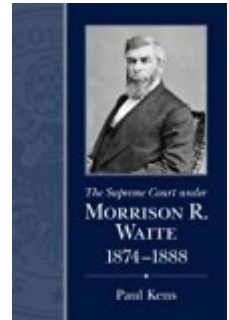


Paul Kens. *The Supreme Court under Morrison R. Waite, 1874-1888.* Columbia: University of South Carolina Press, 2010. 272 pp. \$49.95, cloth, ISBN 978-1-57003-918-8.



Reviewed by Ian J. Drake

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Commissioned by Christopher R. Waldrep (San Francisco State University)

Constitutional and legal historian Paul Kens, a professor of political science and history at Texas State University at San Marcos, has provided a concise but thorough synthetic account of the U.S. Supreme Court during the chief justiceship of Morrison Waite. Kens's account places the Court's history into the larger context of the ongoing changes in the American economy and society, ranging from the latter years of Reconstruction through the rise of large industrial cities and American economic expansion. Accordingly, this book is well suited to an advanced undergraduate or graduate student readership and can be used in a course not only the history of constitutional law but also in a general American history course. However, Kens also aims for an audience comprised of legal scholars who are familiar with the period. He rightly directs scholars' attention to the role the Court played in shaping the relationships between state and national government, the emergent industrial economy, and the period's civil rights conflicts.

Scholars familiar with the period will be intrigued by Kens's contention that the Court during this period was not merely a "transitional" court, what Kens describes as a mere "prelude" to a more "eventful era" of the Court in the 1890s and early twentieth century. Although Kens does not fully articulate what he means by "transitional," he implies that scholars have wrongly taken a presentist interpretation of the Waite Court. That is, Kens appears to suggest that scholars have been so taken with the modern, "imperial judiciary" role of the Court—which was fully achieved by the 1930s but arguably began in the 1890s—that they have failed to recognize the importance of the Court in American life during the Waite tenure. Therefore, Kens offers a reinterpretation of the period, arguing that the Waite Court was a "tradition"-oriented institution forced to react to the actions (or inactions) of other institutions in American life, such as state governments, lawyers, corporations, and especially Congress. In making this argument Kens takes the approach recently endorsed by other scholars, such as

Michael Klarman, that the Supreme Court has rarely led in creating social and/or political change.[1]

One example of Kens's argument regarding a hidebound Court is his contention that in the area of civil rights the Waite Court majority was "hyperformalistic" in response to innovative legal arguments. For example, in *Baldwin v. Franks* (1887) a mob in Nicolaus, California had assaulted and tried to expel Chinese residents from the town. A suit was filed alleging a conspiracy to violate the equal protection required to be accorded to Chinese nationals in the United States under treaties between the United States and China and an 1875 federal statute. The plaintiffs lost at the Supreme Court, which held that the statutory provision relied upon by the plaintiffs was part of a statute that had been declared unconstitutional in a prior Supreme Court case. Since the majority construed the prior unconstitutional statute to have nonseverable provisions, the plaintiffs could not use it. Also, the Court held that only conspiracies directed against the government (not private actors) were illegal. Kens sees this holding as too formalistic, but it serves as one of several examples of his claim that the Waite Court justices were not merely reflecting, or endorsing, the social practices of the larger society. Rather Kens argues that such decisions show that the justices gave principled adherence to the legal norms of the time, especially the doctrines of state action and federalism.

The *Baldwin* case noted above is also an example of another element of Kens's account that will make this work appealing to scholars of the period. Kens provides detailed reviews of cases that usually receive little or no attention in histories of the Court. He shows how doctrines applied in notable cases were later applied or modified in subsequent, obscure cases. This approach allows readers, expert or otherwise, to have a more complete picture of the Court, beyond the traditional "landmark" cases discussed from this period. For

every *Munn v. Illinois* (1877) there is a *Barton v. Barbour* (1881).

Scholars and students new to the period alike will profit from Kens's use of judicial biographies to explain the possible motives behind justices' dispositions in cases or areas of the law. Students will attain a greater understanding of the politics of the industrial age in America and the role of the Court as an institutional force during the period. Kens endorses the view, made famous among scholars by Stephen Skowronek, that this was a period of "courts and parties" that was made possible by national industrialism.[2] For example, Kens notes the federal courts developed bankruptcy rules in the absence of new federal legislation, not because the justices sought to exercise power or favor corporate interests. Rather Kens argues that the justices were responding to the nascent industrial economy made possible by the railroads. An implicit theme is that courts—even powerful, doctrinally creative courts—do not work alone.

Kens's book is a valuable addition to scholars' and students' libraries because it offers a synthesis of the industrial period's legal and political history and distinct opinions on the Court's role in nineteenth-century America.

Notes

[1]. Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2006).

[2]. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982), 287.

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