

of the scholarship that went into her more extensive study of Coke. There are times when the reader feels that her appraisals of Bacon are naively in Bacon's favor,²⁸ and there are small annoyances, such as the absence of documentation.²⁹ But those are unimportant defects in a fascinating study of a puzzling man.

THOMAS L. SHAFFER†

MORRISON R. WAITE: *THE TRIUMPH OF CHARACTER*. By C. Peter Magrath. New York: The Macmillan Company, 1963. Pp. 334. Illustrations. \$10.00.

ONCE known as "The Gilded Age," the quarter of a century of American history following the Civil War has recently been undergoing reconsideration. Historians of a previous generation¹ used to echo Vernon L. Parrington's stereotype about the "Great Barbecue,"² during which unscrupulous businessmen and political spoilsmen used the national and state governments to prey upon poor farmers and oppressed laborers. In the last few years, however, young scholars³ have challenged this stereotype by pointing out that the business community of the 1870's and 1880's was itself badly split over ideology and economic policy, that the politicians often worked at cross-purposes from the "robber barons" for whom they were supposedly fronts, that farmers were comparatively well off, and that, except for a setback in the

28. For instance, she attributes Bacon's opposition to Coke as principally growing out of a loyalty to the idea of the philosopher-king, "whose reign, efficient and benevolent, would benefit art and education as well as the people." P. 141. This may not be entirely consistent with Bacon's efforts to have Coke's *Reports* suppressed, with his issuance of an information charging Coke with riotous behavior when Coke had a quarrel with his family, or with the elaborate and successful campaign Bacon mounted, when at the height of his power as Chancellor, to have Coke removed from office as Lord Chief Justice. Pp. 139, 158; *THE LION AND THE THRONE* 385-88, 396.

29. "To encumber such a book with scholarly apparatus seemed superfluous." Author's Note, p. 235. Mrs. Bowen's accuracy on legal details is usually amazing. One might, though, take issue with her statement: "Decisions in the common-law courts are still subject to review by higher authority . . . in the United States by the Supreme Court." Pp. 138-39. But this is the sort of quibble that *should* be confined to a footnote.

†Assistant Professor of Law, Notre Dame Law School.

1. *E.g.*, DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC, 1865-1877*, Vol. 22, *THE AMERICAN NATION: A HISTORY* (Hart ed. 1907); BOWERS, *THE TRAGIC ERA* (1929); HENRY, *THE STORY OF RECONSTRUCTION* (1938); JOSEPHSON, *THE POLITICOS, 1865-1896* (1938).

2. 3 PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 23 (1930).

3. DESTLER, *AMERICAN RADICALISM, 1865-1901* (1963); SHARKEY, *MONEY, CLASS AND PARTY* (1959); Cohen, *Northeastern Business and Radical Reconstruction: A Re-examination*, 46 *MISSISSIPPI VALLEY HISTORICAL REVIEW*, 67-90 (1959); Unger, *Businessmen and Specie Resumption*, 74 *POL. SCI. Q.* 46-70 (1959).

1873-77 depression, industrial wages in the United States steadily increased from 1865 to 1891. Meanwhile, other historians⁴ have been attacking the correlative cliché that the Supreme Court during the Gilded Age stood guard to protect the "interests" from the "people."

The most recent salvo in this skirmish has been fired by Professor C. Peter Magrath, of Brown University, in his excellent and learned biography of Chief Justice Morrison R. Waite, who presided over the Supreme Court from 1874 to 1888. Drawing heavily upon Waite's own unpublished papers and upon the manuscripts of his contemporaries, Mr. Magrath has framed his argument with great shrewdness. Avoiding hero-worship, he makes no claim that Waite was appointed because of his proved ability or national reputation; instead he shows that President Grant named the Ohioan only after three (or possibly five) other preferred candidates had been eliminated. Nor does Mr. Magrath seek to rehabilitate Waite's reputation by presenting him as a present-day liberal concerned with civil rights. The Chief Justice chose the road to reunion rather than the path of racial equality. In the *Reese*⁵ case he effectively torpedoed the Radical plan of protecting the Negro by direct federal action; in the *Cruikshank*⁶ decision he helped emasculate the fourteenth amendment; and in the *Civil Rights Cases*⁷ he concurred in an opinion nullifying the Civil Rights Act of 1875. Mr. Magrath's argument that it is "essentially irrelevant" to judge these decisions "according to modern standards of what constitutes social justice for the Negro"⁸ is not entirely convincing. After all, Justice Harlan's masterful dissent in the *Civil Rights Cases* clearly showed that there was another course open to the Court, and indeed Waite himself, as his unusual concern for Negro education suggests, seems to have had a guilty conscience about his decisions.

