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Book Review

BOOK REVIEW

THE FORGOTTEN NINTH AMENDMENT, Bennett B. Patterson. The Bobbs-Merrill Co., Inc., North Meridian Street, Indianapolis, 7, Indiana. 1955. $4.

As indicated by the title, this eighty-five page book is devoted to a consideration of the historical background, purpose, meaning and effect of the Ninth Amendment.[1] The author's review of authorities reveals that, to date, no real purpose for the Ninth Amendment has been found, the amendment having been invoked by litigants in only ten cases, and, in each, the Court having found it inapplicable.

The author's two principal contentions are, first, that the Ninth Amendment should be construed to incorporate into the Constitution the doctrine of "natural law" or "natural rights", these rights being regarded by the author as antedating and outranking Constitutional rights,[2] and, second, that the natural law doctrine should operate to restrict not only the powers of the federal government, but also those of the states.

Mr. Patterson acknowledges that the merits of the doctrine of natural law has been much debated.[3] While it is true, as he points out,[4] that the United States Supreme Court has enforced so-called "natural law" to the extent that it has been found "reasonable and just according to our traditional concepts of fair play and substantial justice",[5] the doctrine has been under severe criticism from some Justices of the Supreme Court,[6] and, for some years after the adoption of the Fourteenth Amendment, the Supreme Court steadfastly declined to regard that Amendment as incorporating natural law.[7]

Though a book review may not be an appropriate place for reviewing the merits of the natural law doctrine, it may be fitting to point out that its application necessarily turns on subjective considerations, and leaves the judiciary wholly

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1 "IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

2 At p. 34, natural rights are described by the author as "super-constitutional rights." See also p. 20: "Individual inherent rights and liberties antedate and are above constitutions." At p. 37: "Our constitutions are not the sources of our liberties."

3 At p. 68.

4 At p. 33 and 45.

5 See concurring opinion of Justice Black in International Shoe Co. v. Washington, 326 U.S. 310, 324 (1945).

6 See concurring opinion of Justice Black in International Shoe Co. v. Washington, *supra* note 5, and Justice Black's dissenting opinion in Adamson v. Colbern, 332 U.S. 19, 69 (1947); see also dissenting opinion by Justice Clifford in Loan Association v. Topeka, 87 U.S. 686, (1875), where he stated: "Courts cannot nullify an Act of the State Legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implication of the instrument disclose any such restriction. "Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism."

7 The Slaughter-House Cases, 16 Wall. 36 (1873).

unfettered by an objective criteria. Even Mr. Patterson admits[8] that the enumerated rights that derive from natural law "permit of no exact definition". In his view, moreover, natural rights are not static and fixed as the time of adoption of the Constitution or the Bill of Rights, but are susceptible of qualitative and quantitative changes which "will be revealed and become apparent in the future" as we "increase in spiritual and intellectual growth and are capable of understanding natural rights and liberties that have always existed, but which have been beyond our limited intellect to comprehend".[9]

This thinking suggests an amazing reversion to what the reviewer had regarded as the wholly discredited philosophy of decades ago, that judges do not make law, but merely declare eternally existent rules formulated by the Creator, and constituting, in Mr. Justice Holmes' picturesque language, "a brooding omnipresence in the sky". Nor is Mr. Patterson in a position to indicate just when man's wits are going to be sufficiently sharpened to be able to divine more clearly the mandates intended by the Creator, or how the Bar in general will develop the perspicacity to recognize the true spokesman for the Creator, particularly when the Supreme Court indulges in its usual five-to-four opinions.

Often, we fail to see that what is a crime for one may be extolled as a virtue, duty or honor by another. In World War II, we may have deprecated the reckless destruction wrought by the Japanese with the cry of "Banzai!", but, misguided though the Japanese soldiers may have been, the actions of many of them were no less impelled by fanatic devotion to what they regarded as lofty ideals. And, in the French Revolution, many of the hopes which were predicated on liberty, equality and fraternity dissolved into shadows, and, in those shadows, new crimes appeared. In administering law, no judge may be able to escape the subjective aspects of so-called "justice". But the difficulties of administering justice are scarcely overcome by letting each contesting party ascribe to his own man-made standards the imprimatur of divine authorship.

The words "natural law" and "natural justice" carry a strong emotional appeal and lend themselves readily to oratory. The last three chapters of the book, constituting part 11,[10] are characterized more by rhetoric than by appeal to analysis, and are devoted to the importance of the "inalienable rights with which the individual has been endowed by his Creator" under the "laws of Nature and of Nature's God", and the importance of recognizing within the framework of the Ninth Amendment "the concept of Deity and the relationship of the Deity to our inherent and natural rights". These rights, he points out, necessarily must be balanced by "restraints on individual behavior". Mr. Patterson then visualizes a "Bill of Obligation" as being a proper corollary of the Bill of Rights, and he proceeds to list[11] some of the duties and obligations

8 At p. 44.
9 At pp. 44 and 45.
10 At pp. 64 to 85.
11 At pp. 78 and 79.

which are owing by individuals in exchange for liberty, such as the duty "to defend our country with our lives"; the "duty of fostering and preserving the sanctity of the American family group and family life"; the duty of "cheerfully paying our taxes"; the duty to "stamp out and refrain from the practice of unfair or unethical competition"; the duty "to be outspoken in praise of the services and accomplishments of public servants and functions of government which are praiseworthy"; the duty "to enjoy wholesome leisure and to support a program that will provide a healthful and wholesome leisure for all of our people"; the duty "to take such physical care of our bodies that will enable us to fulfill whatever worthy possibilities are within us"; the duty "to be tolerant of the condition of life and opinions of other people"; the duty "to be charitable"; the duty "to keep informed on public issues"; the duty, on the part of those "who are not in the military service and who do not offer to die for our country . . . to be worth dying for".[12]

These and other platitudinous injunctions are held out as the price of unenumerated natural rights. It is not entirely clear whether Mr. Patterson would also incorporate these correlative obligations within the framework of the Ninth Amendment.

