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## THE CHIEF JUSTICE AS LEADER: THE CASE OF MORRISON REMICK WAITE

D. GRIER STEPHENSON, JR.\*

*What does all this mean?  
I suppose I shall realize it  
all bye and bye. But it seems  
strange now.*<sup>1</sup>

In recent years, social scientists have found the role of the Chief Justice of the United States to offer an intriguing example of leadership in small groups. Moreover, as political scientists become increasingly concerned with the influence which court conferences and intra-court social relations have on judicial decision-making, it is necessary that the concept of judicial leadership be supplied a firmer empirical underpinning.

Based in part on the earlier work of Professor Robert F. Bales,<sup>2</sup> Professor David Danelski in 1960 applied the concept of dual leadership functions—"task" and "social" leadership—to the judicial behavior of the Chief Justice.<sup>3</sup> According to Danelski, a task leader presents his views with force and clarity; defends those views successfully in debate and discussion with his colleagues; provides guidance for perplexing questions; and assumes substantial responsibility for making suggestions, orienting discussions, and writing opinions. A social leader relieves tension, encourages solidarity and agreement, attends to the emotional needs of his colleagues (especially when their views are rejected by the majority), and is often the best-liked member of the Court.<sup>4</sup> Character-

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1. Letter from Morrison R. Waite to Amelia Waite, March 13, 1874, on file in Morrison R. Waite Papers, Library of Congress [hereinafter cited as Waite Papers].

Standardized spelling and punctuation have been supplied in material reproduced from the Waite papers.

2. See generally R. BALES, *INTERACTION PROCESS ANALYSIS: A METHOD FOR THE STUDY OF SMALL GROUPS* (1950).

3. D. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, 1960 (unpublished paper delivered at the 1960 meeting of the American Political Science Association). A shorter version of this paper was first reprinted in W. MURPHY & C. PRITCHETT, *COURTS, JUDGES AND POLITICS* 497-508 (1961). More recently, the same version has appeared in J. KESSEL, G. COLE & R. REDDIG, *MICROPOLITICS* 266-74 (1970).

4. W. MURPHY & C. PRITCHETT, *supra* note 3, at 497-98.

izing leadership in terms of these task and social functions confirms "the common sense observation that a man who wishes to exert influence over his fellows can do so most effectually if he is both intellectually disciplined and tactful in interpersonal relations."<sup>5</sup>

Professor Walter Murphy has employed the same dichotomy, but has outlined the task and social functions in slightly different detail. The task leader, he says, is concerned with getting the job done. "He tends to ignore personal relations and instead to rivet his attention on the efficient solution of problems which confront the group." The social leader, maintains Murphy, "provides the warmth and friendliness which make interpersonal relations pleasant or even possible. He tends to raise the self-esteem of other members of the group, to accept suggestions readily, to be quick to relieve tensions with a laugh or a friendly joke."<sup>6</sup>

One shortcoming in the descriptions of task leadership utilized by Danelski and Murphy is the combination of the roles of the Chief Justice as manager and as persuasive thinker. It is submitted that a division of the concept of task leadership into concepts of *managerial* and *intellectual* leadership can serve to produce additional insight into what a Chief Justice must do in order to be considered a leader both by his colleagues and by the scholars of a later day.<sup>7</sup>

A Chief Justice as a managerial leader must stay abreast of the docket, maintain a maximum degree of court unity, provide expeditious direction of the judicial conference, and assign opinions thoughtfully and with deliberation. Intellectual leadership may be found in a Chief Justice who presents his views forcefully and persuasively, is a principal source of ideas and doctrine, and provides tactical and strategic guidance in political dilemmas.

As noted, these functions comprising managerial and intellectual leadership seem to lie within the broader concept of task leadership. The advantage of applying a trichotomy of managerial, intellectual, and social leadership instead of a dichotomy of task and social leadership is especially apparent when the individual being studied appears to perform certain task functions better than others. This situation can arise when

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5. Murphy, *Marshaling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 642 (1962).

6. *Id.* at 641.

7. As scholars make greater use of the papers of Justices of the Supreme Court, living Justices may wish to protect the privacy of their tombs by destroying certain documents when they retire. See Mason, *Charles Evans Hughes: An Appeal to the Bar of History*, 6 VAND. L. REV. 1 (1952).

a Chief Justice reaches a bench already populated by at least one intellectual giant whose doctrinal and policy persuasions are shared by a majority of the sitting Justices. Under such circumstances, the new Chief Justice may never become an intellectual leader, even if he shares the same persuasions, but may nonetheless exhibit managerial talents of a high order. The trichotomy proposed here is thus intended as a refinement of the Danelski dichotomy, highlighting leadership in sharper detail by focusing on the Chief Justice in his managerial, intellectual, and social functions. This trichotomy is especially appropriate for an examination of Chief Justice Morrison Remick Waite.

After a description of the functioning of the Court prior to Waite's appointment as Chief Justice and the political and personal consequences of that appointment, the discussion will focus upon the personalities of the Justices with whom Waite served. Next, Waite's social leadership, as manifested by Court harmony, will be examined. The inquiry then will focus upon the managerial leadership of the Chief Justice, with particular emphasis on his assignment of opinions. Finally, Waite's intellectual leadership will be analyzed in the context of his opinion in the celebrated *Munn v. Illinois* case.

### THE WAITE ERA

While first impressions are not necessarily lasting ones and the circumstances surrounding the advent of a political or judicial chieftain do not necessarily control the development of his career, still it is entirely possible that conditions prevailing at the time of one's arrival in office can affect that environment out of which leadership arises. With these caveats in mind, an examination may be made of the position and prestige of the Supreme Court and the Chief Justiceship at the time of Waite's appointment, the circumstances of his appointment, and the Court personnel during his tenure. A summary of these materials prepared for Mr. Waite in 1874 would have been something less than auspicious.

#### *The Supreme Court under Salmon P. Chase*

Although studies on the attitudes of the population toward Supreme Court Justices were unknown in Waite's day,<sup>8</sup> there are indications that the Court by 1874 had not recovered fully from the diminished prestige

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8. For a discussion of attitudes toward today's Supreme Court see Kessel, *The Supreme Court and the American People*, 10 *MIDWEST J. POL. SCI.* 167 (1966). Note the discussion of other literature in G. SCHUBERT, *THE CONSTITUTIONAL POLITY* 143-51 (1970).

suffered during the last years of Chief Justice Taney's tenure. Lincoln and Taney were great antagonists, in large part because Taney and several of the Justices had absented themselves from the "dominant national alliance."<sup>9</sup> Indeed, when Salmon P. Chase became Chief Justice in 1864, the Court appeared to some observers to be, at best, a "fossilized circle of venerable antiquities"<sup>10</sup> and to others, at worst, a group tainted by disloyal or even treasonous attitudes. The prestige of the Court "was at its lowest ebb. From *Dred Scott* through the Civil War, the Court suffered from acute public and official distrust. In case of another disaster, it had a very small inventory of public confidence to fall back on."<sup>11</sup>

Several factors hindered the Court's recovery from the despondency of the war and immediate post-war years. Besides the obviously limiting factor of time—Chase's relatively short tenure was overshadowed by the six and a half decades during which Marshall and Taney had served—Chase manifested ambitions to be President.<sup>12</sup> Moreover, a stroke in 1870 left Chase with physical infirmities which probably reduced his personal influence over his colleagues, some of whom were strong-willed and had political and judicial aspirations of their own. Justice Miller (who, together with Justices Swayne and Strong, had eagerly sought to be Taney's successor) remarked that Swayne "artfully beslobbered the President" when Chase became ill, in the event that the Chief Justiceship should become vacant.<sup>13</sup> Finally, Chase lost control of his Court when a majority made a sudden reversal on the legal tender question,<sup>14</sup> marking another "self-inflicted Wound"<sup>15</sup> for the institution still suffering from the reverberations of its *Dred Scott* decision.<sup>16</sup> On this and other major policy questions, Chase led the way only part of the time.<sup>17</sup> Chase's

9. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1958).

