



VOLUME VIII

Troubled Beginnings of
the Modern State,
1888–1910

By Owen M. Fiss

Yale Law School

TORONTO



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

40 West 20th Street, New York, NY 10011-4211, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521860277

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An earlier version of this book was published by Macmillan Publishing
Company in 1993

© Macmillan Publishing Company 1993

First published by Cambridge University Press 2006

Printed in the United States of America

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

Library of Congress Cataloging in Publication Data

Fiss, Owen M.

Troubled Beginnings of the Modern State, 1888–1910 / by Owen M. Fiss

p. cm. – (History of the Supreme Court of the United States ; viii)

At head of series title: The Oliver Wendell Holmes Devise.

Includes index.

ISBN-0-521-86027-X (hardback)

I. United States. Supreme Court – History – 20th century. 2. Constitutional history –
United States. 3. United States – Politics and government – 1933–1953. I. Wiecek,
William M., 1938– II. United States. Permanent Committee for the Oliver Wendell
Holmes Devise. III. Title. IV. Series.

KF8742.A45H55 vol. 8

[KF8742]

347.73'26'09 s–dc22

[347.73/26/090] 2004028548

ISBN-13 978-0-521-86027-7 hardback

ISBN-10 0-521-86027-X hardback

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THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES

Owen M. Fiss' study of the Supreme Court during the period in which Melvin Fuller was Chief Justice is highly interpretive, eminently readable, and a complete account of the cases the Court saw during one of the most tumultuous times in U.S. history. The legacy of the Supreme Court at the turn of the century has largely been negative: Decisions such as *Lochner v. New York* (1905), *Pollock v. Farmers' Loan & Trust Co.* (1895), *In re Debs* (1895), and *Plessy v. Ferguson* have been seen by subsequent generations of lawyers and judges as embodying a judicial method and philosophy that should be avoided at all costs. This book places these decisions in their historical context. It rejects the crude instrumental interpretation of these decisions and explains them as the expression of a conception of liberty that has its roots in the founding of the nation.

Owen M. Fiss is Sterling Professor of Law at Yale Law School. He received his B.A. from Dartmouth College, a B.Phil. from Oxford University, and a LLB from Harvard University. Prior to teaching, he clerked for Thurgood Marshall, then a judge on the Second Circuit, and later for William J. Brennan, a justice of the Supreme Court. He taught at the University of Chicago from 1968 to 1974 and has taught at Yale Law School since 1974 to the present. Professor Fiss's most recent books include: *Liberalism Divided* (1996); *The Irony of Free Speech* (1996); *A Way Out: America's Ghetto and the Legacy of Racism* (2003); and *The Law as it Could Be* (2003).

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HISTORY OF
THE SUPREME COURT
OF THE UNITED STATES
VOLUME VIII

THE OLIVER WENDELL HOLMES DEVISE

History of the
SUPREME COURT
of the United States

To

Irene Sherman Fiss

for the dreams we lived together

Many historians assert that the
French failed at Borodino because
Napoleon had a cold in his head. . . .

Leo Tolstoy, *War and Peace*

Illustrations

FOLLOWING PAGE 76

Cartoon of the Supreme Court should William Jennings Bryan win the presidency in 1896

Campaign poster for William McKinley's 1896 presidential campaign
Chief Justice Melville Weston Fuller

Associate Justice David Josiah Brewer

Associate Justice Rufus W. Peckham

Associate Justice Oliver Wendell Holmes, Jr.

The Supreme Court, 1888; 1894

The Supreme Court, 1904; 1907

FOLLOWING PAGE 140

Eugene V. Debs addressing strikers during the Pullman Strike, 1894

Cartoon of "King Debs" during the Pullman Strike, 1894

Cartoon of Debs leading a vanguard of populist politicians during the Pullman Strike, 1894

Clarence Darrow

William Jennings Bryan

Joseph H. Choate

Attorney General Richard Olney

A drawing in the New York Herald, 1895, showing Attorney General Olney defending the federal income tax before the Supreme Court

James Coolidge Carter

FOLLOWING PAGE 204

Cartoon from Puck, 1904, dramatizing Standard Oil's influence over government

William Howard Taft as circuit court judge, 1892–1900; Taft during his service in the Philippines, 1900–1904

