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Book Reviews

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BOOK REVIEWS

THE FORGOTTEN NINTH AMENDMENT. By Bennett B. Patterson. Indianapolis: The Bobbs-Merrill Company, 1955. Pp. ix, 217. $4.00.

This little volume consists of 85 pages of text and 132 pages of appendices. The latter contain the text of the amendments to the Constitution proposed in the First Congress and the debates upon them as taken from the Annals of Congress. The appendices are not only the major portion of the volume but also the more valuable. In his essay Mr. Patterson, who is a member of the Texas Bar, propounds the theme that the Ninth Amendment to the Constitution of the United States is an incorporation in the Constitution of "the inherent natural rights of the individual" which instead of limiting the power of the national government is a grant of power to it and the imposition of a duty upon it to protect fundamental human rights. In developing this theme Mr. Patterson sketches the legislative history of the Bill of Rights in general and the Ninth Amendment in particular. James Madison, who was the author of the substance of the Amendment, introduced it in order to overcome the argument against a bill of rights to the effect that the enumeration of specific rights would disparage rights that were not enumerated. It is Mr. Patterson's contention that the rejection by Congress of two of the twelve proposed amendments and the frustration of Madison's plan to have those adopted inserted at appropriate places in the original text of the Constitution have combined to give rise to the proposition that the first ten admendments limit only the national government. Such a conclusion, the author urges, is incorrect as applied to the Ninth Amendment which he contends not only limits the state governments but positively empowers the federal government to protect the inherent natural rights of the individual person against all governmental action by legislative enactment and judicial decision.

To corroborate this conclusion Mr. Patterson cites a number of Supreme Court decisions to demonstrate that the Ninth Amendment has not only not been held to be inapplicable to the state governments, but that unenumerated rights of the individual have been judicially recognized under either natural law doctrines or due process of law. However, he thinks it preferable to have the Ninth Amendment carry its full burden in order to avoid the confusion arising out of the selective incorporation of the first eight amendments into the Fourteenth and the neglect of other rights which are not enumerated. Throughout his essay Mr. Patterson is not specific as regards unenumerated

rights, but he does cite trial by jury (p. 51), prohibition of torturous punishment (p. 51), proscription of imprisonment for debt (pp. 51-52) and punishment for witchcraft. Constitutional historians are not likely to praise Mr. Patterson for the manner in which he develops his thesis, but many will undoubtedly agree with his assertion that the federal government has been less of a threat to liberty than the state governments (p. 42), and the quality of statesmanship in the federal government has been higher (p. 43). Students of the Constitution will find it difficult to see relevance to the Ninth Amendment in his homily on religion (pp. 63-71) or his personal draft of a bill of obligations (pp. 77-81). Indeed, they may conclude as a result of this essay that it is just as well the Ninth Amendment has been forgotten.

ROBERT J. HARRIS*

THE BIRTH OF THE BILL OF RIGHTS, 1776-1791. By Robert Allen Rutland. Chapel Hill: University of North Carolina Press, 1955. Pp. vii, 243. $5.00.

This book, a publication of the Institute of Early American History and Culture (at Williamsburg) is, the author says, an effort to draw together "the story of how Americans came to rely on legal guarantees for their personal freedom." Mr. Rutland is a journalist, not a lawyer, and lawyers will perhaps feel that the book suffers because of that. Nevertheless they will find it interesting and valuable, though it may seem incomplete.

The English beginnings of some (not all) of our fundamental rights —habeas corpus, trial by jury, the rights against excessive finds and bails, against self-incrimination, against double jeopardy, and others —are traced. The debt of our Bill of Rights to the English Bill of Rights of 1689, in a few of these matters, is quite obvious. But some of them owed rather more to colonial experience and development. Mr. Rutland, after reviewing the colonial charters and early legislation—notably John Locke's 1669 draft of a charter for Carolina, and the Massachusetts Body of Liberties (1641)—deals with the Continental Congress' Declaration of Rights (October 14, 1774) and its Letter to the Inhabitants of Quebec[1] two weeks later, which contained the first assertion by any public body that freedom of the press was an essential element of liberty.