10. C. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890*, at 52 (1939).

11. D. Hughes, *Salmon P. Chase: Chief Justice* 95, 1963 (unpublished dissertation at Princeton University).

12. Entry of June 12, 1868, in 1 *THE DIARY OF GEORGE TEMPLETON STRONG* 216 (Nevins & Thomas ed. 1952); D. Hughes, *supra* note 11, at 98.

13. Letter from Samuel Miller to William Ballinger, Jan. 18, 1874, in C. FAIRMAN, *supra* note 10, at 265.

14. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), *rev'd in* *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871).

15. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50 (1928).

16. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

17. In 30 important cases involving general property rights, taxation, and banking, the Court divided 14 times. Chase was in the minority on nine of those occasions, while Justice Nelson, his major antagonist, voted with the majority 11 times. See D. Hughes, *supra* note 11, at 354-55.

bare decade as Chief Justice did permit him to relinquish his office knowing that the Court was a better-functioning body than when he had assumed its leadership. Since, however, the Court's prestige had taken such a plunge during the war years, it is difficult to imagine how Chase could have left the institution in a worse predicament, short of a thorough dismantling by the Reconstruction Congress. Perhaps under the conditions prevailing after 1864, however, survival was no small achievement. When President Grant nominated Morrison Waite to be Chief Justice on January 19, 1874, Chase's successor could at least look with some appreciation to the small, but significant, stature and prestige which the Court had regained since 1864. If Waite was no Taney following a Marshall, he was at least no Chase receiving the all-too-slack reins from a Taney. Clearly the Court had lost some of the tarnish of the war years and was beginning to recover some of its former luster.

### *The Waite Court*

#### *The Chief Justice*

Having described the position of the Court at the time Waite acceded to the Chief Justiceship, it is appropriate to examine the circumstances surrounding his appointment. It has been suggested that "much of the Chief Justice's initial advantage is postulated on the belief that his accepted, i.e., legitimate, role is one of leadership."<sup>18</sup> Fortunately for Waite, Chase had strived to exert leadership and often had succeeded.<sup>19</sup> Although the Court had not had a dominant leader in the Marshall tradition since Taney began to lose control of his Court about 1850, the position and prestige of the Chief Justiceship, as well as the Court itself, apparently had benefitted from the presence of Chase.

Perhaps the least auspicious aspect of Waite's appointment was its source—President Ulysses S. Grant. By 1874, the Grant Administration was overwhelmingly corrupt; moreover, skill on southern battlefields did not guarantee success in the White House. Grant had lost control of the government to those more certain of desirable policy goals and the role of the Presidency in achieving those goals. The fact that Grant had the responsibility of appointing Chase's successor, therefore, did little to encourage those who looked with hope toward increased Court prestige and a general recovery from the judicial diminution of the war years.

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18. Murphy, *supra* note 5, at 644.

19. D. Hughes, *supra* note 11, at 355.

Waite's nomination on January 19 and confirmation on January 21, eight months after Chase's death, was the concluding phase in an appointment charade which was thoroughly typical of the Grant era. As Secretary of State Hamilton Fish sighed, "We had '*a time*' over the Chief Justiceship . . . . It has been a hard parturition—I hope that what has been produced may prove successful."<sup>20</sup> The fact that Waite was chosen by Grant—even if he was the fifth or seventh choice<sup>21</sup>—appeared to predestine the enterprise to mediocrity at best. This was probably what Gideon Welles meant when he told his son, "It is a wonder that Grant did not pick up some old acquaintance, who was a stage driver or bartender for the place. We may be thankful that he has done so well."<sup>22</sup> The *Nation* expressed a similar view held by the major part of the country's press.

The President has, with remarkable skill, avoided choosing any first-rate man. Mr. Waite stands in the front rank of second-rate lawyers . . . . But he undoubtedly is a man of the highest character, and has the best possible standing at the bar of his own State . . . . On the whole, considering what the President might have done, and tried to do; we ought to be very thankful, and give Mr. Waite a cordial welcome.<sup>23</sup>

A second noticeable aspect of Waite's appointment was his relative obscurity. That the new Chief Justice—the man with "every requisite

20. Letter from Hamilton Fish to Robert C. Schenck, Jan. 19, 1874, in C. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 2 (1963).

21. The sources conflict on the question whether Waite was Grant's fifth or seventh choice. See C. MAGRATH, *supra* note 20, at 2-21.

22. Letter from Gideon Welles to Edgar T. Welles, Jan. 22, 1874, in C. MAGRATH, *supra* note 20, at 2.

23. NATION, Jan. 22, 1874. Waite himself seemed to make a good first impression. On his first circuit tour in the southeast, one reporter wrote:

This legal luminary is not peculiarly striking in general appearance. He is of medium height, stoutly built, and apparently robust in health. He has a mass of dark hair tinged with gray, clean-shaven upper lip, and full iron-gray beard. A big mouth; prominent nose; large dark eyes, deepset and overhung by thickened eye-brows, and a fine, broad forehead, make up his physiognomy. The face certainly indicates strong intellectual powers. In his manner he is exceedingly genial and pleasant. Evidently Chief Justice Waite is not only [a] thorough lawyer with mental faculties of a high order, but in addition a thorough gentleman, courteous, refined and high-toned. He has made a most favorable impression upon the bar here.

Raleigh (N.C.) Sentinel (quoting the Charlotte Observer), June 11, 1874. Clipping in Waite Papers, *supra* note 1.

except repute"<sup>24</sup>—did not possess a national reputation may, in part, account for the haste with which he was labeled a "representative of that respectable mediocrity which seems to be most esteemed just now."<sup>25</sup> His only national post had been as one of the three American counsel in the Geneva Arbitration. While his service in that post had been distinguished, it was not of the sort which engendered public recognition. Furthermore, he had neither acquired a standing in the legal profession outside the Ohio Bar nor argued a case before the Supreme Court of the United States. Waite's lack of national prominence may well, of course, have aided his chances for confirmation—his abstention from the national political scene saved him from having acquired a battery of formidable enemies. Without a national reputation as a jurist or as an attorney, however, Waite began his labors among political elites who reacted initially with doubts or wait-see attitudes.

A third aspect of Waite's appointment pertinent to a study of his abilities as a leader was the aspiration of several of the sitting Justices to the Chief Justiceship. To be charged with leading a group, some of whom coveted the post now bestowed upon an "outsider," could only have resulted in initial hostility. Indeed, every Republican member of the Court except Davis and the newly-appointed Hunt considered himself an active candidate for the center seat during the eight-month interregnum after Chase's death during which Justice Clifford presided. Justices Swayne and Strong actively sought the favors of the President in 1873-74 as they had in 1864, with the latter suggesting to his agent, J. Wayne MacVeagh, what a good Chief Justice he would make.<sup>26</sup> Justice Miller employed the tactics of inundation with Grant as he had done with Lincoln in securing his initial appointment to the Court, and Navy Secretary George M. Robeson actively pressed the candidacy of Justice Bradley.<sup>27</sup> Such efforts had not been altogether restrained even prior to Chase's death; the signs of Chase's failing "must have been obvious to the Court and could scarcely have failed to excite the ambitions for his place" which his colleagues nursed. They were "somewhat in the same category as vultures, circling around the failing Chase waiting for their chance. Vultures seldom work together well."<sup>28</sup>

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24. A. CONKLING, *THE LIFE AND LETTERS OF ROSCOE CONKLING* 463-64 (1889).

