

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW. By Robert H. Bork.¹ New York: The Free Press. 1990. Pp. xiv, 432. \$22.50.

THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION. By Michael Pertschuk² and Wendy Schaeztl.³ New York: Thunder's Mouth Press. 1989. Pp. xi, 317. \$24.95 (cloth); \$13.95 (paper).

BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA. By Ethan Bronner.⁴ New York: W.W. Norton. 1989. Pp. 339. \$22.50.

*John P. Roche*⁵

There was an air of unreality about the whole Bork affair which these three books do little to dissipate. Indeed, the more a clinical observer of the American political scene reviews this battle, the more mysterious certain dimensions appear. Perhaps I should at the outset set out the premises of my analysis to avoid accusation of cherishing a secret agenda. (Regrettably this may require repetition of points made here and elsewhere on earlier occasions, but then old whales live off their own oil.) For starters, I take it for granted that the Supreme Court is now and has since its creation been a political institution. Given the overlapping jurisdictions of the congress, the president and the judiciary under our system, the political matters that are dumped on the Court's doorstep are usually booby-traps. Congresses and presidents who are exposed to the chilly winds of public controversy without life tenure love to pass the buck to our Platonic Guardians. Has anyone heard a governor or state legislator applauding the Court's *Webster* decision, which returned part of the abortion buck to these politicians?

Just as in 1787 the Founding Fathers left certain ambiguities (e.g., the structure of the federal judiciary, the definition of national citizenship) to be clarified by the new government, the politicians of later generations have hoped the Court would rescue them from messy confrontations, or provide succor. The classic instance of the

1. John M. Olin Scholar in Legal Studies, the American Enterprise Institute.

2. Co-Director, The Advocacy Institute, Washington, D.C.

3. A "media strategist" for the Advocacy Institute.

4. Supreme Court writer for the Boston Globe.

5. John M. Olin Distinguished Professor of American Civilization and Foreign Affairs, The Fletcher School of Law and Diplomacy.

first sort was the almost universal 1850s political conspiracy to get the Supreme Court to “settle” the slavery question. Charles Evans Hughes overstated the matter a bit when he called *Dred Scott* a “self-inflicted wound;” Congress had been busy enacting what sardonic Senator Tom Corwin of Ohio called “not a law, but a law-suit” to force the slavery question onto the Court’s agenda. Taney’s folly was that, unlike his colleague Justice Nelson who had burked the case procedurally on circuit, he thought he could play the Messiah, and found seven competitors on the bench.⁶

Political losers got little help from the Supreme Court before the development of the concept of substantive due process. When President Jefferson—in an “unpacking” of the judiciary that made FDR’s “court-packing” proposal look like a tea-party at the vicarage—pushed the Judiciary Act of 1802 through a delighted Republican Congress, he defenestrated sixteen federal circuit judges by simply abolishing their positions. They had been named by President John Adams under the authority of the Judiciary Act of 1801, and approved by the Senate. In short, they were what we today would call “Article III judges,” supposedly seated for life, but now on the street. The newly unemployed Virginia circuit judge hoped that Chief Justice John Marshall might take a dim view of Jefferson’s exertions, but that canny veteran of Virginia’s wars refused the bait. Instead, picking his own (preposterous yet effective) battlefield, Marshall used *Marbury* as the vehicle for expressing his acidulous views on his cousin’s constitutional innovations.⁷

The relevance of all this to the Bork affair is patent: I think it is legitimate to oppose a judicial appointee on “political” grounds and I have done so on several occasions beginning with Burton, Vinson, Clark, and Minton, Truman’s underwhelming choices. Anyone who thinks this “un-American” is referred to John Adams’s 1795 letter to Abigail on the splendid conduct of the Senate in rejecting John Rutledge as Chief Justice for his opposition to the Jay Treaty, or to Jefferson’s comments on the same event to Wil-

6. For the background in superb summary, see Nevins, *The Constitution, Slavery and the Territories*, in THE GASPER G. BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1953).

