

final order" within section 10(f) but only a refusal to exercise "power" the exercise or nonexercise of which, under section 10(b), is within the legally unfettered discretion of the board.

Anent Justice Stone's opinion for the majority in the *Columbian Enameling* case,³⁶ which contained "the oft-repeated maxim that substantial evidence 'means such evidence as a reasonable mind might accept as adequate to support a conclusion' and then proceeded to reverse the board's order," Mr. Rosenfarb asks (page 604): "Are we to conclude that five justices of the Supreme Court would care to contend that the three members of the board, three members of the circuit court of appeals who sustained the board on that point, and Justices Reed and Black who dissented are not of 'reasonable mind'? Why, then, state so-called rules which prove meaningless upon analysis?" But Mr. Rosenfarb's rhetorical question is unfair. For in the first place if the question before the ten judges in the two courts is whether the board was of "reasonable mind," the five who say "no" are by no means asserting that their judicial colleagues who say "yes" are not of "reasonable mind"; they are only differing with them in their appraisal of the reasonable-mindedness of the board. And secondly, to deny that "a reasonable mind might accept" a conclusion that the board has reached certainly does not mean that the board is composed of irrational or unreasonable people, but only that a mind that is reasonable in this particular operation could not reach the board's conclusion. In short, the majority of the Supreme Court, differing with, but not disparaging the reason of, their brothers in adjudication, deemed the mental operation of the board in this particular case unreasonable. Why, then, does Mr. Rosenfarb give this ugly twist of the judicial lion's tail? Probably because, in his votarial view, the board can do no wrong. For him that is almost the alpha and the omega of the national labor policy.

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The Judicial Power of the United States. By Roy J. Harris. University, La.: Louisiana State University Press, 1940. Pp. viii, 238. \$2.50.

This volume is the result of the study of many cases which construe the judicial power of the United States as set down in Article III of the Constitution. For the most part those cases were decided by the Supreme Court upon appeal from lower federal courts. A few cases from state courts are cited. About one hundred and thirty-five cases are discussed in the text. In his preface the author states that the book represents "an attempt to depict the phantasmagoria produced by the blending and at times contradictory elements of the judicial power of the United States." Mr. Harris divides the work into four chapters under the following titles: External Limits of the Judicial Power, Power of Congress to Regulate Jurisdiction, Incidental or Implied Power of Federal Courts, and Legislative Courts.

At the outset of his discussion of the external limits of the judicial power, the author states that "the courts have achieved a degree of independence from statutory regulation and control that exists in no other country." This is shown to be due to constitutional limitations, which, by judicial interpretation, not only forbid Congress to vest in the courts any functions which are not strictly judicial in their nature but also deny

³⁶ NLRB v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939).

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to the Congress power to nullify the constitutional functions of the courts. It is said that by judicial construction alone the judicial power of the nation has been limited in at least three ways: first, by the nature of the federal system; second, by the enumeration in the Constitution of the cases and controversies to which the judicial power extends; and third, by the principle flowing from the doctrine of the separation of powers that the federal courts will perform only judicial functions. The author holds that "by judicial decision the term 'judicial power' has been gradually converted into a symbol which partakes of mystical and transcendental attributes emanating from the doctrine of separation of powers and its corollary, the independence of the judiciary."

In summarizing a long line of cases the interpretation of the words "cases" and "controversies" is elaborated. The author is led to the conclusion that "'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."

It is found that the cases illustrate "the difficulty of distinguishing between judicial and nonjudicial functions and the futility of attempting to draw a strict line of demarcation between executive and judicial power." It is said further that "in spite of the subtleties which lie concealed in the phrase 'cases and controversies,' awaiting discovery and revelation by judicial penetrations into the occult, these cases demonstrate its flexibility and its capacity for expansion." In another place it is said: "Courts do not sit as pathologists to conduct autopsies on dead issues." In the discussion of the case of *Pollock v. Farmers' Loan and Trust Company*² it is said, "Attorney General Olney, with singular maladroitness, joined the government as a party to the suit instead of attacking it as collusive or of refraining from participation altogether, in which instance the government would not have been bound by the decision."