25. Germantown (Pa.) Chronicle, quoted in N.Y. Tribune, January 21, 1874, in C. MAGRATH, *supra* note 20, at 17.

26. D. Hughes, *supra* note 11, at 93.

27. C. FAIRMAN, *supra* note 10, at 265.

28. D. Hughes, *supra* note 11, at 314.



*The Justices*

In these several aspirants and their colleagues, Waite found an interesting array of personalities with whom he would have to deal as court leader. As might be true with any group of nine men with ages ranging from 58 to 71, there were those whose presence at times made life somewhat less than pleasant for the others. The Associate Justice of highest seniority was Nathaniel Clifford, the sole hold-over from the pre-war administration of President Buchanan, whose age perhaps had made him obstinate and trying and whose tenure on the Court was exceeded only by the length of his opinions.

Samuel Miller, possessed of a commanding personality and mind, came to the study of law after having practiced medicine. Having been an eager candidate for the center seat, Miller resented Waite's arrival to no small degree, and on more than one occasion expressed an unflattering opinion of the new Chief Justice.<sup>29</sup>

Miller and Joseph P. Bradley, were among the intellectual giants of the post-war Court. In the 20 years during which the two men shared the bench, however, they were something less than the closest of friends,<sup>30</sup> perhaps in part because each possessed such an expansive mental capacity. Unlike Miller, Bradley apparently held no resentment for Waite, and, as will be shown, served as an intellectual support for his Chief Justice.

The Presidential ambitions of David Davis, Lincoln's "manager" at the 1860 Republican Convention, proved to be a special problem for Waite. Davis had been designated the candidate of the National Labor Reform Party in 1872. Prior to his resignation in 1877 to enter the United States Senate, Davis stood in sharp contrast to Waite over the propriety of Davis' political campaigning,<sup>31</sup> which situation had caused Sam Miller to snort, "I can't hinder Davis from governing every act of his life by his hope of the Presidency...."<sup>32</sup>

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29. "We have had our new Chief Justice with us now three weeks, twice in conference. He is pleasant, a good presiding officer, *mediocre*, with a fair amount of professional learning." Letter from Samuel Miller to William Ballinger, Mar. 21, 1874, in C. FAIRMAN, *supra* note 10, at 349. As is suggested by Miller's attitude in the above correspondence, his published letters give little indication of any humility.

30. Fairman, *What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U.L. REV. 49, 62 (1950). Much of the background information included here on the several Justices comes from Professor Fairman's article.

31. See generally Stephenson, Book Review, 119 U. PA. L. REV. 536 (1971).

32. Letter from Samuel Miller to William Ballinger, Dec. 5, 1875, in C. FAIRMAN, *supra* note 10, at 373. Davis gave the impression of one who had time for everything

Stephen J. Field of California,<sup>33</sup> whose 35 years on the Court included all 14 years of Waite's tenure, manifested attributes of several of the other Justices. "Like Miller, he was strongly purposeful; like Bradley, deeply learned; like Chase and Davis, hankering to be President; and in a way peculiarly his own, provocative of irritation and conflict."<sup>34</sup>

As had Miller, Noah H. Swayne studied medicine before becoming a lawyer, but, unlike Miller, Swayne would have proved more capable in his initial calling. Only a year younger than Clifford, Swayne was probably the weakest of Lincoln's Supreme Court appointees.

If Swayne was less than brilliant, Ward Hunt, while a decent and kindly man, failed to carry his share of the Court's work load. He became totally incapacitated in late 1878 but refused to retire until January 1882, when Congress finally provided for his future with a proper pension. Finally, the contributions of William Strong to the field of private law have not been remembered nearly so well as the addition to the Preamble of the United States Constitution which was proposed by an organization of which he was president.<sup>35</sup>

Morrison Waite thus found a bench well-endowed intellectually with Bradley, Miller, and Field; embittered occasionally by Clifford, Miller, and Field; and encumbered at times by the ponderous Clifford, the mediocre Swayne, and the failing Hunt.

#### CHIEF JUSTICE WAITE AS A SOCIAL LEADER

The individuals on the Court in 1874 provided both the setting and the subjects for Morrison Waite's social leadership. Among their separate prides and passions and their sometimes conflicting personalities and judicial vendettas, the new Chief Justice would attempt to fashion the camaraderie necessary for the Court to function effectively. Generally,

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except court business. He once complained to his Chief, "I really have not the time to write the opinion in *Habersham v. Bates County*. I have three cases to write opinions in, and I must go to Maryland . . . to transact some personal business, or I can't go to the centennial, which I am very desirous of doing." Letter from David Davis to Morrison Waite, April 29, 1876, Waite Papers, *supra* note 1.

33. Field was born in Connecticut, but like so many of that day—Waite included—moved west.

34. Fairman, *supra* note 30, at 64.

35. It was suggested that the Preamble be amended so as to begin: "Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler of all nations, and his revealed will as the supreme law of the land . . ." *Id.*

the record indicates that Waite as social leader was equal to this challenge. His careful handling of Justices such as Field, Clifford, and Swayne demonstrates that the new Chief Justice was peculiarly sensitive to the benefits which could be derived from relieving interpersonal tension and supporting fallen egos. His success is most apparent in the manner in which he assigned the writing of opinions.

Shortly after Waite assumed his post, the Court held in *United States v. Union Pacific R.R. Co.*<sup>36</sup> that the national chartering acts did not require a railroad to pay semi-annual interest prior to maturity of the government's second-mortgage bonds. Very likely because the decision was in favor of the railroad, Waite assigned the opinion to Davis, the most "radical" member of the Court at that time. Waite may have adopted an approach similar to that which Charles Evans Hughes would utilize as Chief Justice—have conservative justices write liberal opinions and liberal justices write conservative opinions in an attempt to preserve an image of judicial impartiality.<sup>37</sup> At the conference in which Davis was given the task of writing the opinion, Waite remarked that it would be well that the opinion not be written by a Justice closely identified with the railroads. While Bradley had often served as counsel for railroads before joining the Court, it was Field whom Waite most likely had in mind. As Chief Justice of the California Supreme Court, Field not only had established a reputation with his pro-railroad decisions but also was a close friend of Leland Stanford, the head of the Central Pacific.<sup>38</sup>

Field communicated his resentment at not receiving the assignment in a letter to Waite. The Chief Justice responded the following day:

On my return home last evening I found your note. The direction I gave the case to which you refer, was after mature consideration and most certainly was not influenced by any personal feeling against yourself. I had no idea that you specially desired it, and when the announcement was made, supposed you would not fail to see its propriety. If what I have done is not satisfactory to my brethren, I regret it, but I think they and you would, as you said the other day, "put your minds alongside of mine" for a little while, it would be seen that my judgment was correct.<sup>39</sup>

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36. 91 U.S. 72 (1875).

37. 2 M. PUSEY, CHARLES EVANS HUGHES 678-79 (1951).

38. See generally C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW, 240-67 (1930).

39. Letter from Morrison Waite to Stephen Field, Nov. 7, 1875, Waite Papers, *supra* note 1.

However, Waite's efforts were insufficiently soothing for Field, who scratched off a second note. Waite made another attempt to mollify the Californian:

I have just received and read your note of yesterday. I think you must be mistaken in your understanding of the words I used after the consultation. If those you give were the words I did use, certainly they were not used in the offensive sense you appear to have received them.

We cannot conceal from ourselves the fact, that in the excited state of feeling which exists, or has existed, with the public in respect to the connexion of the government with the Union Pacific there may be some feeling of disappointment at the result of this case. It seems to me, therefore, to be specially important that the opinion should come from one who had not only been understood to be watchful of the government purse, but who would not be known as the personal friend of the parties representing these rail road interests. There was no doubt of your intimate personal relations with the managers of the Central Pacific, and naturally you, more than any one else in the court, realise the vast importance of the great work that has been done. To tell the truth also, I knew that you were dissatisfied with the manner of the argument on the part of the government, and was afraid that this might unconsciously to you, find expression in the opinion. Once in and it would be difficult to get it out. Nothing could be more unfortunate for the court than to have it there.

