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BOOK REVIEW

HISTORY OF THE SUPREME COURT OF THE UNITED STATES. I. ANTECEDENTS AND BEGINNINGS TO 1801. By: JULIUS GOEBEL, JR. New York: Macmillan, 1972. Pp. xxv, 864. $35. VI. RECONSTRUCTION AND REUNION, 1864-88—PART ONE. By: CHARLES FAIRMAN. New York: Macmillan, 1972. Pp. xx, 1540. $35.

Along the continually lengthening bookshelves of works on the Supreme Court of the United States, it is rather surprising that one may find only two prior attempts at writing a comprehensive institutional history such as this. Constitutional histories, which obviously deeply involve one fundamentally important dimension of the Court and its functions, are somewhat more plentiful, but they necessarily are addressed to documenting the development of a doctrine rather than the full record of a judicial institution. The first significant study was a massive single volume prepared for the Judicial Centennial Committee of the New York State Bar Association which was published in 1892 under the title, *The Supreme Court of the United States: Its History*. Commemorative works of this type are often indifferent in scholarship, but happily this one was prepared by Hampton Carson, a leader of the Pennsylvania bar and one of the first of the still sparse number of legal historians in the United States. Carson assembled much significant data for his study, and the fact that some of these findings, such as the unreported early prize cases, have inexplicably been neglected by later writers means that his work is still the best source for some important information on the early Court.[1]

Although 30 years passed before the second significant work of this nature was published—*The Supreme Court in United States History*, a two-volume study by Charles Warren of the Boston bar—the author made no attempt to develop in depth the details of the Court's history beyond the centennial period set by Carson in his original work. "The succeeding thirty years of Chief Justices Fuller and White comprise

1. H. CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY (1892). The introductory statement indicates that the author's purpose was to record a precise chronological history of the Court: "Topics and doctrines illustrative of different phases of our national growth are presented in the exact order of their occurrence and in natural sequence." *Id.* at v. For the *Prize Cases* and other judicial antecedents to the federal court system, see *Id.* chs. V and VI.

a period so recent and so clearly within the view of living men as to render such detailed treatment unnecessary," was the author's astounding explanation. More plausible was his added statement that "the proper historical perspective is lacking."[2] This was probably overjudicious; the want of scholarly detachment which he protested—with undoubted sincerity, since his reputation as a historian of the bar was solidly established[3]—apparently was amplified to exaggerated proportions by his own professional activity as a member of the Supreme Court bar over this time period. Despite all this, Warren's work, published in 1922 and revised in 1926, has remained in print for half a century as the only general history of the institution for the period it fixed for its coverage.[4] Even now, with a monumental and truly definitive history making its appearance, Warren's work will not be entirely supplanted, as will be indicated below.

Two other works should be mentioned since they come within the same general frame of reference. One is Gustavus Myers' *History of the Supreme Court of the United States*, a leftist critique of the institution published in 1925 which, like Carson's book, contains much useful information still not to be found elsewhere.[5] The other is a specialized study by Professor (later Mr. Justice) Felix Frankfurter and James M. Landis as *The Business of the Supreme Court* (1928), a statutory history of the federal judiciary from 1789 to 1925.[6] Finally, and in specialized category within this reference frame, mention should be made of the annual *Supreme Court Review* published since 1960 under the editorship of Professor Philip B. Kurland of the University of Chicago.[7]

It is useful to note these various scholarly ventures not only to pro-

2. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1937). His defense of the treatment of the period following 1888 appears in I C. WARREN at vii.

3. *Cf.* C. WARREN, A HISTORY OF THE AMERICAN BAR (1913); Warren, *New Light on the History of the Federal Judiciary Act of* 1789, 37 HARV. L. REV. 49 (1923).

4. The standard constitutional histories also stopped short of the present century, with the exception of Professor Carl Brent Swisher's excellent textbook, AMERICAN CONSTITUTIONAL DEVELOPMENT (1954).

5. Myers, although an avowed Marxist, was a painstaking scholar. G. MYERS, HISTORY OF GREAT AMERICAN FORTUNES (1910) is still considered one of the authorities on that subject. For another leftist critique of the Court, which nonetheless is a product of exemplary scholarship, see L. BOUDIN, GOVERNMENT BY JUDICIARY (1932).

6. The substance of this study appeared first in a series of articles in the Harvard Law Review, and later provided the statistical format for the annual review of the Supreme Court business which has been published in that journal since 1949.

