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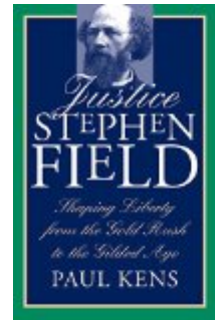

Paul Kens. *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age.* Lawrence: University Press of Kansas, 1997. viii + 376 pp. $39.95, cloth, ISBN 978-0-7006-0817-1.

Reviewed by Jonathan Lurie

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More than thirty years ago, the late political science Professor David Fellman emphasized that "every member of the United States Supreme Court deserved scholarly scrutiny." His comment came to mind as this writer a) decided to assign David Currie's wonderful gem "The Most Insignificant Justice: A Preliminary Inquiry," (50 *University of Chicago Law Review* 466 [1983]), and b) accepted an invitation to review Paul Kens's new study of Field for H-SHGAPE. Unlike Justice Gabriel Duvall, who richly deserved Currie's encomiums, and certain other justices whose contributions to constitutional jurisprudence are minimal if not miniscule, Stephen Field's importance and significance to nineteenth century legal history is not open to serious debate. Paul Kens succeeds very well in illustrating why this is so. But he chose, intentionally, not to write a biography of the justice who--with one exception, William O. Douglas--served on the High Court longer than any other of his associates past and present.

Rather, Kens sought to present "a story about law, society and politics," one that reflects the author's interest "in the concept of liberty and what it meant to people who thought they possessed it. My primary purpose is to inquire into the relation between law and the social order in the last half of the nineteenth century" (pp. 1,8). Thus, there is virtually no biographical material on Field's early years, his legal education, or his career prior to late 1849, when Field reached San Francisco. Nor does Kens discuss Field's relationships with his fellow USSC brethren, and we get little sense concerning the personality of the High Court from 1863 to 1897. If Charles Evans Hughes is to be believed, it was "a brutal court in its personal relations. I heard that they actually shook their fists at one another" (Joseph P. Lash, *From the Diaries of Felix Frankfurter* [1975], p. 313). Field, replete with his hates, lasting grudges, vindictiveness, and unfulfilled political ambitions, may well have felt right at home.

And, indeed, when Field made an enemy, apparently it was for life. Thus, one of his "critics," William Turner, described Field's career in California as "series of little-minded meanliness, of braggadocio, pusillanimity, and contemptible vanity, which when known will sink him so low in

public estimation that the hand of the resurrectionist will never reach him." Field returned the sentiments. Turner, who had served with Field as a California judge, was a man "of depraved tastes, of vulgar habits, of ungovernable temper, reckless of truth ... and grossly incompetent to discharge the duties of his office" (pp. 34-5).

Kens devotes three chapters to Field's experiences in California between 1849 and 1863. He gives us a real sense of the constructive chaos that characterized California governance as miners, land squatters, and speculators, as well as other adventurers, flocked to the new state, even as Field himself had done in 1849. He emphasizes, I think correctly, the importance of the Jacksonian ethos. Immigrants to California might not have been supporters of the most popular president thus far in American history, but "they were weaned in a political environment in which Jacksonian ideals shaped the political and ideological debate" (p. 49).

>From the state constitutional convention in 1849 to the Civil War era, "the Jacksonian tenets of individual libery; opposition to privilege; desire for limited government; admiration for equality, democracy, and natural law; and most of all, fear of concentration of power tended to dominate debate" (p. 51). Although Field's thirty-four years on the High Court sometimes reflected strong devotion to them, his tenure also revealed a tendency to deviate from these values, without any concession from Field concerning a lack of consistency--as will be seen.

The remainder of Kens's chapters focus on Field's High Court career, from March 1863, when Lincoln appointed him as the tenth justice, to 1897 when--suffering from marked physical discomfort and mental confusion if not feebleness--he reluctantly resigned, effective December 1, 1897. Field served during the presidencies of Lincoln, Johnson, Grant, Hayes, Garfield, Arthur, Cleveland, Harrison and McKinley. In an era much less sensitive to appearances of judicial impropriety, Field remained on the bench in numerous cases where one of the participating lawyers was his brother David Dudley Field. Moreover, he welcomed his brother's management of an ill-conceived and unrealistic movement to push Stephen Field for selection by the democrats as a presidential candidate in 1880. Like his colleagues Samuel Miller and Joseph Bradley, Field believed that he was admirably suited to be chief justice, a position to which they all aspired, though in vain.