No one appreciates your vigorous style more than I do, and, but for these considerations I should have been glad to have had its use in this case—And while I regret that you do not look at the matter as I do, I cannot but think my judgment was for the best interest of us all. As for opinions in important cases, I don't know, but I think you fared better than the Judge [Davis] who has the case did at the last term. Certainly during the present term he has had no advantage over you. I certainly intend to treat all my brethren fairly in this most delicate and at the same time important part of my work. If I do not, it is the fault of the head and not of the heart.

I am glad to know that I misunderstood some of the expressions in your former note, and that I may hope to retain your friendship and respect if my conduct shall be such as to merit it.<sup>40</sup>

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40. Letter from Morrison Waite to Stephen Field, Nov. 10, 1875, Waite Papers, *supra* note 1.

Waite's second reply may have satisfied Field no better than did the first, but a biographer of the Chief Justice reports having found no evidence that the "fiery Californian" ever again challenged Waite's opinion assignments.<sup>41</sup> Indeed, if a single challenge produced such a torrent of correspondence, Field understandably may have concluded that his time might be better spent on other pursuits. Field probably had taken Leland Stanford's motto *Labor omni vincit*<sup>42</sup> as his own, but there was clearly a limit to the number of concerns which he could acquire and maintain.

Nathaniel Clifford presented a special case for Waite. As noted previously, this carry-over from the Buchanan Administration was the oldest member of the Court, and early in Waite's tenure his intellectual capacity was weakening.<sup>43</sup> His opinions became so ponderous that Waite once intimated politely of one, "It will take a good while to find out *all* there is in it. Bro. Clifford is never very short."<sup>44</sup> Clifford, however, was alert enough to sense what others were thinking of his work and was quick to take offense. Waite attempted on several occasions to mollify Clifford, often with flattering letters. On one occasion, for example, Clifford voted with the majority in a case, was assigned the opinion, but later returned it to Waite, declining to write it because he was unprepared; Waite wrote the opinion himself. In another such instance, Clifford had been upset by something and notified Waite: "I am not willing to write an opinion in No. 93 and therefore return it. If you want No. 99 for any of your friends you may have that also."<sup>45</sup> Waite replied carefully and cautiously:

I regret that my assignment of cases to you last evening was not satisfactory. I gave you 93 because you were familiar with the law of copyright, and although the case was a simple one, I thought it might be made the foundation of one of your useful opinions.

In looking over the cases again, since your note came, I can now see where I might have pleased you better, and in respect to one in particular some things have occurred to me that I overlooked before, which make it apparent that there would have been great

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41. C. MAGRATH, *supra* note 20, at 260.

42. C. SWISHER, *supra* note 38, at 246.

43. Justice Miller left no doubt in his correspondence of the seriousness of the problem. See C. FAIRMAN, *supra* note 10, at 351, 373-74, 378.

44. Letter from Morrison Waite to D. T. Wright, Feb. 22, 1877, Waite Papers, *supra* note 1.

45. Letter from Nathaniel Clifford to Morrison Waite, Dec. 25, 1878, Waite Papers, *supra* note 1.

propriety in giving it to you. I regret that it is now beyond my control.

If you still think you do not want 93, I will keep it and announce the decision stating simply the grounds on which it is placed without more. I wanted to give you the two important land cases which Judge Miller has, but you said expressly in the conference that you did not want them.<sup>46</sup>

A misunderstanding between Swayne and Miller in conference led to a similarly delicate note from Waite to Swayne<sup>47</sup> in an attempt to avoid further conflict with Miller, who considered Swayne scarcely worthy of the robe, and was willing to say so.

Felix Frankfurter once termed opinion assignments "the deployment of his judicial forces" and the Chief Justice's "single most important function."<sup>48</sup> As will be demonstrated,<sup>49</sup> Waite's adeptness in carrying

46. Letter from Morrison Waite to Nathaniel Clifford, Dec. 25, 1878, in B. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 259 (1938).

47. As I said in the consultation room, I am entirely satisfied with your opinion. It expresses the law as I understand it precisely. I think however, Miller had the right to believe from what occurred when the case was decided, that the point which he suggested yesterday was not to go into the opinion. While no formal vote was taken he had good reason to believe his objection was assented to.

I submit to you, therefore, whether, under all the circumstances, that part of the opinion had better not be left out. You know how important it is to avoid, as far as possible, all occasion for unpleasant criticism in our consultations, and if one judge is allowed to write an opinion on a different ground from that on which the decision was placed, it is easy to see how difficult it may sometimes be to enforce the rule as to others.

I hope you will receive this suggestion in the same spirit it is made. I repeat that the opinion is entirely satisfactory to myself, and I should not mention the subject again after what occurred yesterday, except to prevent this case becoming a precedent in case we should think it necessary to apply the rule hereafter.

I leave the matter entirely to your own judgment.

Letter from Morrison Waite to Noah Swayne, Nov. 8, 1879, Waite Papers, *supra* note 1. On a separate occasion, Swayne complained about his work load, and Waite attempted to accommodate him by letter: "It was an imposition to ask you to take the French . . . case. Send it back to me and I will write it. I shall have plenty of time this week." Letter from Morrison Waite to Noah Swayne, April 10, 1875, in B. TRIMBLE, *supra* note 46, at 265.

48. The Chief Justice's interest went beyond assignment to content, especially when dealing with some of the lesser lights among his colleagues. "Can you find time to run your eye over this opinion between now and Monday morning," Hunt once asked, "to see if I have stricken out enough to bring it within your idea of the facts? . . . Put pencil marks [around?] anything about which you doubt." Letter from Ward Hunt to Morrison Waite, Dec. 9, 1876, Waite Papers, *supra* note 1.

49. See text following note 64 *supra*.

out this aspect of his duties indicates his ability as a managerial as well as social leader.

### CHIEF JUSTICE WAITE AS MANAGERIAL LEADER

The reputation of the Supreme Court at a given point in time in large part is determined by the ability of the Court effectively to handle its case load. Efficient disposal of cases requires that the Chief Justice, or someone else, act as manager.

The number of cases on the dockets of the Supreme Court after the Civil War, and especially during Waite's term as Chief Justice, evidences a quantum leap in the Court's work load. In 1850, for example, 253 cases were pending before the Supreme Court; by 1860, the number had grown slightly to 310. By 1870, however, the case load had more than doubled to 630, and by 1880, there were 1212 cases on the Court's docket. In 1890, two years after Waite's death, Melville Fuller and his Court faced a docket of 1816 cases. However, these figures are dwarfed by the 29,013 cases pending before the federal circuit and district courts in 1873. A prolific source of federal litigation was bankruptcy; however, even after repeal of the Bankruptcy Act, the number of cases in the federal courts continued to increase, and by 1890 had jumped to 54,194.<sup>50</sup>

The swelling of the dockets resulted primarily from the growth and expansion of the nation's economy and the assumption by federal courts of litigation previously within the exclusive jurisdiction of the state courts. Beginning in 1863, Congress enacted legislation permitting removal from state to federal courts of a wide variety of cases; this trend culminated with the Act of March 3, 1875, which permitted any suit asserting a federal constitutional or legal right to be commenced in the federal courts or to be transferred there for final disposition. Surprisingly, the opening of the floodgates received hardly a single contemporary comment.<sup>51</sup>

The Supreme Court during Waite's tenure lacked the power of discretionary review enjoyed by today's Court. At that time, the size of the dockets, rather than the preferences of four Justices, was the primary determinant of the number of formal decisions each term.<sup>52</sup> For instance, the Court announced 193 decisions during the 1875 term; in contrast, only 26 cases were decided during the 1825 term. Moreover, until 1891,

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50. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 60 (1928).

51. *Id.* at 65.

