evil; but once the magic words "foreign affairs" are mentioned, matters change entirely. Now the government becomes transformed into a Guardian Angel.

Has it ever occurred to our author that Marshall Plan Aid to Europe, which he celebrates, did not arise out of the free market? Suddenly, coercive taxation and governmental direction of the economy earn his plaudits. (For some much needed skepticism on foreign aid, Henry Hazlitt's *Will Dollars Save the World?* remains unsurpassed.) And drafting men to fight overseas, at the risk of their lives, in an unconstitutional "police action" under the aegis of the United Nations is not my idea of a free society.

Frum is anxious to import the blessings of militarism to his native country, Canada. Since, "as de Gaulle observed, states are rather inhuman monsters," Canada must acquire the means for independent action—atomic weapons (p. 163). Absent these, Canada is doomed to be a ward of her nuclear allies.

In order to act effectively in a world where "it's every state for itself," the necessary measures must be taken. No doubt nuclear proliferation is a problem, but Canada can do nothing to halt this. To arms! Frum is no doubt right that a state without nuclear weapons is apt to be at a disadvantage in a struggle with a state that possesses them. But why Canada need engage in this sort of battle at all, Frum never discloses.

I have sometimes been accused (always unfairly) of displaying excessive hostility to some of the books I review. Even were I to try as best I can to mock David Frum (as of course is not my intention), I would not be able to match his own words. He remarks that Adam Smith "seems to have been a singularly unamusing man." In support of this assessment, he quotes a remark of Thomas Carlyle that, incredibly, he interprets to mean that Carlyle thought Smith a dull dinner companion (p. 171). If Frum will take the trouble to look up the dates of Smith's death and Carlyle's birth, he will, I venture to suggest, discover a slight problem with his interpretation. ❖

Bill-of-Rights Despotism

THE NINTH AMENDMENT AND THE POLITICS OF CREATIVE JURISPRUDENCE: DISPARAGING THE FUNDAMENTAL RIGHT OF POPULAR CONTROL
Marshall L. De Rosa
Transaction Publishers, 1996, viii + 216 pgs.

Professor Marshall De Rosa's excellent book calls attention to a paradox in recent constitutional law. The Ninth Amendment to the U.S. Constitution provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the

people." One might at first sight read the Amendment, together with the Tenth, as a limit to the power of the national government.

This, indeed, is the way De Rosa thinks the amendment should be read; and it is, in his view, the understanding intended by its authors. The Constitution did not establish a centralized state, under the total dominance of the federal government. Quite the contrary, the states retained a large measure of autonomy, and the document would never had been ratified without appropriate guarantees of state sovereignty. "Until the 1960s, the Ninth Amendment served as a precautionary reminder that there were limits to the national government's powers that were not explicitly stated in the Constitution and these unenumerated rights were, indeed, retained by the people in their respective states" (p. 11).

Until the 1960s, the Ninth Amendment served as a precautionary reminder that there were limits to the national government's powers that were not explicitly stated in the Constitution but retained by the people in their respective states.

The matter appears straightforward; what, then, is the paradox to which I initially referred? The problem arises from the fact that the Fourteenth Amendment has been held by the Supreme Court to apply the Ninth Amendment to the States. "For the past three decades the significance of the Ninth Amendment has incrementally increased due to its utility in limiting governmental power, especially state power" (p. 11).

De Rosa locates another potential trouble area for states rights in the "privileges and immunities" clause. This forbids a state from denying the privileges and immunities of its citizens to citizens of other states present within its borders. In the crucial early case that established the standard interpretation of this clause, *Corfield v. Coryell* (1823), Justice Bushrod Washington "stipulated that the purpose of the privileges and immunities clause is not to establish a national standard of rights for all Americans, but to better 'secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union'" (p. 11, citing Washington's opinion). By the way, Bushrod Washington was George Washington's nephew.

To grasp the point of Washington's opinion, one must take hold of a simple distinction. The clause prevents a state from restricting the privileges and immunities of non-citizens; it does not require a state to enforce a particular set of rights. Put bluntly, a state is perfectly free to enact a very restricted set of rights, so long as it does not discriminate between its

own citizens and citizens of other states.

Unfortunately, from the author's point of view, there is a competing interpretation of the clause, most clearly stated by Justice Bradley in his dissent in the *Slaughter-House Cases* (1873). "According to Justice Bradley, the privileges and immunities clause of Article IV inherently incorporates the U.S. Bill of Rights, thereby making them applicable to the states; the states must not only confer these rights on citizens from other states, but also on their own citizens and non-citizens within their jurisdictions" (p. 52).

The Supreme Court has not (yet) adopted this construal; but should it do so, state sovereignty will be struck a devastating blow. De Rosa speculates that on this understanding, Congress could establish national abortion rights even if *Roe* v. *Wade* were overturned by the Court.

The pattern De Rosa has so well described occurs again and again in current constitutional law: the right of the citizens of a state to determine their own affairs constantly clashes with judicial requirements that states meet a fixed standard of rights.