7. In the opening number to this series, the editor wrote that there was a need for

vide a certain background to the present undertaking, but to project some understanding of its magnitude. This work has been underway for much of the past decade, and it is likely that much of the coming decade will have passed before its projected 11 volumes have all appeared. Nine highly reputed scholars, each selected for his specialized knowledge of a particular period in the Court's history, have been at work on the various volumes under the general editorship of Professor Paul Freund of Harvard, acknowledged *doyen* of students of the Supreme Court. It is officially sponsored by the Oliver Wendell Holmes Devise of the Library of Congress, a fund left by the great jurist to the United States for such use as the nation might see fit to make of it.[8]

I

Warren's history, with which the Devise history will inevitably be compared, was written in a conscious effort to see that "[the Court's] decisions might be the better correlated, in the reader's mind, with the political events in the Nation's history." Warren "laid particular stress upon the views taken of the Court and of its important cases by contemporary writers and statesmen," quoting extensively from current newspapers and pamphlets.[9] While the authors of the present volumes —and particularly Professor Fairman—have some occasion to do the same thing, the approach is markedly different. This is to be an exhaustive study of the development of the Court as an institution; constitutional issues, political background, and contemporary reaction are thus properly seen as only some among many facets and factors in the total history.

How exhaustively this background is developed is illustrated in the organization of the first volume, in which Professor Goebel draws upon a lifetime of specialization in the transplantation of law and legal institutions to the English colonies in the New World. Only the last three of the 17 chapters are devoted specifically to the Supreme

a medium for the exchange of "sustained, disinterested, and competent criticism of the professional qualities of the Court's opinions," a "forum in which the best minds in the field will be encouraged freely to express their critical judgments." 1960 SUPREME COURT REVIEW vii (P. Kurland ed. 1961).

8. The fund is administered by a Permanent Advisory Committee under the chairmanship of the Librarian of Congress. In addition to sponsoring the multivolume history, the Devise also sponsors an annual series of lectures on the Court at various law schools. *Cf.* the explanatory Foreword in each of the volumes here being reviewed.

9. I C. WARREN, *supra* note 2, at v.

Court; yet the subjects covered in the antecedent 14 are essential to a true perspective of the new federal judicial system in the context of American experience. It is important to know how law was brought from the mother country, how it was adapted to frontier conditions, and how it was administered in 13 colonies for more than a century and a half before independence. For one thing, judicial review—that peculiarly American doctrine—which was all but taken for granted by most of the Founding Fathers, was taken for granted because the colonial experience had made it familiar.

If the few prior histories of the Court did not develop the same elaborate background from the colonial history, it was primarily because the legal history of the colonial period was, and still is, a subject waiting to be adequately explored. Even within the still small fraternity of legal historians in this country only a certain proportion are concerned with American legal history—some of the best work on the historical roots of the English common law has been done by Americans.[10] Nor has it been the legal history of the colonial period alone; until work began on this multivolume study of the Supreme Court, few scholars had even explored the documents in the various Federal Records Centers located about the land, where, as it soon developed, materials of major significance were waiting. Since, for some 50 years after the Judiciary Act of 1789, the Justices continued grudgingly to ride their circuits regularly, and for another 50 years to ride them irregularly,[11] it was obvious that important records of Supreme Court business lay in the circuit files.

Professor Goebel accounted for an initial break-through in searching out these sources for his period and also setting an example for his fellow authors in the periods following. Professor Goebel has also provided, in his opening two chapters, the first concise review of legal history for the colonial period since Professor Richard Morris wrote his essays on the colonial period of American law nearly 30 years ago.[12] His third chapter, "The New States and the Principle of Constitutional Authority," is a concise summary of a subject which has not been systematically studied since Allan Nevins wrote his book even longer ago.[13] And his fourth chapter, "The Continental Congress

10. The best work on Bracton, for example, has been done by Professor Woodbine of Yale and Professor Thorne of Harvard.

11. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT chs. 2, 3 (1928).

12. R. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW (2d ed. 1958).

13. A. NEVINS, AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1798 (1924).

and National Constitutional Authority," develops the problem of a national regime without a defined judicial function which, together with the headless nature of that regime, foredoomed the Articles of Confederation.

