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### Book Review (reviewing Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One (1971))

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#### Recommended Citation

Gerhard Casper, "Book Review (reviewing Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One (1971))," 73 Columbia Law Review 913 (1973).

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therapeutic programs against their benefits, we should keep in mind the value, in practical as well as ideological terms, of tolerance for a wide range of attitudes and behavior. For a society unable to accept, and even encourage, variations in behavior does not offer an hospitable environment for the free development and expression of ideas.

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**HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, PART ONE.** By Charles Fairman. New York: The Macmillan Co., 1971. Pp. xxii, 1540. \$30.00

This is the first of two volumes to appear under the subtitle "Reconstruction and Reunion, 1864-88" in the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States*. According to the preface, the 1500 pages of "Part One" cover the years 1864-73, or the Chief Justiceship of Salmon P. Chase. As is inevitable, however, the light Fairman sheds on this period often flashes back to its antecedents. Less inevitably, though often intriguingly, it flashes forward as well. The 200 pages devoted to the Supreme Court decisions involving municipal bonds in aid of railroads analyze the major cases until 1887 and conclude with a gloss on municipal financing of industrial development in the 1960's. The discussion of the 1866 Civil Rights Act includes a fifty page critique of the 1968 Supreme Court decision in *Jones v. Alfred H. Mayer Co.*<sup>1</sup> A footnote to *Georgia v. Stanton*, taking two-thirds of a page, tears apart another, much shorter footnote unnecessarily attached by Mr. Justice Douglas to his concurring opinion in *Baker v. Carr* (p. 396). Though many of these remembrances of the future are instructive in that they highlight continuities as well as change, others, like the third example just given, merely add tiresome burdens to a volume already overburdened with asides.

The bulk of the book (approximately 80 percent) is concerned with the six-year period 1865-70. It is largely organized according to subject matter, focusing on such topics as Reconstruction legislation, the *Legal Tender Cases*, and municipal bonds. The major exception is the treatment, out of context, of the thirteenth amendment, the 1866 Civil Rights Act, and the fourteenth amendment to introduce the author's discussion of the *Slaughter House Cases*. To the reviewer, who may be the only reader more or less forced to read the

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1. 392 U.S. 409 (1968).

book from cover to cover, this is quite disturbing, since hundreds of pages intervene before any real assessment can be made of the legislative endeavors of the Reconstruction period. Rather too often Fairman teases the reader by, for instance, advising him on page 1125 that *Crandall v. Nevada* will "presently" be examined. In this particular case, "presently" turns out to be almost 200 pages later.

The series title printed on the cover of the book ("History of the Supreme Court of the United States") is misleading if taken as narrowly delimiting the scope of Fairman's enterprise. This is more accurately described as a constitutional history of the United States during Reconstruction from the vantage point of the Supreme Court. Thus Fairman, as a prelude to *Georgia v. Stanton*, provides us with one hundred pages of thorough and detailed examination of the Reconstruction Acts of March, 1867, the state of affairs in the South that brought them about, and the Congressional debates on and public reactions to the legislation (pp. 253-355). His excellent discussion of the options before the 39th Congress (pp. 334-43) follows his analysis of the various votes and coalitions in that body. Fairman shows how pursuit of short-term partisan advantage led the House Democrats to gang up with the Radicals in order to defeat the Blaine Amendment, which, with moderate and conservative Republican support, would have restored the Southern states to the Union on the condition that they accept the fourteenth amendment and black suffrage in their state constitutions. The constitutions would have been drafted by conventions elected only by those already entitled to the vote in the spring of 1867. Defeat of the amendment, with the help of Democrats attempting to demoralize the dominant party (pp. 292-94), resulted in adoption of the much tighter Reconstruction Act and its supplements, providing for all male citizen participation in the framing of new constitutions and for elections under military supervision. Fairman's evaluation and apparent approval of the outcome is well reasoned:

Congress must reckon with a President who had met every critical measure with a veto, and who, while adhering to his duty to enforce the statutes, would yet give them the narrowest construction. The Court had not placed its authority behind the statutes: indeed it was widely believed to stand ready to condemn the entire effort. State officers were not merely evading federal laws by subterfuge: at critical junctures they proclaimed them to be unconstitutional and refused obedience. What Congress did in the prosecution of its effort to restore the Union on the basis of the Fourteenth Amendment is entitled to a far more discriminating consideration than it has generally received. (Pp. 342-43.)

