

Government by Judiciary

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The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control, by Marshall L. DeRosa, *New Brunswick and London: Transaction Publishers, 1996. 196 pp. \$32.95.*

PROFESSOR MARSHALL DEROSA of Florida Atlantic University is the author of *The Confederate Constitution of 1861: An Inquiry Into American Constitutionalism*,¹ an excellent examination of the short-lived Confederate constitution, and so the appearance of his latest work raised high expectations. Generally speaking, although his new book suffers from poor editing, it is on the same high level as the previous tome. *The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control*, the overly lengthy title of his new book, is really DeRosa's thesis statement. Students of the United States Constitution's treatment by the Supreme Court of the United States are familiar with the fact that, while recent Supreme Court opinions have distended the justices' favorite Bill of Rights provisions, three of those first ten amendments are virtual dead letters.

The Second, Ninth, and Tenth Amendments are dead insofar as anything remotely related to their actual purpose—limiting the power of the federal government—is concerned. The Ninth Amendment, however, has been given a *new* purpose over the last 75 years: it is the

vehicle for the justices' project to submit all the states to "government by judiciary."² DeRosa's chosen task is not only to explain how the judges—supported by their sycophants in academia and in the mass media—have subjected us to such a government, but also to point to an alternative model. His effort on that last score, while convincing, is almost certainly futile, but he does a good job of explaining how the current juridical situation has developed and showing how it can be expected to progress from here.

In his first chapter, "The Promise of Judicial Federalism," DeRosa says, "... the U.S. Supreme Court's willingness to write its understanding of unenumerated rights into the Ninth Amendment is incompatible with a federal model of the Ninth Amendment through which the states could exercise prerogatives in the articulation of unenumerated rights within their respective jurisdictions; precluding such state prerogatives by nationally defined unenumerated rights is inconsistent with the states functioning as quasi-sovereign entities in exercising their Ninth Amendment prerogatives."³ Herein we have both a clear statement of the problem and a failure to see that it is Publius, not the justices of the Supreme Court itself, whom we should blame.

John Randolph of Roanoke, the outstanding leader of the old "Virginia School" of constitutionalism, famously said that "asking a State to surrender a part of her sovereignty is like asking a lady to surrender a part of her chastity,"⁴ and DeRosa wants the states to be only "quasi-sovereign." The only thing we know about a "quasi-sovereign" body, to paraphrase my old Criminal Law professor, is that it is not sovereign.⁵ At the root of this strain of thought is the justification laid down by James Madison in his old age for his own opposition to the Nullifiers' efforts to assert South

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Carolina's sovereignty: South Carolina wasn't sovereign at all, he asserted; she was only a useful administrative unit. She was, to use DeRosa's term, "quasi-sovereign." This, Madison insisted, had been Virginia's position in 1798.⁶ While no one believed that in 1798, and few Virginians believed it in 1832, DeRosa seems to believe it now.

Once the states have been reduced to the status of semi-chaste ladies, then, how does one make them maidens again? My own guess is that one does not. Randolph's view was that the "parchment barriers" ridiculed so roundly by Patrick Henry in the Virginia Ratification Convention of 1788 had already broken down by the 1820s. Henry held that, "All checks founded on any thing but self-love, will not avail,"⁷ and there are no such checks on the Supreme Court acting as our highest legislative body. Yet DeRosa, joining M.E. Bradford, holds out a forlorn hope.

In his confirmation hearing for a seat on the Supreme Court, Judge Robert Bork opined that the Ninth Amendment is akin to "an ink blot," a bit of text whose historic meaning is simply lost to us.⁸ In probably the most thought-provoking section of his book, DeRosa claims to have divined the meaning of that provision. It was intended, he says, to allow states to recognize new rights for their own residents which the general government's courts must respect. Unfortunately for DeRosa, no one in the national government either agrees with or has any sympathy for his view.

Rather, the Ninth Amendment has joined the Fourteenth Amendment and the Commerce Clause as one of the vehicles of the Old Republic's constitutional subversion. The sapping of the constitutional edifice began, according to DeRosa's account, with the writings of Roscoe Pound, who pronounced the Ninth Amendment an empty provision into which anything could be poured.

