REVIEWS


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Despite the book's many accomplishments, one cannot wade through Charles Fairman's first contribution to the *Holmes Devise History of the Supreme Court* without a feeling of disappointment, an oppressive sense of opportunity lost. Professor Fairman, a superhuman researcher, indefatigable in the pursuit of every bit of information pertinent to whatever he chooses to study, spent about thirteen years on this work. He was aided by financial grants from prestigious learned societies, enabling him to use the resources of the great libraries and manuscript repositories of the country. The permanent administrating committee of the *Holmes Devise* apparently offered the honored scholar a carte blanche in determining the size and scope of this work. The emergent volume, over fifteen hundred pages long, is only the first of two, but the material Professor Fairman includes in this half of his study could—and should—have made three books. He has tried to do too much; he has had too much material to work with, and the editors have, I fear, done him a disservice by allowing him such complete freedom. In this work a restraining hand was needed. While it may not be customary to dwell upon the stylistic and organizational shortcomings of a scholarly work, when they go to the heart of its value, that unpleasant task becomes necessary.

Most of the chapters lack focus. With a few exceptions, Professor Fairman has not organized his material around his conclusions. Where he has—in the chapters on the scope of the thirteenth amendment and the Civil Rights Act and on the Court's handling of the *Legal Tender Cases*¹ and the municipal bonds controversy—Professor Fairman displays that power of analysis through which he has made his great contributions to our understanding of American legal and constitutional history (al-

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¹ 79 U.S. (12 Wall.) 457 (1871).
though, as will become apparent, I do have some quarrels about what he chooses to analyze). For the most part, however, readers will be mired in a morass of detail. Without major points about which to organize, Professor Fairman seems to have been unable to discriminate in selecting his data, so that one often has the feeling that not a single note has been omitted from a discussion. For example, in his examination of the appointment of Salmon P. Chase as Chief Justice, Fairman in thirty-one pages quotes six or more lines from eighteen separate letters, many of the passages redundant. He quotes or discusses eleven letters congratulating Chase on his appointment, none of which offers the reader much insight. More letters are quoted in the footnotes. This pattern, although not carried to such an extreme, continues throughout the book.

The overabundance of detail is apparently part of Professor Fairman's laudable effort to bring his history alive. He regularly drops his narrative to give readers brief social notes on participants. Many of them offer information relevant to the subject at hand, but others tell us who individuals' fathers were, who their children will be, or what famous cases or events they will be associated with. Furthermore, Professor Fairman likes to quote letters at length rather than excerpt truly relevant passages. Instead of making the book more lively these practices make it very difficult to read.

Professor Fairman's decision to organize the book in the same way he has organized some of his great articles adds to this difficulty. He first presents a full discussion of events (with all the distractions noted above), and then draws conclusions in separate discussions. As Professor Fairman explains it: "[u]nless one has patiently examined the involved chronology... and has looked squarely at the hard alternatives inherent in the facts, he cannot know the context within which the Court acted. Without a full knowledge a responsible judgment may not be made."\(^2\) This system leads, however, to some untoward results. Professor Fairman discusses Reconstruction and the Supreme Court's involvement in its controversies for over six hundred pages. But he delivers his own interpretations of the scope of the thirteenth amendment and the Civil Rights Act of 1866 and his analysis of the *Slaughter House Cases*\(^3\) only after some four hundred intervening pages—on the Court's handling of contracts made under Confederate authority, questions arising under the Confiscation Acts and the Abandoned Captured and Property Act, and the municipal bonds cases. Undoubtedly Professor Fairman's caveat

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\(^2\) P. 90.

\(^3\) 83 U.S. (16 Wall.) 36 (1873).
is correct when directed at the researcher, but it should not be the responsibility of the lay reader to pore over the author’s assembled data and then draw his own conclusions. He is entitled to know Professor Fairman’s opinions as a scholar and to a clear explanation of how the evidence sustains them. Professor Fairman’s preferences in organization and selection of data make his book so difficult that its real contributions may be inaccessible to ordinary, nonscholarly readers.

I do not mean to imply by these criticisms that Professor Fairman’s work has no value. Far from it. His six-hundred-page discussion of Reconstruction is among the fullest we have. Professor Fairman suggests an understanding similar to those offered by LaWanda and John H. Cox, Eric L. McKitrick, William R. Brock, Kenneth M. Stampp, and John Hope Franklin. Radical Reconstruction, he implies (as already noted, Fairman’s main purpose in these pages is to impart information, not to present conclusions), resulted from Andrew Johnson’s lack of concern for the freedmen, and from white Southerners’ intransigent insistence upon maintaining a society for the benefit of whites only. Moderate Republicans emerge as the heroes of the piece, resisting both Johnson and their radical allies, who fare rather badly at Professor Fairman’s hands. Fairman recognizes, as have McKitrick, the Coxes, and Brock before him, that early Reconstruction legislation—the Freedman’s Bureau Bill, the Civil Rights Act and the fourteenth amendment—was proposed and carried by the moderates in an effort to conciliate both the President and the South and to avoid the appearance of radicalism. Although offering little new to historians, this assessment may well be of value to those in the legal profession who have missed this new interpretation developed by historians in the last decade.