William Howard Taft on the day of his inauguration as president, March 4, 1909, with President Theodore Roosevelt

Cartoon of the Roosevelt administration's position on railway regulation, shortly before Congress passed the Hepburn Act of 1906

A photograph of the bakery involved in Lochner v. New York Associate Justice Louis D. Brandeis

A photograph of the laundry involved in Muller v. Oregon; Josephine Goldmark, publication secretary of the National Consumers' League and sister-in-law of Louis D. Brandeis

Cartoon advocating temperance, 1894

FOLLOWING PAGE 268

Two newspaper front pages announcing the explosion of the U.S. man-of-war Maine, February 17, 1898

Two cartoons on the Spanish-American War, 1898

Associate Justice Edward Douglass White

A photograph of a certificate of residence required by the Geary Act of 1892

Front page of The Rocky Mountain News, June 25, 1905, leading to a contempt citation that was the subject of Patterson v. Colorado Albion Tourgée

Associate Justice Henry Billings Brown; Associate Justice John Marshall Harlan

A photograph of a march in New York City, 1917, organized by the recently formed National Association for the Advancement of Colored People

Foreword

THE *History of the Supreme Court of the United States* is being prepared under the auspices of the Permanent Committee for the Oliver Wendell Holmes Devise with the aid of the estate left by Mr. Justice Oliver Wendell Holmes, Jr. Mr. Justice Holmes died in 1935 and the Permanent Committee for the Devise was created by Act of Congress in 1955. Members of the Committee are appointed by the President of the United States, with the Librarian of Congress, an *ex officio* member, as Chairman. The present volume is the eighth in the series. The Committee hopes to complete the history expeditiously while maintaining the high quality of the scholarship. The volumes in the Holmes Devise *History of the Supreme Court of the United States* bring to this subject some of the best legal scholarship of the decades since Mr. Justice Holmes' death. We hope that, when completed, the series will widen and deepen our understanding of the Supreme Court and bring honor to the memory of one of its great Justices.

James H. Billington

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Editor's Foreword

Although this is now the second volume in the Holmes Devise series for which I have taken full editorial responsibility, it is the first for which I have not had the moral support of my co-editor, Paul Freund. Paul's death in 1992 has deprived the world of constitutional scholarship of its most distinguished member, and the Holmes Devise of its memory and its scholarly conscience. I should like to record here my personal and professional debt to Paul, an acknowledgment that places me among hundreds of fortunate legal scholars and lawyers.

It is fitting that this volume should be the work of Owen M. Fiss. Owen was one of Paul Freund's most distinguished constitutional law students, though I think it unlikely that Owen had yet identified himself as a student of legal history. Owen and I were colleagues at the University of Chicago Law School in the 1970s, where we co-taught a seminar on antebellum race and law with our beloved friend, the late Harry Kalven, Jr. As a historian, I take pleasure in putting in the record that our very proper dean, Phil C. Neal, listed the course in the catalogue as *Government Regulation of Race Relations in the United States* to avoid the imputation that the Law School was promoting chattel slavery. It gives me great pleasure to think that history no longer needs such a disguise in American law schools!

Owen Fiss's volume follows along the new path opened for the Holmes Devise by G. Edward White in his Marshall Court volume. It is a tightly organized, highly interpretive, and monographic approach. It serves, I think, not only to provide an accurate record of the United States Supreme Court at the turn of the twentieth century but also to make available a readable account of the function of the Court in American life. Fiss challenges the accepted interpretations of many of the most famous Supreme Court opinions in this period, especially that of the *Lochner* case. Above all, he provides a fresh approach to the political orientation of the Court, rejecting the simplistic notion of crude conservatism that has for too long stigmatized a creative bench. I believe that Owen has produced the benchmark study of the Fuller Court.

EDITOR'S FOREWORD

Owen M. Fiss is the Sterling Professor of Law at the Yale Law School. A Harvard Law graduate, he clerked first for then Judge Thurgood Marshall on the United States Court of Appeals for the 2nd Circuit, and subsequently for Justice William J. Brennan of the United States Supreme Court. He has also served in the Civil Rights Division of the Justice Department and as professor of law at the University of Chicago. As any of his students will tell you, Owen is also one of the best—and most demanding—law teachers in this country. Working with him on this book has been an unusual pleasure for me.

Stanley N. Katz

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