Early in the first phase of his Supreme Court career, Field appeared to emphasize the Jacksonian values noted above. Thus in the famous test oath cases, ***Cummings v. Missouri***, and ***Ex Parte Garland***, that arose at the end of the Civil War, Field glorified the right to practice one's calling free from imposition of penalties because one refused to swear a loyalty oath. David Dudley Field had argued that when Missouri deprived Cummings, a minister, of his right to preach, it also deprived him of his profession; and "is not his interest in his profession property?" (p. 114). Similarly, in ***Garland***, Field denied that Congress could require a test oath of attornies who practiced in federal courts. Only a court could bar attornies "for moral or professional delinquency." (p.116). Kens notes that in dismissing the test oaths as unconstitutional, Field "invented a new right. Nowhere does the Constitution expressly guarantee a right to engage in a trade or profession" (p. 117).

These cases, however, involved constitutional provisions dealing with ***ex post facto*** laws or bills of attainder, and applying them had seemed almost like criminal punishment. What about ordinary trades or professions such as butchering?

Still in his staunch Jacksonian mode, in answering this question Field employed the most famous of the Reconstruction amendments, the Fourteenth--ratified in 1868, shortly after the test oath cases had been decided. This is not the place to get into a discussion of what the framers intended by the "broad, sweeping, and vague language" they employed. As Kens notes, however,

the phrases in section one of the amendment "are as vague and flexible as they are sweeping." In the famous Slaughterhouse Cases (1873) Field's Court confronted the 14th amendment for the first time, and by the narrowest of margins sustained a Louisiana statute that awarded a 25-year franchise to a slaughterhouse company. All slaughtering had to take place in a central location it controlled. But prices the corporation could charge were regulated, all butchers could utilize it, and indeed the statute "prohibited the company from refusing to allow any butcher" access to it (p. 119). Was this a monopoly?

Although he spoke in dissent, Field denounced the statute as a "naked case ... where a right to pursue a lawful and necessary calling ... is taken away and vested exclusively for twenty five years ... in a single corporation." Echoing the views of former Supreme Court Justice John Campbell, who argued the case for the disgruntled butchers, Field insisted that the new amendment insured a person's right to "pursue an ordinary trade" free from arbitrary state interference. Kens notes Field's long attachment to this right, adding that Field's position reflected the traditions of Jacksonian Democracy and free labor. He warns the reader, however, to expect marked deviation by Field from other Jacksonian tenets--such as increased federal control over state regulation (p. 124).

Indeed, Kens is at his best when he contrasts the old Jacksonian ethos with Fields's long range love of corporate enterprise. By 1880, Field seemed obsessed with a fear of democracy, while old-line Jacksonians had voiced a demand for democracy. They had feared and distrusted early examples of corporate power such as the Bank of the United States. But Field "was not the least bit ill at ease with corporate power" (p. 271). On the other hand, he was troubled by "corporate power that originated with government." Thus his denunciation of the Slaughterhouse monopoly. Yet if aggressive entrepreneurs could form monopolies on their own, more power to them. Thus his equally vigorous dissent in ***Munn v. Illinois*** (1876), where his brethren affirmed an Illinois regulatory statute dealing with grain elevators. In general, Field was "often unwilling to allow government to...curb the excesses of corporate power."

On the other hand, Joseph Bradley, who had agreed with Field in the Slaughterhouse cases, vigorously endorsed the Court's position in ***Munn***. For Bradley, the issue was governmental power. It was wrong to allow the legislature to create a monopoly, as in Slaughterhouse. But it was equally wrong to deny legislative authority to respond to a monopoly--a distinction lost on Field.

Kens concludes that in the late nineteenth century, both the Jacksonian and free labor traditions "splintered, sendng out shoots in different directions." Further, he comments that "the tendency to depict ***laissez-faire*** constitutionalism as sole heir to the free labor and Jacksonian traditions has an unfortunate side effect. Intended or not, it gives to that doctrine a sense of democracy and egalitarianism that is not justified" (p. 274). Finally, Kens notes (I think correctly) that recent High Court decisions indicate a "a new era of judicial oversight of economic regulation predicated upon many of the same ideas that Field championed."

Field appears not to have been a particularly likeable jurist, yet Kens treats him fairly, and with admirable objectivity. One might have wished for more insights into Field the man, but on balance this book is just what Professor James Ely noted on the jacket--"A major contribution to our understanding of the jurisprudence of the late 19th century." It is well worth reading.

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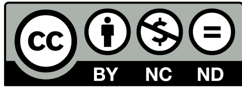

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