Once the Constitutional Convention faced up to the fact that both an executive and a judicial function had to be defined, the history begins to focus upon the specific subject of the Supreme Court itself. Thus, from Chapter V through Chapter IX, the author traces the debates in the convention and in the states over the function of a separate system of federal courts. It was one thing for the states to draw upon their colonial experience for substantive and procedural law to be administered and applied by their own judicial experience; it was another for them to conceive of a judicial process which would be part of a federal process itself not yet fully defined.

If the author yielded to any temptation in developing his comprehensive background to the founding of the federal judiciary, it was in deciding to write his own history of the ratification of the Constitution as a whole. Perhaps there is something to be said for this, since article III is after all inextricable from the total document; and with scholarship so excellent one would not begrudge the extra hundred and fifty pages or so which this adds to the book. The only problem is that one finds himself following the story of ratification for vast stretches in which little or no specific mention of the judiciary appears. Eventually, however, with the report of the Virginia and New York ratifications—strategically essential to the adoption of the Constitution—the basic federal substantive law, with which a federal (but also a state) court system must deal, was created.

Almost before the judiciary could address itself to this new body of law, the movement for addition of the Bill of Rights created a significantly different corpus of federal law with which the courts were to be concerned. Thus, by the time the machinery was fashioned by the Judiciary Act of 1789—as discussed in Chapter XI, about halfway through the volume—the question of the type of law with which a federal court system would be dealing had answered itself. The Bill of Rights, of course, had originated with the states' concern that more explicit restraints be placed upon the central authority which the Constitution had created; but, as the author points out, the men who drafted the first organic statute on the federal courts "were federally

minded and so politically disposed to take a bold view of the legislative authority conveyed by Article III." [14]

With his complementary chapter on the federal process legislation, enacted at the same time as the far more famous Judiciary Act, the author virtually rounds out the 550-page background to the federal court system which he then describes in his remaining 300 pages. These relative page counts are not intended to do more than emphasize the amount of important detail which Professor Goebel, from his years of research into the beginnings of American law, is persuaded the student should consider in order to understand the place of the Supreme Court in our national life. The author has provided all the essential information to understand, better than we have ever before been equipped to understand, the context within which the Supreme Court began its work.

That work, for obvious reasons, did not amount to a significant volume or variety in the first decade. John Jay, who perhaps appealed to President Washington because of his extensive international experience which presumably would give him a unique judicial vantage in disposing of interstate questions, found the first Chief Justiceship too small a stage for his executive interests; John Rutledge, irascible and increasingly neurotic, merely held the office long enough to become history's first spectacular rejection by the Senate; Oliver Ellsworth, godfather of the Judiciary Act, was a legislator miscast as a jurist and followed Jay into retirement after a decent interval. Within its first decade, the six-man Court had 17 openings.[15] It was obvious that the Court's own history was waiting to begin with the appearance of John Marshall.

II

With Professor Fairman's first volume, the political history of the Court, long familiar to readers of Warren's history, is developed in detail. This is proper and inevitable for the period covered—the nine years of Salmon P. Chase's Chief Justiceship, the age of vindictiveness, Reconstruction and the rapid debasement of the integrity of government, state and national, in general. The author has already demonstrated his interest in the impact of such conditions upon the abilities of individual jurists.[16] In this massive work he broadens his theme to

14. J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 457 (1972).

15. II C. WARREN, *supra* note 2, at 757 *et seq.*

16. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT (1966); Fairman, *What*

the impact upon the Court as an institution, and the effects upon the Court's own functions as an interpreter of American law.

The fourteenth amendment restated the relationship between Americans and their government, setting out in terms what had been implicit but in practice inchoate: (1) A separate citizenship status for citizens of the United States was now made explicit;[17] (2) certain "privileges and immunities" of such citizens were specifically acknowledged (although not identified), sowing seeds which would germinate a century later in the incorporation of much of the Bill of Rights into this amendment;[18] (3) the common law concept of due process in the fifth amendment was reiterated in the fourteenth, but it also sowed other seeds for early germination in a somewhat mutated form; and (4) the "equal protection of the laws" was added almost as an afterthought, more seed to lie dormant until an unanticipated future age.[19]

Little or none of this was perceived in 1867; there was more than enough in the way of immediate crisis to demand all the attention and energy which the Court could muster. The chief statutory concern of that year was the first Reconstruction Act, and its implications for the Court are exceptionally well developed by the author in Chapters VI to IX. Between the machinations of a radical Congress and the ambitions of Chief Justice Chase with reference to the Presidency, the steady decline of the Court in this period was predictable. Fairman's volume on the Court, in fact, is a fascinating study of Chase as an individual and as a jurist caught in the circumstances of this point in history—the author has done for Chase, in 1500 pages, what he has previously done for Associate Justices like Miller and Bradley in lesser space.[20]

Yet Chase is not the sole subject of Professor Fairman's study; it is the Court as a body, and the soul-shaking political and constitutional questions with which it had to deal, that requires the lengthy treat-

Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892, 30 B.U.L. REV. 49 (1950); Fairman, *The Education of a Justice: Justice Bradley and Some of his Colleagues*, 1 STAN. L. REV. 217 (1949).