This passage serves as an illustration of the careful and balanced manner in which Fairman argues and as an example of where he stands on Reconstruction. By and large, Fairman's views parallel and lend further support to

the so-called "Revisionists," in particular their destruction of the legend of excessive harshness toward the white people of the South.<sup>2</sup> "'Masterly inactivity'" and "'passive resistance,'" the course then approved by ruling Southern opinion (p. 281), was not exactly a policy that could lead to a common constructive effort.

More importantly, however, Fairman's treatment of the Reconstruction Acts demonstrates how he approaches his task with respect to the Supreme Court. Fairman's method is one of context analysis, including political, economic, and social aspects of the context. The Constitution he expounds is a "living constitution"—worlds removed from the sterility of our constitutional law casebooks with their emphasis on concepts, embellished by a few "background" notes. Since Fairman does his job with scrupulous (sometimes almost pedantic)<sup>3</sup> attention to the technical aspects of the law, his approach is a model of a much-neglected mode of legal scholarship. As Fairman puts it:

Unless one has patiently examined the involved chronology—to distinguish between what was cause and what was consequence—and has looked squarely at the hard alternatives inherent in the facts, he cannot know the context within which the Court acted. Without full knowledge a reasonable judgment may not be made. (P. 90.)

But the author does not restrict himself to using cases as a justification for exploring which legal, political, economic and social variables might explain Court decisions of that era. By emphasizing the Court's attempt at clarifying constitutional and political commitments of the postwar American polity, he contributes to the use of court decisions for understanding political value conflicts and their authoritative resolution. In his words: "One who observed, perceptively, in the Supreme Court chamber would learn enough to chronicle the annals of America—political, economic, and social." (P. 251.)

The trouble with Fairman's patient examination of the involved chronology is that all too often he leaves that chronology involved, interspersing it with short evaluative comments but rarely offering the reader the sum of his own evaluation. The last chapter, of about a hundred pages, is entitled "The Chief Justiceship of Chase." It is a most misleading title. The chapter introduces a hodgepodge of new matters not previously discussed, offers a summary of the eight occasions during this period on which the Supreme Court found that Congress had gone beyond its powers, presents an intriguing table on the length (by modern standards the shortness) of average opinions, informs us that in only twenty out of about 170 reported decisions was there dissent by as many as two Justices, and finally gets around to four and one-half pages subtitled "In Conclusion."

2. See K. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877* 9 *passim* (1965).

3. See, for instance, his discussion of *Crandall v. Nevada*, which treats us to an endless, three-page footnote on the question whether the case could still be called a "case or controversy" by the time the Supreme Court decided it (pp. 1303-05 n.11).

About the most straightforward summary of Fairman's views about Chase himself—who is clearly not the hero of this book—is contained in the next to last sentence of Part One, which introduces Chief Justice Waite: "And presently [the Supreme Court] would receive as its new Chief a man of unpretentious dignity who would devote himself singly to the duties of his office and prefer his brethren to himself." (P. 1481.) In short, Chase was pretentious, did not concentrate on the duties of his office (see Chase's ill-fated attempts at helping the Congress draft legislation, *e.g.*, p. 324) and preferred himself to his brethren (see his various attempts at the Presidency). History has not been kind to Chase—and rightly so. As Fairman suggests, he took no deep interest in much of his work (*e.g.*, p. 1458). Chase himself expressed an attitude shared by other Justices before and since: "I have so long taken an active part in *shaping events* that I feel the task of *adjudicating cases*, however important, as somewhat irksome." (P. 120.) The Chief Justice was not the common denominator of "his" Court; rarely do we refer to the Supreme Court from 1864-73 as the "Chase Court." Still, one wishes that Fairman had supplied us with a more comprehensive assessment of a complex and difficult character. As it is, one has to turn to the index to get the picture. The entry "Chase, Performance as Chief Justice" includes the following items: his "imperious will"; finds the work "irksome"; announces an order and is obliged to restate it accurately; no orderly record-keeping; apprehensive of a decision in *Test Oath cases* being reached in caucus; without consulting his brethren, he solicits judiciary legislation, with new title for his office; his own statement about his office; attitude toward his colleagues.