7. For elaboration of my position on such matters, see Roche, *Education, Segregation and the Supreme Court: A Political Analysis*, 99 U. PA. L. REV. 949 (1951); Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 WESTERN POL. Q. 592 (1952); Roche, *Plessy v. Ferguson: Requiescat in Pace?*, 103 U. PA. L. REV. 44 (1954); Roche, *Judicial Self-Restraint*, 49 APSR 762 (1955); Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 APSR 799 (1962); Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103 (1963); Roche, *The Expatriation Decisions: A Study in Constitutional Improvisation and the Uses of History*, 58 APSR 72 (1964); Roche, *Equality in America: The Expansion of a Concept*, 43 N.C.L. REV. 249 (1965).

liam Giles.⁸ American constitutional law has always been a contact-sport.

It does not follow that one should oppose every nominee whose political views are imperfect. Tactically, the question is whether you believe you can force the president to give you a candidate you like better. To take a good example, after the Carswell nomination had gone down in flames, Nixon had to dive toward the middle and emerged with Chief Justice Burger's old friend Harry Blackmun. Surely none of Carswell's liberal opponents has had cause to regret his opposition to the man that Senator Hruska tried to defend on the ground that mediocrities are entitled to representation on the Court. On the other hand, the defeat of Judge John J. Parker in 1930 surely led to a net loss for the Court: Owen J. Roberts's only redeeming judicial value was as Hughes's pocket-vote in the "switch in time that saved nine."

Which brings us to the macropolitical setting in which the Bork saga was played out. The Republicans lost control of the Senate in the 1986 elections, a fact that was taken by the media as indicative of liberal Democratic resurrection. But one who looked closely at the individual Senate races where Democrats gained seats would have found few traces of ideological polarization. In the South the Democrats rallied unprecedented black support, but the Democratic contenders were facing incumbents who had—in several cases much to their own surprise—been carried in by Reagan's 1980 coattails. They were not an impressive lot: an eminent southern Senator of my acquaintance observed that "they were such turkeys that even the other turkeys noticed." At any rate, enough new Democrats entered the Senate to provide a net Senate majority of ten. These newcomers discovered that they were supposed to be "liberal" paladins, devotees of the "Massachusetts Miracle," gay rights, higher taxes, lower defense budgets, saving whales, and abortion. It was rumored that the Kennedy Institute at Harvard was offering a crash seminar on "How to be a Liberal."

The Bork nomination gave them the perfect opportunity to be "Liberal" on the cheap. The nomination had been anticipated by liberal pressure groups, and occurred against a background of leaks from the White House and Justice Department to the effect that *now*, at last, the conservatives were going to dominate the Court and—presumably by a great demonstration of judicial self-restraint—whack away at famous liberal precedents. It was a goofy spectacle, but then nobody ever accused President Reagan or Attor-

8. See Roche, Book Review, *The Documentary History of the Supreme Court of the United States, 1789-1800, Vol. I, Parts 1 and 2*, 4 CONST. COMM. 166, 171 (1987).

ney General Meese of being cunning; indeed, had my rational faculty not overpowered my conspiratorial instincts I would have accused Meese of being a covert fund-raiser for the ACLU⁹ and People for the American Way.

So the cannon roared, the smoke cleared, and there stood Robert Bork, destined to be the great Tribune of "original intent," old-fashioned virtue, and vintage Americanism. I doubt that he fully realized, when he was sent forth as the Defender of the Faith, that his sponsors had put him in such an exposed position. The poor man never knew what hit him: during his inquisition I was constantly reminded of the Charlie Chaplin movie in which the tramp sees a red warning flag fall off a projection from a truck, grabs it and runs after the driver shouting, then accidentally finds himself leading a communist parade that swings behind him at the next corner, and finally gets clobbered by the cops.