52. *Id.* at 302.

the members of the Court were still saddled with some circuit responsibilities.<sup>53</sup> Additionally, the Court was under-manned during much of Waite's tenure. Justice Hunt suffered a stroke in 1878 and did not write another opinion or otherwise participate in the work of the Court during the three years he waited for Congress to grant him a pension. The mental faculties of Justices Clifford and Swayne continued to decline until those Justices were replaced; in the meantime, their presence probably hindered their colleagues in the discharge of their collective responsibilities. "I am hard at work, but still very well," Waite wrote to Clarke Waggoner. "The experience of this fall has satisfied me entirely that six or seven is less than nine."<sup>54</sup>

As presiding officer under these less than ideal circumstances, Waite apparently did his best to stay abreast of the case load, but the sheer weight of numbers was overwhelming. The Chief Justice's correspondence reveals a backlog of 600 cases awaiting decision in May of 1876, 1000 cases in March of 1877, 1054 cases in 1878, and 1500 cases in 1888.<sup>55</sup> An enormous backlog thus became an accepted, if unpleasant, part of Court life.

Waite, therefore, as a managerial leader cannot be judged by the same standards which would be applied, for example, to Taft, whose Court benefitted from appellate relief measures enacted by Congress, in part at Taft's instance.<sup>56</sup> Indeed, in light of the quantity of litigation faced by the Court after the Civil War, it is difficult to suggest how Waite could have managed better than he did; the Court's record could have been much worse.

Together with Miller, Waite questioned the trend of gradual enlargement of the Court's jurisdiction. In the *Pacific Railroad Removal Cases*,<sup>57</sup> for example, the Chief Justice in a rare dissent objected to the majority's holding that, because a federal charter of incorporation was a "law of the United States," any litigation involving a corporation under federal

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53. Act of March 3, 1891, chap. 517, 26 Stat. 826. Circuit riding, however, had been drastically curtailed by the Act of April 10, 1869, 16 Stat. 44.

54. Letter from Morrison Waite to Clarke Waggoner, Jan. 2, 1881, in B. TRIMBLE, *supra* note 46, at 273.

55. B. TRIMBLE, *supra* note 46, at 250 n.43. In comparison, there were 793 cases remaining on the dockets of the Supreme Court at the end of the 1969 term and 767 cases remaining at the end of the 1968 term. 84 HARV. L. REV. 254 n.10 (1970).

56. Act of February 13, 1924, ch. 229, 43 Stat. 936; Act of September 14, 1922, ch. 305, 42 Stat. 837. Taft's other reform proposals did not become law until after his death. Act of June 19, 1934, 48 Stat. 1064. See A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 88-120 (1964).

57. 115 U.S. 2 (1885).



charter could be pressed in federal court. Waite may well have had second thoughts about an earlier decision in which he spoke for the Court in permitting an expansion of federal jurisdiction to certain suits involving corporations.<sup>58</sup>

Although his attempt to manage an ever-increasing case load required avid pursuit of a work ethic, Waite felt compelled to maintain a strenuous schedule for emotional reasons as well.<sup>59</sup> His work load grew to the point that in 1886 he had to decline an invitation from President Eliot of Harvard University to travel to Cambridge to receive an honorary degree.<sup>60</sup> The numerous "little" cases were as demanding of Waite's time as the "big" cases. Of the 193 cases decided during the 1875 term, for example, the issues in litigation related largely to common law topics (81) and special areas such as admiralty (5), bankruptcy (13), patents (8), and claims against the government and legislation concerning the public domain (21).<sup>61</sup>

Waite attempted to ease the load somewhat by appointing a "Reporting Committee" to study the possibility of condensing decisions; the effort, however, was in vain.<sup>62</sup> Maintaining at least semi-harmonious relations among the Justices was perhaps costly in terms of efficiency, but, in light of the case load, shorter opinions would have brought only temporary and partial relief at best.

58. *Ex parte Schollenberger*, 96 U.S. 369 (1877). See generally F. FRANKFURTER & J. LANDIS, *supra* note 50, at 90.

59. "You know better than I, that I must have just such work as I do have, or I cannot exist. More than fifty years of life, which has never known a minute that could be devoted to idleness, must be hard worked or it will go off on a switch. I do work all the time, but I am not overworked." Letter from Morrison Waite to Amelia Waite, Nov. 13, 1881, Waite Papers, *supra* note 1.

60. Waite had been willing, however, to be of assistance on several occasions to the "law department" at Yale, his alma mater. For instance, in 1874 he presided at ceremonies commemorating the 50th anniversary of the establishment of the law school. See Letter from Francis Wayland to Morrison Waite, Mar. 4, 1874, and subsequent correspondence, Waite Papers, *supra* note 1.

61. F. FRANKFURTER & J. LANDIS, *supra* note 50, at 302.

62. I have also been on a committee of our court appointed at the close of our last term to consider the subject of Reporting. The main object is to secure more condensed reporting. We have thus far been unable to agree on any thing useful, because the main objection is the length of the opinions themselves.

While perfectly conscious as the committee is, of whom the C. Justice and Swayne are the other members, and as also are most of the judges, that the opinions are far too long we have not been able to suggest any satisfactory remedy.

C. FAIRMAN, *supra* note 10, at 408-09.

Adequate relief from the overburdened dockets could come only from Congress,<sup>63</sup> which was very much aware of the Court's dilemma. While it was widely agreed that reform was needed, the exact form of the proposed relief was hotly debated; the rules of jurisdiction and review were as politically significant then as they are today. The Chief Justice was, of course, a supporter of reform which would provide for new and enlarged machinery to handle the added litigation while not relinquishing federal judicial power. While Waite apparently lacked Chief Justice Taft's enthusiasm for Congressional lobbying, he was nonetheless outspoken.

If mastery of the Court's dockets proved to be an insurmountable task for Waite and his Court, the Chief Justice fared much better with the management of the internal affairs of the Court. His skill at reducing conflict and tensions among his brethren carried over into his abilities as a leader in the conference.<sup>64</sup>

Assignment of opinions is an important aspect of the managerial leadership of a Chief Justice. Since the opinion often serves as the public expression of the rationale of policy, the choice of the author of the opinion can play an important role in maintaining court cohesion and in gaining public acceptance of the ruling. There are strong indications that Waite fully understood that designating the author of an opinion involved more than a simple, if important, concern that each Justice do his fair share of the work. As has been suggested, Waite on occasion would assign the opinion for a conservative ruling to a liberal Justice or the opinion for a liberal ruling to a conservative Justice in an attempt to preserve an image of impartiality.

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63. Compare the current efforts by Mr. Chief Justice Burger to achieve jurisdictional reform. *N.Y. Times*, July 4, 1971, at 24, col. 1.

64. Waite arrived in Washington in 1874 determined to be a leader, especially in conference. He was greeted as an "interloper" and sought Benjamin Rush Cowen's advice as to the approach he should assume. Cowen suggested that Waite let no uncertainty prevail about the center seat. The following day Waite reportedly told Cowen, "I acted on your suggestion literally. I got on the box as soon as I arrived there this morning, gathered up the lines and drove, and I am going to drive and those gentlemen know it." B. TRIMBLE, *supra* note 46, at 135. While Cowen's part in the story may well be apocryphal, the account is probably indicative of the Chief Justice's mental outlook on assuming his duties.

Waite's driving apparently was successful, for when Justice Miller, hardly one of the Chief Justice's greatest admirers, found himself as senior Justice presiding in 1885 during Waite's illness, he discovered the full demands of the office. "I always knew that he did a great deal more work than I," Miller confided to Edward C. Ballinger, but "what I had suspected hardly comes up to the draft on his time as he performed those duties . . ." Letter of Jan. 18, 1895, in C. FAIRMAN, *supra* note 10, at 391.

In addition, Waite very likely made a conscious effort to vote with the majority, especially in important cases, in order to retain the power to assign the opinion. In 1881, the Chief Justice compiled for the historian George Bancroft a list of those cases decided since his appointment which Waite thought were of greatest constitutional importance. Waite noted 72 such cases; of these, he had voted with the minority in only six, thus retaining the power to assign the opinions in the remaining 66. Furthermore, of these 66, the opinions generally had been written by the most intellectually capable members of the Court. Waite assigned 14 opinions to himself, 11 each to Field and Miller, 10 to Strong, seven to Bradley, and five to Harlan. Swayne and Davis had written four and two, respectively, and Clifford and Hunt only one.<sup>65</sup> By retaining a plurality of the important cases for himself, Waite demonstrated to the Court's clientele and to his colleagues that the Chief Justice as leader *ought* to write the greater number of opinions.

