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Book Review

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BOOK REVIEW

1 History of the Supreme Court of the United States: Antecedents and Beginnings to 1801. By Julius Goebel, Jr. New York: The Macmillan Company, 1971. Pp. xxv, 864.

6 History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One. By Charles Fairman. New York: The Macmillan Company, 1971. Pp. xx, 1540. $30 each ($25 by subscription to the entire eleven volumes).

Were an American citizen to bequeath the bulk of his estate to the "UNITED STATES OF AMERICA," such action might indeed be newsworthy, but certainly not disabling for the recipient. But when Oliver Wendell Holmes, Jr., did just that, strange things began to happen.

Apparently no dispute arose over the identification of the "UNITED STATES OF AMERICA" as the federal government, and the money was tucked away in the Treasury in a special fund to await the pleasure of the disbursing agent, the Congress. Over five years passed before Congress formally recognized its responsibility; then it passed a resolution providing for the sale of Holmes' residence, the proceeds of which were to be used to publish a memorial volume including Holmes' writings and to finance the creation of an "Oliver Wendell Holmes Garden" in Washington, D.C.[1] Apparently this legislation accomplished nothing beyond the conversion of Holmes' residence into money, and the Holmes Fund drew neither investment interest nor further political interest for the next decade and a half. Then in 1955 a committee was appointed consisting of three members each from the House, the Senate, and the Supreme Court charged with reconsidering the use of the Holmes Fund. The suggestions of the committee became the Act of August 5, 1955.[2] Carried over into the new legislation was the provision for the memorial volume, but it was placed at the end of a list of three priorities and apparently has received no further attention. The committee had scrapped the idea of a Holmes garden and put in its place the writing and publication of a history of the Supreme Court of the United States. The second item provided, as funds were available, for the financing of an annual series of Oliver Wendell Holmes Lectures,

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[1]Joint Resolution of Oct. 22, 1940, ch. 908, 54 Stat. 1206.

[2]Act of Aug. 5, 1955, ch. 572, 69 Stat. 533.

which were commenced in 1960 and have continued to the present. A permanent Committee of the Oliver Wendell Holmes Devise was established with directions to devote the income and principal, as necessary, to the history and then, as funds were available, to the second and third proposals.

The Permanent Committee met first in late 1956 and devised plans for the history. Paul A. Freund of Harvard was selected as Editor-in-Chief, and seven chronological volumes were planned with each contributor doing a single volume. Those seven volumes have over the years expanded to eleven, and the projected coverage to the present has been cut back so that the final volume will carry the story only to 1941. The decision to terminate the history in 1941 seems wrong-headed and incomprehensible on any historical or financial grounds. Apparently work was commenced by the authors in 1958; these two volumes published in 1971 are the first evidence of these years of effort. To guide the contributors, the Permanent Committee in its first report in 1957 expressed its hopes for the series:

> The Committee has in mind a history that will be comprehensive, authoritative, and interpretative. It will be self-contained and form an integrated whole, developing its subject chronologically, in the large outline, by distinguishable periods in political, economic, and social history as these are reflected in the work of the Court. Since the totality of the Court's business is the subject of examination, the 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. . . . As a whole, the history will seek to portray the Court as a living institution, to trace its vital growth and development, and to show and interpret the interactions between the Court and its cultural environment over a period of more than a century and a half.[3]

On the verge of our inspection of the volumes, we might speculate on how Oliver Wendell Holmes, Jr., might have reacted to the activity that his will provoked. This writer of grace and elegance, who believed brevity to be a virtue, is honored by a mammoth set of books, whose price, approach, and style assure a most limited audience. Oh, for the simplicity and beauty of a garden!

A project so long in the making is bound to excite anticipations that it cannot fulfill, and any multi-volumed, multi-authored series is assured

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[3]Quoted in *The Holmes Devise and the Supreme Court History*, 2 Q. LEGAL HISTORIAN, March 1963, at 4.

of unevenness in both contemplation and execution. Here, as in so many other instances, there is little collaboration; what we have is collaboration by segregation and the precise demarking of boundaries, collaboration only in the sense that the total product is the result of many people working alone, not together. Obviously different authors will produce different books, but some acceptance of the limitations and guidelines of the corporate enterprise should reduce the magnitude of the difference. If these two volumes are any indication, what we will get are books of differing value and approach tied together only by fiat and common funding. The congressional act contemplated the employment of "one or more scholars of distinction" for the purpose of preparing the history. One possibility that apparently was not really explored was the commissioning of a single author or, if the task was too awesome, two, who could present a unified treatment of more moderate dimensions. Charles Warren's *The Supreme Court in United States History*, published in 1922 in three volumes does little with the material beyond the 19th Century, but it is a well-unified and humanly interesting treatment of its subject. The fact that it is still in print bespeaks its value with eloquence. Warren had his blind spots, and his reverence for the Court seems dated to a later generation, but the book has an enduring appeal.