Pertschuk and Schaetzal have given us a thunderous *ex parte* exploration of the hatchet job that was done on Bork both in and outside of the Senate Judiciary Committee hearings. I will examine later what I consider to be the odious nature of the attack; suffice it here to say that it was extraordinarily effective in bashing Bork and *sub specie aeternitatis* totally useless: a thoughtful, perceptive, and speculative conservative was dumped; a colorless but equally conservative Justice Kennedy now sits in his place. When I finished reading *The People Rising*, momentarily hypnotized, I had visions of Justice Laurence Tribe, or Justice Alan Dershowitz, enrobed *vice* Robert Bork, but regaining my senses I recalled instead some friends of mine in World War II who, after a fierce firefight, captured the wrong Pacific atoll.

In strategic terms, then, the campaign against Bork was a failure, but beyond that—if one knows anything about the folkways of the Senate—it was a farce. Recall that in 1986 the Republican dominated Senate approved Antonin Scalia by a vote of ninety-eight to zero, and in my judgment Justice Scalia is a far more rock-ribbed conservative than the intellectually curious and ruminative Bork. (In fact, Scalia, as some of his opinions and side-shots in oral arguments suggest, may age into the churlish James McReynolds of the Rehnquist Court.) Moreover, if the president had nominated Senator Orrin Hatch of the Judiciary Committee, surely a vintage con-

9. "Partly as a result of the sharp attacks on the organization during the last Presidential Campaign, the A.C.L.U. has more resources than ever before. The organization's national membership has grown to more than 275,000, with an annual budget of \$25 million, both all-time highs." N.Y. Times, Jan. 14, 1990, p. 19, col. 2.

servative, the Senate would have whisked it through before anyone had time to notify The People.

Finally, to indulge fancy a bit, suppose Mr. Reagan had had the cunning to nominate a stalking-horse. Phyllis Schlafly would have been ideal—a highly intelligent, conservative, woman lawyer with a zest for hand-to-hand combat utterly absent in Bork. In that event, Senator Edward Kennedy's vicious opening salvo against Bork¹⁰ would have been met with an equally deadly broadside.

To put it differently, Mrs. Schlafly would instantly have recognized the red pennant of "No Quarter" flying over the Senate Judiciary Committee and would have responded accordingly. The Senate can't cope with contumacious defiance (for instance, Oliver North's performance) and by the time Schlafly was voted down, and Senators had limped off to get their wounds stitched, Bork's subsequent nomination would have passed by unanimous consent at 2:00 a.m.

As Bronner's *Battle for Justice*—a slightly insipid, but essentially fair journalistic narrative—amply documents, it was clear to anyone who ever ran for precinct captain that Robert Bork was a political innocent, whose performance under questioning had the shocked incredulity of a nun who has accidentally wandered into a bordello. Here was the same friendly committee that had waved him onto the prestigious D.C. Circuit Court (with no fireworks from the then Democratic minority) suddenly out for his scalp. Bronner puts the blame for this bushwacking squarely on the White House, where everyone from the president down anticipated another easy trip on the Scalia model.

Yet, as Heraclitus put it, character is destiny and the foundation of Bork's political innocence had been laid long before his Senate ordeal. A disciple of the Chicago economist Aaron Director, Bork wholly rejected Holmes's dictum that the life of the law has not been logic, but experience. According to Bork, "Logic has a life of its own, and devotion to principle requires that we follow where logic leads."¹¹ His career, until it was sideswiped by the Senate, was a testimony to this vacuum-packed, esoteric doctrine. Suddenly this medieval scholastic, accustomed to a university environment where ideas have no practical consequences, found himself in a universe where it is generally agreed that a straight line is the shortest distance to disaster. What could a battle-scarred politician say of a man who, when asked why he would like to be on the Court, replied with patent sincerity, "I think it would be an intellec-

10. For the full indictment, see BRONNER, *BATTLE FOR JUSTICE* 98-99 (1990).

11. *Id.* at 63.

tual feast, just to be there and to read the briefs and discuss things with counsel, and discuss things with my colleagues”?