Of greater value to Reconstruction scholars and laymen alike is Fairman’s full discussion of the development of the Reconstruction Act of 1867. He provides a complete description of the North Carolina “compromise” reconstruction plan of January, 1867, which catalyzed congressional action. More important, Fairman is the first scholar to draw attention to the Louisiana reconstruction bill proposed by radicals as an adjunct—and in many ways an alternative—to the Reconstruction Act that finally passed. While the Reconstruction Act provided merely for a degree of military control in the South until

new governments based on equal suffrage could be formed, the Louisi-
ana bill would have disbanded the provisional governments created and
recognized by President Johnson, replaced them with civilian govern-
ments manned by loyalists untainted by Confederate sympathies, and
limited suffrage to black and white Louisianans who could demonstrate
loyalty dating at least from 1864. Cognizant of the importance of this
truly radical reconstruction bill, Fairman is among the first scholars
to suggest that interpretations of the Reconstruction Act as a compro-
mise between radicals and moderates are wrong, and that, in fact, the
Act embodied the notions of the moderate Republicans rather to
the exclusion of those of the radicals. 5

As one would expect, Professor Fairman’s discussion of the Supreme
Court’s role in Reconstruction is quite strong. Like Stanley I. Kutler,
Fairman recognizes that Southerners hoped to use the Court to frustrate
democratic resolution of an essentially political problem. 6 The much-
quoted and often-endorsed criticism of the Court’s timidity in the face
of Republican radicalism, Fairman indicates, was the result of the
failure of this design—the howl of the losers. His discussions of the
internal operation of the Court, of the pressure of some of the more
conservative justices to cooperate in the southern plan to dismantle
Reconstruction by judicial decision, of Chief Justice Chase’s ambiv-
alent position, and of the often crass southern attitude toward the
Court are the best that have appeared.

Professor Fairman’s avowedly interpretive chapters on the thirteenth
amendment, the Civil Rights Act, and the Slaughter House decision
are somewhat uneven. Fairman dissents from the influential arguments
of Howard Jay Graham and Jacobus tenBroek that the thirteenth
amendment incorporated into the Constitution the legal and constitu-
tional antislavery argument of the abolitionists, and that the abolition-
ists’ concept of liberty included the fundamental rights of citizenship, 7
rights broadly conceived in the light of Corfield v. Coryell. 8 According
to Graham and tenBroek, in abolishing slavery and giving Congress
the authority to enforce that abolition, these triumphant antislavery

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5 Larry George Kincaid made the same argument in an unpublished Ph.D. dissertation
completed in 1968. L. Kincaid, The Legislative Origins of the Military Reconstruction Act,
derstanding is implicit in J. McPherson, The Struggle for Equality: Abolitionists and
the Negro in the Civil War and Reconstruction (1964).


7 See J. tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951),
revised and republished as Equal Under Law (1965); Graham, The Early Antislavery
Backgrounds of the Fourteenth Amendment, 1950 Wis. L. Rev. 479, 610.

8 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
men intended Congress to have the power to enforce black people's rights of citizenship. Professor Fairman points out that the thirteenth amendment was carried through Congress by the votes of Democrats who could not have favored such a revolutionary extension of national power; the wording of the amendment was based on the old Northwest Ordinance's antislavery provision rather than on abstract libertarian phrases; and the most lawyer-like and responsible Republicans minimized the amendment's scope.\(^9\)

Fairman's argument is both confusing and unpersuasive to one familiar with the Civil War-Reconstruction era. It is confusing because it proves too much: if accepted completely, his argument leaves no room for the Civil Rights Act, passed merely one year after Congress sent the thirteenth amendment to the states for ratification. The Act required the states to guarantee specified fundamental rights equally to all citizens and provided an elaborate mechanism by which those rights could be enforced. Yet Professor Fairman offers a long discussion of the Civil Rights Act and never once suggests that it exceeded the scope of the thirteenth amendment. But if the framers of the amendment gave the freedman "no right except his freedom,"\(^10\) passage of the Civil Rights bill one year later would be simply inexplicable.