One thing the contributors to this series seemed to agree upon was the magnitude of their research task. For years the profession heard of the lengths to which the authors and their assistants were going to turn up new material that might be useful in their study. The fact that this material will be collected and made available to scholars is one of the happy by-products of this effort. But in a study of the Supreme Court, when so much of the essential material is readily available, the difficult task is synthesizing the materials into a meaningful manuscript. Certainly the excavating process may, at times, turn up handsome results, but, without belittling them, they are less important than the major task of telling the story well. There is some new material in both of these volumes, along with some rescuing of material not readily available in other forms, but they contain few surprises or major reinterpretations.

While the two volumes are more different than alike, there are some important similarities. Both Goebel and Fairman are proven scholars whose work on this series is revealing of the strengths and weaknesses of their earlier published work. Lest the moment pass, Goebel and Fairman should be commended and admired for their production of major works long after retirement. Aside from the similar format that one could expect of serial publication, both volumes contain picture sections consisting primarily of portraits, both are heavily docu-

mented with extensive footnotes at the bottom of the page, both provide an uncritical bibliographical listing, and both contain workable, though not complete, indexes. Finally, both authors show a decided preference for judicial restraint; in dealing with periods of turbulence, they concur that a more active Court could have gained little but lost much.

Julius Goebel, Jr., had the unenviable task of beginning the series with *Antecedents and Beginnings to 1801*. What makes the task difficult is deciding what properly belongs in a history of the Supreme Court prior to its creation. Goebel chose to focus on appellate review and its institutionalization in a society particularly sensitive to the need to limit government by codifying the fundamental law. In examining the colonial period and the imperial appellate structure, Goebel concludes "that the colonists' grasp of the law and its operations was broadly based."[4] The colonists conceived the common law as a standard by which a claimed usurpation of liberty could be tested, and when the controversy with Great Britain entered its final phase, "it was with solid shot from the magazine of common law precedent that the American cause was chiefly vindicated."[5] By the Revolution the idea of a constitution was a matter of political conviction, and everything "in the experience of the American lawyers, intellectual and practical, had prepared the way for committing"[6] the power of determining conformity or repugnancy to the Constitution to the judiciary. From there Goebel moves on to a discussion of the new states and their judicial organizations. Then in an interesting chapter on "national judicial authority" during the period from 1775 to 1789, he fills in a gap in our understanding of practice under the Continental Congress and the Congress under the Articles of Confederation.

Goebel's two-hundred page treatment of the drafting and ratifying of the Constitution is largely focused on the judiciary, and though his limited focus can be questioned, he does provide some new insight. Facing the same inadequate discussion of the judiciary in the Philadelphia Convention that has puzzled researchers, he comes to an interesting conclusion. He attributes the inadequate discussion of the judicial article to the fact that the establishment of a national judiciary was a theoretical necessity once you start, as the framers did, with a commitment to the separation of powers principle. This logical deduction commended

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[4]J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 47 (1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1971).

[5]*Id.* at 95.

[6]*Id.*

itself to all; in the absence of dispute no defense was necessary. Controversy was, however, provoked over the insistence that a provision for an inferior federal court structure be lodged in the Constitution. James Madison lost the battle but won the war with a provision that apparently gave to the Congress discretion to establish such courts. Goebel goes further and contends that revisions in language in the Committee of Style, where "ordain and establish" was substituted for "constitute," left Congress little real discretion.

Goebel's chapter on the Bill of Rights necessitates some digression from his main focus, but he quickly gets back to his narrower history in two chapters that deal with the Judiciary Act of 1789 and supplementary procedural legislation. In these chapters and throughout the book, Goebel demonstrates that he can grapple with procedural matters as well as, if not better than, any other legal historian. His treatment of the significant Judiciary Act of 1789 provides some correction to Charles Warren's famous and influential treatment of it. His next two chapters on the Circuit Courts are useful and informative and provide the best coordinated treatment of them in print. The final 132 pages are devoted to the Supreme Court in the first decade of its existence, supplemented by an appendix collating the material unearthed on the appellate jurisdiction of the Court to 1801. Much of the case material in the volume concerns admiralty cases, and Goebel has done a good job in tracing the intricacies of this jurisdiction throughout the volume. He concludes that within "the confines of what the Court considered to be the bounds of its authority there was no lack of professional acumen or, indeed, of moral courage."[7] That the storms ahead were weathered he attributes in part to the restraint of this early Supreme Court.

