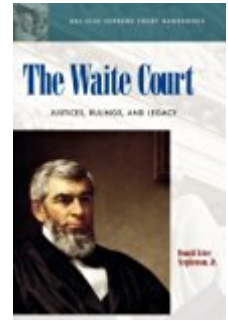


Donald Grier Stephenson, Jr.. *The Waite Court: Justices, Rulings, and Legacy*. Santa Barbara: ABC-CLIO, 2003. xvi + 349 pp. \$65.00, cloth, ISBN 978-1-57607-829-7.



Reviewed by Paul Kens

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"It was an exciting time in U.S. constitutional law. Americans can be glad Waite was at the helm." So ends Donald Grier Stephenson's *The Waite Court: Justices, Rulings, and Legacy* (p. 251). Although Stephenson probably did not intend it, these two sentences might contain his most unique and valuable thesis. There may be nothing more likely to produce a look of bewilderment in someone's eyes than to tell him or her you are writing a book on the Waite Court. Indeed, Morrison R. Waite is one of the least known of the chief justices of the U.S. Supreme Court. Even among constitutional scholars and legal historians, the years of his tenure as chief justice, 1874 to 1888, are often treated as a mere prelude to the controversial era between 1890 and 1937--commonly called the laissez-faire era.

For Stephenson the Waite Court era was not a prelude but rather a transition. Stephenson describes it as a transition from a "classical court" to a "modern court" (pp. 223-224). He defines the era of the classical court as one "marked by (1) an exceedingly limited federal jurisdiction, (2) a structure that made the bench mainly a court of errors,

not a court of legal policy, and (3) onerous circuit riding duties" (pp. 224-225). The modern court era, by contrast, is "marked by (1) a vastly expanded federal jurisdiction, (2) an increase in cases involving individual rights, and (3) a structure that has allowed the Court to become an arbiter for the nation" (p. 226).

Stephenson's explicit thesis is that the Waite court had a foot in each era. Ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments changed the Court's jurisdiction and, more significantly, added to the Court's docket numerous cases involving civil rights and civil liberties. The Court was more often asked to look into the constitutionality of state legislation. In terms of jurisdiction, in other words, the Waite court was a modern court. Organizationally, however, it remained a classical court. Although expanded jurisdiction dramatically increased the number of its cases, the Court had little control over its docket. Furthermore, it was the only federal appellate court for most issues. Both of these characteristics changed with passage of the Circuit Court of Appeals Act in 1891. Enacted three years after

Waite's death, this new law set up a system of circuit courts of appeal much like what we have today, relieved the justices of most of their circuit riding duties, and gave the Court the discretion to choose the cases it would decide.

The resulting image is of a Court facing new problems but stuck in its old skin. And, because Stephenson paints this image in his concluding chapter, a reader might be led to conclude that organization and overwork was the only thing restraining the court from becoming the overseer of public policy that it became in the years following Waite's tenure. I am not sure that Stephenson intends to leave that impression. Implicit throughout his book are indications that the Court, or individual justices, resisted becoming an arbiter of policy not because they were overworked but rather as a matter of principle. Certainly this can be seen in Stephenson's description of Chief Justice Waite as a man who embraced a modest view of the federal judicial power (p. 244).

Some readers who are familiar with constitutional history might prefer more depth in Stephenson's treatment of the implication of Waite's tenure, but that is not the purpose of this book. *The Waite Court: Justices, Rulings, and Legacy* is part of the ABC-CLIO Supreme Court Handbook Series. Each book in the series covers the history of the Supreme Court during the tenure of one chief justice. They all have the same subtitle and follow the same formula. The text is broken into four chapters: "The Court and the Period," "The Justices," "Major Decisions," and "Legacy and Impact." Reference material following the text includes: "Key People," "Laws and Events," "Chronology," "Table of Cases," "Glossary," and "Annotated Bibliography." The series editor writes that the series is designed to have value for the academic reader and legal communities, but each volume is intended as well for the general reader who does not have extensive background on the Court or American Constitutional Law (p. ix). Stephenson has succeeded on both counts.

