

Louisiana Law Review

Volume 3 | Number 2

January 1941

THE JUDICIAL POWER OF THE UNITED STATES, by Robert J. Harris. Louisiana State University Press, University, 1940. Pp. ix, 238. \$2.50.

Joseph C. Hutcheson Jr.

Repository Citation

Joseph C. Hutcheson Jr., *THE JUDICIAL POWER OF THE UNITED STATES*, by Robert J. Harris. Louisiana State University Press, University, 1940. Pp. ix, 238. \$2.50., 3 La. L. Rev. (1941)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol3/iss2/14>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Book Reviews

THE JUDICIAL POWER OF THE UNITED STATES, by Robert J. Harris.
Louisiana State University Press, University, 1940. Pp. ix,
238. \$2.50.

If some good fairy had been present at the birth of this little book, to offset the strong prenatal influence of Arnold, Corwin, et al., by endowing it with the gift of friendly approach to and understanding of the work of judges of which the book treats, not a thing of value or of substance would have been lost. Its over-severe and not at all polite strictures upon the intellectual and moral integrity of the judicial branch, whose business it is within constitutional limits both to determine and to administer the judicial power, would indeed have been absent, along with the distortion from objectivity resulting from the bias it evidences and seeks to induce in the reader. But the real merits of the book, and they are considerable, would have been more apparent to and better appreciated by the judges and lawyers who are likely to be its chief readers. Most of these strictures will be found in the preface¹ and in the first² and second³ chapters.

1. Preface: "The Supreme Court has developed a ritual and liturgy which it can chant or not as it likes." "Somewhat less monotonous, but equally impressive, is the chant of the Court on its own independence and the limits on the power to regulate the jurisdiction and powers of the federal courts." "The following pages represent an attempt to depict the phantasmagorio. . ."

2. P. 7: ". . . vivid examples of judicial equivocation and recondite reasoning. . ."

P. 23: ". . . 'cases and controversies,' 'adverse parties,' 'substantial interests,' and 'real questions' are no more than trees behind which judges hide when they wish either to throw stones at Congress or the President or to escape from those who are urging them to do so. . ."

P. 44: "But judges are apt to be 'naïf, simple-minded men' and, therefore, susceptible to entanglement in the intricacies of a conceptualistic jurisprudence."

P. 47, n. 125: "One of the most amazing advisory opinions of the members of the Court is the gratuitous opinion of Chief Justice Hughes in a letter to Senator Wheeler. . ."

P. 58: "Hence the jargon of the Court in the past. . ."

Pp. 72-73: "The sham that courts have no substantive power to declare acts of a legislature unconstitutional or to exercise a suspensory veto through the device of the injunction but have only the power to apply the law to cases and controversies properly presented for adjudication has accomplished more than any other device in giving to the federal courts powers of the greatest magnitude without the slightest responsibility. The federal courts should either abandon this ceremonious pretense or be forced to do so by constitutional amendment.

"The absurdity of a system which makes judicial review the keystone of the arch and permits courts by ceremonies and celebrations always to ob-

The third chapter is fairly free of them, though there the writer goes out of his way to speak of the "furiously oracular intonements of Chief Justice Hughes." The final chapter, "Legislative Courts" is the most objective and least marred. In fact, there is only one statement in it which exhibits bias.

Just what made this particular writer, when writing on matters of judicial concern, thus bristle and strut and wisecrack as so many other professors do when writing on matters of judicial concern, I do not know.⁴ It is probably, with this writer, due to a mixture of an inferiority with a superiority complex and a kind of showmanship which manifests itself in an effort to appear smart, modern and in the know, in the game of following the leader.⁵

sure and occasionally to defeat its real purposes is too manifest even for courts and judges who are apt to be 'naïf, simple-minded men'. . . . Like the medicine man of a primitive tribe, the modern judge mixes strange elements to obtain unpredictable results; he peers into present and future mysteries and solemnly chants his ritual. The primitive medicine man, however, did not always demand a combat before he would function. The instinct for violence among modern judges is more highly developed."

Other examples are to be found on pages 10, 19, 20, 22, 34 and 70.

3. P. 84: ". . . the Court wilted—as it must always wilt—in the heat generated by a serious and determined congressional majority. . . ."

P. 107: "The underlying assumption of the Chief Justice in [the St. Joseph's Stockyards Company Case] . . . is that courts—and only courts—as the repositories of all that is wise and good, are the only agencies that can or will protect the constitutional rights of persons. . . . Thus the rule of law is utilized to buttress and fortify the rule of judges."

P. 119: "The theory is primarily the work of the lawyers in and out of Congress; it represents the lawyer's ideal of a government in which doctrinaire legalism dominates policies and in which lawyers take precedence over politicians."

P. 144: ". . . a negative and defeatist government by a judicial oligarchy acting under a system of equity that has been transformed into inequity."

Other examples are to be found on pages 74, 86 and 143.