Just as Goebel's volume could be expected to have worth, substance, and insight, it could be expected to have limited appeal. This is lamentable, for this project, more than any other than Goebel has devoted himself to, had a dimension that offered the author a larger audience. The book is too narrowly conceived; Goebel's concentration on appellate review has led him to neglect the more important currents of thought and activity that went into the making of the Constitution. Whether or not a study of the Supreme Court can be legitimately separated from constitutional history, a more complete coverage of how and why we got the Constitution we did is a necessary part of even the more limited story.

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[7] *Id.* at 792-93.

Perhaps the failure to develop more fully the period prior to the framing of the Constitution by considering political philosophy and practice in a wider setting could be forgiven if, when Goebel reached the Supreme Court, he treated his subject well and comprehensively. But this he does not do. At times there is a certain vagueness in Goebel's discussion of the cases and issues. For instance, in the discussion of the subject of pensions for Revolutionary soldiers, where congressional legislation gave the federal courts a decision-making power subject to being overruled by the Treasury Department, a reader of Goebel's treatment without prior knowledge of the episode would have real difficulty in understanding the matter and its resolution. And in a significant case like *Calder v. Bull*,[8] Goebel's treatment is short and neglectful of the opposing philosophic views on the relationship of the Constitution to natural law.

Goebel's treatment of Court personnel is arid; what little the volume contains of human interest is generally relegated to the footnotes, apparently under the assumption that it is irrelevant to the institutional study. The process of appointment is treated laconically; Washington's first appointments to the Court are covered in what amounts to only one page of text. And look at the drama hidden behind this single sentence: "After the Senate had refused to confirm Rutledge, William Cushing had been nominated and confirmed but he declined the post because of age and infirmity."[9] The story of John Rutledge is a fascinating one mixed up with politics and accusations of mental derangement, but Goebel's footnote conveys little of the total picture. Cushing was Washington's second choice for Chief Justice. Goebel relies on a letter Iredell wrote to provide an explanation for the refusal, but the episode merits more attention. Does not the refusal by Cushing, who remained on the Court until his death in 1810, give us some insight into the office of the Chief? Such examples of missed opportunity could be multiplied. Though the Justices' opinions are described, little is said of the men; the closest Goebel seems to come in saying something meaningful is when he concludes that James Iredell had "his own characteristic approach"[10] to a case. Goebel, however, does commend Oliver Ellsworth, Washington's third choice for the top spot, for bringing some leadership to a hitherto leaderless Court, and though his evidence is slim, such speculation is welcome.

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[8]3 U.S. (3 Dallas) 386 (1798).

[9]J. GOEBEL, *supra* note 4, at 749.

[10]*Id.* at 783.

Though Goebel follows the letter of the Permanent Committee's thoughts on the history, he has not caught its spirit. The decade of the 1790's was one of profound importance not only in launching the new government but in making substantial constitutional decisions. What the Congress and President did at that time gave operative meaning to many parts of the Constitution, and, if these decisions did not figure into contemporary cases, often they established customs that the Supreme Court generally refused to tackle as open questions when later the subject matter was presented. There is no discussion in the Goebel volume of the extensive debates of constitutional questions in Congress and in the executive department. The Virginia and Kentucky Resolutions are only cursorily mentioned, and no real attention is paid to the disturbing Sedition Act of 1798.[11] Goebel does look at the federal legislation from the perspective of the Circuit Courts when he concludes that the Federalist judges do not deserve the villification that intemperate observers have heaped upon them for their conduct of the Sedition Act trials.

In short, despite the obvious strengths of Goebel's work, the book is disappointing when viewed from the perspective of the Permanent Committee's hope that these volumes would be definitive and self-contained.

Charles Fairman's volume is quite a different book, even considering the great difference in the eras treated and the difference in the richness of the materials available. Originally commissioned to write a single volume in the series covering the years from 1864 to 1888, Fairman soon discovered that his conception of the task would necessitate its execution in two volumes. So this present book is only Part I and covers, in the main, the period of Salmon P. Chase's Chief Justiceship, 1864 to 1873.

