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## Book Review

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# Book Review

MORRISON R. WAITE: *THE TRIUMPH OF CHARACTER*. By C. Peter Magrath. New York: The Macmillan Company, 1963. Pp. 321. \$10.00.

This is the story of a Chief Justice in a time of profound change, when America was in transition from an agrarian mercantile society to an urban industrialized society. It is a story of the Court's response to the post-Civil War forces which eventually crystalized into our second Constitution, an industrial one designed for the new order. The book reveals what has been known for some time, at least since 1937, that the United States Supreme Court is a political institution whose judicial philosophy is not authored by it but ghost-written in lines of power by various elite groups in our pluralistic society. From the beginning to the end, we witness the industrial amending of the Constitution. It is only fair to say that this is not the author's contention; he maintains that the Waite Court successfully and courageously defended the Constitution against the vast aggregates of wealth at least along the path of due process.

The first third of this book portrays with a rather wide brush the uneventful life of Morrison R. Waite to the time he was suddenly catapulted by President Grant to the chief justiceship of the United States Supreme Court. Born in Connecticut in 1816 of a father who was later to become a supreme court justice of that state, he attended Yale Law School and then left his rural state for the commercial midwest. In 1838 he took a position in the law office of Samuel M. Young, a Maumee, Ohio, attorney, who was later to become "Toledo's leading entrepreneur."<sup>1</sup> Attracted by the young lawyer's flair for property and commercial law, the senior lawyer offered him a partnership and the sage advice that the nearby city of Toledo had a more promising future for the practice of law than Maumee.

Waite met with little success in local politics. Prodded by the business community who was attracted by his whiggish mind and his success as a railroad lawyer, he served uneasy terms on the Toledo City Council and in the Ohio State Legislature. He found it difficult to attune his legal temperament to the free-wheeling legislative process. Twice he lost bids for election to Congress. But Morrison R. Waite's path to power and fame was not in the direction of the electoral process, but rather in the direction of the appointive process. His first national appointment came in 1871 when President Grant appointed him to the Geneva Commission whose function was to settle claims over the destruction wrought by the English constructed warship "Alabama" during the Civil War. The success of the American delegation brought national praise to the committee and constituted probably the most successful act of the Grant administration. His second national appointment came three years later, when Grant, after having offered

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1. Magrath, *Morrison R. Waite: The Triumph of Character* (1963), p. 37.

the position to five or seven other men who rejected it, appointed him Chief Justice of the United States Supreme Court. The nation, thankful that Grant "did not pick up some old acquaintance, who was a stage driver or bartender for the place,"<sup>2</sup> did not look too closely at Waite's qualifications, for unlike most of the other candidates, he possessed both "geography" and "character."

At this stage, the author points out, "the record remains unimpressive. Waite's state of Ohio had hundreds of men with similar records, most of whom were forgotten within a few years of their death. Had Morrison Waite not gone on the Supreme Court, he, unlike William Evarts or Caleb Cushing, would soon have been consigned to oblivion."<sup>3</sup> Even more eloquently, at the time of his appointment, a colleague told him that he was "that luckiest of all individuals known to the law, an innocent third party without notice."<sup>4</sup>

The rest of the book is devoted to an analysis of Waite's opinions and to the proposition that he redeemed himself on the bench from his previous role as a railroad lawyer. It is necessary, however, before discussing this portion of the book to recall the temper of the Gilded Age. For it was that age, especially its formative years from 1883 to 1888—the time of Chief Justice Waite's tenure on the Court—that gave birth to the permanent crisis of our times, the problem of the coexistence of personal and institutional freedom in an industrial society.

The Civil War destroyed more than the institution of slavery; it destroyed an old order, a society based upon an agrarian tradition and a mercantile authority, integrated in status and function by the market place. It produced a new group, a powerful industrial middle class whose faith rested in the unrestrained accumulation of wealth and whose goal was an industrial feudalism in which all obligations which formerly ran to the states and the aristocratic farmers would run to it and its industrial complex. This new order marched under the banners of centralization, industrialization and mechanistic science and the nation, intoxicated by the spell of the industrial revolution, followed until America became urbanized, industrialized, and technologically centered. The victory of the new culture was inevitable; that was not the problem. The question was what authoritative body could contain the new industrial force which threatened to supplant popular sovereignty for economic sovereignty.

This was a period of weak executives and weak Congresses. It was a time of conciliation, a time when the country was willing to compromise personal rights, those of the citizen and the Negro, for economic rights and institutional liberties. It was a time of consolidation, a time of group unity when the vested interests of the North urged the vested interests of the South to join its crusade to the "Great Barbecue"<sup>5</sup> and close ranks against the enemy—the radical third parties, such as the Grangers, the Greenbacks, etc. Perhaps at no other time in its history, except possibly the age of Marshall, did the Supreme Court have a greater oppor-

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2. *Id.* at 2.

3. *Id.* at 72.