The argument, moreover, is unpersuasive. Professor Fairman seeks legal precision from the debates on the amendment. He notes, with understatement, that "a degree of imprecision is to be found throughout the deliberations on the constitutional settlement consequent upon the war," and that, "[i]f the debates are invoked to aid in construing the amendment, there is need to distinguish between sanguine prophecies and cold propositions about legal consequences."\(^11\) This sounds reasonable, but Professor Fairman uses this justification to exclude from evidence not only Senator James Harlan's prediction that abolition of slavery would help restore freedom of speech and press in the South and make possible education and stable family lives for freedmen—clearly a prophecy rather than a construction of the thirteenth amendment's scope—but also Senator Henry Wilson's statement that the amendment "will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it . . . ."\(^12\) This Fairman dismisses as mere "heightened speech." It is not clear, however, why such "heightened speech" may not

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\(^10\) P. 1157 (quoting Senator Henderson).
\(^11\) Pp. 1134-35.
\(^12\) P. 1135.
offer a valid construction of the amendment, except that it contradicts Professor Fairman's conclusion. One can easily demonstrate the narrowness of the framers' intent by choosing to cite only those congressmen who employed "precise" language, especially when "precise" is held to mean only language that does not indicate too broad a purpose in the amendment.

Although many Republicans who lauded the amendment did launch into flights of oratory, it is questionable that their statements should be so casually discarded. Even when they engaged in hopeful prognostications rather than hard analysis, their statements clearly suggest that the thirteenth amendment was passed in a broad rather than a narrow spirit. After all, as Fairman recognizes, the Republicans were not much concerned with manifesting legislative intent for future generations of judges. They expected Congress, not the courts, to enforce the amendment's prohibitions. And the importance of establishing "legislative intent," so obvious to us, accustomed as we are to judicial review of congressional legislation, was less important to men who had seen only one national law overruled by the judiciary in their lifetimes and who considered that decision, *Dred Scott v. Sanford*, an insupportable usurpation. The debates in Congress were meant to justify the amendment before the people and to guide future Congresses; the broad, impassioned and sometimes legally "imprecise" language employed in that endeavor should certainly carry as much weight as the "precise" language that might find favor with courts to which it was not directed.

The passage of the Civil Rights Act of 1866 is a clear indication of this. If abolition of slavery did not imply a positive protection of fundamental rights, how could Republicans justify that Act, which required equal state protection of enumerated, basic rights? Yet one of the senators whose language Fairman cites as sustaining a narrow view of the thirteenth amendment is later quoted as saying that the Senate Judiciary Committee, which considered the amendment, intended "to give to Congress precisely the power . . . which is proposed to be exercised by the [Civil Rights] bill . . . ."14

Professor Fairman follows this murky discussion of the scope of the thirteenth amendment with an analysis of the scope of the Civil Rights Act of 1866 as seen through the prism of the Supreme Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*, which held that the 1866 law forbade private, individual racial discrimination in the purchase and sale of property. In an almost line-by-line criticism, Fairman demolishes

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14 Pp. 1157, 1179-80 (remarks of Senator Howard).
15 392 U.S. 409.
the reasoning of Justice Stewart's opinion, arguing that the Court intentionally ignored a crucial change in the law's language in order to read unintended meaning into key statements by congressmen. As originally proposed, the Civil Rights bill included a provision that "there shall be no discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery." Many congressmen, while reviewing the bill's provisions, simply paraphrased the clause, stating that the proposed bill would allow "no discrimination in civil rights or immunities." The clause was eventually stricken, but the Supreme Court in its 1968 decision considered these innocent statements to be interpretations of the scope of the clauses that remained. Thus, despite language that apparently banned only state discriminations in the specified rights, these congressmen had, in the Court's view, interpreted the law to ban any discrimination in rights or immunities, with no state action limitation. Professor Fairman implies, in a somewhat overly coy manner, I think, that the Court majority knew the actual circumstances of those congressional pronouncements and intentionally blurred them.

Professor Fairman also criticizes the Court's argument linking the term "custom," as used in the Act, to "prejudice." Custom, insists Fairman, meant practices that had the force of law and were carried out by state officers. To sustain this interpretation, Fairman points to several statutes in which the words "custom" and "usage" were employed as coordinate with "law," and cites United States v. Arredondo, where Justice Baldwin defined "custom" as a form of law. Finally, Fairman quotes from the debates themselves to demonstrate that "custom is one sort of law." Fairman rejects the Court's simple pronouncement that the words of the statute—"All citizens of the United States shall have the same right . . . as is enjoyed by white persons thereof to . . . purchase . . . real and personal property"—indicated, on their face, an intention to render black Americans free of "all discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities." Like Gerhard Casper and Alfred Avins, Fairman points out the difference between guaranteeing citizens' equal capacity to purchase property and creating in other cit-

