

Cambridge University Press

978-0-521-76960-0 - Reconstruction and Reunion, 1864-1888 - Volume VI

Charles Fairman

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HISTORY OF THE SUPREME COURT OF THE UNITED STATES

Reconstruction and Reunion, 1864–1888, Part One B is the second part of the sixth volume of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*. In these volumes, Charles Fairman examines the activity of the Supreme Court during the tenure of Chief Justice Salmon P. Chase, considering issues of procedure, doctrine, technicalities of pleading, and the precedents and consequences of the Court's work. The second of the two volumes enumerates and examines specific issues that confronted the Supreme Court during this period, including the Legal Tender Act litigation, property confiscation and wartime private contracts in the South, and railroad bond-aid controversies. Part One B also provides a comprehensive discussion of the Thirteenth and Fourteenth Amendments and the Civil Rights Act. The concluding chapter is a summation of Salmon P. Chase's chief justiceship and the significance of his tenure for the Supreme Court and its history.

Charles Fairman (1897–1988) was Professor of Law, Emeritus, at Harvard Law School. He was the author of numerous articles and books, including *The Law of Martial Rule* (1930) and *Mr. Justice Miller and the Supreme Court* (1939). In 1948 he published his casebook, *American Constitutional Decisions*, and a year later, he published his classic article, "Does the Fourteenth Amendment Incorporate the Bill of Rights?"

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521769600

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An earlier version of this book was published by Macmillan Publishing
Company in 1971

© The Permanent Committee of the Oliver Wendell Holmes Devise 1971
First published by Cambridge University Press 2010

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Fairman, Charles, 1897–1988.
Reconstruction and reunion, 1864–88 / by Charles Fairman.
p. cm. – (The Oliver Wendell Holmes devise history of the Supreme Court of the
United States ; v. 6 (Part 1B))
Includes index.

ISBN 978-0-521-76960-0 (hardback)
I. United States. Supreme Court – History. I. United States. Permanent Committee
for the Oliver Wendell Holmes Devise. II. Title.
KF8742.A45 H55 vol. 6, etc. 2009
347.73'2609–dc22 2009032092

ISBN 978-0-521-76960-0 Hardback

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Foreword to the Cambridge Edition

WHEN JUSTICE OLIVER WENDELL HOLMES died, he left his entire estate to the Congress of the United States, which, after a long lapse, established the Permanent Committee for the Oliver Wendell Holmes Devise. The Committee consists of five members, four appointed by the President of the United States and the fifth, the chair, by the Librarian of Congress. More than half a century ago the Committee decided that its principal purpose would be to commission a multi-volume history of the Supreme Court of the United States. The Holmes Devise History was originally envisioned as an eleven-volume series, concluding with a volume on the Hughes Court and ending in 1941. More recently, the Committee decided to extend the coverage of the series and commissioned new volumes, one on the Stone and Vinson Courts, and another on the Warren Court. It is possible that further volumes will be commissioned for subsequent Courts.

The Holmes Devise History has had a complicated history. A few of the initially commissioned volumes appeared fairly promptly, but many were long delayed. A few of the authors abandoned their volumes. Others passed away before they could complete their volumes, and new authors were appointed. As of 2009, two of the original volumes, as well as the recently commissioned volume on the Warren Court, have yet to appear, though we hope to see them within the next few years. The series was initially published by Macmillan, but after that firm ceased to do business, the Committee was fortunate enough to be able to contract with Cambridge University Press to publish the remaining volumes—and, remarkably, to put the earlier volumes back into print. The Committee is deeply grateful to Cambridge for undertaking this large and important publishing project.

The conception of the Holmes Devise History has also changed substantially over the years. Under its original Editor in Chief, Professor Paul Freund of Harvard Law School, the individual volumes were conceived of as nearly encyclopedic. Authors were expected to cover all of the most significant cases

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decided by the Supreme Court of the United States, as well as to provide exhaustive biographical accounts of the Justices. After I became the Co-Editor with Paul Freund in 1978, however, authors were asked to take a more focused and analytical approach. More recent volumes are somewhat shorter and significantly more thematic, though I hope it is fair to say that each volume remains the major account of the Supreme Court during the period it covers.