DeRosa, following the American Revolutionaries, claims, "American political culture necessitates that public policy be grounded in popular control if the policy is to be legitimate and thereby sustain the political obligation of the citizenry." Pound took a conflicting position. Eschewing the fealty to popular control that had been at least the public posture of the Federalists, the Anti-Federalists, and succeeding major political groupings, Pound claimed that obedience to social, economic, and political "necessity" must come first.⁹

Although the Thirteenth, Fourteenth, and Fifteenth Amendments were forced on the country by the Republican Congresses at the end of the War for Southern Independence, the Supreme Court recognized that the changes those amendments had wrought were limited. Pound, arguing in the 1900s for a new view, declared, "There are two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. The first is narrow and illiberal construction of constitutional provisions, state and federal.... The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as...not to be applied beyond the requirements of its expressed language."¹⁰ A common name for that to which Pound was objecting is "law," and he was calling for judges to make war on the very idea of law. Pound's argument had limited effect in his lifetime, but DeRosa asserts that the judges of the 1930s and later employed Pound's mode of argumentation in remaking the Civil War amendments and, through them, the entire regime.

Pound called the type of jurisprudence he advocated—jurisprudence wholly dependent on the judges' whims, totally unbound by law (*i.e.*, unconcerned with a given provision's authors' intentions)—"creative" jurisprudence, and DeRosa's

complaint is that such jurisprudence effectively combines the functions of the judiciary and the legislature in the same hands.¹¹ Pound's paradigm would leave it to judges, not to the people in the states or to their legislators either in the states or in the Congress, to decide what individuals' and society's interests are. The performances of Justices William Brennan and Thurgood Marshall in the area of capital punishment, regarding which they claimed to know the people's will better than did any legislature, are clearly in Pound's tradition.¹² No longer was law to be understood as government by the consent of the governed; rather, as radical abolitionists had once claimed,¹³ government only merited citizens' obedience insofar as its strictures approximated some Enlightenment model of "justice."¹⁴ "There are," according to Edward Corwin, a higher law theorist, "certain principles of right and justice which are entitled to prevail of their own intrinsic excellence." The right of the people to be ruled only by laws to which they arguably have assented apparently is not among ideas possessed of such "intrinsic excellence." It is by the consent of the *judges*, not by their own or their peers,' that the people should be governed.¹⁵

Pound's and his followers' view of the Constitution was that it was a useful ruse, a cover for government by judiciary.¹⁶ Just tell the rubes "the Founders said so" (as in, "the Founders protected pornography" or "the Founders enshrined flag burning" or "the Founders 'chose' feticide") and the average American would believe it, Pound predicted. Pound held, "Civilization rests upon the putting down of arbitrary, willful self-assertion and the substitution of reason."¹⁷ Decoded, that means, "Civilization is unfreedom; Platonic guardians are necessary." Yet, the people must not be let in on the secret. Here I am reminded of Justice Abe Fortas's instruc-

tion to his law clerks to 'decorate' one of his totally political opinions with legalese.¹⁸ Power is the thing; another name for this school is "legal realism," of which Fortas and William O. Douglas were leading avatars. This principle has come to dominate legal education and the legal profession, as both my own law experience and DeRosa's research make clear. Anyone who doubts this assertion need only turn his memory to the 1987 confirmation hearings of Judge Robert Bork, then a nominee to a seat on the Supreme Court.

Bork's opponents hooted and howled about his intention to adhere to anything resembling the intentions of legal provisions' authors. To do so would undercut virtually the entire leftist edifice of American government. Statists' opposition to Bork's principles was predictable. What was not so predictable was that Bork himself would refuse to stand by his own statements. Bork declared one morning that there was no legal basis for the Court's 1954 decision in the case of *Bolling v. Sharpe*, in which the court struck down the provisions of statutory law requiring racial segregation of the public schools in Washington, D.C. While the Supreme Court's more famous decision striking down segregation in the public schools in several states, *Brown v. Board of Education of Topeka, Kansas*, had purported to be based on the Fourteenth Amendment, the inapplicability of the Fourteenth Amendment to federal statutes made *Brown* inapposite to the question of D.C. segregation.