In addition to these "important" cases which Waite noted for Bancroft, the Chief Justice bore the larger part of the opinion-writing burden generally. Of 3470 cases decided with opinion during Waite's 14-year tenure, he authored 967, or 28.13 percent; frequently, the Chief Justice was forced to take over an opinion when the Justice to whom it had been assigned asked to be excused because of illness.<sup>66</sup> While many of these opinions amounted to little more than brief statements of law followed by the order of the Court, a clear commitment of time still was involved.

Furthermore, in connection with his power to assign opinions, Waite's total of public dissents between 1874 and 1888 amounted to 54, or 1.56 percent of the 3470 cases. During the same period, by comparison, Miller

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65. C. MAGRATH, *supra* note 20, at 263. Waite could be insistent at times with his assignments. On one occasion Field wrote:

I have the two railroad cases from Minnesota and the case from Indiana argued by Mr. Lincoln, to write this week. I would therefore much prefer that you should give the pencil patent case . . . to some other judge to write. The cases I have will occupy all my leisure, besides the necessity of attending to the birth of that Louisiana baby.

Waite replied: "Can't you keep the pencil case and write it during next week? I prefer that you will do so if you can. However, if you prefer not to do it let me know and I will find someone else to take it. P.S.—I will promise not to give you anything next Saturday if you will do so." Letters from Stephen J. Field to Morrison R. Waite, and from Waite to Field, April 23, 1876, Waite Papers, *supra* note 1.

66. Justice Field once attributed part of the blame for a certain malady to "brother Harlan's 33 years old whiskey." Letter from Stephen Field to Morrison Waite, Feb. 2, 1878, Waite Papers, *supra* note 1.

entered 87 public dissents, Bradley, 104, and Field, 122. These three were the only Justices who served throughout Waite's 14-year tenure. Clifford, who died in 1881, had recorded public dissents on 69 occasions after 1874, while Strong's dissents numbered 54 in the six years prior to his retirement in 1880. Davis dissented 27 times between 1874 and 1877, and his successor John Marshall Harlan, whom Felix Frankfurter was later to label an "eccentric exception,"<sup>67</sup> managed 75 dissents before Waite's death in 1888. Although several members of the court appear to have been less inclined to dissent than the Chief Justice (Hunt, Matthews, Blatchford, and Woods publicly dissented on 23, 16, seven, and seven occasions, respectively, during their years with Waite), certainly Waite's rate of public dissent was one of the lowest and can be attributed in part to his desire to control assignment of opinions and his belief that the Chief Justice ought to move with his Court if the Court could not be persuaded to move with him. An examination of Waite's personal docket books indicates that he sometimes switched his vote after conference so that he could choose the author of an opinion.<sup>68</sup> In order to preserve judicial harmony and reach definitive results, Waite on occasion demonstrated a willingness to compromise his own views. For example, in *Stone v. Farmers Loan & Trust Co.*,<sup>69</sup> one of the "Railroad Commission Cases," the Court considered a challenge to the operation of a Mississippi regulatory commission based on a presumed contract in the charter granted by the state to the Mobile and Ohio Railroad. In the first draft of his opinion upholding the position of the state, Waite barely mentioned due process of law. Miller, Bradley, Matthews, and Gray had voted with the Chief Justice in conference, with Blatchford not taking part. Field, Woods, and Harlan dissented. When the Chief Justice circulated his opinion, Matthews added several paragraphs noting that state regulation of railroads was limited by considerations of just compensation if the regulation was confiscatory and by the equal protection clause if it was discriminatory. The Chief Justice accepted his colleague's suggestion, no doubt having in mind that a change of mind on Matthews' part would result in a tie vote and affirmance of the circuit court's decision in favor of the Mobile and Ohio. Waite then incor-

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67. *Adamson v. California*, 332 U.S. 46, 62 (1947) (concurring opinion).

68. Magrath, *Chief Justice Waite and the "Twin Relic": Reynolds v. United States*, 18 VAND. L. REV. 507, 510 (1965).

69. 116 U.S. 307 (1886).

porated his fellow Ohioan's suggestion into the final version of the opinion.<sup>70</sup>

As a managerial leader, Morrison Waite strived to maintain court unity. Of the 3470 cases decided with opinion between Waite's appointment in 1874 and his death in 1888, one or more Justices entered a *public* dissent in only 359, or 10.34 percent. However, Waite's personal docket books show a recording of at least one dissent *in conference* in 44 percent of the cases decided through the 1886 term.<sup>71</sup> Of the 247 cases disposed of by the Court during the 1887 term prior to Waite's death, conference dissents were recorded in 35 percent and public dissents in only 10 percent. While a Justice often might have changed his vote on further consideration or simply have concluded that a public dissent, especially one involving a separate opinion, was not worth the trouble, the Chief Justice may well have been instrumental in maintaining a high degree of unity.<sup>72</sup> In any event, in light of the heavy case load with a Justice often writing at least 30 majority opinions a term, it may have been a relief not to dissent.<sup>73</sup>

#### CHIEF JUSTICE WAITE AS INTELLECTUAL LEADER

Although Waite should receive an acceptable score as a social and managerial leader, his abilities as an intellectual leader appear to have been less than acceptable. While an inquiry into the intellect of another admittedly is fraught with danger, the purpose of this discussion is not to suggest the depth of the Chief Justice's intellect, but rather to assess, among other things, the degree to which he appears to have been a major source of ideas and doctrine manifested in decisions of his Court.

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70. *Id.* at 331.

71. Magrath, *supra* note 68, at 509.

72. In a letter to Amelia White, the Chief Justice once told of successfully persuading Clifford and Field not to file a public dissent in an unnamed case. Letter of May 19, 1878, Waite Papers, *supra* note 1.

Morrison Waite was clearly interested in court statistics himself. In the last pages of his docket books, he would often record the number of opinions each Justice had been assigned and the number of times each had dissented.

73. In contrast, during the 1970 term, the Justices of the Supreme Court each wrote an average of 12 opinions, ranging individually from nine to 16. If concurring, separate, and dissenting opinions are included, the average number of opinions written by each Justice was 32 (individually, the numbers ranged from 20 to 52). Of the 148 cases disposed of by per curiam and full opinions, dissents were publicly voiced in 61 percent. The Court's dockets were burdened by 4212 cases, of which 790 were left pending at the conclusion of the June 1971 term. 40 U.S.L.W. 3035-41 (1971).

The discussion will focus upon what likely was the most significant area of controversy confronting the Court during Waite's tenure—governmental regulation of business. Other important matters which faced the Court will be mentioned only in passing. For example, the Court greatly narrowed the scope and diminished the impact of the Civil War amendments and the several enforcement acts designed to protect and aid the emancipated slaves. The post-war shaping of the commerce clause and the intriguing problems created by the proliferation of municipal bonds demanded much of the Court's time. The Court during Waite's tenure fielded a wider variety of questions than it does today, if only because the Chief Justice and his colleagues had far less control over the types of cases set for argument. Indeed, the questions were so diverse that no available published source contains an adequate summation and analysis of the Court's reaction to each question it faced, much less a clear description of Waite's particular role in deciding those cases. Even the Chief Justice's two major biographers treat only three or four policy areas. The purposes of this brief inquiry can adequately be served by restricting the discussion to a thorough examination of Waite's participation in one of the most significant cases of his tenure. This examination should prove at least suggestive of the Chief Justice's abilities as an intellectual leader in general.

*Munn v. Illinois*<sup>74</sup> was the first significant constitutional response given by the Waite Court to the movement favoring utilization of the recently adopted fourteenth amendment as a barrier to governmental regulation of business enterprises.<sup>75</sup> The case involved an attempt by the State of Illinois to set maximum rates charged by the grain elevator industry in Chicago.<sup>76</sup> It was argued that the establishment of maximum rates by legislation amounted to a taking of property without due process of law.