Only a decade stood between the end of the Civil War and the beginning of Morrison Waite's tenure as Chief Justice. Not surprisingly, the era was very much shaped by the legacy of the War, reconstruction of the Union, and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Stephenson thus begins chapter 1, "The Waite Court and the Period," by looking backward to some cases coming out of the preceding era. This approach to describing the period is both usual and necessary. However, Stephenson provides an even better sense of the times in a subchapter entitled "Assembling the Waite Court." There he describes the political considerations behind the nomination and the confirmation battles over each justice of the Waite era. Stephenson points out, for example, that President Hayes's nomination of Stanley Matthews in 1881 marked the first time organized interests attempted to block a Supreme Court appointment (p. 29). Hayes was beholden to Matthews for his role in formulating the Compromise of 1877. Often portrayed as the end of Reconstruction, the Compromise played a part in ending the dispute over the prior year's election contest between Hayes and his Democratic opponent, Samuel Tilden. In exchange for Tilden's acquiescence to Hayes, the new president promised to withdraw the last of the federal troops from the South. The circumstances behind Matthews's nomination thus illustrate the links to the past and to the Civil War. The confirmation battle, by contrast, highlights links to the future. Stephenson maintains that Matthews was not opposed because of his role in the Compromise of 1877, but rather because of his ties to corporate power, especially the railroads and Jay Gould.

Chapter 2, "The Justices," provides biographical sketches of each of the fifteen justices who sat on the Supreme Court during the Waite era. Although obviously limited by space, these sketches provide more information than one would find in a reference book such as Kermit L. Hall's *The Ox-*

ford Companion to the Supreme Court of the United States (1992). Stephenson also provides a sense of how the character of the Court changed as presidents made their appointments.

In chapter 3, "Major Decisions," Stephenson divides the Court's significant decisions into four categories: Civil Rights; the Bill of Rights; Due Process of Law and the State Police Power; and the Commerce Clause. He points out that in some of the earliest cases involving the rights of African Americans, the Waite Court took a limited view of Congress's power to enforce civil rights. In the *Civil Rights Cases* (1883), for example, it held that the Equal Protection Clause of the Fourteenth Amendment prohibited state discrimination only, not private discrimination. Enactment of the Fourteenth Amendment, Stevenson points out, presented the Waite Court with novel questions in other areas as well. In *Hurtado v. California* (1884), for example, it addressed the question of whether the Amendment's guarantee that no person shall be deprived of life, liberty, or property without due process of law applied the Bill of Rights to the states. Another novel question it faced was the extent to which the due process limited the states' power to pass economic regulation. In *Munn v. Illinois* (1877) it ruled that, although in some instances regulation may violate due process, the states were free to regulate businesses affected with a public purpose. Finally, Stephenson points out that America's evolution toward a national, rather than local, economy placed before the Court numerous cases asking whether state regulations interfered with Congress's power, under Article I, to regulate interstate commerce.

Although I have discussed chapter 4, "Legacy and Impact," in the opening paragraphs of this review, I should add that Stephen includes an account of the Court's role in the disputed 1876 election between Rutherford B. Hayes and Samuel Tilden.

Not much has been written specifically about the Waite Court. C. Peter Magrath's *Morrison R. Waite: A Triumph of Character* (1963) is a biography of the Chief Justice and Charles Fairman's *Reconstruction and Reunion 1864-88* (1971) covers both the Chase and the Waite Courts. Fairman's two-volume history is awesome in its detail, but not particularly reader friendly. *The Waite Court: Justices, Rulings, and Legacy* is a welcome addition. Stephenson has a knack for clearly explaining complex legal concepts, like substantive due process. The strength of this book does not necessarily lie in breaking new ground but in telling the story of this frequently overlooked era of Supreme Court history in a way that is accessible to the general reader. Given its organization and appendices, it also functions as a useful reference tool that certainly belongs in any library.

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