I have been the Editor in Chief since 1990, and it gives me special pleasure to know that the entire series is now back in print and available to readers. The Holmes Devise project is one of the most ambitious in the history of American law, and I believe it is true to say of the Holmes Devise History that the whole is much more than the sum of its parts. While I cannot describe myself as a neutral party (I was, after all, a member of the Permanent Committee from 1974 until 1980), I also think it likely that Justice Holmes would have admired both the seriousness and comprehensiveness of the History of the United States Supreme Court, for it is much more than a handsome set for one's library shelves! I trust that it will prove useful to scholars lawyers, and general readers for many years to come.

Stanley N. Katz

Foreword

WHEN OLIVER WENDELL HOLMES, JR., Associate Justice of the Supreme Court, died in March 1935 at the age of ninety-three, he left to the United States of America his residual estate, amounting to approximately \$263,000. Since such a bequest was unusual, there was no ready formula for utilizing this money. The subsequent deliberations among government leaders about a suitable disposition of the gift were interrupted by the onset of the Second World War, with the result that for many years the money remained in the Treasury, untouched and uninvested. Finally, in 1955, an act of Congress (P.L. 84-246) established the Oliver Wendell Holmes Devise Fund, consisting of the original bequest augmented by a one-time appropriation in lieu of interest. The act also created the Permanent Committee for the Oliver Wendell Holmes Devise to administer the fund. The Committee consists of four public members appointed by the President of the United States for an eight-year term and the Librarian of Congress as Chairman *ex officio*.

The principal project supported by the Holmes bequest, as stipulated in the enabling act, has been the preparation and publication of a history of the Supreme Court of the United States. The present volume is part of that series. Intended to fill a gap in American legal literature, the multivolume history has been planned to give a comprehensive and definitive survey of the development of the Court from the beginning of the nation to the present. Paul A. Freund, Carl M. Loeb University Professor, Harvard University, has served as editor in chief. The authors, of whom Charles Fairman, Professor of Law emeritus, Harvard Law School, is one, have devoted many years to the research and writing.

The operation of the Permanent Committee has been dependent upon the services of the distinguished men who have contributed their time, their wisdom, and their practical assistance as members of the Committee. Their names appear on p. xvii.

In the early days of the Committee, Joseph P. Blickensderfer was Administrative Editor and Special Assistant to the Chairman. Dr. Blickensderfer

FOREWORD

contributed much imagination, enthusiasm, and hard work to plans for the publication of the history of the Supreme Court and later to preparations for the Holmes Devise lecture series also supported by the Committee. Following Dr. Blickensderfer's death in 1960, the late Lloyd Dunlap served as Administrative Editor for the years 1961–64. Since then the responsibility for the office of the Permanent Committee has been assigned to Mrs. Elizabeth E. Hamer, Assistant Librarian of Congress, who is assisted by Mrs. Jean Allaway as Administrative Officer for the Devise.

As Chairman *ex officio* of the Committee that has sponsored this work, I am happy to see the plans for the Oliver Wendell Holmes history of the Supreme Court come to fruition. This volume and its companions will form an appropriate tribute to the great Justice whose legacy has made possible their publication.

L. Quincy Mumford
LIBRARIAN OF CONGRESS

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Editor's Foreword

NO MORE ANXIOUS RESPONSIBILITY could be faced by a court than to adjudicate controversies arising out of a civil war and its aftermath, in a time of turmoil that pitted not merely citizen against citizen but section against section and Congress against the Chief Executive. How the Supreme Court discharged that responsibility is a pervading theme of this volume, which covers primarily the period of the Chief Justiceship of Salmon P. Chase (1864–73), though its unity is defined by topics rather more than by dates.