For a reader without Fairman's very long breath, probably the best way to use this book is to treat it as if it were an encyclopedia in which he will find almost everything on almost all important legal developments during Chase's tenure. As the example just given indicates, the index is excellent. As is also indicated, it often leads the reader to substantial excerpts from the sources themselves. The book is full of quotations in small print and footnotes in even smaller print. Quite a number of them, however, are inexcusably distracting. For example, in a brief discussion of the position of a certain lawyer in an attempt in 1863 to restore Louisiana to the Union, a footnote tells us that he will later appear as counsel for the butchers in the *Slaughter House Cases*. In what looks like a caricature of a law review comment, the proper citation to those cases is also supplied (p. 94).

Most of the references are to original sources; citations to and discussions of the secondary literature are extremely rare. The author justifies this course by explaining that it would have been very difficult to do justice to books and articles that are beyond numbering (p. xix). Since Fairman is clearly *au courant* as concerns Reconstruction scholarship, those who have also labored in that vineyard will easily forgive him in spite of the lingering feeling

that some of the space given to historical trivia might have been used better if the author had joined issue with more of the literature.

Forgiveness for such relatively minor matters is particularly appropriate since Fairman so often treats us to masterly analysis of subjects by and large neglected in the literature. His two chapters on municipal bonds (pp. 918-1116) stand out among other examples that could be cited. The Supreme Court with Chase as Chief Justice was not only more active than ever before in holding congressional legislation unconstitutional, it also was, as Wright has noted,<sup>4</sup> "more vigorous in its condemnation of state legislation than at any time since Marshall's most active years . . ." Fairman focuses on still another form of judicial activism: the Supreme Court's exercise of "independent judgment" in cases involving state court construction of state constitutional law on the power of municipalities to issue railroad bonds. In the period 1864-88, the Supreme Court decided some two hundred cases on railroad bonds—mostly in favor of the validity and enforcement of such bonds, which often, though not always, had been issued through fraud and bribery.

When as often happened the railroad never came, or fraud and bribery in the bond issue came to light, or statutory prerequisites had been ignored, or people simply became disenchanted, communities would refuse to pay taxes, interest would be stopped, and then bondholders would sue to compel payment. Normally the plaintiff resided out-of-State and thus could resort to the federal court, where a more sympathetic hearing was to be expected than in State courts held by judges popularly elected for brief terms. (P. 918).

The Court, availing itself of *Swift v. Tyson*,<sup>5</sup> did not only take its stand against state courts that "judicially repudiated" contracts authorized under previous state decisions but, in Fairman's words, went much further: "enforcing bonds which the State court had held invalid without overruling any decision; construing State statutes—on the powers of municipal officers, on debt limits, on the privileges of railroad corporations, etc.—contrary to the construction given them by the State courts . . ." (P. 919.)

Fairman lucidly disentangles the politics and economics underlying this particular form of municipal boosterism, sorts out the complicated jurisdictional issues, provides us with guidelines on the proper way in which to conduct the municipal bond business, and leaves little doubt that he is appalled by the Supreme Court's performance. It comes as no surprise from Justice Miller's biographer that the Justice from Iowa, "certainly one of the greatest . . . ever to reach the Supreme Bench" (p. 3), emerges as the hero of this episode. Fairman quotes from an 1878 letter to the Justice's brother-in-law, which characterizes the Court's jurisprudence as a "mania":

If I were a practicing lawyer today, my self respect . . . would forbid

4. B. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 82 (1942).

5. 41 U.S. (16 Pet.) 1 (1842).

me to argue in this court any case whatever against the validity of a contract with a county, city or town under any circumstances whatever. It is the most painful matter connected with my judicial life that I am compelled to take part in a farce whose result is invariably the same, namely to give more to those who have already, and to take away from those who have little, the little that they have. (Pp. 1068-69.)

The two chapters on municipal bonds also serve as a reminder that the Supreme Court during this period had preoccupations other than the Reconstruction-related issues. As it is those issues, however, that have become so important, I shall turn in conclusion to Fairman's discussion of the thirteenth amendment and the 1866 Civil Rights Act. What was intended when the Congress was given authority to "enforce" the abolition of slavery? Did section 2 of the thirteenth amendment merely grant power to act against attempts at "reenslavement," to secure the freedmen what one might call the status of being "nonslave"? Or, was it intended to enable Congress to define a positive status of personal freedom? One should hasten to note that the framers of the thirteenth amendment and the authors of the 1866 Civil Rights Act went out of their way to make clear that such positive status could not possibly include the franchise. The franchise had never been automatically associated even with the status of citizenship. This much should be relatively noncontroversial. There remains the question whether, under the thirteenth amendment, Congress could secure the freedmen their civil capacity in contradiction of state law, as it did in the 1866 Civil Rights Act.

