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CHIEF JUSTICE WAITE: DEFENDER OF THE  
PUBLIC INTEREST, by Bruce R. Trimble.  
Princeton University Press, Princeton, 1938. Pp. ix,  
320. \$4.00.

Robert J. Harris Jr.

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A most constructive suggestion is the speed, accuracy and economy that a photographic method of recordation would produce. It is not unlikely that this will in time completely supplant the present slow, expensive and often inaccurate copying system. The author has displayed a profound knowledge of his subject matter; the work should prove considerably helpful to the legal profession in this time of wholesale financing of real estate by the Federal Government.

LEON SARPY\*

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CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST, by Bruce R. Trimble. Princeton University Press, Princeton, 1938. Pp. ix, 320. \$4.00.

Biographies of judges may perform a number of functions. They may serve to depict legal and constitutional history during the tenure of a particular judge, to analyze the social and constitutional theories which dominate a court at a given time, to examine the environmental forces that have tended to mold the character of a judge, and to evaluate the contributions of a judge to the growth and development of law. In any of these aspects, judicial biography, when competently done, can be very instructive as well as very interesting. As Dean Clark of the Yale Law School has indicated: "There is possibility of brilliant promise in the tracing of the development of constitutional doctrine in the light of the personalities of the Justices . . ."<sup>1</sup>

In his full length but rather sketchy life of Chief Justice Waite, Mr. Trimble announces his intention of showing "something of the influence of Chief Justice Waite, in the solution of the constitutional problems" which faced America during the period of Reconstruction and to narrate the story "of a lawyer of ordinary attainments, with no prior judicial experience, who became a great administrator, and a judge of recognized ability." Either of these purposes is a laudable one, but the manner in which Mr. Trimble has executed them can hardly be said to realize "the possibility of brilliant promise" in judicial biography.

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1. Nation, June 12, 1937, p. 683.

Mr. Trimble's book begins with a note of ancestral nostalgia and ends in a mildly eulogistic tone. The book is marred throughout by excessive quotations of the trivial and the irrelevant, many of which partake of the naiveté of men of enterprise in a thriving and pioneering community. The picture of Chief Justice Waite is more that of a wax figure in a museum than that of a living being who was confused and perplexed at the problems which came before his court and who failed to become a great judge because of the lack of either a definite philosophy or an intelligent skepticism in an age which saw the triumph of business enterprise and the rise of nationalism. This deficiency of the biography may be attributed in part to the colorless personality of Waite, but the major portion of blame must be assessed against Mr. Trimble for his disconnected and repetitious style and his genius for emphasizing the insignificant.

Conceding, however, that political scientists and constitutional lawyers have a certain literary and biographical license in analyzing a judge's contributions to the law, we are still faced with certain shortcomings in Mr. Trimble's book on matters of constitutional theory and interpretation. Very little attention is paid to those great forces which resulted in the triumph of industrial capitalism nor is any great understanding manifested of those nuances and overtones of constitutional theory which had so much influence upon the development of constitutional law during Chief Justice Waite's presidency of the Court. At a time when the Court was transforming the due process, commerce and obligations of contract clauses on the basis of conflicting theories of government, Chief Justice Waite was wavering and inconsistent. Mr. Trimble fails to present the full picture of the impact of these theories upon the Court and his book suffers accordingly.

Chief Justice Waite's fame depends largely upon his writing into American constitutional law Lord Hale's concept of business "affected with a publick interest."<sup>2</sup> Waite's misunderstanding and misapplication of this concept in *Munn v. Illinois*,<sup>3</sup> and the eventual perversion of his original purpose in that line of cases from *Wolff Packing Company v. Court of Industrial Relations*<sup>4</sup> to *Nebbia v. New York*,<sup>5</sup> not only constitute a most important branch of constitutional law and theory, but afford a most revealing insight

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2. See Hargrave, *Law Tracts* (1787) 77.

3. 94 U.S. 113, 24 L.Ed. 77 (1876).

4. 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1924).

5. 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

into the process of judicial legislation. Unfortunately, Mr. Trimble misses much of the significance of all this which, to cite but one instance, has been so ably treated by Mr. Breck P. McAllister.<sup>6</sup>

The literature of American constitutional law does not lack discerning criticism and analysis in constitutional theory and interpretation and in the function of the Supreme Court in the formulation of public policy. Unfortunately, most of this literature has escaped Mr. Trimble's attention, with the result that his chapters dealing with due process, commerce, obligation of contracts, reconstruction, and the nature of the federal system suffer. With less emphasis on such things as Whig campaign circulars in 1842 and other less interesting trivialities and with a more careful study of the impact of nationalism and business enterprise upon the Court in general and upon Chief Justice Waite in particular, Mr. Trimble might have written a significant contribution to the literature of constitutional law. As it is, his book is neither good biographical writing nor good constitutional history. The definitive and complete story of the chance rise of a mediocre and obscure lawyer to high position and fame and of his influence on the law remains to be told.

ROBERT J. HARRIS, JR.\*

## Book Notes

MAY'S LAW OF CRIMES, 4th edition, completely rewritten and revised by Kenneth C. Sears and Henry Weihofen. Little, Brown and Company, Boston, 1938. Pp. lvi, 438. \$3.75.

Although represented to be the fourth edition of May's Law of Crimes, this book is really a new work. The anticipation aroused by the known competence of Professors Sears and Weihofen meets with rather sharp disappointment. The book adds little, if anything, to the existing literature in the field. The authors have apparently examined the mass of periodical contributions elucidating numerous difficult problems, but their own analysis bears little indication of having profited from their van-

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6. McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 Harv. L. Rev. 759.

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