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## Harlan: The Evolution Of A Judicial Philosophy. Edited By David L. Shapiro

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## BOOK REVIEW

## HARLAN: THE EVOLUTION OF A JUDICIAL PHILOSOPHY.

Edited by David L. Shapiro. Cambridge: The Harvard University Press. 1969. pp. xxvii, 311. \$6.95.

"[J]udges," said Justice Holmes, "do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."<sup>1</sup>

The delicate balance of power inherent in the supremacy of judicial review depends for its continuance upon judicial restraint, self-imposed. The opinions of Mr. Justice Harlan furnish welcome sanctuary in an era of judicial legislation which threatens that balance.

A reading of the selected opinions quickly points up the difference between the jurist who sometimes "utters a happy phrase from a protected cloister," and the experienced realist who recognizes the proper role of continuity and tradition. Our jurists are called to the courts from a great variety of backgrounds—ranging from elective offices involving little lawyer's work, to deep experience in the practice of law. Justice Harlan's background is of the latter variety. Educated at Princeton, Oxford and the New York Law School, he became one of the nation's leading trial and appellate lawyers.

While decrying any intention "of turning into a solemn old hermit" on the bench, Justice Harlan has come close to his own ideal, for a judge, of becoming a man apart.

In his fifteen years on the Supreme Court bench, Mr. Justice Harlan has, according to the authors, "...reached the same result as the majority but by a very different route."<sup>2</sup> To ascribe this divergence, as have the authors (and the Justice himself) to inadequate advocacy within the Court, is at best an oversimplification.

Rather, the divergence involves nothing less than the question on which the survival of our republic depends: Where may power safely repose? This is the question which haunted the fathers of our federal system.

Jefferson warned us that "the people"<sup>3</sup> are the only safe repositories of governmental power; and his writings respecting the alloca-

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<sup>1</sup>*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting opinion).

<sup>2</sup>p. xxv.

<sup>3</sup>Letter to A. Coray, October 31, 1823, in *THE WRITINGS OF THOMAS JEFFERSON* 483 (A. Lipscomb ed. 1905).

tions of power should give pause to today's master planners—whether found in the courts or in the innumerable warrens of the executive branch.

This resistance to usurpation of prerogative is the thread which winds throughout the opinions of Mr. Justice Harlan. The introductory materials of the editors are somewhat disappointing for their failure sufficiently to identify the thread. It is clearly visible, however, in the selected opinions, which are well chosen and logically arranged.

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