Having been worked over by Senate committees on several occasions, and having watched at close range as my White House colleagues Joe Califano and Jim Gaither in 1968 desperately tried to get movement on President Johnson’s nomination of Abe Fortas as Chief Justice,¹² I know the tribal custom on the Hill: when you smell blood, howl and join the pack. As LBJ predicted while the House of Representatives was debating punishment for Adam Clayton Powell (the chamber’s most powerful black), that body would not stop short of expulsion: “they never kick a man when he’s up, and they’ve been waiting for years to see *him* down. They just *love* to shoot the wounded.” In short, the Senate’s treatment of Bork was in character.

In the fall of 1987 Ronald Reagan was a lame-duck who had lost his magic, the Democrats were back in control of the Senate, the high priests of the media were eagerly anticipating a confrontation (they would never forgive Reagan for treating them like members of some Rotary Club rather than as peers of the realm), and Bork provided a choice opportunity. Just as the ideal juror these days seems to be someone who never reads a paper or watches television, the ideal candidate for a judgeship is one who never wrote a letter home, much less committed controversial opinions to print. Bork, however, had left a paper trail a mile long and the liberal pressure groups (with no realization they were fighting for the wrong island) did a spectacular job compiling “The Book of Bork.”

I knew that Bork would be given a work-out, but it never entered my mind that he would be the victim of an intellectual lynching-bee. I, for example, would have enjoyed questioning him on the subtleties of whether and how to enforce the Original Intentions of the Framers. But the assault rapidly took on the characteristics epitomized in Senator Kennedy’s July 1 invective; by the time the ad hoc “Block Bork Coalition” got into motion, the real questions before the Senate seemed to be whether Bork would 1) return blacks to slavery; 2) restore the antique common law notion of a woman as a chattel; 3) relegitimize “yellow dog” contracts; and 4) enforce Thomas Jefferson’s view that castration is the appropriate penalty for rape, sodomy, and adultery.

As the hearing dragged on through September something resembling a religious revival swept the nation’s law schools, resulting in anti-Bork petitions signed by a couple of thousand law professors

12. Roche, Book Review, NAT’L REV. Dec. 9, 1988 at 54 (reviewing A. MURPHY, FORTAS, THE CHECK COLLECTOR (1988)).

and deans, most of whom probably had never read a Bork article or judicial opinion. A former student of mine, now a law professor, called and asked me to sign on. When I inquired about the details of the true bill, he said, to summarize, that Bork would take us back to *Lochner*. When I told him that Bork had cited *Lochner* as a horrible example of judicial usurpation, he replied that he hadn't followed the Original Intention debate but that everybody at his school thought Bork was an arrogant reactionary. I said I thought that if Bork was anything he was a radical in the libertarian tradition who wanted to incorporate his views in the law and provide spectral evidence that this was Original Intent. He asked, "What is spectral evidence?" I told him to read Cotton Mather's treatise on why it was inadmissible in witchcraft trials. He returned to teaching trusts. He is a bright man, but I fear this was the *modus operandi* used to collect all those Esquires. Of course, that's the way it is with political petitions.

Outside the legal profession the Block Bork Coalition did a superb job of defamation. Norman Lear, the *deus ex machina* of People for the American Way, went through the entertainment industry and rounded up the usual suspects, but his *tour de force* was "The Last Word," a television spot featuring Gregory Peck ("Ahab in a grey flannel suit," as Perry Miller called him), on a "voice-over" outside the Supreme Court temple stating with prophetic intonation that Bork as a Justice would do a Samson on those pillars of American constitutional decency. As a retired political activist who vetted a lot of proposed political spots in his time, I had to give this four stars: it was a barn-burner and at \$170,000 a real bargain. The content was a pungent rerun of the by then standard litany of vulgar misrepresentations.

Bork took a hard fall and I confess my heart went out to him. I have never abandoned my conviction that judicial review is a Platonic aberration, though I believe that the framers took it, *en principe*, for granted, while reserving the right to denounce decisions that they disliked as "usurpations"—just like you and me. My impression of Bork was of a delightful, ironic, intellectual buccaneer. He loved to run up various controversial flags and see who saluted—a dangerous hobby, particularly when combined with irony, which in this life will get you into more difficulty than homicide.