Fairman's conception of his task, his approach to his material, and his execution differ markedly from Goebel's. Concentrating mainly on the subject of Reconstruction in this volume, Fairman has written a wide-ranging constitutional history. His basic justification is that one cannot understand how the Court responded in its relatively few cases to the issues at hand without understanding what the Congress, the President, and the former Confederate states were doing. He approaches his task by utilizing and quoting at length Congressional debates and private correspondence. Also he recognizes that a study of the men involved is a matter of human interest and a necessary part of the

[11]Act of July 14, 1798, ch. 74, 1 Stat. 596.

total history. Though some Justices receive more substantial treatment than others, we do get some insight into both individual and corporate decision-making. We see the Supreme Court as part of a total picture of governmental activity. This is all so positive and such an improvement over Goebel's perspective that the problems of execution in the volume are all the more disturbing.

Quite simply, the book is too long, too disjointed, and too casually organized. It cries out for an editor who is in tune with Fairman's approach but who is ruthless enough to cut its size in half and tighten its organization. Our plague has been an abundance of writers but a dearth of creative editors. Difficult though it may be for an author to scrap material that he has labored over, the final result would be worth the psychic strain. There are sections of the book that simply should have been deleted; self-restraint is as applicable to an author as it is to a Supreme Court Justice. Fairman devotes over fifty pages to a gratuitous showing of how wrong the Supreme Court was in its reading of the 1866 Civil Rights Act[12] in the 1968 case of *Jones v. Alfred H. Mayer Co.*[13] Though he uses the cases as a vehicle for describing the legislative history of the Act, and though this reviewer is inclined to agree that the Court took the 1866 act out of its historical context, Fairman's excursion is unnecessary; it serves only to reveal the inescapable pitfalls that await players in the game of discerning legislative intent. Another instance of helpful deletion would have been Fairman's laborious coverage of Chase's many inconsequential bids for the Presidency. This can only be understood in light of the fact that Fairman has selected Chase as the villain of his tale. Aside from such wholesale excisions, the book could be considerably tightened by pruning the text and eliminating repetition. Fairman also uses too many quotations. Used sparingly, quotations can be extremely effective, but heavy reliance on them is a symptom of indigestion. There is much of worth in this volume, but its ponderous size and heavy-footedness limits its appeal.

Even recognizing that a coverage of the Supreme Court requires frequent shifts in subject matter, the book is more disjointed than it had to be. Part of the problem stems from Fairman's thoroughness, which leads him to treat a number of cases in catch-all fashion. Reconstruction is the subject of the first part of the book, and the resulting amendments to the Constitution, the subject of the last part; this separation of the

[12]Act of April 9, 1866, ch. 31, 14 Stat. 27.
[13]392 U.S. 409 (1968).

total story is undesirable. Finally, the overuse of sub-headings leads to a choppiness and tends, at times, to be a compensation for a failure to unify the treatment better. If sub-headings do have some independent value, they should be listed in the table of contents.

Though Fairman's writing style is good, it contains certain patronizing habits. Fairman regularly injects himself into the narrative to tell the reader that he needs some background information or that he should pay special heed, for this matter will be raised again. Such "stage directions" are annoying to the reader, who expects the writer's organization to be unobtrusive and self-sustaining.

Devoting most of this volume to Reconstruction matters, Fairman is writing in an area that has commanded much scholarly attention, but except for purposes of note supplementation, he ignores this body of literature. Every tub, he says, should be allowed "to rest upon its own bottom."[14] Yet this body of work can be seen in the background of Fairman's treatment. For instance, impliedly recognizing that some historians have labelled the Court's action in refusing to decide *Ex parte McCardle*[15] cowardly, Fairman asks whether the Court's willingness to bend to efforts to divide it and the Congress would have better served justice, Fairman's support for deference is clear. In fact he suggests that tension between Congress and the Court could have been completely eliminated if the Court had deferred to Congress on the test-oath matter in *Ex parte Garland*.[16]

Fairman is to be commended for avoiding some of the old questions that troubled constitutional scholars: did the states secede, were the states in or out of the Union during the period of Reconstruction, and what theory can embrace the various actions of the federal government? An awful amount of print can be expended dealing with these abstract questions, but such discussion has little meaning in dealing with the realities of the period. Fairman's approach is a pragmatic one that realizes that judgments must be passed in light of situations actually confronted.

Within this framework he writes approvingly of the Court, its hesitation, and its recognition of the realities of power during the course of Reconstruction. He blames recalcitrant Southern leadership and the irresponsible course of the Democratic Party in Congress for the mili-

[14]C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, PART ONE, at xix (6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1971).

[15]74 U.S. (7 Wall.) 506 (1869).

[16]71 U.S. (4 Wall.) 533 (1867).

tary measures of Reconstruction. The Court is commended for its refusal to succumb to the intrigues of the disaffected. President Andrew Johnson took the other course and fared poorly, though Johnson is praised by Fairman for recognizing his responsibility in executing the acts he despised. While other interpreters may be willing to listen more carefully to the claims of injustice, Fairman sees "justice" sullied by its advocates and is more moved by the needs of the Court to preserve its viability within the changing federal government.

