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Book Review: The American Doctrine of Judicial Supremacy, By Charles Grove Haines

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The American Doctrine of Judicial Supremacy, By Charles Grove Haines, Professor of Political Science, University of California at Los Angeles. Second Edition, revised and enlarged. 1932, One Volume. University of California Press, Berkeley, California.

Perhaps the most unique contribution the people of the United States have made to political science and public law is the doctrine of judicial supremacy, as enunciated particularly by the Federal Supreme Court. The Court has maintained that it has the power to declare acts of Congress and acts of the state legislatures null and void from the time of their adoption, and that it has the power to give a "reasonable interpretation" to the meaning of all legislative acts.

Various aspects of this doctrine, cautiously developed and advanced piece-meal and progressively, have evoked their separate storms of protest, yet duly become consolidated and entrenched, as the timeless patience, entrenched position, and varied resources of the judiciary outlasted the intense but shifting and distracted blasts of popular indignation. The last great outcries against it took place in the half-dozen years leading up to the election of 1912, and again in 1924, in both of which a third-party movement unsuccessfully sponsored a shearing of the judicial powers. The second attempt evoked by comparison far less heated discussion, though the court had meanwhile (possibly by reason of the first failure) felt encouraged to advance the very fullest claims. The practically unanimous agreement of the bar with the bench throughout the country,¹ every lawyer seeing himself as a potential judge, helped to discount such criticism in professional circles as bad form.

The last attempt to curb the Court at the polls evoked little monographic literature. The decision in the last *Legal Tender case*² had marked the beginning of the modern literature on the subject of the Judicial Power. The great historian George Bancroft attacked the court for its decision in this case in a pamphlet entitled *The Constitution Wounded in the House of Its Guardians*. Mr. R. C. McMurtrie, a famous lawyer of that day, replied with *A Plea for the Supreme Court: Observations on Mr. Bancroft's Plea for the Constitution*. But he said the power of the Federal judiciary to declare laws unconstitutional was not given expressly in the Constitution, but as an "implied" power. Mr. Brinton Coxe, a noted scholar and lawyer, then undertook to prove an express Constitutional grant (which neither Marshall nor any of his successors had ever claimed), and incidentally also supplement by historical props the challenged assumptions of Marshall's logic. He lived to produce only the *Historical Introduction to his Essay on Judicial Power and Unconstitutional Legislation*, which he published posthumously in 1893. But it was such a substantial work in itself that, as to historical precedents, the flood of monographic literature belonging to the contentious period of 1909-1914 did little more than mull over the same field. The author here under review, Haines, was one of a dozen men outstanding in this period, his edition of 1914 being the most complete and analytic of these monographs. Since then, the treatises of Meigs, Warren, Moschzisker, and Boudin have been the outstanding additions in English, though foreign scholars, particularly French, appear to have become notably interested, frequently for purposes

¹ Where the two do not constitute quite rigidly separated careers separately trained for, as is the case in France, Germany, and other European countries.

² *Juilliard v. Greenman*, 110 U.S. 421 (1884).

of home consumption and application. The time has appeared fitting and ripe for another such summary.

It is a pity that Professor Haines published his second edition so shortly after Boudin launched his attack upon the Supreme Court.³ Perhaps Professor Haines did not have the opportunity to consider these criticisms adequately before he was ready to publish his own book. Perhaps he was not disposed to answer them. Nevertheless, one who reads the first edition of Professor Haines' work and thereafter reads the present edition cannot help but feel that Boudin has influenced Haines. It would appear that Professor Haines has not only reconsidered the tenability of the early historical "precedents", but that he has reconsidered his own enthusiastic championship of the Court.⁵