My problem with Bork was not that he seemed an ideologue with views set in concrete, but rather that I found his jurisprudence *unclear*. Predicting his behavior as a Supreme Court Justice struck me as a high risk endeavor; I kept thinking of Felix Frankfurter, another one-time intellectual pirate. So, *faute de mieux*, I sup-

ported his nomination. I could never join the pentecostal vigilantes who were out to savage him, and given Ronald Reagan's preferences Bork was clearly the best candidate. I would have preferred an Edward Levi, but there were no Edward Levis in the competition. So "The People Rose"—and gave us Anthony Kennedy. As Robert Southey put it in *The Battle of Blenheim*, "But what good of it came at last?" Quoth little Peterkin, "Why I cannot tell, said he, But 'twas a famous victory."

Turning from "The Book of Bork" to Bork's book, *The Tempting of America*, is not a pleasant task: the work is turgid, repetitious, and bitter. One can understand the bitterness, but nonetheless—as my wise wife convinced me a quarter of a century ago—it sours the soul. Get catharsis from writing a blast, then put it aside for six months, reread it, and tear it up. One of the more appealing aspects of Bork's personality has been his irony, his ability to look at himself in the mirror and chuckle. At times, he still has it: I recently saw an interview with him in a student newspaper in which the questioner asked him how he thought he would appear in the light of history; he replied, "Unfortunately I won't be there to find out." However, this book lacks any trace of irony; it has the manic, teeth-gritted stridency of a Trotskyite polemic. The title of Chapter 12 provides a good example: "The Impossibility of All Theories that Depart from Original Understanding."

It is hardly a state secret that I consider the quest for Original Intent an intellectual snipe-hunt.¹³ If in 1789 the First Congress, which teemed with framers, could get into a dispute over the president's removal power, may God have mercy on judges and scholars who in 1990 set forth to read the minds of the distinguished deceased. Charles Warren laid out the basic material in 1922 and while subsequent research has amplified his data-base, I think all of us who work in constitutional history are his academic heirs.

Bork is far too intelligent to argue that the framers, and the 1700-plus ratifiers who get thrown in every so often, had a blueprint for running the United States in our time. He further concedes that judicial usurpations of the legislative function go back at least to *Calder v. Bull* (1798) and suggests that judicial review of Acts of Congress was not meant to be within the scope of judicial power. However, he never supports unlimited majority rule on the British model: judges, *assuming they do not arrogate to themselves the role of policy-makers*, have the obligation to set the majority on the straight and narrow path of Original Intent.

13. See Roche, Book Review, 5 CONST. COMM. 477 (1988) (for a crisp summation).

When you see a judge attempting to decide whether the Founding Fathers, or the authors of the fourteenth amendment, would have approved mandatory busing to eliminate school segregation, how do you know what is going on in his mind? Is he waiting for James Madison or John Bingham to come to him in a vision? Or is he substituting his own values for those of these past worthies? Bork attempts to deal with this in a statement that defies logical analysis:

The Slaughter-House Cases pose the interesting question of the appropriate judicial response to a constitutional provision whose meaning is largely unknown, as was, and is, the privileges and immunities clause. [Whether Charles Fairman's view] is the case or not, that the ratifiers of the amendment presumably meant something is no reason for a judge, who does not have any idea what that something is, to make up and enforce a meaning that is something else.¹⁴

While readers are decoding that delphic pronouncement, I might add that Bork's constitutional history is very sloppy. Beginning with his treatment of *Hayburn's Case* (1792),¹⁵ as if it were a Court decision, through his assumption that after Taney's decision "Scott was to remain a slave,"¹⁶—his text is littered with simple misstatements of fact. We all make mistakes, but when Bork declaims with Solonic finality that "regulation of commerce had to be done for commercial reasons and not as a means of effecting social or moral regulation,"¹⁷ it is clear that he has not read the statutes (e.g., the 1803 law, 2 *Stat.* 205, which prohibited the importation of slaves into states whose laws forbade slavery, or the later bans on lottery tickets, contraceptives, or other "bad" things) or the pertinent legal literature.¹⁸