18 P. 1241 (emphasis in original).
19 42 U.S.C. § 1982 (1970). This is the present statute, which is derived from the Civil Rights Act of 1866.
20 392 U.S. at 421.
izens an obligation to sell to them. The statute, according to Fairman, Casper, and Avins, created the capacity but not the obligation.\textsuperscript{21}

Professor Fairman's tour de force on \textit{Jones v. Alfred H. Mayer Co.}, one of the most devastating attacks on a decision that I have read, can mislead the reader into thinking that he has established the contrary position—that the Civil Rights Act applied only to discrimination under color of state law. But that is not so. In concentrating so completely on the logic and other errors of the opinion, Fairman does not deal with the independent suggestions of Casper and Robert L. Kohl that the Civil Rights Act reached private discrimination.\textsuperscript{22} Casper poses the possibility that the word "custom" in the law covered private conspiracies to perpetuate inequalities once sanctioned by law, such as combinations of former slaveowners to force freedmen to labor under near-slave conditions. He cites several statements made in the 1866 debates that imply that some sort of private action could be reached under the Act, and this type of private conduct seems the likeliest candidate.\textsuperscript{23} If this interpretation is correct, it can be argued that private, wholesale discrimination by real estate agents and builders constitutes a private conspiracy to enforce defunct state discriminations in violation of the Civil Rights Act of 1866. Kohl insists that the word "custom" must refer to private activities because Republicans were very much aware that, despite the apparent liberality of the new "black codes" that southern states were framing in 1866, blacks in the South were subjected to systematic private oppression. The logical presumption, Kohl argues, is that the ban on discrimination based on "custom" was meant to eliminate this pervasive denial of rights.\textsuperscript{24} Fairman seems unaware of Casper's suggestions; he barely touches on Kohl's, dismissing in a few words the Court's similar but less emphatic argument.\textsuperscript{25} Professor Fairman's discussion of the meaning of custom would have been more persuasive if he had dealt with these considerations more fully. I am inclined to agree with his interpretation, but the case is simply not proved.

The problem is that Professor Fairman has chosen to assess the Court's performance in interpreting the Civil Rights Act of 1866 rather than offer an interpretation of his own. Fairman's practice of assessing


\textsuperscript{23} Casper, \textit{supra} note 19, at 106, 115-18.

\textsuperscript{24} Kohl, \textit{supra} note 20, at 276-85.

\textsuperscript{25} Pp. 1222-24.
Court performance rather than explaining it is the fundamental weakness of the interpretive portions of his study. Throughout, he passes judgment on the Court's performance as good or shoddy, wise or unwise, justified or unjustified. To some extent this may reflect the often different approaches of legal scholars and historians to constitutional history. There is a strong tradition of case criticism in legal literature, and in many ways it is the backbone of our understanding of the law. Even legal history is often written more to shed light on the correctness of present doctrine than on past events, as in, for example, Avins' studies of the fourteenth amendment and congressional reconstruction legislation. Fairman's study of the intended relation of the fourteenth amendment to the Bill of Rights, and the investigations of Republicans' intentions toward segregation during Reconstruction. All aim at targets in the present through (in)sights from the past. Legal scholars imbibe this tradition continuously.

Professor Fairman, however, persists in this close, case-criticism form of analysis even where there are no present applications. So far as he goes, Fairman does the outstanding job that we have come to expect of him. Only hardy souls will venture to defend the Court where he condemns it, or vice versa. But except in the discussion of Jones v. Alfred H. Mayer Co., where the present-day importance of the analysis is manifest, Fairman's concern with performance alone is too narrow to satisfy most historians.

For example, having devoted sparse attention to the framing of the fourteenth amendment—his main point is that the congressional debates exhibited slight awareness of the complexities the amendment introduced into American law—Fairman concentrates on the Slaughter House Cases, in an interpretive section near the end of the volume. He defend the decision, which emasculated the privileges and im-

26 Avins has published numerous articles on Reconstruction-era legislation. Three of the most important are: Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding, 8 Ariz. L. Rev. 236 (1967); The Ku Klux Klan Act of 1871: Some Reflected Light on the Fourteenth Amendment, 11 St. Louis L.J. 331 (1957); and The Civil Rights of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations, 69 Colum. L. Rev. 873 (1966). See also Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353 (1964).