Oral arguments in *Munn* were heard on January 14 and 18, 1876, while arguments in the companion railroad rate cases had been heard from October 25 through November 4, 1875. One of the Chief Justice's personal memoranda noted:

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74. 94 U.S. 113 (1877).

75. Note, however, the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), decided only a few weeks before the death of Chief Justice Chase. Justice Miller for a five-man majority found the fourteenth amendment much less restrictive of state power than ex-Justice John Campbell and the southeastern Louisiana butchers had hoped.

76. See generally Magrath, *The Case of the Unscrupulous Warehouseman*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 109 (J. Garraty ed. 1964).

At the consultation on the 29th of April 1876 they were continued until the next term under advisement.

At the consultation on the 14th of Oct., they were set down peremptorily for a final vote on the 18th of Nov.

On the 18th of Nov. all the Judges except Field and Strong voted for the judgment in *Munn vs. Illinois*. The same vote was in all the other cases except in *Winona & St Peter vs. Blake*. Judge Clifford did not vote. My impression is his doubt rose on the question of contract in the charter.

The opinions were prepared while the Electoral Commission was in session, and read in conference on the 26 of February. As Judge Davis was to leave the bench on the 4th of March the judgments were announced on Monday the 1st of March, and Judge Field was given leave to prepare a dissent at his leisure.<sup>77</sup>

The Chief Justice's reference to the Electoral Commission is evidence that concern over the outcome of *Munn* and related cases was at least matched and probably exceeded by the national interest in the outcome of the Hayes-Tilden dispute over the Presidency. Five Justices of the Supreme Court joined 10 members of Congress to form the Commission, which divided eight to seven along party lines in recommending that the Republican electors be certified. The Chief Justice administered the oath of office to fellow Ohioan Rutherford Hayes on March 4, 1877, only three days after the public announcement of the decision in *Munn* and the other rate cases. Thus, a crisis in the Presidency between November and March formed the backdrop for Waite's work on the opinions.

In dealing with the extent of the limitations of due process of law, the Chief Justice in his opinion cautioned:

. . . [I]t is apparent that, down to the time of the adoption of the 14th Amendment it was not supposed that statutes regulating the use, or even the price of use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.<sup>78</sup>

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77. July-December 1876 correspondence, Waite Papers, *supra* note 1.

78. 94 U.S. at 125. Waite was merely restating the law, not venturing along a bold new course. Excepting the questions of slavery and secession, most of the Justices did not possess outlooks profoundly different from those of their predecessors in Taney's day.

Waite then suggested that the power of regulation possessed by the states rested on the proposition that "when private property is 'affected with a public interest, it ceases to be *juris privati* only.' " <sup>79</sup> This portion of the Chief Justice's opinion was drawn in part from Lord Chief Justice Hale's treatise *De Portibus Maris*.

Waite thus introduced two classifications of property: that "affected with a public interest" and that which was not so affected. Presumably, the state legitimately could regulate the former but not the latter; however, Waite's description of property "affected with a public interest" probably appeared sufficient at the time to permit broad legislative discretion based on the facts of particular economic situations. Although the Chief Justice did not deny the possibility that a Court could strike down regulatory legislation, he sharply reduced the probability of such action. "We know that [the power to regulate] may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts." <sup>80</sup>

A strong argument can be made that Waite's opinion in *Munn* was the result not of his own thought and effort, but that of his colleague Justice Bradley. Bradley had prepared and forwarded to Waite in late November of 1876 an "Outline of Views," in which he stated:

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... [T]heir Republicanism was that of the Civil War period—a comparatively Jeffersonian Republicanism, idealistic and humane, with a faith in democracy that involved human dignity and independent [and] . . . popular participation in the determination and control of public policy. Some of the new Justices had been lawyers for great financial interests. But practice had not yet become specialized. They had been lawyers for ordinary men as well. They shared the ordinary man's anxiety as to the effect upon him of industrial expansion and the concentration of wealth . . . They wanted the great new United States to be rather an enlargement than a subversion of the United States in which they had grown up. That United States was in danger. How could it be saved without the help of legislation? Conditions being new, legislation must be experimental. Legislative power must therefore be comparatively free.

Nelles, Book Review, 40 YALE L.J. 998, 999 (1931).

79. Property does become clothed with a public interest when used in a manner to make it of public consequences, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

94 U.S. at 126.

80. *Id.* at 134.



I have reduced my notes in the Granger cases into a sort of general *Outline of Views* on the questions involved. The authorities referred to, particularly in the first portion, may be of service to you. Make just such use of it as you please. I wrote it out so as to steady my mind and judgment, and to see how each proposition would appear on paper. I feel more than ever sure that our conclusion is right. And now I dismiss the cases from my mind except to hear your opinion, which I feel sure I shall approve, for I think we look at the subject much in the same point of view.<sup>81</sup>

A close examination of Bradley's correspondence makes reasonable the conclusion that he—not Waite or counsel—was the principal source for the policy and rationale utilized in *Munn*. Furthermore, the departures which Waite made from Bradley's "Outline of Views" appear in retrospect to have weakened decidedly the opinion.<sup>82</sup>

"The principal question in all these cases," Bradley wrote, "is, whether the legislative authority extends to the regulation of charges to be exacted for transportation on railroads, and for receiving and delivering grain in the Elevator Warehouses like that in question."<sup>83</sup> In answer to this question, Bradley's "Outline" established a "fundamental principle" to govern the case:

[W]herever a particular employment, or a business establishment becomes a matter of public consequence so as to affect the whole public and to become a '*common charge*,' it is subject to legislative regulation and control. Whatever affects the community at large ought to be subject to such regulation, otherwise the very object

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81. Letter from Joseph Bradley to Morrison Waite, Nov. 20, 1876, Waite Papers, *supra* note 1.

The memorandum in *Munn* was not Bradley's first such assistance to Waite. In a letter of April 20, 1875, Bradley had advised the Chief Justice on the proper disposition of a case involving railroad charter rights. A short time after the *Munn* memorandum, Bradley forwarded another with a note. "I send you my memorandum in No. 88 which you [may] retain. You will see I refer to *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, respecting which Justice Miller and I had a word yesterday when No. 88 was decided. I send you the memo merely that you may distinguish the present case (if you think desirable) from that in 1 Wallace. I presume they can be distinguished by trying hard." Letter from Joseph Bradley to Morrison Waite, Dec. 17, 1876, Waite Papers, *supra* note 1.

82. Fairman, *The So-Called Granger Cases, Lord Hale and Justice Bradley*, 5 STAN. L. REV. 587, 670 (1953).

83. *Id.*

of legislative power—the consulting of the general good—would be subverted.<sup>84</sup>

Bradley offered excerpts from Lord Chief Justice Hale's treatise and British cases and statutes to demonstrate that such regulation had been viewed for centuries as being thoroughly compatible with—indeed a part of—the principles of common law.

Counsel for the industry, of course, had hoped at least to convince the Court that the determination of what was reasonable in this instance was a judicial, rather than a legislative, function. Waite's response was not nearly so definitive as was Bradley's in his "Outline":

As between individuals it is undoubtedly true that a reasonable price, or quantum meruit, arising on private contract, is a matter to be ascertained judicially. And where the question as to what is reasonable is left at large and not fixed by law, it must be ascertained in the same way. But it is taking a narrow view of the legislative power to deny to it the authority to prescribe and declare what is reasonable. The legislature, as the grand inquest of the state, is the most appropriate power of all others to declare what is reasonable, or the maximum limit beyond which any charge would be unreasonable. In granting charters the legislature daily prescribes this limit, and the fact that the companies which accept such charters voluntarily acceded to the rule prescribed does not detract from the force of the argument that regulation belongs to the legislative authority.