He also glides over *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923), treating them as defenses of religious and educational freedom. This may have been their net impact—indeed, I have argued that *Meyer* should be paired with *Gitlow* as a bridge case in the incorporation of the first amendment in the fourteenth¹⁹—but in each the *ratio decidendi* was that the Catholic order and the German teacher had been deprived of property without

14. R. BORK, *THE TEMPTING OF AMERICA* 39 (1990).

15. *Id.* at 24.

16. *Id.* at 30.

17. *Id.* at 56.

18. See Cushman, *National Police Power Under the Commerce Clause of the Constitution*, 3 *MINN. L. REV.* 289, 381, 452 (1919); Cushman, *National Police Power Under the Taxing Clause of the Constitution*, 4 *MINN. L. REV.* 247 (1920); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 *MINN. L. REV.* 402 (1920); cf. Roche, *Entrepreneurial Liberty and the Commerce Power*, 30 *U. CHI. L. REV.* 680 (1963).

19. J. Roche, *American Liberty*, in *ASPECTS OF LIBERTY* (Konvitz & Rossiter eds. 1958).

due process. Like *Buchanan v. Warley* (1917), which barred racial zoning on the ground that it deprived realtors of their entrepreneurial vocation, these cases have marginal status in the history of civil rights.

One final observation along these lines: Bork has not done his homework on *Marbury*, or, for that matter, on that great constitutional broken-field runner John Marshall. In general he approaches the work of the founders and the early Court on bended knee: he would have profited greatly from reading Suzanna Sherry's delightful report in this journal on the family picnic known as *Hylton v. U.S.* (1796)—the first case in which the Court exercised jurisdiction to determine the constitutionality of an Act of Congress.²⁰

Bork in other words knows the words but not the music and thus ends up like most legal logicians in a distinctly ahistorical position; his whole approach to Original Intent has an eschatological flavor. Hence he misses the disconcerting but delightful atmosphere of improvisation that surrounded all three branches of the "general" government in its early years. For example, Supreme Court behavior in those days was pretty casual; *Marbury* merits some kind of prize. Bork correctly notes that Madison did not appear, but he has never read the full script. When, in March, 1801, the clock struck midnight in the Adams administration, Levi Lincoln, Jefferson's Attorney-General, was acting Secretary of State while Madison visited his sick father. Lincoln, according to a legend that is too good to be false, was in Secretary of State John Marshall's office looking at his watch as the Secretary/Chief Justice (he occupied both posts for six weeks) busily sealed commissions, and closed shop as the hands hit midnight. Lincoln, now only Attorney-General, did appear in *Marbury* as a witness. Marshall, always inquisitive, asked him what happened to the commissions; Lincoln promptly pleaded the fifth amendment guarantee against self-incrimination!

Conservatives like Bork usually treat Marshall with great respect, which is amusing when you consider what a loose constructionist he was. Marshall displayed an impressive talent for improvisation, inventing the political question doctrine, belatedly providing a constitutional rationale for Jefferson's acquisition of new territo-

20. Sherry, *Perspectives: Law in the Grand Manner*, 2 CONST. COMM. 9 (1984). I would object that calling *Hylton v. U.S.* "an obscure taxation case" is a bit casual on her part. At the same time that the states were challenging Court jurisdiction in the English creditor cases (e.g., *Chisholm v. Georgia* (1793)) and pushing the eleventh amendment to restore sovereign immunity, it is hard to believe that Spencer Roane, Edmund Pendleton and the others alleging the unconstitutionality of the carriage tax would have thus affirmed the Court's jurisdiction over Congress. They were not barefoot country lawyers.

ries, dreaming up the concept of article I "legislative courts," and reading an "original package rule" into the commerce clause. In *Marbury*, his result may well have been true to some sort of "original intention" about judicial review, but much of his reasoning was as slipshod and debaterish as anything produced by the Warren Court.