An introductory chapter passes in review the chief types of foreign government today in regard to degrees of judicial control. This generalizes upon Appendix II (pp. 573-663), which contains the pertinent quotations from the constitutions of practically all modern governments, together with comment concerning the extent to which judicial review is there practiced. Some twenty countries will be found classified in that Appendix under the rubric "Governments in which the Guardianship of the Constitution is conferred to a *Certain Degree* (italics ours) upon the Courts," while only thirteen appear as "Governments in which the Guardianship of the Constitution Belongs Primarily to the Legislative or Executive Department." But analysis of the classification he gives in Chapter I will produce more significant results. Here he lists fourteen countries, including all the most important, under the heading "Governments in which the legislature interprets finally the fundamental law;" seven countries are listed where judicial interpretation of the constitution is "implied as a necessary requirement to maintain the equilibrium between federal and state governments," i.e., primarily judicial supremacy over the acts of *inferior* legislatures and executives, the propriety of which even Mr. Boudin does not contest, that issue having been settled in our land by the final arbitrament of war; and twelve countries are listed under the heading "Governments in which the constitution grants authority to the courts to interpret the constitution and to prevent violations of its provisions," most of them, we note vassal or fourth-rank states. Of these last fourteen, it appears on closer examination of the provisions, that only Bolivia, Cuba, Czechoslovakia, Haiti, Honduras, the Irish Free State, Nicaragua and Venezuela have even in theory as full power for the judiciary as the United States, and even then Professor Haines admits that "in certain instances the power is rarely exercised." (p. 9).

Most of the rest of Professor Haines' work is historical in nature, tracing the precedents and the development of the claims, the theories and points of view involved. It is interesting to see the accumulation of the claims, and the succession of emphasis, as ever newer critical topics come to the fore. It is really a better constitutional history of the United States than several we have seen formally purporting to be such,—amply demonstrating as it does the more realistic view that the Constitution of this country is what the Supreme Court chooses to make it,—that all the other processes of its development and growth,

³ Louis B. Boudin, *Government by Judiciary*, 2 vols. (New York, William Godwin, Inc., 1932).

⁵ Or is it, for example, just happy coincidence that Professor Haines in his new edition omitted the table of early precedents, with the short, sweeping statements of facts and disposition that Boudin just shortly before made so much out of the demolition of?

such as amendment, statutes, administrative rulings and usage, are finally subject to judicial interpretation.

It is an interesting intellectual adventure, an Odyssey in social causation to trace the evolution by which, as John Dickinson has put it, "The doctrine of the supremacy of law, which was evolved to check the usurpations of a king ruling by paramount title, has thus been turned into an instrument to control the action of popularly chosen officials and legislators by the supposedly fixed and absolute standards of an abstract Law."⁶ Evidently in this new edition Professor Haines is taking great pains to make clear that he is not depending on the "precedents" in any legalistic sense, but simply upon the psychological effect of their accumulation in their times, with special reference to the reaction for and against. It would then still remain to prove, if proof were aimed at, what was the result of this reaction. Professor Haines appears to be willing to admit no bases in history previous to the 19th century assertions, and yet does not want to do it too loudly, which indeed for most minds closed to the reading of such an obviously more radical work as Boudin's, may be the wisest way effectively to propagate the truth.⁷ The old English "precedents" for judicial review are still gravely considered, even though here again the reviewer finds explicit language the first edition did not contain: "Most English legal authorities agree that there is no specific case on record in which an English court of justice has directly overruled or disregarded the plain meaning of an act of Parliament. * * * Even if it be true, as is claimed, that there is no case on record in which the clearly expressed will of the king or of Parliament was really checked by the courts there were instances in which the courts interpreting the common law changed the meaning of statutes, refused to give them the effect intended (*Reviewer*: which last can be contested), or to apply a rule of his majesty in council until the King, Lords, and Commons joined in an unmistakable mandate, which the courts reluctantly at times conceded it was their duty to obey." (pp. 34-36.) On this, many may prefer to stand with Pollock, Holland and Holdsworth.

The legal historian may feel that both layman and journeyman lawyer have a right to more detailed specifications of the shortcomings in the individual "precedents" as they are taken up, especially since Professor Haines' work is

⁶ John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, 1927), pp. 98-99.

⁷ The following, introducing the chapter on State precedents prior to 1789 is typical: "The list as presented is not intended to be exhaustive—for historians are still finding data on new cases (*Reviewer*: i.e., he lists everything so far even faintly discovered to smell like a "precedent") but representative precedents are selected which were known and recognized as instances involving either directly or indirectly the issue of the validity of a legislative act as in conflict with natural law and natural rights or with fundamental written law. (*Reviewer*: Which explains why most of the cases do not refer to repugnancy with a constitution, which is the primary basis of our American doctrine today.) * * * The account of early cases is not confined to definite legal precedents, for a number of cases are included in which no act was held invalid, but in which the judges discussed the issue of judicial review in the form of dicta." (pp. 88-89). The last sentence, by the way, has been added to the text of the original edition, and very timely indeed, considering the way Mr. Boudin took up the cudgels with Professor Haines on precisely that point in his work published the same year. It would have been even better had Mr. Haines in his new edition continued on to specify more clearly the shortcomings in each of the precedents, which Mr. Boudin has so thoroughly done in his work.