More convincing is Mr. Magrath's refutation of the idea advanced by Robert G. McCloskey and Benjamin F. Wright that Waite's opinions on economic issues served as an unlimited guarantee of private property against public regulation. Such an argument, Mr. Magrath persuasively pleads, is a misreading of the record. Waite's rural, almost pioneer, Ohio background made him a representative of "the ante-bellum class of professional and mercantile men to whom wealth was not an end in itself";⁹ unlike Stephen J. Field, he was never an intimate of the rapacious millionaires of the postwar generation. His opinion in *Munn v. Illinois*¹⁰ meant exactly what it seemed to mean, a recognition of public over private right. If phrases from his opinions were subsequently used as a concession to *laissez-faire*, Mr. Magrath

4. See, e.g., TRIMBLE, CHIEF JUSTICE WAITE, DEFENDER OF THE PUBLIC INTEREST (1938), and FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 (1939).

5. United States v. Reese, 92 U.S. 214 (1875).

6. United States v. Cruikshank, 92 U.S. 542 (1875).

7. 107 U.S. 3 (1883).

8. P. 153.

9. P. 207.

10. 94 U.S. 113 (1876).

reminds us that "the *actual decisions* clearly pointed in the direction of support for public regulation."¹¹ So long as Waite was Chief Justice, the Court "never became, wittingly or unwittingly, a tool of business."¹²

In view of the record which Mr. Magrath so ably presents, one is tempted to ask why constitutional historians often underrate Chief Justice Waite. Perhaps the simplest explanation is that for years Waite has been the victim of the envious Justice Samuel F. Miller's witticism: "I can't make a silk purse out of a sow's ear. I can't make a great Chief Justice out of a small man."¹³ More basic, however, is the present-day unpopularity of some of Waite's fundamental ideas. In an age of growing nationalism the Chief Justice never outgrew his conviction that the Constitution meant what it seemed to mean and that in a federal system it was imperative to differentiate between the functions of the central and the local governments. In both civil rights cases and cases involving economic legislation Waite cast his votes for states' rights. Another of his basic beliefs was in judicial deference to legislative decisions. "Of the propriety of legislative interference within the scope of legislative power," the Chief Justice said tartly, "the legislature is the exclusive judge."¹⁴ "In my judgment," he added, "the fault of Judges sometimes is to try and make too much law at once."¹⁵

Because such beliefs may be unfashionable these days, it is unlikely that Professor Magrath's book will succeed in making of Chief Justice Waite either a major or a respected figure in our judicial history. But his biography of the neglected Chief Justice should do much to demolish the stereotype that the Court in the postwar decades was simply the bulwark of private property. In presenting this revisionist view, Mr. Magrath has proved himself one of the ablest of the young historians who are painting a new and more complex picture of the decades following the Civil War.

DAVID DONALD†

INDEMNIFYING THE CORPORATE EXECUTIVE. By George T. Washington and Joseph W. Bishop, Jr. New York: The Ronald Press Company, 1963. \$15.00.

THIS is a probing and provocative study of the law and public policy involved in the reimbursement of corporate executives for personal liability arising out of their corporate connections. Its publication coincides with a renewed flurry of interest in the subject, aroused by recent sharp reminders

11. P. 201.

12. *Ibid.*

13. P. 271.

14. P. 189.

15. P. 209.

†Harry C. Black Professor of American History, The Johns Hopkins University.