

**THE CONFLICT OVER
JUDICIAL POWERS IN THE
UNITED STATES TO
1870, VOL. XXXV, NO. 1**

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The conflict over judicial powers in the United States to 1870, Vol. XXXV, No. 1 by Charles Grove Haines

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**THE CONFLICT OVER
JUDICIAL POWERS**

In the United States to 1870

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PREFACE

THIS essay is the outgrowth of a special study of one of the problems of constitutional law begun at Ursinus College in 1903, under the direction of Dr. J. Lynn Barnard, now of the School of Pedagogy, Philadelphia. The main features of the monograph were planned and partially developed while pursuing the courses in constitutional law offered by Professor John W. Burgess, Dean of the Faculty of Political Science of Columbia University. The search has been continued in the reports of judicial decisions, executive messages, legislative debates and resolutions and newspaper comment for public sentiment bearing on the right of the judiciary to declare legislative acts void.

American constitutional history reveals an almost continuous conflict over the assertion of this right by the judiciary in the United States. The controversy originated at the time when the rising nationality in America found itself at the parting of the ways—toward a supreme power in the legislature, or toward a modified form of supremacy in courts of justice. The contest, begun when judges refused to execute legislative acts which they considered contrary to fundamental laws or constitutions, has been one of the foremost problems in the practical working of our federal government, and, according to the recent indications, is likely to assume greater importance in the future.

This study aims to trace the sentiment relative to the exercise of judicial authority prior to 1870. The purpose has been to show the gradual development of the extraordinary powers of the judiciary in the United States, and to present a brief analysis of representative opinions on the conflict involved in this development. The rapid industrial progress since 1870 and the extension of judicial authority re-

sulting therefrom has led to a series of controversies which will require a separate treatment.

Scarcely more than a beginning has been made in the vast field of material which is included within the scope of this paper. In fact, since the sources to be examined cover such a wide range of history, government, politics and law no contribution is likely to offer much of permanent value unless it has been the outgrowth of a life-long study in constitutional history and political practice. With a keen appreciation of the limitations of this attempt, the following pages, offered as a preliminary essay, are intended to serve merely as an introduction to a more exhaustive treatise.

In the preparation of Chapter I, I have been obliged to make constant use of the collection of cases and notes prepared and edited by the late Professor Thayer, in his *Cases on Constitutional Law*, and the essay of Brinton Coxe on *Judicial Power and Unconstitutional Legislation*, edited by William M. Meigs, Esq. For an account of a few of the conflicts of the states with the federal judiciary, the historical notes and papers in the collection of *State Documents on Federal Relations* by Professor H. V. Ames, have been relied upon. I wish, therefore, to express my appreciation for the aid received from these works.

I also wish to acknowledge my indebtedness to Professor Charles A. Beard of Columbia University for sympathetic guidance and the many helpful criticisms, which have made it possible to present the essay in its present form, to Dr. Barnard for valuable suggestions at every step in the preparation of manuscript, and to Professor Burgess for the inspiration toward a critical study of public law in the light of modern historical methods.

CHARLES G. HAINES.

COLLEGEVILLE, PA., MAY 1, 1909.

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