A crucial instance of this battle concerns the Second Amendment. This forbids the federal government from infringing on the right to keep and bear arms; but, as our author persuasively argues, it leaves the states perfectly free to do so. As one might expect, De Rosa's traditional understanding of the Second Amendment no longer prevails on the federal bench. "[T]he [1939] *Miller* decision essentially . . . subordinat[ed] the Second Amendment to national policy objectives, specifically as those objectives pertain to national politics, and not states' rights" (p. 136). Our author argues strongly that the *Miller* decision and its progeny are mistaken (but I think it might also have been useful for him to address Michael Curtis's argument that the Fourteenth Amendment applies the restrictions of the Second Amendment to the states).

> The judiciary should not become the instrument of advocates of a particular political theory to impose their system on the people of the states.

Our author's incisive analysis raises an essential issue of political theory. Suppose one believes that individuals *should* have the right to keep and bear arms. Should one support federal enforcement of this right, or should one defer to the rights of the states, at the risk that states may restrict individual rights?

An exactly similar issue arises in disputes over economic regulations. Suppose that one supports laissez-faire capitalism. Should one then, like Richard Epstein, endorse the revival of "*Lochner*-era jurisprudence"? In

Lochner and similar cases, the Supreme Court used "substantive due process" to prevent states from interference with property rights. What is one to think of this?

For our author, the matter admits of no doubt: the judiciary should not become the instrument of advocates of a particular political theory to impose their system on the people of the states. De Rosa supports his point of view in greatest detail in what to my mind is his book's finest chapter, "Contrasting Theories on the Articulation of Unenumerated Rights." The chapter assesses the views of two diametrically opposed thinkers: M.E. Bradford, a literary scholar and authority on American history, and Ronald Dworkin, perhaps the leading legal theorist of "activist" jurisprudence.

The Constitution does not endeavor directly to promote political ends: instead, it leaves the people of the states free to pursue their own ends.

For Bradford, "the U.S. Constitution was produced by delegates determined to complement their respective state governments, not to obliterate them" (p. 153). The Constitution does not endeavor directly to promote political ends: instead, it leaves the people of the states free to pursue their own ends, within the confines of a strict set of legal procedures.

Following the British political philosopher Michael Oakeshott, Bradford termed a regime of this sort a nomocratic order. This is to be contrasted with a teleocratic order, which aims to promote a given set of goals, to which legal procedures are strictly subordinate.

Bradford saw in teleocratic regimes the danger of despotism; and the position of Ronald Dworkin, whom our author selects as an example of a teleocratic theorist, goes far to show that Bradford (as usual) was perfectly right. Dworkin makes the text of the Constitution a mere tool to enforce a so-called "right to equal respect." Equal respect, in his sense, by no means requires equal treatment. In some cases, it precludes it, all of course as decided by Dworkin's fiat.

On only one minor detail do I differ with De Rosa's brilliant account of Bradford. When Bradford described the "comic action" of the Constitutional Convention, he did not mean, I think, that "Madison should have known better, especially when the intended or unintended effects of his actions could have been disastrous" (p. 184 n. 14). Rather, he meant that the Convention's story ended happily, despite Madison's initial problem of adjustment. Bradford is using "comic" in the sense of Northrop Frye's great *Anatomy of Criticism*, a work by which he was much influenced.

De Rosa has described two sharply different ways of understanding the

De Rosa's book is the product of wide scholarship and discerning judgment. Anyone interested in constitutional law will find the book of major value.

Constitution, and forcefully argued for the view he thinks correct. Granted that he is right, the question arises: how did strict adherence to the Constitution's text come to be replaced by what he terms "creative jurisprudence"?

Our author ascribes a large share of the blame to the great American legal scholar Roscoe Pound, who vastly influenced the legal profession in the 1920s and 30s. A proponent of "sociological jurisprudence," Pound spurned attempts to insulate legal texts from social trends. Instead, the jurist should act as an "engineer" to mold society to the ends he thinks proper. "Mechanical jurisprudence" (quite close to what Bradford meant by a nomocratic order) is to be rejected.

Pound's unrivaled erudition gained him wide respect among law professors and judges; and his contention that jurists should construct legal history in a way calculated to put into practice their social goals soon, unfortunately, found many takers. More specifically, Pound's introduction to Bennett Patterson's *The Forgotten Ninth Amendment* helped lead to the new view of the Ninth Amendment we discussed at the outset.

De Rosa's book is the product of wide scholarship and discerning judgment. It contains many gems I have not commented on here: e.g., the illuminating account of Dred Scott (pp. 42–46); the criticism of Graham Walker's moral realism (pp. 185–86 n. 40); and the unusual application of Karl Popper's phrase, "problem of demarcation" (pp. 103, 109 n. 56). Anyone interested in constitutional law will find the book of major value. ❖

Treaty? What Treaty?

IS NAFTA CONSTITUTIONAL?
Bruce Ackerman and
David Golove
Harvard University Press, 1995, 129 pgs.

The authors of *Is NAFTA Constitutional?* call attention to a striking absence in the heated public debate over the Nafta agreement. The measure secured the approval of both Houses of Congress, albeit with considerable arm-twisting from the White House. But the Constitution on its face mandates another procedure for agreements of this sort.