One strong point of Fairman's volume is its recognition of the part advocates play in the Court's decisionmaking. So many volumes dealing with the Supreme Court ignore the lawyers at the bar, but Fairman recognizes their efforts and their influence within the system. At least in one instance, though, Fairman over-emphasizes the role of the attorney to the detriment of the issues. Jeremiah S. Black, a leading attorney hired to contest matters relating to Congressional Reconstruction, is pictured as a villain seeking to advance the interest of his clients at the expense of the Court. This is an interesting view, one which focuses not on the claim but on its propounders.

In evaluating the failure of Reconstruction to advance more substantially the condition of the former slave, Fairman suggests an explanation that may really get to the heart of the matter. He suggests that the second reconstruction of the 1950's and 1960's was necessary, not because an earlier generation lacked the conscience or commitment, but because the power had not yet been recognized in the federal government and the skill necessary for the undertaking of such a substantial program of organized social service was not present. In spite of cries of despotism, the federal government was still a considerably limited enterprise in the 1860's and 1870's.

Despite Fairman's eager willingness to defend the Court on Reconstruction matters, he certainly is not an uncritical observer. With the comfort of a later Court's full concurrence, Fairman castigates the Court's handling of municipal bond litigation. In a very useful two-chapter excursion into the tangled web of municipal bond litigation, dealing largely with municipal debt incurred in the attempt to encourage railroad development, he unhesitatingly condemns the Court for its tendency to protect the bondholders no matter what the cost to legal doctrine. Justice Samuel F. Miller, a frequent dissenter in these cases, provides Fairman with a well-reasoned path to follow. Fairman notes a sloppiness in the Court's handling of certain matters, and he concludes that "the exercise of corporate responsibility for the work of the Court

was badly needed at that period."[17] when loose practice seemed to be the rule.

A good part of the responsibility for this lack of corporate responsibility Fairman places on the shoulders of the Chief Justice, Salmon P. Chase. The Court survived Chase, Fairman well might say, but Chase offered it little help in the struggle. Fairman has nothing good to say about Chase; he passes over the Chief Justice's role in the impeachment trial of Andrew Johnson, a performance that has generally earned Chase plaudits, with no comment. Fairman condemns Chase for his constant courting of the Presidential nomination, his political lobbying, and his failure to exercise his office responsibly. As previously mentioned, Fairman expends considerable space on the straw-grasping that characterized Chase's bid for the Presidency. He demonstrates how Chase acted unilaterally on matters that concerned the Court as a whole, including his search for glory in getting Congress to retitle his office, Chief Justice of the United States. As part of a package deal, he supported reduction in the size of the Court in return for a substantial increase in salary, and he suggested measures to provide patronage for the judicial office. Chase probably failed to become the leader of the Court not because of incapacity but because of a lack of interest. Fairman holds Chase directly responsible for the legal tender controversy that saw the Court do a flip-flop on the question of constitutionality. Fairman contends that Chase had a political interestin in finding the legislation unconstitutional and that the matter was too important to rest on the deciding vote of an inconsistent and senile Justice Robert C. Grier. No one would suggest that Chase was a great judicial officer, yet this reviewer believes that an historian less unsympathetic to Chase might present a better balanced picture of the man and the Chief Justice.

In addition to providing much information on the individual members of the bench and the bar, Fairman does a fine job of tracing the intricacies of Supreme Court litigation and giving a full analysis of the major, and some interesting minor, cases of the period. From this treatment of *Ex parte McCardle*[18] to the *Slaughter-House Cases*,[19] there is a fullness of treatment. In addition, Fairman has chased down some interesting cases that never came before the Court for opinion; they add considerably to the total picture. The thoroughness of the volume may lessen its readability, but it is a boon to scholars in the period, even those

[17] C. FAIRMAN, *supra* note 14, at 662.
[18] 74 U.S. (7 Wall.) 506 (1869).
[19] 83 U.S. (16 Wall.) 36 (1873).

who will take issue with Fairman's interpretations.

If these two volumes are representative of the total series, each will bear a very distinctive stamp. Since Oliver Wendell Holmes, Jr. recognized diversity and at times celebrated its virtues, perhaps such a composite history of the Supreme Court is not an inappropriate memorial after all.

JOHN E. SEMONCHE
ASSOCIATE PROFESSOR OF HISTORY AND LECTURER IN LAW
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

Walter D. Navin, Jr.
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