Although Bork attempts to distinguish his views from Herbert Wechsler's famous 1959 article "Towards Neutral Principles of Constitutional Law,"²¹ I find his position essentially similar, though not as tightly argued. At the risk of being found in (temporary) agreement with Ronald Dworkin, I would argue that "neutral principles" is an oxymoron, the epistemological version of the Indian rope-trick in which the magician climbs up his premises and then hauls them up behind him. I share a number of Bork's caustic opinions of touchy-feely jurisprudence: "emanations from penumbras" (or was it vice-versa?) is a bit much. Yet when all is said and done Bork's reification of Original Intent has no more evidential solidity than does that of, say W.W. Crosskey or Edward S. Corwin—both of whom concluded in the 1930's that the principles of the New Deal had been formulated at the Philadelphia Convention.²²

Bork thus finds himself, like many American conservatives, trying to find a corpus of values to conserve. The historical problem is that from the outset "American exceptionalism," as Tocqueville called it, has been noted for improvisation, experimentation, and an ingrained contempt for history and precedent. Like it or not, the nucleus of the American tradition since the seventeenth century has been a dedication to various substantive goals, and an almost total disinterest in procedural niceties.²³ After all, 600,000 young men, and uncounted civilians, Union and Confederate, had to die to clarify some aspects of Original Intent.

This casual approach to the dilemma of ends and means has always distressed a number of us from different locations on the political spectrum, but it is, and has been since 1789 (or even the 1600s) the only game in town. Bork and I from our respective perspectives have criticized the groundrules, but to create a useful past, to conjure up a mythic Treasury of Grace upon which one can draw checks, is both intellectually bogus and politically useless. Alas, we

21. R. BORK, *supra* note 14, at 143.

22. If gossip has a place in a learned journal, it might be noted that a number of Corwin's contemporaries felt he was "running" for the Supreme Court—as the first non-lawyer.

23. As John C. Calhoun noted in 1817, the Constitution "was not intended as a thesis for the logician to exercise his ingenuity on. It ought to be construed with plain, good sense . . ." M. PETERSON, *THE GREAT TRIUMVIRATE* 79 (1987).

are a people without a historical umbilical cord: as an intelligent student said to me last week, "Wasn't it remarkable how President Roosevelt finally got us to take on Hitler." Just as every American generation thinks sex was invented when it hit puberty, every political cohort strongly supports *stare* if it likes the *decisis*. American law has been politically "seduced" since the memory of man runneth not to the contrary.

THE RIGHTS RETAINED BY THE PEOPLE. Edited by Randy E. Barnett.¹ Fairfax, Va.: George Mason University Press. 1989. Pp. viii, 416. Cloth, \$39.50.

*Larry Alexander*²

I

The ninth amendment is like a mysterious, unopened box only (relatively) recently discovered among constitutional artifacts. It has not yet been placed on public display because the constitutional curators are unsure in which section of the museum to place it. Some, the minimalists, believe that it is empty and should be regarded as a very minor exhibit in the federal powers wing. Then there are the maximalists, those who think the ninth amendment box is full and that it belongs in the individual rights wing of the museum. Some maximalists (the optimists) think the box is a treasure trove of rights that we should open as soon as possible. Indeed, they urge that the box and its contents not be kept in the museum at all, but should be put into service to deal with contemporary problems. Other maximalists (the pessimists) fear the ninth amendment is a Pandora's box that should in the public interest remain closed, despite the constitutional framers' desire that it be opened. They are quite content to treat the amendment as a museum piece and nothing more.

Interest in the ninth amendment is perhaps at an all time high. Evidence of this is the publication of a major symposium on the amendment and the book that is the subject of this review. The symposium,³ also edited by Professor Barnett, consists of contemporary analyses of the ninth amendment. The book, on the other hand, is a collection of the major writings on the ninth amendment

1. Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law.

2. Professor of Law, University of San Diego.

3. *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 35-268 (1988).