Assuming the desirability of incorporating the doctrine of natural law into the Constitution, despite the fact neither those who wrote the original Constitution nor those who wrote the Amendments made specific reference thereto, the need for incorporating the doctrine into the Ninth Amendment is not altogether clear, at least to the extent that it is acknowledged that the Due Process Clause is being used as a source of natural law. It is true that the Court has applied natural law under Due Process only to the extent that it regards a particular right as "fundamental" and in keeping with "our traditional concepts of fair play and substantial justice". But even if wider application of natural law principles were desirable, there is nothing to indicate that reliance upon the Ninth Amendment, instead of Due Process, would advance the cause. If judges are to be wholly unfettered by the Constitution, and are to be permitted to strike down statutes and even the Constitution itself to the extent that "superconstitutional" natural rights may be deemed violated, it is difficult to see why more tools are necessary than those already at hand. At any rate, there can be no assurance that natural law would receive any greater recognition under the Ninth Amendment than under Due Process.

Mr. Patterson objects to the necessity of resorting to Due Process to vindicate natural rights, since he regards the latter as antedating and as rising above the Constitution.[13] He argues, in brief, that no reference to any language of the Constitution should be necessary in order to invoke natural rights.[14] But,

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12 *Cf.* CHASE, THE TYRANNY OF WORDS, Harcourt, Brace & Co. (1938).
13 At pp. 33 and 45.
14 *Cf.* pp. 33, 34, 45.

if so, why is he insistent upon having the doctrine of natural rights spelled out of the Ninth Amendment, or, for that matter, out of any other part of the Constitution?

As already indicated, the author's second contention is that the Ninth Amendment, when and however applied, should operate not only against the federal government, but also against the states. Initially,[15] he contends that the rule of *Barron v. Baltimore,*[16] making the Bill of Rights a restriction only against the federal government, should be applicable only to the first eight Amendments, the Ninth being quite different. However, in Chapter 6, the author suggests that other limitations of the Bill of Rights should also be equally applicable to both the states and the federal government. In this connection, he argues forcibly that "it is impossible to believe that human rights and individual liberties were wrung from tyrants and despots, through suffering, sacrifice and death, and announced in the Declaration of Independence and other liberty documents, only to be surrendered up to state governments". Indeed, he does show language used in the Congressional debates on the Amendments indicating that some, at least, of the framers intended the guarantees of the Bill of Rights to apply to states, as well as to the Federal government. Of course, it has already been persuasively argued by some justices of the Supreme Court that the Due Process Clause of the Fourteenth Amendment was intended to and should incorporate all of the provisions of the Bill of Rights as a restriction upon the states.[17] Whether reliance on the Ninth Amendment will increase the likelihood that the present membership of the Court would protect, against state encroachment, even more of the guarantees of the Bill of Rights than the Court now does, under Due Process, remains problematical.

Mr. Patterson has performed an invaluable service to the legal profession in publishing the annals of Congress[18] showing the debates leading to the adoption of the Bill of Rights. The original publications of these proceedings are relatively rare, and unavailable to the average student.

Whether the reader agrees with Mr. Patterson's contentions or not, the sincerity of his views cannot be gainsaid, and his treatment of the subject is stimulating and provocative. Right or wrong, his major contentions deserve evaluation by all students of Constitutional Law.

DONALD J. FARAGE*

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15 At p. 2.
16 7 Peters 243 (1833).
17 See Justice Black's concurring opinion in International Shoe Co. v. Washington, *supra* note 5, and Justice Black's dissenting opinion in Adamson v. Colbern, *supra* note 6.
18 At pp. 93 to 217.

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BOOKS RECEIVED

CASES IN NEW JERSEY PRACTICE, Theodore S. Meth, Seton Hall U. Press, Newark, N. J. 1955. $7.50.

Chief Justice Vanderbilt has expressed the hope that New Jersey trial judges, in interpreting the Revised Rules of Practice, will be guided by New Jersey precedents and not "the authority of opinions of far-off state and Federal judges presiding in code jurisdictions."[1] It is appropriate, therefore, that a casebook be compiled dealing exclusively with New Jersey procedural decisions. Unfortunately Professor Meth's book probably will not meet this need. The volume, consisting of 300 pages and 47 cases, does contain many of the important decisions interpreting the Revised Rules, and brings together many of the cases to which one is cited in annotated volumes of the Rules.

The book, however, contains little original editing and no accompanying text. Other than the table of contents there is no table of cases, or table of Rules, and the book contains no index. One of the cases cited from the Law Division was subsequently overruled by the Appellate Division[2] and no mention is made of this fact in the casebook. It would have been helpful, also, had Professor Meth inserted the present Rule numbers in brackets in cases where the court has cited the former Rules. As a casebook it has the unique quality of lending itself to coverage in the one-semester course for which it was designed. Some provision for a pocket supplement, however, would be helpful in keeping the volume abreast of current decisions interpreting the Rules.

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1 SCHNITZER, THE NEW PRACTICE 15 (1949).

2 Palestroni v. Jacobs, included at p. 98, was subsequently overruled on the point cited: 10 N.J. Super. 266, 77 A.2d 183 (App. Div. 1950).