Though Fairman devotes considerable space to this matter (almost one hundred pages), he shies away from answering the question. He writes:

No doubt some of Senator Harlan's "incidents" [of slavery] amounted to "badges of servitude" that would fall within the ban of the amendment. But surely freedom of speech and press and education for Southern whites were not by the Thirteenth Amendment being placed under the guardianship of Congress. And Senator Wilson's affirmation that the amendment would obliterate the "spirit" of slavery can count for no more than a prayer. If the debates are invoked to aid in construing the amendment, there is need to distinguish between sanguine prophecies and cold propositions about legal consequences. (P. 1135.)

As concerns this last sentence, Professor Benedict, in his review of this book, properly asks why statements that Fairman dismisses as "heightened speech," may not offer a valid construction of the amendment.<sup>6</sup> There is little about "cold propositions" that justifies us to attribute to them special significance in the shaping of history, except that they may have a greater appeal to Harvard law professors than "lofty rhetoric."

Fairman's reference to Senator Harlan suggests that he may consider

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6. Benedict, *Book Review*, 39 U. CHI. L. REV. 862, 866-67 (1972).

the Civil Rights Act to be constitutional under the thirteenth amendment. Harlan had dealt explicitly with civil capacity.<sup>7</sup> Yet, later in the text, Fairman seems to further qualify his qualified support for Harlan by emphasizing Senator Henderson's observation that "We give him [the slave] no right except his freedom, and leave the rest to the States." (P. 1157.) The difficulty with laying stress on this particular remark is that Henderson's statement immediately follows a sentence in which he denies that the amendment confers the right to vote.<sup>8</sup> Thus it may simply have been intended to underline that important point. In addition, Henderson's speech provides an example of the fragility of Fairman's distinction between "sanguine" and "cold" propositions. If one reads Henderson's contribution in its entirety, one finds that earlier he engages in a discourse about the causes of the Civil War. Among these causes he counts the "contradiction" between the institution of slavery and the concept of liberty and its blessings embodied in the Declaration of Independence and the preamble to the Constitution. "This thing of slavery is a heresy. The fire of truth is upon it, and the moral world will be convulsed until it is consumed."<sup>9</sup> This is rather lofty language. What it implies as to the scope of the thirteenth amendment is less clear to the reviewer than it apparently was to the author.

Putting aside the fact that Fairman's reading of the debates is not always compelling, the curious aspect of the matter is that he is unwilling either to confirm or to deny congressional authority to pass the Civil Rights Act. Fairman's reticence is disappointing, not because we want clear answers where none are to be had, but because, given the author's intimate familiarity with the sources and given the amount of space he devotes to the subject, it seems a just expectation on the part of the reader that Fairman would supply some of the "reasoned discussion" that he says is needed to unfold the meaning of the thirteenth amendment. (P. 1159.) This is especially so since he spends fifty pages severely taking Justice Stewart to task for his abominable performance in *Jones v. Alfred H. Mayer Co.* It is almost annoying that in that context Fairman goes out of his way to state that he is making no suggestion as to the extent to which Congress may rightly go in enforcing the thirteenth amendment (p. 1258).

Fairman's preference for cold propositions is once more expressed as he sets out to analyze the 1866 Civil Rights Bill. He warns: "Americans living at the time of the Civil Rights Act of 1866 were not more broadminded than those living a hundred years later. Nor were Senators and Representatives of a nobler mold." (P.1168.) Maybe so, but why is this relevant? Surely, the Congress that enacted the 1964 Civil Rights Act and the 1965 Voting Rights

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7. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

8. See Fairman's own account, p. 1142.

9. CONG. GLOBE, 38th Cong., 1st Sess. 1461 (1864).

Act has not struck anybody as having been made up of a particularly noble set of characters. Yet their political judgment led them to enact such legislation as the aforementioned Voting Rights Act, which represented a drastic interference with state power over elections. In terms of the mid-nineteenth century, the 1866 Civil Rights Bill proposed an equally or even more radical interference with state power over civil capacity and the state judicial process. I should add that the debates of the 39th Congress have not impressed me as displaying any special degree of narrow-mindedness.