4. I do know that I sat once at a dinner in Lincoln's Inn between Lord Wright and Lord MacMillan, with distinguished English law men, lawyers, teachers and judges all around me, and there I heard Sir Frederick Pollack, then in his late 90's and the dean and peer of them all, delight his audience by discoursing with rare wit and wisdom upon the changing complexes toward judges, of the law teacher and writer. "Beginning in its early humble stage of inferiority and advancing to its present engorged stage of superiority, law teachers and professors had now," he said, "by a strange metempsychosis, become teacher, lawyer, legislator and justice, all in one and lorded it with indomitable sway."

5. He even appears to take seriously and rings the changes on Arnold's "Old Wheeze," that judges lust for violence, and their insistence that there must be an actual controversy is seated in that lust. And, he swallows whole Corwin's expressed view that judges are engaged in a kind of hocus pocus when they say that courts are not concerned with abstract questions of constitutionality. They merely determine in actual controversies whether constitutional rights actually asserted, in fact exist. For a view the exact opposite of Arnold's, see Hutcheson, *Some Observations on Stare Decisis* (1932) 32 *Report of the Louisiana State Bar Association*, 17, 23-27; Hutcheson, *Lawyer's Law*, and the Little, Small Dice (1932) 7 *Tulane L. Rev.* 1, 4-7.

The net result however is to present the writer, his patron saints, Corwin, Arnold, et al., and professors generally, as looking Jovianly down from a great height on the antics of the "naïf, simple-minded" men called judges, to whom, instead of to professors, the American people, with a fatuity and a continuity which cannot but cast a reflection upon their intelligence, have from the first confided the administration of the judicial power.

Off me, a more or less tough citizen, with eighteen years of lawyering, twenty-two years of judging, a small try at teaching and deaning, and no little acquaintance with both logomachy and logomancy, these professorial strictures fall like water off a duck's back. For, I know professors and their ways. Like the Baker, I can confidently affirm, "You may charge me with murder or want of sense, we are all of us weak at times, but the slightest approach to a false pretense was never among my crimes." But some of my "naïf, simple-minded" brethren are more gentle creatures than I am, and it is for them that I have taken up my cudgels to give the writer a gentle drubbing, have set my lance in rest to put him off his high horse, have sought a little of his blood for ours he has spilled. I have done it too for the sake of the writer and the book itself, which despite its infusion with a sort of anti-court and anti-lawyer attitude, is not at all, as at first glance might appear, a diatribe against the present and propaganda for a new form of government without judicial checks and balances, and I hope by making this clear to purge the bias out and leave the message clear. I have done it because I take his strictures to be largely a case of following his leaders, who in writing so-called popular books on law and judging, seem to be animated by a desire to split the ears of the groundlings, if not to make the judicious grieve. I have done it because his bias and his showmanship aside, the book is a good one on a difficult and greatly interesting subject, and except in a few instances where the writer has missed the boat altogether,⁶ it is written fairly and with a clear and just understanding and appraisal of the work of the courts in de-

6. For instance, his inability to understand the theory of the Admiralty decisions; his statements, that Hughes' letter to Wheeler was an advisory opinion; that the federal courts are not fully giving effect to the declaratory judgment in accordance with its letter and spirit; that since judicial power is exercised in civil contempts for the protection of the right of private parties, Congress should have greater discretion in civil than in criminal contempts; his failure to see that it is government by law and not by lawyers for which lawyers contend; his characterization as sham of the undoubted rule that courts sit merely to decide controversies and to give protection in and through them to asserted rights; they do not sit to make abstract decisions on public policy.

fining and administering the judicial power. It is certainly a book which every lawyer and judge interested in this delicate and difficult subject should read thoughtfully and carefully.

The chapter headings clearly and correctly designate the subject matter of each chapter. Each chapter, in a thorough though, because of the writer's tendency to follow his leaders, a somewhat hackneyed way, presents in scholarly fashion the matter with which it deals. The whole is a book which, despite its lack of objectivity, its impression that our author is a hero with a mission to perform to set right what the judges have marred in making, is a very worthwhile book upon a very interesting subject. I only hope the writer will write again in the judicial field, writing next time more as a chronicler, less as a caviler, and that it will be my lot to review his next book.

JOSEPH C. HUTCHESON, JR.*

ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, by Elsa de Haas. Columbia University Press, New York, 1940. Pp. xii, 174.

Though the present volume throws light upon some minor points, Miss de Haas has been notably unsuccessful in adding materially to current knowledge of the subject upon which she has chosen to write. It is (to say the least) doubtful whether the early history of bail can be approached to advantage by isolating its criminal and civil aspects, but apart from this, her work consists to a surprisingly large extent of the repetition of sufficiently known statements which have been in effect annotated, often to a remarkable extent, by corroboratory instances and examples gleaned from the printed records. Miss de Haas recognizes, paradoxically, that her thesis does not prove any particular thesis, and on this observation agreement may easily be had, for her chapters serve only to bring together conclusions expressed elsewhere and make no attempt to synthesize these often casual remarks by a careful reexamination of the problem and its implications. Her inquiry into the origins of bail is confined to summaries of the views of several modern scholars, among which she selects as most useful that put forward some years ago by Franz Beyerle. The alignment of the tangled and conflicting Germanic

* United States Circuit Judge, Fifth Judicial Circuit.