The Virginia Declaration of Rights (1776), drawn by George Mason, is reviewed with the detail which, because of the profound influence

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1. Quoted in Near v. Minnesota, 283 U.S. 697, 717 (1931).

this immediately began to exert, it deserves. The bills of rights and constitutions which were then adopted by the states, ending with New York in 1787, are dealt with more briefly, for they followed the Virginia pattern, "modified or enlarged to suit local conditions and demands." (The modifications were more substantial than the enlargements.) The bill of rights contained in the Northwest Territory Ordinance of 1787, and the rejection of Mason's proposal for a bill of rights in the new Federal Constitution, then set the stage for the struggle over ratification of the Constitution, from which the first ten amendments emerged. Mr. Rutland's treatment of this, state by state, is thorough. Here again Virginia led the way, ratifying, but recommending the addition of a Bill of Rights. On the basis of that understanding ratification was in the end obtained. Mr. Rutland concludes that "a broad base of public opinion forced the adoption of the Bill of Rights upon those political leaders who knew the value of compromise."

In a final chapter the author discusses the enforcement of the Bill of Rights by the courts from 1791 to 1955. He observes that Jefferson did not foresee "complete rejection of the eighteenth-century notion that government was at best a necessary evil which must be curbed to safeguard individual freedom," and that "perhaps individual liberty has become a secondary concern, subordinate to the paramount issue of safety of the nation." "It is quite likely," Mr. Rutland remarks, "that the great men of the Revolution would be extremely uncomfortable in such a climate of opinion." To this pessimistic conclusion such a decision as *Dennis v. United States*,[2] which cut out the heart of the clear and present danger rule by eliminating its temporal element, depriving the rule of its vital force, certainly lends support. But the last word has not been written; one may still hope that in the end we shall display the courage of our forefathers, and restore its earlier vigor to the first amendment.

It is probable that no lawyer has examined the Annals of Congress without regretting that the debate in the First Congress over the Bill of Rights is there so scantily reported. Mr. Rutland's account is further abbreviated. There are other substantial omissions in the book. Our freedom of speech and freedom of the press did not come from England—we established them first[3]— yet Mr. Rutland gives no hint of any influence by or derivation from Voltaire, Rousseau, the

2. 341 U.S. 494 (1951).

3. *Cf.* Bridges v. California, 314 U.S. 252, 264-65 (1941): ". . . to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' "

". . . . No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."

Encyclopaedists, and the Great Enlightenment. And, while the Supreme Court has on several occasions traced the history of various provisions of the Bill of Rights, Mr. Rutland makes no reference to these opinions. If these are faults, they are perhaps the price paid for attempting to compress into a small and easily readable volume the history of the twenty-four rights and freedoms, of diverse origins, and occasionally possessing latent inconsistency with each other, which the Bill of Rights protects. The book remains a useful and a stimulating one.

JOHN RAEBURN GREEN*

JAMES WILSON: FOUNDING FATHER, 1742-1798. By Charles Page Smith. Chapel Hill: University of North Carolina Press, 1956. Pp. xii, 426. $7.50.

James Wilson, as a subject of study, has been neglected, in striking contrast to other founding fathers like Hamilton, Jefferson and Madison. He well deserves this sympathetic biography, which is published for The Institute of Early American History and Culture of Williamsburg. Wilson surpassed or at least equalled any of his contemporaries in composite and prophetic outlook. In his own advanced work and thought, he combined Jefferson's faith in democratic sovereignty, Madison's balanced constitutionalism, Hamilton's call for national power, and Marshall's concept of judicial review. He sought to institutionalize energy in the Presidency as if to aid a twentieth-century Wilson or a Roosevelt. As a capitalistic lawyer he bet too heavily with borrowed funds on America's expanding economy and brought his crowded career to a crashing anticlimax in a grand rehearsal for the panic of 1929. His life was a strenuous one, even in its final failure.

The Smith biography takes James Wilson from birth in a Presbyterian home of the Scotch lowlands through four years as a scholarship student at St. Andrews University, an additional year of theological study, and then at the age of twenty-three to America for a changed career with a waning of parental control. The new American soon tired of tutoring duties in Philadelphia and, with the aid of a relative, undertook the study of law in the office of John Dickinson, the brilliant "Hamlet of the American Revolution." In due time he became the leading lawyer of the Quaker City, where he was to hold a law professorship at the College of Philadelphia. His first lecture was attended by President Washington, members of Congress, other dignataries and charming ladies. The processes of moot court and moot legislation were his designs for vitalizing the law for students.