But Bork later recanted. *Bolling*, he said, had been rightly decided. The Fifth Amendment, adopted more than four score years before the Emancipation Proclamation, banned segregation in the District of Columbia. It was obviously a case of buckling to political reality, and Bork's opponents decried his inconsistency. This was an even more shameful case of hypocrisy than the one to which

DeRosa points, which is Bork's justification of the *Brown* decision itself. Whatever one may think of Bork's purported judicial philosophy or of the *Brown* decision, the philosophy does not support the decision. Even in political retirement, Bork will not admit as much.¹⁹

DeRosa proposes that the arrogation of power by the Supreme Court be remedied by adoption of an amendment establishing an attenuated state check on the Supreme Court's power of judicial review. This proposal is not well-suited to its purpose, since the new officials to be assigned to the commission he would create would be responsible not to the legislatures, but to the peoples of the states. The only real (as opposed to paper) check is an off-setting authority. The states' reserved powers can only be protected by giving the states power to protect them, such as they had under the original constitution. The Framers recognized the validity of this argument in deciding to give the Executive a qualified negative on congressional legislation. DeRosa is, of course, familiar with such devices for state self-protection. In any event, any such proposal would certainly meet with at least as much hostility as Bork did, and with the same result.

The remaining part of DeRosa's book is devoted to an examination of the way the Supreme Court has manipulated the Second Amendment using Pound's methods; to exposing the Poundian basis of three Reagan-Bush Supreme Court appointees' support for the perpetuation of the judge-made policy enunciated in *Roe v. Wade*; and to contrasting M.E. Bradford's originalism to Ronald Dworkin's unabashed constitutional Nietzscheanism.²⁰ It is not a hopeful picture, *pace* DeRosa. Randolph of Roanoke once exclaimed that the Constitution was a dead letter, that there were only the states and the federal government, and the stronger would rule. The stronger rules.

1. Marshall DeRosa, *The Confederate Constitution of 1861: An Inquiry Into American Constitutionalism* (Columbia and London, 1991). 2. This term was most famously employed by Harvard Law School Prof. Raoul Berger in the title of his seminal book, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Massachusetts and London, 1977). DeRosa relies heavily on Berger's argument in that book, as well as his *Federalism: The Founders' Design* (Norman and London, 1987) and his *The Fourteenth Amendment and the Bill of Rights* (Norman and London, 1989). Among them, these works explain how the states' virtually all-encompassing reserved rights have been reduced to naught. 3. Marshall DeRosa, *The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control* (New Brunswick and London, 1996), 3. 4. Robert Dawidoff, *The Education of John Randolph* (New York, 1979), 34. 5. Professor Robert Dawson of the University of Texas School of Law, 1987. 6. Kevin R. Gutzman, "A Troublesome Legacy: James Madison and 'The Principles of '98,'" *Journal of the Early Republic*, Vol. 15, No. 4 (Winter 1995), 569-589. 7. *The Anti-Federalist*, ed. by Herbert Storing (Chicago and London, 1981), 322. 8. He elaborates at Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York and London, 1990), 183-185. 9. DeRosa, *op. cit.*, 64. 10. *Ibid.* 11. *Ibid.* 12. DeRosa provides an example of one of Marshall's opinions to this effect at *ibid.*, n. 30. 13. A supportive description of some leading abolitionists' "jurisprudence" is found in Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven and London, 1975), 154-158. 14. DeRosa, *op. cit.*, 67. 15. *Ibid.*, 67-68. 16. This view has its odd echo in Gordon Wood's view that the Federalists of 1787-1790 pulled the wool over the eyes of the ratifiers in the various states, selling them one idea—that of popular government—while actually foisting off another—an aristocratic government—upon them. Gordon Wood, *The Creation of the American Republic, 1776-1787* (New York and London, 1969), 562-564. From a republican point of view, this explanation of the events of 1787 is nonsensical, for since a legal enactment means what its enactors think it means, it is impossible for them to adopt something whose meaning they misunderstand. From a Poundian point of view, it is ingenious. 17. De Rosa *op. cit.*, 77. 18. Laura Kalman, *Abe Fortas* (New Haven and London, 1990). 19. De Rosa, *op. cit.*, 195, n. 2. 20. Bork quotes my former teacher, Sanford Levinson, calling himself a "Nietzschean reader of constitutions" at Bork, *op. cit.*, 218.