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.

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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.

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of the executive's personal exposure to serious trouble and substantial expense under the federal antitrust and securities laws.

Professor Bishop of Yale has effectively collaborated with Judge Washington in revising and bringing up to date the latter's pioneering study of indemnification included in his 1942 treatise on compensation of corporate executives.[1] The subject was then in high fashion. The depression had spawned a large number of shareholder derivative suits against corporate executives, and, while the few reported cases left the issue in some confusion, it had been generally assumed that the costs incurred by an executive in at least a successful defense of an action should or could be paid by the corporation. But in 1939, *New York Dock Co.* v. *McCollom*,[2] a suit for declaratory judgment brought by the corporation against certain of its directors who had successfully defended a derivative suit, held that the directors were not entitled to reimbursement. In the years immediately following this decision, hundreds of corporations adopted by-laws providing for indemnification. In April 1941, New York led a parade of states by amending its corporation law to authorize and provide for indemnification under prescribed circumstances.

Writing in 1942, Judge Washington evaluated indemnity provisions. Noting some examples of indemnity arrangements bordering upon exculpation, he cautioned restraint and warned management that it would make a grave mistake if it sought greater dispensations than enlightened public opinion would grant.

In 1956, Professor Bishop, then in private practice, took another hard look at the issues.[3] Whereas Judge Washington had focused on problems arising in derivative suits, Professor Bishop's study emphasized the different principles applicable in suits brought by third parties against the corporation and its directors. Frankly concerned with the uncertainties faced by persons invited to serve as directors of corporations in which they had no substantial financial stake, he asked rhetorically whether such persons, realistically evaluating the risks involved, would consider "the game worth the candle".[4]

The basic issue is how far risks, traditionally imposed on management, may properly be shifted to the enterprise. In terms of policy, fairness to the individual must be balanced against the necessity of ensuring that proper standards of management responsibility toward shareholders and the public are maintained. Fairness requires reasonable protection for the individual who acts in good faith. The potential liabilities, counsel fees, and other expenses to which an executive is regularly exposed in his corporate position are of an order of magnitude which, even if tolerable in the corporate scale of income and expenditure, would be overwhelming to the individual. But, as Professor Bishop points out, the line must be drawn somewhere. It is the authors' purpose in

1. WASHINGTON, CORPORATE EXECUTIVES' COMPENSATION (1942)

2. 173 Misc. 106, 16 N.Y.S.2d 844 (1939).

3. *Bishop, Current Status of Corporate Directors' Right to Indemnification.* 69 HARV. L. REV. 1057 (1956).

4. *Id.*, at 1060.

the present volume "to examine the many and complex considerations, legal and otherwise, which affect the point at which that line is drawn and to venture some conclusions as to the nature of fair and reasonable solutions in varying circumstances".[5]

This purpose the authors accomplish very well indeed. They deal with the pros and cons of direct participation by the corporation in the defense of management[6] and with reimbursement.[7] Different considerations are shown to be relevant in "drawing the line" in derivative suits, where the gravamen of the complaint is mismanagement, and in third party actions where the individual's legal troubles usually arise from his actions on behalf of the corporation but where indemnification may involve more troublesome issues of public policy. The authors then cover the ground twice again. First, this is done in a detailed and caustic analysis of the statutes enacted in some 32 jurisdictions, few of which distinguish between the issues presented in derivative actions and those presented in third party actions, and many of which (including the relevant section of the Model Business Corporation Act[8] and its Delaware prototype[9]) the authors regard as "inordinately permissive".[10] Finally, the authors analyze critically the scope and form of typical by-laws which have been adopted by leading corporations. Chapters dealing with the tax status of indemnity payments and the role of the Securities and Exchange Commission, together with Appendices which include the full text of all 32 statutes and 29 examples of by-law provisions, strengthen the book's usefulness as a working tool.

Where should the line be drawn? Clearly, executives ought to be indemnified when they are vindicated on the merits and ought not be indemnified when they have been finally adjudged by a court to be guilty of dereliction in their duty to the corporation. A gray area lies between. The authors' views are succinctly summarized when they give reasonable limits of a by-law providing "the maximum of protection which corporate management really needs and to which it is fairly entitled".[11] They would sanction indemnification when the defense has been successful on the merits. In other cases, they distinguish between derivative suits and third party suits not in the right of the corporation. As to the former, if no payment has been made to the corporation, indemnification of legal expenses is appropriate only after a "genuinely impartial agency"[12] has determined that the individual's conduct was not in fact negligent or wrongful. If payment has been made to the corporation under a settlement or pursuant to judgment, expenses (but never the amount paid to

5. P. v.
6. Pp. 37-74.
7. Pp. 75-111.
8. ABA-ALI MODEL BUS. CORP. ACT, § 4(*o*) (1960).
9. DEL. CODE ANN. tit. 8, § 122(10) (1953).
10. P. 168.
11. Pp. 202-04.
12. P. 202.

the corporation) may be reimbursed only after a court has approved both the settlement and the reimbursement. In third party suits, the authors find wider scope for indemnification. They deem it appropriate to provide indemnification for expenses (including fines and payments in satisfaction of judgment or pursuant to compromise settlement) in civil or criminal cases if a court or other impartial agency determines that the individual was acting in good faith, within the reasonable scope of his authority, and without reason to believe that his conduct was illegal or otherwise wrongful. In third party situations, the authors focus on the good faith of the executive and are less concerned than some other contemporary commentators [13] that fairness to the individual will undermine the regulatory purpose of the legislation giving rise to the liability.

This book will undoubtedly become a standard reference work for lawyers, legislators, and judges called upon to deal with the problem of indemnification. The clarity of its message and the soundness of its scholarship virtually assures that it will influence the development of the law toward the norms delineated by Judge Washington and Professor Bishop.

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13. See Note, *Indemnification of Directors: The Problems Posed by Federal Securities and Antitrust Legislation*, 76 HARV. L. REV. 1403 (1963).

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