The American Doctrine of Judicial Supremacy (2nd Ed.) (Book Review)

Louis S. Posner
adoption of the Uniform Sales Act. In addition to the lawyer-like presenta-
tion of the case and statutory law on the subject, the writer has given consid-
erable attention and thought to our swiftly changing economic system and to
the social and historical background which give rise to the present-day trends
in the administration of this and other branches of our jurisprudence.

The decisions and the frequent statutory references are carefully inter-
woven with a thread of interesting comment and we believe that the time and
labor expended upon this effort were well spent and that it merits high praise
as a textbook, a ready reference and a complete and succinct analysis of the
New York Law of Sales.

James B. M. McNally.

St. John's University School of Law.

Charles Grove Haines, Ph.D. University of California Press, 1932,
pp. 705.

It cannot be too often emphasized that the American system of judicial
control of legislative and executive action is peculiarly American, both in con-
ception and practical application. Americans tend to get the idea that because
with us the Supreme Court of the United States may declare acts of co-
ordinate bodies to be unconstitutional and therefore void, similar judicial
powers are exercised by high courts in other countries. The English doctrine
of legislative omnipotence, while taught in our elementary schools, seems to
us to some extent unnatural. Almost instinctively we have come to feel that
in cases of a conflict the decision must rest with the Court, and even the
increasing number of five-to-four decisions has failed to make the average
American realize that we are governed essentially by the Court rather than by
the legislature. The advent of the New Deal, with its necessary legislative
innovations, has caused speculation as to the reasoning the Supreme Court will
apply to the constitutional obstacles that will inevitably be raised; and many
now see more clearly than ever before that in the last analysis the problem of
determining whether the New Deal will or will not stand, will be a judicial
problem, rather than legislative or executive. Every fundamental change in
our state and federal laws affecting property rights, every legislative effort to
readjust the law of the land to the pace of changed economic conditions, runs
the judicial gauntlet.

This volume renders an important service by giving a clear and lucid
account of the relations between the judiciary, the legislature and the executive
in countries other than our own, and by comparing these relations with the
American doctrine of judicial supremacy. Perhaps nowhere so clearly as in
the United States has the Court secured so large a measure of control over
domestic affairs and so important a veto power over legislation, both state
and national. There is a familiar note in the protest expressed as early as 1784
against the assumption by the Courts of powers here under consideration: "The
state, instead of being governed by representatives in the general assembly, is subject to the will of three individuals who unite in their own persons the legislative and judicial powers, which no monarchy in Europe enjoys."

Dr. Haines, in an exhaustive and erudite manner, traces the history of American judicial supremacy and gives a complete account of the way in which it became fixed in our constitutional traditions. He also explains the various constitutional views with regard to the power of the judiciary in American life.

For law students the most significant part of the work will, of course, be the account of judicial review since the Civil War and the rise of the importance of the Fourteenth Amendment in American constitutional law. The line marked out by the phrase "due process of law" has involved judicial statesmanship of the highest order and Mr. Haines gives a sympathetic account of the profound manner in which this task was performed by the Court. He is fully aware of the uncertainties that still lie ahead in constitutional theory, and the difficulties which the Court has experienced in setting up positive standards with regard to the limits of the police power in state courts. As America embarks on new economic experiments, it is believed that the Constitution will be found to possess that same flexibility which has made it possible in the past for the Court to find in its text and spirit a safe guide for the destinies of the nation. From a rural and agricultural community, sparsely populated, the United States has become the greatest industrial empire in the world. The founders of the Constitution never envisaged the unparalleled industrial development that took place under its ægis. Little did they dream that it was destined to be regarded as the most important political instrument of modern times. The Supreme Court has been able, by sound theory and logical development, to interpret the original tradition as established by the Constitution itself so that it has been found equal to all changes of our social and economic life. There is great hope, strengthened by its recent pronouncements, that the Court will again find itself able to steer the American ship of state through the rocky shoals of the new economic experiment without too greatly scarring the hull of that majestic vessel.

Decisions, state and federal, which deal with constitutional questions, range the gamut of our whole national life. They touch the political, social and economic experiences of the republic. The courts have exhibited, in the main, a prescience that is truly startling. The journey to judicial supremacy winds its long road from the initial step in Virginia, in 1778 (re Josiah Phillips) and in the Federal Courts in 1792 (re Hayburn's case), to the latest declaration in the New York Court of Appeals upon the Banking Moratorium Act (March 12, 1931), and in the Supreme Court upon the Minnesota Mortgage Moratorium (Jan. 15, 1934). The author traces the journey with unusual skill and a knowledge of the road and its by-paths that only a trained traveler could

---

3 2 Dall. 409 (U. S.).
possess. The faltering step of judicial adventuring has given place to the sure tread of judicial supremacy.

Professor Haines strips the American doctrine of judicial supremacy of all mystery by a scholarly and analytic study of the historical material. His book is a significant and valuable contribution to legal literature.

Louis S. Posner.

New York City.

The Catholic Church frowns on the marriage of one of its members to a non-Catholic. This is because the Church considers the primary purpose of matrimony to be the procreation of children and the rearing and upbringing of such offspring in accord with her teachings. Naturally where one of the parties to a union is not a Catholic, he will be unsympathetic to the fostering of that faith in his children. Thus it is that the Church of Rome refuses to marry one of its members to a non-communicant without his absolute promise to the other party that in consideration of marriage the children of the union will be educated in the Catholic religion and furthermore that the Catholic party shall not be interfered with in the exercise of religious duties. Concerning the legal enforceability of such agreements as these, Father White, Professor of Law at the Catholic University Law School, has written this interesting little book.

The author holds that the mutual promises of the parties constitute a valid contract which is of such a nature that Equity will decree its specific performance.

Legal precedent is always of paramount importance both to lawyers and courts. It is to this subject which the writer first directs the reader's attention. A careful analysis of the various English and American cases reveals a startling lack of actual authority, as distinguished from dicta, on the subject. The few decisions, actually in point, are shown to be based on prejudice as well as faulty reasoning.

With the first great hurdle overcome, specific performance of the antenuptial agreement is reviewed in light of pure legal logic. Into the lawyer's crucible are thrown the mutual promises, proper in form, the consideration spelled out of these promises (free practice of religion and education of the children of the union in that religion by one party against marriage and a change of status by the other), finally the legality of the undertaking and from these the valid contract is moulded. Having demonstrated the existence of a good legal undertaking, the writer states the case in favor of an equitable decree of performance. The nature of the right involved, which Dean Pound has denominated a "right of personality," brings forth a learned discussion of the modern light in which Equity views such a claim. The ancient doctrine