One should probably assume that Fairman's warning against "sanguine prophecies" is ultimately directed at the Supreme Court's attribution of overly generous intent to the framers of the 1866 Civil Rights Act. As others before him,<sup>10</sup> he dissects Stewart's opinion in *Jones v. Alfred H. Mayer Co.* and finds little to approve of. Indeed, before reading Fairman I would have thought it impossible that anybody could be a more severe taskmaster of the Supreme Court's historical analysis in that case than I had flattered myself to be. Fairman clearly surpasses me.

As Fairman by and large reaches the same conclusions I reached, I have little choice but to find his treatment of the subject generally excellent. In *Jones v. Alfred H. Mayer Co.*, the Supreme Court held section 1 of the 1866 Civil Rights Act to prohibit discrimination in the sale of housing by a private individual. Fairman shows that there is no support for this reading in the debates. The Court's theory was in part based on an involved argument to the effect that section 2 (the penal provision of the act) was carefully drafted to exempt private individuals from its operation, thus supposedly indicating that section 1 was intended to reach those individuals. Again, Fairman comes to the result that there is no indication whatsoever that the two sections were of different scope. So far, I agree.

I have argued that nothing in the language of section 2 forecloses the possibility that some attacks on civil rights by "mere" citizens were included in its purview. Punishable under the act was "any person" who, "under color of law or custom," subjects another to a deprivation of civil rights on racial grounds.<sup>11</sup> Fairman, like the Court, reads section 2 to refer only to persons who were either state officers or exercised authority expressly conferred upon them by state law (pp. 1178-79 n.173). Fairman bases his argument in part on his identification of "custom" with "custom having the force of law." His discussion of that point is subtle (p. 1238-44). I am somewhat shaken in my view that custom is a much more ambiguous concept, at least as I read the congressional debates.<sup>12</sup> Still, I am not entirely convinced. The debates on the Civil Rights Bill referred to planters who combined together to compel

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10. I should disclose that I am among them. See Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89 (1968).

11. *Id.* at 112-13.

12. *Id.* at 117-18.

freedmen "to work for such wages as their former masters may dictate, and [to] deny them the privilege of hiring to anyone without the consent of the master," and who whipped them for insolence.<sup>13</sup> I do not quite see (1) why Congress should not have wanted to punish such conspiracies as a misdemeanor<sup>14</sup> and (2) how such adaptation of outmoded slavery customs to new governmental conditions by private action deserves to be called legal custom.<sup>15</sup> This argument, if it has any power, raises, of course, the spectre that the Supreme Court may have been right in *Jones v. Alfred H. Mayer Co.* for the wrong reasons. As the Court had framed the issues, it was whether *any* private discrimination was outlawed. The actual facts in that case, however, had to do only with the modern equivalent of those nineteenth century "combinations": large-scale real estate developments.

Finally, my summary view of Fairman's work: the book is an awesome, if sometimes excruciatingly discursive, accomplishment. Its forbidding scope and excellence of detail have to be experienced rather than read about. For once, *nomen est omen*: the author bends over backward to be fair to all the data he has collected—and that is almost all the data there is.

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**LAW, ORDER AND LIBERTY IN SOUTH AFRICA.** By A. S. Mathews. Berkeley: University of California Press, 1972. Pp. xx, 318. \$15.00

*Law, Order and Liberty in South Africa* is a study and appraisal of contemporary repressive legislation in South Africa. Written by a South African law professor, who continues to live and teach there, it is a venture into a field generally avoided by legal writers of that country. Under the prevailing authoritarian legal structure, serious criticism of key repressive laws brings a risk of official reprisal, which makes Professor Mathews' action in publishing this work one of some courage.<sup>1</sup>

Despite its title, the work is not a general survey of the totality of the infringements of liberty and the full impact of repressive legislation in that

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13. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (remarks of Representative Windom); cf. *id.* at 1833 (remarks of Representative Lawrence).

14. Fairman's argument *ad absurdum* (p. 1253).

15. Casper, *supra* note 10, at 115.

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1. Professor Barend van Niekerk, a colleague of the author, publicly called on judges to refuse to admit evidence from persons who had been detained under the Terrorism Act. As a result, he was convicted of contempt of court and attempting to defeat the ends of justice.