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James Wilson quite naturally became active in the government of his city, state and nation-in-the-making. He became a pamphleteer of the Revolution. He became a member of the Continental Congress and signed the Declaration of Independence. As a member of the Constitutional Convention of 1787 he advanced or advocated important proposals that were adopted and others that were rejected. The biographer pronounces this summer work "the greatest of Wilson's life." Glimpsing the modern doctrine of dual federalism, the Pennsylvanian wished to make the national government directly responsible and responsive to the voters without intermediary or indirect action by the states in electing President or Senators. With no fears of monarchical tendencies, he fought for a one-man chief executive and against his election by the national legislature. He preferred majority rule to minority obstruction, moral criteria of the people to seeking a balance of power among group interests. He looked for a common denominator of individual preference that would transcend state lines, sectionalism and class cleavage. He espoused democracy against the Tories; he espoused central and executive power against the democrats.

Wilson urged in the convention that the judiciary and executive acting together have constitutional revisionary power to forestall statutes that might be unjust, unwise, or dangerous without being "so unconstitutional as to justify the Judges in refusing to give them effect." As an active member acquainted with the history of jurisprudence, he has been credited with authorship of the clause prohibiting state laws "impairing the obligations of contracts," which crept into the Constitution rather anonymously. Professor Smith suspends evidence on the point as neither proved nor disproved. An exponent of property and democracy and a giant speculator in western lands, Wilson consistently and successfully opposed prohibitive or restrictive provisions on the admission of new states. He was one of the grand architects of the Constitution, and he became the chief champion of the successful movement for its ratification in the crucial state of Pennsylvania. In the latter contest, an observer called him a "blaze of fire," and another compared him to a combination of Cicero and Demosthenes.

The rugged and ambitious Wilson drove his dynamic talents in many directions, into law, learning, land and love, into private and public affairs. His manifold career can be covered only with a high degree of sketchy selectivity by a one-volume study. In spite of a stiffness and reserve of personality, he possessed intellectual confidence as a master of law, which he designated a "historical science." With the Constitution in force and George Washington becoming President, Wilson recommended himself outright by letter to Washington for

appointment as Chief Justice, only to see the office go to John Jay, later to John Rutledge, and then to Oliver Ellsworth. He had to be contented or discontented with an Associate Justiceship, perhaps missing the first prize because of his extensive financial involvements and the expansion of his financial ventures after not having received the coveted appointment. In the words of the biographer, there was "a vein of impracticality in Wilson's nature." Besides Court duties and business activities, he launched an undertaking to codify the state and colonial laws of Pennsylvania with annotations from common law. Making headway with this, he vainly sought a similar or approximate assignment with the national government. And Justice Wilson had for a time his law teaching, with formal lectures that would be preserved and provide more biographical grist than his service on the bench.

Wilson's performance as Associate Justice was consistent, if not impressive in days when the Supreme Court was not impressive. In riding his circuit, he was one of the Justices who militantly refused to comply with congressional legislation requiring them to perform non-judicial administrative functions in processing papers for veterans' pensions. Not being a judicial proceeding, this set no precedent, but it provided a hint of the future role of the Court in passing on the constitutionality of federal statutes. Wilson wrote a strong opinion on national sovereignty and the role of the Supreme Court in *Chisholm v. Georgia*,[1] the provocative case which brought forth the eleventh amendment. Overwhelmed with misfortune, he became a virtual fugitive from the nation's capital to avoid Pennsylvania imprisonment for debt. Racked with fever in his body and feverish schemes in his head while on circuit, he died in Horniblow Tavern, Edenton, North Carolina, in 1798.

Professor Smith has looked at the making and flowering of the mind of James Wilson, taking account of the broad social and intellectual currents of the times. Except for brevity of treatment, his work might be classed with Beveridge's *Marshall* as an eloquent tribute to its man, a tribute bordering on hero-worship. Is it favorable or unfavorable comment to observe that the Smith study gives more space and analysis to Wilson as law teacher than to Wilson as Associate Justice?

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1. 2 U.S. (2 Dall.) 419 (1793).

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