Professor Fairman has mapped the terrain of his period on a spacious scale, enabling him to present the telling detail that gives color and verisimilitude to the narrative and conviction to his judgments. Supreme Court litigation appears as a stage in a cycle, a transforming station in the flow of a current that includes the political and social origins of a conflict as well as the consequences and repercussions of the Court's decision. For the litigation stage itself the author has taken in effect the model described by Maitland in writing of the Year Books: "What they [some nameless lawyers at Westminster] desired was not a copy of the chilly record, cut and dried, with the concrete particulars concealing the point of law: the record overladen with the uninteresting names of litigants and oblivious of the interesting names of sages, of justices, of sergeants. What they desired was the debate with the life-blood in it, the twists and turns of advocacy, the quip courteous and the countercheck quarrelsome. They wanted to remember what really fell from Bereford, C.J., his proverbs, his sarcasms . . ." We are able in this volume to savor the personal as well as professional qualities of the protagonists in litigation, coming to know many of them as familiars. And through exposure to the minutes of the Court and personal journals we gain revealing glimpses into the management of the Court's business.

Litigation, as I have said, is only one phase of the contests, great and small, reaching the Court for judgment. The contests are recounted and analyzed with an intimacy made possible by prodigious labors of scholarship. From this intimacy arise new insights. Some of the great conflicts, notably Reconstruction,

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have been fought over by historians until the battlefield seems barren. What Professor Fairman has done to invigorate the subject is to explore the interrelations of Court, Congress, and state legislatures, revealing, for one thing, the effects of tall talk and obiter dicta in judicial opinions on the hardening of positions in the local editorial offices and legislative halls. Other conflicts of the period, notably the extensive controversies over municipal financing of railroad expansion in the western states, have been grossly neglected by historians. In order to assess the right of the matter as between the holders of repudiated bonds and the municipalities that repented of their frenzied finance, Professor Fairman has done a major original work of historical reconstruction. Here, as in the study of Reconstruction itself, he has wrung from legislative journals, court records, memoirs, and newspaper files the figures of politicians, publicists, litigants, and the interests behind litigants that are vital characters in the drama.

The whole work immerses us deeply in the affairs of Court and country. It is rich and penetrating, the product of many years of single-minded scholarly dedication.

Paul A. Freund

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Preface

THIS FIRST OF TWO VOLUMES allotted to the period of Reconstruction and Reunion, 1864 to 1888, records the affirmation of universal freedom and the framing and adoption of the Fourteenth Amendment. Upon the basis of this new security for the protection of all persons, by March 1870 the last of the secessionist States had been restored to representation in Congress. In April 1873 in the *Slaughter House Cases* the Court made its initial construction of the new Amendment. A few weeks later Chief Justice Chase died, while the Court was in adjournment. This makes a convenient point at which to interrupt the main thread of the account. Some topics, however, have been carried to their conclusion, long after 1873—notably the discussion of the adjustment of private relationships affected by the war, and the controversies over municipal bonds issued in aid of railroad projects.

Some readers may expect that a book about the Supreme Court will be entirely a composition in lofty strains. But to be truthful it must be pointed out that in this period the Court's work as determined by the Judiciary Act included a mass of commonplace litigation on matters of private right, differing from what came before the State courts in nothing save that the parties must be citizens of different States. And only in exceptional circumstances did a matter of criminal justice reach the Court. Enough is said in the present volume to substantiate these observations. The Court's contributions to the growth of the common law and to the special subjects of federal cognizance are reserved for consideration in the volume to follow.

It will be evident that the writing has been based upon bedrock: the transcripts of record and briefs, the Court's Docket and Minutes, sometimes the case files in the National Archives. For the States undergoing reconstruction, the proceedings of their constitutional conventions, their session laws, and the legislative journals underlying the session laws received painstaking examination.

PREFACE

Records and briefs for the terms covered by the present volume are available in collections so few that one does not count beyond the fingers of one hand. I have been happy to work from microfilm produced according to my requirements. The set of paper books at the Michigan State Library at Lansing begins with those that belonged to Justice Bradley, which are enriched by his notes as he worked his way through the cases. My selections from that source crowd five reels of microfilm.¹

Throughout the book the reader will recognize the value of the papers of Chief Justice Chase, some preserved by the Historical Society of Pennsylvania and some by the Library of Congress; those of Justice Davis, deposited with the Illinois State Historical Society at Springfield, and available by photoduplication at the Chicago Historical Society; and the letters of Justice Miller to his brother-in-law. I am obliged to the Library of Duke University for supplying from their Herschel V. Johnson papers the items quoted in the discussion of the *Cotton Tax Case*. It is by permission of the Harvard College Library that quotation is made from Charles Sumner papers there collected. Twenty reels from the Library of Congress microfilm of the Andrew Johnson papers, for years of his Presidency, were examined. This time-consuming exercise was undertaken because there was a fair prospect that it would prove useful: in the outcome it yielded some pertinent items, and a mass of observations of considerable cumulative effect. This is illustrative of numerous ventures, prudently undertaken, which as it turns out may return an abundance, or a trifle, or nothing at all.