That a wise and prudent legislature, conservative in its character and regardful of vested rights, would not unnecessarily interfere with established rates on the faith of which capital has been expended, has been seen in the example of the British Parliament. But what a wise legislature would do, and what any legislature with powers unrestricted on the subject has authority to do, are very different things. To deny to the legislature the authority to regulate the charges of public employments would introduce the very evil which the legislative regulation of such employments was intended to guard against. It would be to make juries instead of the

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84. *Id.* This "principle," however, was not originated with Bradley. Compare it with the summation made by James Edsall, Attorney General of Illinois: "Whenever any person pursues a public calling and sustains such relations to the public that the people must of necessity deal with him, and are under a moral duress to submit to his term if he is unrestrained by law, then in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law." 97 U.S. at 122.

legislature the judges; and create as many tribunals as cases, each of which might adjudge a different charge to be reasonable.

Undoubtedly, the authority may be abused. So may the taxing power, and every other authority with which the legislature is invested. But it has been well said that the possible abuse of a power, is no argument against its existence.<sup>85</sup>

Even this brief discussion should be sufficient to indicate Waite's reliance on the thinking and research of Joseph Bradley. Since the publication of Bradley's "Outline," several writers have suggested a similar conclusion. However, there have been two additional suggestions which merit consideration. The first is Professor Magrath's contention. In his biography of Chief Justice Waite, Magrath stated:

Where Bradley used Lord Hale's treatise in its historical context—to illustrate "merely one instance" of how price regulation had been justified—Waite converted it into the universal proposition governing legislative price fixing. Unless the public interest principle was meaningless, applying, as Justice Field feared, to every enterprise "engaging the attention and labor of any considerable portion of the community" in which the public had an interest, Waite's usage implied two categories of business: those affected with a public interest, where regulation was permissible, and those not affected where, presumably, regulation was forbidden.<sup>86</sup>

A close reading of Waite's opinion, however, reveals that the legislature was granted power to regulate only "when . . . one devotes his property to a use in which the public has an interest. . . ." <sup>87</sup> Waite's introduction of Hale's example of property "affected with a public interest" in no way appears to negate Waite's earlier reliance on Bradley, since Bradley's discussion of the public interest implied that not all property is so affected. While the determination of what is a reasonable regulation was held to be a legislative and not a judicial question, Waite and Bradley appear to have been in agreement that the determination in the

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85. Fairman, *supra* note 82, at 676.

However, the oft-quoted statement in *Munn* admonishing the people to look to the polls and not the courts for relief from legislative abuse apparently originated with Waite.

86. C. MAGRATH, *supra* note 20, at 186-87 (footnote omitted).

87. 94 U.S. at 126.

first instance of whether certain property is subject to any regulation is a judicial question.<sup>88</sup>

The late Professor McCloskey, on the other hand, suggested that Waite intentionally planted tiny acorns for the growth of the great oak of *laissez-faire* economics in American public law.<sup>89</sup> Although later opinions would indeed rely heavily on Waite's distinction between property affected with the public interest and property not so affected,<sup>90</sup> this depiction appears to rest more upon hindsight than upon historical evidence. McCloskey would have done well to heed Frankfurter's caveat in his discussion of Chief Justice Taney: "One must be on his guard against recreating history by hindsight and attributing to the language of an early legal doctrine the implications which the evolution of experience have put into it."<sup>91</sup> For Waite as well as for Bradley, the limitations of due process of law were violated when any governmental action against individuals appeared sharply arbitrary and stood apart from the accepted practices of law.<sup>92</sup> That this was the position of the Court at that time is evidenced by an opinion of Justice Miller the following term, in which he stated:

It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision.<sup>93</sup>

The *Munn* decision remained the basis of the Waite Court's policy toward state regulation of business, even in the controversial case of *Stone v. Farmers Loan & Trust Co.*<sup>94</sup> in 1886. Although care must be taken not to diminish unnecessarily the Chief Justice's role in the formu-

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88. Bradley had expressed initial approval of Waite's opinion in *Munn*, declaring it to be "an admirable opinion—terse, correct, and safe." Letter from Joseph Bradley to Morrison Waite, Feb. 22, 1877, Waite Papers, *supra* note 1. Bradley, of course, had been quite occupied with affairs of the Electoral Commission.

89. R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 129-30 (1960).

90. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson v. Banton*, 272 U.S. 418 (1927); *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1924).

91. F. FRANKFURTER, *THE COMMERCE CLAUSE* 60 (1937).

92. See generally Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967).

93. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1878).

94. 116 U.S. 307 (1886).

lation of this policy, it is a reasonable conclusion that the principal intellectual force behind the *Munn* opinion was Joseph P. Bradley. While Waite, in the exercise of managerial leadership, strived to maintain this policy during the remaining years of his tenure, credit for its intellectual foundations must rest with his colleague.<sup>95</sup>

### CONCLUSION

Shortly after Morrison Waite's appointment as Chief Justice in 1874, Justice Field wrote with standard acidity:

That matter—the Chief Justiceship is at last settled. We have a Chief Justice. He is a new man that would never have been thought of for the position by any person except President Grant. He is a short thick set person, with very plain—indeed rough features. He is gentlemanly in his manners and possesses some considerable culture. But how much of a lawyer he is remains to be seen. He may turn out to be a Marshall or a Taney, though such a result is hardly to be expected. My objection to the appointment is that it is an experiment whether a man of fair but not great abilities may make a fit Chief Justice of the United States—an experiment which no President has a right to make with our Court.<sup>96</sup>

Supreme Court appointments are to a large degree experimental, as Professor Robert Scigliano has so graphically described.<sup>97</sup> Field's expectation that Waite's jurisprudential stature would fall short of that of Marshall or Taney proved correct, although it is tempting to add that Field himself was neither a Joseph Story nor a James Wayne. However, failing to equal Marshall or Taney is hardly to fail altogether, especially since circumstances probably will never be such as to produce another Marshall.

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95. An examination of the Court's role in legitimizing the declining national interest in civil rights for the freedman—the Waite Court's second most significant policy contribution—would, it is suggested, demonstrate that primary intellectual leadership in this area was supplied by Justices Bradley and Miller.

Perhaps indicative of the intellectual leadership shared by Bradley and Miller are additional statistics on Waite's voting pattern. Of his 54 public dissents, only half (27) were recorded without the companion dissenting vote of either Bradley or Miller, or both. Of Waite's 976 majority opinions, only one lacked the concurrence of either Bradley or Miller, or both. And of the 3416 instances when Waite did not dissent publicly, the majority lacked either Bradley or Miller, or both, on only eight occasions.

96. Letter from Stephen Field to Matthew Deady, Mar. 16, 1874, in C. MAGRATH, *supra* note 20, at 107.

97. R. SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 125-60 (1971).

An examination of the Waite Court reveals that the Chief Justice was a capable social and managerial leader who appears to have tended to relinquish much of the intellectual leadership of the Court to his colleagues. It is reasonable to suggest that Waite's abilities as a social and managerial leader might have suffered had he tried to excel as an intellectual leader. With strong men such as Bradley, Field, Harlan, and Miller, Chief Justice Waite may have served as capably as could be expected. It is questionable whether any other Chief Justice could have performed as well under the circumstances.<sup>98</sup>

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98. According to Kenneth B. Umbreit's evaluation, "Certainly there has been no period during which the Supreme Court has functioned with greater general satisfaction than the fourteen years during which Waite presided over it." K. UMBREIT, *OUR ELEVEN CHIEF JUSTICES* 295 (1938). While Waite's own leadership talents were factors in producing this "general satisfaction," the larger share of credit probably goes to the restraint which most of the Justices were inclined to observe while Waite was Chief Justice. The era was a permissive one for legislatures as they sought to relieve economic growing pains by generous applications of public law. When the Court decreased or negated the effectiveness of laws designed to protect the freedman, the Justices were merely legitimizing in constitutional law the Compromise of 1877.