The following striking statement illustrates the author's opinion of a judicial attitude: "To the apostolic Taney is due much . . . of the present confusion regarding the nature of the judicial power. . . . Taney's confusion of finality of judgment and the necessity of an award of execution were incorporated by the court into many decisions with the result that the power of the courts to render such an award became one of the criteria of judicial power." It is found, however, that it is no longer true that an award of execution is an essential element in the exercise of the judicial power and that this later holding "does much to rescue the judicial article from the confusion into which Chief Justice Taney plunged it." The author finds that this overruling of Taney's position paved the way for the declaratory judgment in the federal courts, but he finds also that the use of the declaratory judgment has been rendered "completely futile as a means of preventing litigation in cases involving the validity of legislation and in expediting the determination of constitutional issues involving public interests and private rights of the greatest magnitude."

In concluding his discussion of the meaning given to the words "case" and "controversy" by the courts, the author has this to say: "Like the medicine man of a primitive tribe, the modern judge mixes strange elements to obtain unpredictable results. . . . 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."

In the second chapter, on the power of Congress to regulate jurisdiction, we find

² 157 U.S. 429 (1894) and 158 U.S. 601 (1895).

that the Supreme Court has held that its constitutional grant of original jurisdiction is self-executing in the sense that after the Court was once organized under the Judiciary Act of 1789 it could proceed to execute that jurisdiction without further congressional enactment prescribing jurisdiction and regulating procedure. On the other hand, it is found that the appellate jurisdiction of the Supreme Court has been construed by that court to be subject to almost complete control by Congress. The author states that "a perusal of hearings before the judiciary committees of Congress reveals that the opposition to any restriction of the jurisdiction and powers of the federal courts comes primarily from the representatives of large corporate business interests of an interstate or national character . . . and commercial aspirations become associated with patriotic efforts to preserve the independence of the judiciary." He quotes Senator Vandenberg as saying that "Congress is the potter which shapes the vase, but when it is shaped the judicial power is poured into it by the Constitution and not by Congress."

The author reaches the conclusion that the "jurisdiction of the inferior courts of the United States is, therefore, determined by statute, and apart from the powers that inhere in a judicial tribunal after it has been established; they can exercise no jurisdiction not conferred upon them," i.e., by act of Congress.

The following statements are significant: "In general the Supreme Court has applied the restrictions of the Norris-LaGuardia Act in good faith and has interpreted the law in conformity with the aims and purposes of Congress." "The enlightened interpretation of the Norris-LaGuardia Act . . . may or may not be significant. . . . Perhaps these decisions are but a reflection of an ephemeral attitude of a court chastened by a combination of election returns and a proposal to infuse it with a sufficient number of new members, a proposal that shocked the Court into what may be accurately called the Supreme Court revolution of 1938. If so, such attitude is probably destined to pass as soon as the lessons of chastisement are forgotten."

In the third chapter on Incidental or Implied Powers, the conclusion is reached that "Congress can regulate the inherent power of courts to punish for contempt but that it cannot destroy this power." Here we find an excellent, brief discussion of the distinction between criminal and civil contempts.

In the final chapter, on Legislative Courts, we find that the courts of the territories are no part of the judicial power of the United States as defined in Article III of the Constitution. Consequently legislative, executive and judicial functions may be merged in prescribing the duties of such courts. This function is said to arise from the plenary powers of Congress over the territories of the United States.

The author here traces what he calls the "chance growth of the courts of the District of Columbia into constitutional courts through the contradictions of individual decisions." This part of the study reveals a very interesting chapter in the story of judicial acrobatics.

This study leads the author to the final conclusion that "courts of justice cannot adequately perform the new functions of government which have arisen out of an advanced sense of social responsibility and the increasing necessity of social control." Therefore he finds that there must be many "special courts manned with experts, endowed with new forms of procedure and vested with the power to render decisions to which is attached all the sanctity of judicial finality."

The book seems very much worth reading.

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