otherwise so complete yet restrained, revealing yet sanely reassuring. The reviewer would like to make an analysis of all the precedents mentioned by Professor Haines. Disparaging comments can be passed on the colonial cases adduced (involving, e.g., mainly acts of an inferior legislature before the Privy Council), the revolutionary, early State and Federal precedents, all of which have many more limitations on their value as precedents than a reading of Haines' work alone would indicate. When we remember in what bad odor both judges and lawyers were in those revolutionary times and the hatred for all things English, it is hard to believe such "precedents" can have borne much fruit, even into the 19th century, particularly when some of them, as Mr. Boudin has shown,⁸ were "reported" for the first time forty-five years after the event, at the time of the Jacksonian Revolution and the accompanying judiciary upheaval fostered by Judge Gibson's opinion in *Eakin v. Raub*; and then one of them, in another opinion purporting to come from 1802, both of them under circumstances suggesting editing or even invention for partisan purposes of the hour.

As to the ideas of the Fathers on the advisability of judicial review, and their intentions here, we wonder why Beard's list of so many members as favorable to judicial review is featured (pp. 132-3), while there is only footnote space for Corwin's utter demolition of the total of twenty-five claimed, cutting it down to eight, three of them "pretty recent converts."⁹ An analysis featuring the economic conservatism of the Fathers of 1787, the analysis so dear to Beard, and for which Professor Haines specifically acknowledged indebtedness to him in the first edition (p. 151) *would* seem to point to their having intended judicial supremacy—were it not possible to point to the ample safeguards they had otherwise provided, through indirect election of the upper houses, property and other qualifications for voting and office holding, etc., all sufficient of them selves to make their legislatures quite conservative enough.

After all, is it important to know what the Fathers intended? What difference does it make whether the "precedents" are real or not? Perhaps it does not matter one whit for today's problem and situation which ever way the historical contest comes out. Manifestly it is quite tangled. We cannot yet be sure what some like Madison and Hamilton thought. Indeed most nascent ideas are apt to be foggy and unclarified: in the development of ideas in intellectual history it takes time to cut the outlines clear by distinction just as it takes time for the artist or sculptor to clean-cut the lines of his representation. So on the one hand it seems to the reviewer that if the intentions of the Fathers are proved finally to have been in favor of the Judicial Power, even that would not say we must have it just so today,—nor on the other hand that if such were not their intentions, that that is *the* argument why the bloated powers of our present Supreme Court should be melted down. Why in either case should we be governed by dead men? Eternal principles are not involved. As involving merely human institutions (there is nothing Divine about a Constitution) and the application of final principles to the moment, we must expect governments to grow. Where there is life there must be growth and change, as well as stability. Few persons today would suggest seriously that any change be made now except through judicial recognition.

⁸ E.g., *Holmes v. Walton*, N.J., 1780, and *Commonwealth v. Caton*, Va. 1782. See, Boudin, *ibid.* I, 541-555.

⁹ Review of Beard's *Supreme Court and the Constitution* (New York, 1912), 7 Am. Pol. Sc. Rev. 331 (May, 1913).