4. *Id.* at 97.

5. Farrington, Vernon L., *Main Currents in American Thought*, Harcourt, Brace and Company, New York, 1930, Book III, p. 23.

tunity to define the new industrial relationships among the person, the institution and the state than during this Gilded Age.

The eighteenth century Constitution, not fashioned in an industrial mold, simply could not cope with the new dynamic problems and large scale organizations unleashed by the industrial revolution. Both Marshall and Taney had left the interstate commerce clause open-ended—anything could be read into it. The edge of the contract clause had been blunted. Meaning had to be poured into the new war amendments. The circumstances of the age cast the Court of the seventies and eighties into a creative role. With no compass or chartered course to follow, it could either drift with the prevailing gales of power or follow the stars. No matter which course it took, it would be writing a second Constitution, an industrial one in which the dynamo would replace the hoe.

The author's thesis is that the Waite Court rose to the occasion and steered the nation through this period of crisis. With Grant's inaugural speech "Let us have peace,"<sup>6</sup> he avers, began a new era—that of conciliation with the South and consolidation with economic groups—"in 1876 reconciliation was in the air . . ."<sup>7</sup> and "Stateways cannot change folkways."<sup>8</sup> In the compromise of 1877 the nation tacitly agreed to withdraw troops from the South and return the Negro problem to the states if the states, or more properly the vested interests in them, would support economic nationalization. It was understood that the Supreme Court would supervise this arrangement through such legal doctrines as the war amendments and the interstate commerce and due process clauses. The Court "saw to it that the bargain was not violated."<sup>9</sup>

With a splendid form of constitutional violence, in a series of eight cases within the span of eight years, it chipped away at the war amendments leaving nothing but a shell which encased only added guarantees to rights already protected. When the scalpel failed, the Court took to the sledge hammer, declaring unconstitutional the Civil Rights Act of 1875 which protected Negroes from the violence and the economic strategies of the Ku Klux Klan and other hostile private groups. "With the exception of one or two decisions . . . , the Negro became the forgotten man of American constitutional law. No less than the Confederacy was his the Lost Cause."<sup>10</sup> Although the author blushes at this judicial activism in reverse as compared with the presumption of unconstitutionality concerning legislation affecting political and civil rights entertained by the present Supreme Court, he feels that it was a necessary measure because of the violence of the times.

On matters of economic legislation, however, the book's thesis is that the Waite Court is the original author of the judicial restraint doctrine—a judicially strong presumption that economic laws are constitutional—which has dominated the thinking of the United States Supreme Court since 1937. To the Chief Justice he attributes a modest conception of the judicial function—"For protection against

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6. Magrath, *supra* note 1, at 114.

7. *Id.* at 134.

8. *Id.* at 145.

9. *Id.* at 149.

10. *Id.* at 140.

abuses by legislatures the people must resort to the polls, not to the courts."<sup>11</sup> A heroic attempt to prove this point is made by a rather extended analysis of Waite's opinions under both the interstate commerce and due process clauses.

In respect to the interstate commerce clause, it is contended that Waite entertained a sort of geographical jurisprudence; that is, in the absence of explicit federal action, he endorsed state authority over transactions physically intrastate even though the economic consequences of these transactions might transcend local boundaries. This doctrinal insight, it is pointed out, is an illustration par excellence of judicial restraint, for it leaves to Congress rather than arrogates to the Court the accommodation of commercial interests between nation and state.

The most striking illustration, however, of his judicial restraint lies in the interpretation of the due process clause. He "denied to vested property interests a preferred position in the American constitutional system, assumed that legislative policy judgments override judicial policy judgments, and insisted that factual realities deserved the Court's highest respect: in short, . . . [he] allowed for power to regulate in the public welfare."<sup>12</sup> The classic case of *Munn v. Illinois*<sup>13</sup> is invoked in support of the author's position. There the Chief Justice upheld the Granger rate-regulating laws of Illinois against the railroads' contention of congressional dormant regulation and absolute right to rule under the fourteenth amendment.

In conciliating the nation by exercising judicial activism in the political and civil rights arena, striking down nationalizing legislation protecting fundamental liberties, and in consolidating the nation by exercising judicial restraint in the economic arena, refusing to strike down legislation regulating public interest corporations, the author concludes that Waite, a vastly underrated Justice, should now take his place in the front ranks of our Chief Justices. If Mr. Magrath's main point is that the Waite Court was a political institution which effectively served as a guardian of the compromise, then he has admirably proven his point. If, however, as I believe it is, his chief point is to demonstrate that the Court transcended the times by setting boundaries to the new industrial rush and thus preserved political and personal freedom, then, in my estimation, he has miserably failed to prove his point. The record simply does not support such a conclusion.