27 Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding, 2 Stan. L. Rev. 5 (1949).


munities clause of the first section of the amendment, as a laudable example of judicial restraint. The butchers' argument that the Louisiana regulation authorizing the Crescent City Stock Landing and Slaughter House Company to operate New Orleans' only abattoir violated their fundamental rights to practice lawful trades, Fairman recognizes, carried the same potential for constitutional mischief that substantive due process doctrines demonstrated in later years, inviting the justices to impose their own standards of justice upon state economic and health regulations.

By focusing on the *Slaughter House Cases* as essentially state police power cases, Fairman corrects the Reconstruction-oriented interpretation advanced by Graham and others that the decision marked simple judicial nullification of the Republican intention to nationalize protection for civil rights. But Fairman, too, oversimplifies. Because of his evident rejection of the tenBroek-Graham thesis that Republicans intended the fourteenth amendment to provide broad protection for civil rights, he tends to minimize the depth of Republican commitment to safeguarding rights. Thus, implicitly, in Fairman's opinion, the *Slaughter House* decision did little violence to the Republican program. By concentrating so completely on the legitimacy of the Court's decision, however, Fairman ignores its context and deeper implications. He misses, I think, the tension between Republicans' deeply felt commitment to the protection of citizens' rights and their equally profound desire to maintain the balance between the powers of the state and national governments. The *Slaughter House Cases* presented the inevitable clash between protection of rights, carried to its logical conclusion, and the traditional balance of federalism. It should not be viewed in isolation but rather as part of the general, melancholy decision of Republican moderates and conservatives that their efforts to sustain southern loyalists threatened too great violence to basic constitutional precepts. For an historian, considerations of this sort are more important than whether or not particular court decisions were "good law."

This reluctance to dive into the deep water becomes a source of real frustration to the historian in the very chapters in which Professor Fairman makes his greatest contributions to historical knowledge. His

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31 Fairman does not discuss this interpretation as it applies to the fourteenth amendment, but his position is obvious from his earlier arguments.
The prodigious capacity for research has rewarded historians with important new information on the Supreme Court's disposition of contract and property cases arising from wartime legislation. The two chapters in which he assays a detailed discussion of the municipal bond controversies of the 1850s-1870s offer information bursting with implications for our understanding of constitutional development during this great transitional era. But with all this material, this ripe crop sprung from previously untilled soil, Fairman continues his restrained way, limiting his conclusions to the narrow question of how well the Court performed. (His answers: very well in property cases arising from the war; very badly in the municipal bond cases.)

There is, however, so much more. An attentive reader will immediately note the discrepancy between the *Slaughter House Cases*, in which the Court, by a narrow majority, refused the invitation to review state legislation by general standards of fundamental right, and the Court's incredible willingness to intervene in states' handling of municipal bond cases. In the leading case of *Gelpcke v. Dubuque*, the Court held that an Iowa state court decision, which, in construing the state constitution, had overturned a prior ruling that municipalities and counties could tax citizens to subsidize privately owned railroads, violated the contracts clause of the United States Constitution. Since there had been an earlier state court decision holding that local governments could enter into such contracts, the Court's decision was not manifestly wrong or unjust. The bondholders had, after all, made contracts in the conviction that the state judiciary had sustained their legitimacy. But, Fairman informs us, the Court went much further in *Pine Grove Township v. Talcott*, decided only one year after the *Slaughter House Cases*. There the Court overturned an original Michigan court decision that the state's constitution forbade local governments from issuing bonds to aid railroads. The Court compared the statute authorizing the bond issuance with the Michigan constitution and decided that the Michigan Supreme Court had erred in holding it unconstitutional, that, therefore, the contract between the bondholders and Pine Grove Township had been valid when made, and that the Michigan court decision impaired the obligations of a valid contract in violation of the United States Constitution. This decision constitutes one of the most remarkable forays into undoubted state jurisdiction in the history of the Supreme Court.

The information with which Fairman provides us goes a long way toward bridging the gap between the pre-Civil War judicial propensity

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32 68 U.S. (1 Wall.) 175 (1865).
33 86 U.S. (19 Wall.) 666 (1874).
for protecting property rights and the development of the doctrines of substantive due process in the 1880s. It will take a thorough study to demonstrate it, but one can now hypothesize that Supreme Court acceptance of those doctrines marked, not a reversal of the restraint manifested in the *Slaughter House Cases* and *Munn v. Illinois*, but rather a continuance of a second line of decisions in which the Court had regularly and imperiously protected property rights from infringement.

Professor Fairman, however, appears to have been unconcerned with the historical application of his information. He has created a fact-filled source book, difficult to read, to a large degree lacking the kinds of insight that will satisfy historians. He has nonetheless presented us with a banquet of information. We will be digesting his largesse for some time to come.

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84 94 U.S. 113 (1877).