporation was literalistic and mechanical. [\[FN23\]](#) As Bobbitt observed:

The doctrine of incorporation is crucial to the textual approach, since the language of the Fourteenth Amendment by itself is too sparse to provide the common phrases on which the textualist relies. Indeed, one may say that the development of this doctrine was driven by the theoretical requirements of textual argument. [\[FN24\]](#)

Or, as I later put the point,

[F]or Black, part of the appeal of incorporation lay in its mechanical quality--its apparent ability to reduce judicial discretion by establishing an exact identity between the broad language of the Fourteenth Amendment and the seemingly more specific rules of Amendments I-VIII. . . . As Professor Bobbitt has noted . . . incorporation did enable Black to substitute a longer set of words in the original Bill for the shorter set in the key sentence of Section One--no small thing to a textualist. [\[FN25\]](#)

Armed with Bobbitt's insight, I began to wonder whether the Fourteenth Amendment might best be understood as incorporating principles--rights, freedoms, privileges, and immunities--rather than words--that is, amendments as such. And this wondering eventually led me to develop what I have called "refined incorporation." [\[FN26\]](#) So, here too, I am in Bobbitt's debt.

I could go on--but I won't, for I hope the point is clear. In virtually every way--methodologically, substantively, and even empirically--I have profited enormously from Philip Bobbitt's book *Constitutional Fate* and the Texas Law Review article from which it derives. His new book, *Constitutional Interpretation*, carries on this tradition nobly and well--and I am sure that it, too, will shape my mind in the years to come. I salute Professor Bobbitt, and I commend his work to all.

[\[FN1\]](#). Southmayd Professor, Yale Law School. B.A. 1980, J.D. 1984, Yale University.

[\[FN1\]](#). PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). Although I offer these words of praise as part of a symposium on Professor Bobbitt's more recent book, *Constitutional Interpretation*, I have organized my remarks around Bobbitt's earlier work, for it lays the theoretical groundwork on which *Constitutional Interpretation* builds so admirably.

[\[FN2\]](#). HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

[\[FN3\]](#). CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

[\[FN4\]](#). LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

[\[FN5\]](#). JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[\[FN6\]](#). BRUCE ACKERMAN, WE THE PEOPLE (1991).

[\[FN7\]](#). See generally BOBBIT, *supra* note 1 (identifying six methods, or "modalities," of constitutional interpretation--historical, textual, doctrinal, prudential, structural, and ethical).

[\[FN8\]](#). Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205 (1985).

[\[FN9\]](#). *Id.* at 272 n.222.

[\[FN10\]](#). Philip Bobbitt, Constitutional Fate, 58 TEX.L.REV. 695, 707 (1980).

[\[FN11\]](#). Akhil Reed Amar, Comment, Our Forgotten Constitution: A Bicentennial Comment, [97 YALE L.J. 281 \(1987\)](#).

[\[FN12\]](#). Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, [55 U. CHI. L. REV. 1043 \(1988\)](#).

[\[FN13\]](#). See *id.* at 1081 n.36.

[\[FN14\]](#). Letter from Akhil Reed Amar to Philip Bobbitt (undated) (on file with the Texas Law Review).

[\[FN15\]](#). Akhil Reed Amar, Law Story, [102 HARV. L. REV. 688 \(1989\)](#) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)).

[\[FN16\]](#). See Bobbitt, *supra* note 1, at 39-58.

[\[FN17\]](#). Amar, supra note 15, at 690 n.11.

[\[FN18\]](#). Akhil Reed Amar, Civil Religion and Its Discontents, [67 TEX.L.REV. 1153 \(1989\)](#) (reviewing SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988)).

[\[FN19\]](#). Id. at 1171.

[\[FN20\]](#). Akhil Reed Amar, Taking Article III Seriously: A Reply to Professor Friedman, [85 NW. U. L. REV. 442, 443 \(1991\)](#) (citing BOBBITT, supra note 1, as an "extraordinary rich discussion of this proposition").

[\[FN21\]](#). Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, [101 YALE L.J. 1193 \(1992\)](#).

[\[FN22\]](#). See id. at 1227 n.156 (citing BOBBITT, supra note 1, at 32, 246-47).

[\[FN23\]](#). See BOBBITT, supra note 1, at 31-32.

[\[FN24\]](#). Id. at 32.

[\[FN25\]](#). Amar, supra note 21, at 1227, 1227 n.156.

[\[FN26\]](#). See Amar, supra note 21, at 1264-65.

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