Interspersed throughout the book, on page after page, are hints that Waite temperamentally favored local state interests and thought that the Court should maintain an easy balance between the federal and state governments. The fact is, however, that he upheld national authority over commerce in nearly every important case which came before him. In 1883 when he first took his seat on the bench, the commerce clause was open-ended; in 1888 when he left the bench, it was closed except for local control over such minor topics as wharves, bridges, and ferries. This record is completely consistent with the economic creed of the bench at that time for all the Justices favored free trade.

The story of due process and *Munn v. Illinois*<sup>14</sup> is much more complicated,

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11. *Id.* at 186.

12. *Id.* at 203.

13. 94 U.S. 113 (1876).

14. *Ibid.*

for the opinion is chiefly important not for what it says but for what it does not say. Instead of dismissing the company's contention that the fourteenth amendment afforded its substantive due process protection, Waite hinted that the Court under certain conditions could intervene to veto state regulation of business. "If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State."<sup>15</sup> Ten years later in the Railroad Commission cases he expanded upon this caveat to the state legislatures, saying:

From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.<sup>16</sup>

In this caveat the Waite Court told the other branches of government that the Supreme Court would be the ultimate guardians of the fourteenth amendment and that it, through judicial sovereignty, would supervise the business-government relationship. Thus, probably as a concession to Justice Field, Waite transformed procedural due process into substantive due process and implied that all businesses not clothed with a public interest could not be regulated. Future courts would seize upon such phrases as "confiscatory," "public interest" and "reasonable" as free-wheeling devices for nullifying political and economic legislation for the protection of class justice. During the course of the next fifty years the nation would realize that the opinion contained a Trojan horse inhabited by the Court and the businessman which would eventually transform judicial review into judicial sovereignty.

By the end of Waite's tenure in 1888 it could be said that the Negro and the citizen had been removed from the protection of the fourteenth amendment, that the corporation was protected by it, and that if the corporation was not clothed with a heavy public interest, under the strange new theory of natural rights it was free from any governmental regulation. The Fuller Court would later build upon this catafalque until the industrial middle class would not only bring under its control the western agrarian movement but also the political state.

This book, *Morrison R. Waite: The Triumph of Character* by C. Peter Magrath, an assistant professor of political science at Brown University, is an intelligent and interesting work. It gives us, especially in the first portion of the book, a close and intimate insight into the character of the Chief Justice. The biography holds its own with the typical legal biographies of the century.

At this stage it is difficult not to reflect upon the decay of biography as an art form in this century. Few twentieth century biographers can compete with those of the nineteenth century who possessed the genius of writing from the center

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15. *Id.* at 132.

16. Railroad Commission Cases, 116 U.S. 307, 331 (1886).

of things, from the inside among the decision makers. They succeeded in catching the flavor of the period—the rush and immediacy of events on the wing as they affected the participants. In my opinion, Arthur M. Schlesinger, Jr., especially in his biography of Roosevelt and the New Deal, captures a great deal of this nineteenth century genius.

C. Peter Magrath is no Schlesinger. He writes from the outside not from the inside. Here is no picture of America in crisis, in what is perhaps the most dramatic moment in her history. Instead there is an attempt to understand the man through his collective opinions. This, in my estimation, is an impossible task for majority opinions are group opinions and as such “the style is the man” does not apply. I do not believe that the new evidence uncovered by Mr. Magrath will impress the historian, but on the contrary will only confirm that history was correct in the first place in assigning the Chief Justice to a second-rate position.

Morrison R. Waite was of the genteel tradition, a good man and a quiet success in his day. He “did nothing to lower the dignity”<sup>17</sup> of his office and served as an effective lubricant on a court of discordant personalities. He came to the bench an unheroic figure in an unheroic age, committed not to experimentation and adventure, but to the maintenance of the business ethos. Contrary to the contentions of Mr. Magrath and Justice Frankfurter, he possessed no judicial philosophy; his modified judicial restraint in economic matters proceeded more from instinct than from intellect. He was a technician who favored strategies over principles, bankers and merchants over Negroes and proletarians. For the Negro he suggested instead of political and civil rights “a stiff dose of education.”<sup>18</sup>

The most favorable comment that can be made is that he did not comprehend his times. He felt to some extent that his regime was the continuation of Taney’s. His intellect was not in touch with the powers of history and thus he failed to engage the real problems of his time—the permanent crisis that is the truth of our times—personal freedom in an industrial society.

The Morrison R. Waite High School in Toledo, Ohio, faces backwards toward a small field instead of facing forward toward the street. Rumor has it that this was caused by an architect’s mistake. In many ways this symbolizes the public life of the Chief Justice—he looked sideways and backwards but never forward. This book, *Morrison R. Waite: The Triumph of Character* could more appropriately be labeled *Morrison R. Waite: The Triumph of Compromise*, for the Court did its job well as the guardian of the compromise. If it is true that he restored respectability and power to the Court by allying it with the industrial class, then it is also true that he failed to restore splendor to it by not allying it with the Constitution and all classes.

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17. Magrath, *supra* note 1, at 314.

18. *Id.* at 167.

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