Contrary to the Supreme Court's most zealous expositor and champion in recent times, Charles Warren, Haines frankly admits and makes clear, the Court's insignificance in the first years under the Constitution (pp. 171-2). The glaring weaknesses in the reasoning of *Marbury v. Madison* are well indicated, together with its character of "deliberate partisan coup" (pp. 200-202). Haines opines: "The fact of the matter is that judicial review of legislation was adopted as a practical device to meet a particular situation by shrewd men of affairs who knew what they wanted and who seldom expressed clearly the reasons which prompted their conclusions. Furthermore, the arguments for judicial review were based upon principles of political faith and inner motives of conduct which were seldom made articulate when American political and legal institutions were in the process of formation." (p. 205.) The chapter on opposition to judicial review features the rise of the Court's claims as an aspect of the political battle between the triumphant Jeffersonian Democracy, presently Jacksonian, on the one hand, and on the other the remains of the defunct Federalism firmly entrenched on the bench, till the grim reaper supplanted Marshall and his cohorts with Taney and his Democrats in the 30's. The vain struggle of the state courts to preserve their reserved powers against implied powers, interstate commerce and other interpretations restricting the sphere of state legislation¹⁰ is described, featuring the heroic efforts of Judges Gibson and Roane, and of John C. Calhoun. Under Jackson, the President, rather than the Court, became the guardian and enforcer of nation-state relations, when as in the South Carolina Nullification ordinance he set definite limits to his recognition of state-rights. Professor Haines agrees with Mr. Boudin that the *Dred Scott* decision was a departure from the rule in this pre-Civil war period, but does not, like Mr. Boudin, make that case the real starting point of the present-day Judicial Power, even though he admits it was the first invalidation of an act of Congress since *Marbury v. Madison*, which latter Mr. Boudin says (II, 2) merely put forward a "comparatively modest claim." Marshall's Federalist principles of politics were made a part of constitutional law, but the author's conception of Marshall's position is different from that still held by many college orators on the Constitution. Haines pointedly asks: "With a more natural and easy outlet for political feelings and prejudices and greater free play for particularist tendencies may it not have been that the issues of expansion and of slavery could have been dealt with and settled without such long, severe, and bitter controversies?" (p. 366.)

The change in scope of judicial review since the Civil War, described in Chapters 14-17, can be summed up in two sentences from Professor Haines: "New problems awaited the court. * * * The court slowly became involved in the determination of business and economic policies" (p. 391). The features here are the 14th Amendment and the expansion of the meaning of "due process" and "equal protection,"¹¹ contraction of the police power of the states, as well as the development of the principle of reasonableness and the triumph of Justice Field's constitutional theories. In the chapter on Recent Criticisms (Chapter 16) Professor Haines feels that "labor has borne the brunt of the restrictive atti-

¹⁰ This began with *Fletcher v. Peck* and *Dartmouth College v. Woodward*. Of the *Dartmouth Case* Prof. Haines says: "The decision aligned on the side of nationalism the economic interests of corporate organization," (p. 314).

¹¹ Soon there were over 30 cases or more annually before the Supreme Court under the 14th Amendment, whereas in its first year it had given rise to only one annually. Supposedly framed to safeguard human rights, it became the great bulwark of corporate interests.

tude of the courts toward legislative activity, and that there is warrant for the persistent hostility of labor organizations to the American doctrine of judicial supremacy." (p. 455.) The present inquiry into the teaching of the Constitution in colleges being conducted by the Committee on Citizenship of the American Bar Association may well ponder Professor Haines' statement on p. 480: "Along with the admonition to the people to respect constitutions and laws there should be a similar admonition to judges to confine themselves to the clear and direct duty of the interpretation of the laws and to restrict their jurisdiction so as not to expand the vague terms of written constitutions, thereby placing unexpressed limitations on popular sovereignty."

Disturbing questions may crop up in the mind of the reader while going through Professor Haines' last chapters, such as, "What is the difference between the 'right' determined by a 'jurisprudence of noses' (changing majorities, as in the *Legal Tender Cases*, and reversals as in the 50-odd recently listed by Justice Brandeis, many of them in 5-4 cases) and the 'right' determined by a majority of popular ballots?" "Have the judges a monopoly on the right when they overrule themselves about as often as they declare acts of Congress unconstitutional?"¹² "Is it not really a despotism of the few—of a few old men, some wise, some not so wise (we think)—a gerontocracy?" "And yet, can we risk despotism of the many, as the alternative?" It indeed appears an unenviable Hobson's choice that government ultimately comes to. But Professor Haines' treatment of the remedial proposals somewhat assuages our fevered brow, and provides a self-reforming middle-of-the-path solution to the radical alternative of laying rude hands on the court from without. Everyone interested in law or government should make the acquaintance of this work of Professor Haines which sums up the discussion and development of an era in the problem of the place of the Judiciary.¹³

MAJOR L. YOUNCE.*

¹² In Appendix I Professor Haines gives an excellent detailed study of some 60 decisions invalidating acts of Congress, also classified by topics.

¹³ Appendix III gives an excellent bibliography of selected American monographic and periodical literature in the field, and also for some 22 other countries.

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