17. *Cf.* Justice Miller's statement in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 74 (1873) that the citizenships set out in the fourteenth amendment for the United States and for the states were separate and distinct, and "depend upon different characteristics or circumstances in the individual."

18. On incorporation, see Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205, 231 (1970).

19. *Id.* at 246 *et seq.*

20. *See* note 16 *supra.*

ment. Not all members of the Court were of the heroic—or perhaps merely oversize—proportions of others; there was rather substantial evidence of conflicts of interest and considerations of material advantage which were, to put it in the mildest of understatements, nonprofessional and unbecoming to members of the bench. The famous "Court packing" episode revolving around the *Legal Tender Cases* highlights this era, and the author devotes virtually a hundred pages (Chapter XIV) to its details.

Perhaps the most revealing portions of the volume concern litigation which flowed to the Court as a consequence of the Civil War, yet involved what were, in the author's phrase, issues which "sound strange because, happily, the nation has had little occasion to remember." But to contemporaries they were of profound importance—not only because they involved confiscatory acts of the wartime administration, followed by amnesty and the reformation of contracts compelled by the course of events; but because in the process they subtly but permanently affected the principles of property law itself. These were also unhappy episodes in legal history; as the author observes, they "shifted and unsettled estates, raised up informers, brought numerous and hard cases to the Court, and in the end showed no benefit commensurate with the detriments that resulted."[21] Not only did confiscation upset contract and property law, but it all but fostered corruption in the lower courts themselves. The Supreme Court as a result was caught in an all but impossible position between a situation in which "in some Southern districts the administration of federal justice was not entitled to public confidence" and an increasingly rapacious Reconstruction Congress determined that the highest tribunal should not overturn the wrongful acts of the lower tribunals.[22]

While Professor Fairman does not indulge in the introspection which would be required to develop the thesis that the rationale of the *Slaughterhouse Cases* was a product of this unhealthy postwar jurisprudence, preferring as he does to stick to demonstrable evidence, the critical situation in property and contract law which emerged from the postwar cases is the seedbed in which the constitutional issues in the *Slaughterhouse Cases* were cultivated. In postwar America, what *were* the property rights of which citizens of the United States were not to be deprived without due process of law? This was the primary

21. C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88—PART ONE 776 (1972).

22. *Id.* at 873 *et seq.*

principle in the fourteenth amendment which the Court was to be asked to adjudicate; and the importance of that question was to divert judicial attention for more than half a century from the rights of freedmen which it had been assumed would be the basic constitutional subject to be litigated.

The ideological progression from the rights of freedmen to the privileges and immunities of citizens of the United States, from the thirteenth amendment to the new orientation given the fourteenth by the *Slaughterhouse Cases*, is meticulously described by the author in the closing chapters of his massive volume. The postwar decade, from 1864 to 1873, was a crisis of the spirit in American life, a cataclysm in constitutional history, and an ordeal of many varieties for the Supreme Court. It is appropriate that this should be the second of the two volumes with which the great history of the Oliver Wendell Holmes Devise has been launched, for, like Volume I, Volume VI is the opening work in a national history which divided into two separate parts with the close of the Civil War.

One cannot say enough for the magnificence of the concept of the Holmes Devise history. Two of our finest scholars have prepared these first volumes; the books are superlatively manufactured, as well. Considering the number and cost of the volumes, they are obviously intended primarily as library references—although this should not deter anyone who seeks at last to grasp the whole story of the Court in our national history. Bulkwarked on the one side as they already are by such constitutional studies as those of Professor Bernard Schwartz,[23] and on the other as they eventually will be by the documentary history of the ratification of the Constitution begun by the late Professor Robert Cushman and now being continued by Professor Merrill Jensen, this generation, at least by the time of the Constitution's bicentennial, will be well equipped with authoritative and fascinating studies of our judicial heritage.

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23. *See* B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (1961-68); B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971).

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