Gatherings from many newspapers figure prominently in text and footnotes. We are concerned with a period that had nothing comparable to the present *New York Times* with its wide coverage and comprehensive *Index*. One must select, from what is available, such files as seem promising, and put them to the test. The preservation of old newspapers on microfilm has progressed so far as to make that the scholar's chief reliance.² Conditions in the South during the war and reconstruction were not favorable to the orderly production or to the preservation of newspapers. Enterprises were often short-lived, changes in ownership and in editorial policy were common; there are numerous gaps, small and large. Often the files of a journal of a century ago had so far deteriorated that it is only by aid of a magnifying glass that one can decipher. Amassing details for the chapters on municipal bonds involved a wearisome quest for newspapers reporting on communities affected. It seemed a great discovery to

¹ I am grateful to Professor Samuel Krislov for drawing it to my attention that these books bore the comments of Justice Bradley; to Miss Charlotte C. Dunnebacke, the Librarian, for her courtesy and patience; and to the Michigan State Records Center for the execution of a difficult assignment.

² *Newspapers on Microfilm*, 6th edition 1967, compiled under the direction of George A. Schwegmann, Jr., and published by the Library of Congress.

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find that the *Missouri Republican*, published at St. Louis, had comprehensive reports of activities throughout the State in the years when resistance to judicial enforcement was most stubborn.

In the pursuit of newspapers and other materials I visited State archives, historical societies, and university libraries, selecting for photocopy useful papers, and learning from their collections of microfilm what it would be profitable for me to procure for examination in my study at home. I recall with gratitude the courtesy and helpfulness of the archivists and librarians along my way.

It was recognized from the beginning that the Library of Congress would provide “a center of information.” The earliest report of the Permanent Committee promised that the authors’ investigations “will reach far into collateral fields, in order to set the Court at all stages firmly in the political, economic, and intellectual context of the moment.” That has involved the calling forth of materials from the far corners of that great repository, to be woven together at the author’s desk. The Library has lent books, provided photoduplication of many items, and fulfilled numerous requests for specific bits of information. My file of correspondence, several inches thick, suggests the extent of the traffic.

The arrangements entered into in the summer of 1957 contemplated that an author would be able to complete his book within four years, with a semester or perhaps a year of leave from academic duties. It soon became manifest that for a due performance of my undertaking a far more persistent effort must be made. Thanks to Guggenheim and Social Science Research Council fellowships, and a share in grants made to the Committee by the Rockefeller Foundation, it was possible to be on leave from January 1960 to June 1962—and the work has continued incessantly since that time. In 1966 the Committee agreed that two volumes be allowed for my period.

Books and articles about the Court and the Justices are beyond numbering and, like the stars, “one differeth from another in brightness.” Reconstruction has been the subject of spirited reinterpretation, and the outpouring of essays has quickened while the present volume was being written. Few of these titles will be mentioned in my chapters. To have expressed admiration for particular writings would have suggested a lack of appreciation for others. To have pronounced an adverse judgment without giving reasons would have sounded presumptuous; to have composed critical reviews would have been uncongenial and space-consuming. It has seemed the proper course simply to allow every tub to rest upon its own bottom. I have been busy hooping my barrel as tightly as skill permitted.

Every volume of the Reports bears evidence that while the Justices are sworn to “do equal right” there will yet be divergence in their conclusions. It must be patent that when one individual undertakes to appraise the work of the Bench over a period of years—and an exceedingly controversial one at that—it

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is beyond belief that all of his judgments will command universal assent. I have been mindful of the responsibility imposed by participation in the writing of our *History*, and have taken time to arrive at conclusions “according to the best of my abilities and understanding.”

Charles Fairman