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The Forgotten Ninth Amendment (Bennett B. Patterson, 1955)

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BOOK REVIEWS


This little volume — the text itself is but 85 pages in length — constitutes in the words of the author a “call for legislative and judicial recognition of rights” under the Ninth Amendment to the Constitution of the United States. The author makes his thesis clear, almost overly so: the Ninth Amendment is an expression of natural rights philosophy and should be used as a positive instrument by the Congress, the courts, and the states. He is, in a word, “rediscovering” the amendment and suggesting that it be restored to the central place in legal and popular thought that, he argues, it held at the time of its adoption.

In the first part of his work, comprising roughly two thirds of the text, Mr. Patterson examines the legislative history of the amendment and its judicial construction. He argues that the amendment is applicable to the state governments as well as the national government and attempts, imperfectly, to list certain rights that he considers to be placed properly in the unenumerated rights category of the Ninth Amendment. It is in this section that he lays down the proposition that the amendment protects personal rights and liberties rather than collective or public rights. Thus he sees in the Ninth Amendment a possible counter to increased governmental regulation of the various phases of today's complex civilization.

In the second part of the text the author turns to philosophy, treating the importance of individualism in a democracy, or at least individualism as he conceives that term should be defined. He is not unmindful of the necessities of society as a whole; he recognizes that restraints on individualism are necessary. He is not successful, however, in establishing any criteria for determining where the one must leave off and the other take over. Since this is, in part at least, the task he set for himself, it is to be noted that he has been no more successful than the many others who have attempted this difficult, if not impossible, philosophical feat.

Over 130 pages are given over to appendix materials, the bulk being devoted to portions of the Annals of Congress pertinent to the Ninth Amendment. Those who like their history firsthand and like to arrive at their conclusions unaided or unh hampered by the argu-

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ments of others will find the appendix of considerable value. A foreword by the eminent Dean Pound adds to the worth of the total product.

Attempts to "redefine" and "reinterpret" the Constitution of the United States are in the best academic and juristic tradition. Usually such attempts interest few members of academia, bench, or bar. Most such attempts, and the present volume is no exception, are built upon a notion of attempting to discover "what the Framers really meant." There is seldom little, if any, realization, or at least such authors make no demonstration of it, that constitutions are living documents, that each new generation takes the wisdom of the old and interprets and applies that wisdom in new ways. Constitutions grow by the formal process of amendment and the addition of words, but they grow more, and more lastingly, through custom and usage and interpretation.

To argue, as Mr. Patterson does and as Professor Crosskey has done in his monumental Politics and the Constitution, that we must return for salvation to the basic principle of the framers— or at least a basic principle as the author interprets it—is to ignore well over a century and a half of constitutional growth. This is not to say that occasionally the courts have not through the process of interpretation seized upon some previously unused portion of the Constitution and put it to use. Nor is it to deny that the "redefiners" and "reinterpreters" may not serve very useful purposes. One has only to recall the battle waged so successfully by Borchard in gaining acceptance of the principle of the declaratory judgment.

The author of this volume believes in natural rights, deeply and sincerely. This reviewer does not believe, however, that the courts will accept the interpretation of the Ninth Amendment that Mr. Patterson proposes; he would go further and state that power in the hands of a court to determine what constitutes the "natural rights" of a citizen might bring a genie out of the jurisprudential bottle more dangerous to liberty than the present threats that the author sees. Moreover, as Mr. Patterson admits, many of these "unenumerated rights" have been given effect under interpretations of the Fourteenth Amendment—the wrong weapon for the right cause in his opinion.

In summary, those who believe in natural law may take some comfort from this little work; those not so inclined will not alter their views as the result of reading it.

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