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Book Review

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MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES, 1888-1910. By Willard L. King. New York. The Macmillan Company, Pp. xiv, 394. $5.00.

The subject of this fine biography, Melville Weston Fuller, was the eighth[1] Chief Justice of the United States. Like six[2] of our thirteen[2a] Chief Justices to date, his background was New England. He was born on February 11, 1833, at Augusta, Maine. By dint of careful Yankee thrift, he was enabled to go to Bowdoin college, whence he was graduated, in 1850, a member of Phi Beta Kappa. Fuller, with the rest of his fellows, studied Latin, Greek, Hebrew, French, Spanish, German, and Italian; mathematics, and theological philosophy. There were no "snap" or "reading" courses then offered, and no electives of any kind. In 1851, he went to Harvard Law School, but only for six months; and he returned to Maine not to practice law (except incidentally), but to edit the staunchly Democratic Augusta *Age*. In 1856, despairing of a political future at home in view of the rising tide of Maine Republicanism, and smarting from a broken romance, he went to Chicago, where he hung out his legal shingle with firm of Pearson & Dow.

He became a staunch and eloquent Douglas Democrat in the State Constitutional Convention and Legislature, and carried the "Little Giant's" torch for a vigorous prosecution of the Civil War during the four years of that tragic conflict. He condemned the Emancipation Proclamation, however, as an unconstitutional violation of both State sovereignty and private rights.

For his first eight years as a lawyer, Fuller averted starvation for himself and his family only by the greatest resourcefulness and industry — and by borrowing from relatives and friends. This was due to the sad state of the currency, not to lack of a practice. In accordance with the litigious spirit of the times, "Fuller apparently tried every case that came to him and appealed every case that he lost.

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[1] Counting John Rutledge, who served as Associate Justice from 1789 to 1791, when he resigned. He was reappointed by President Washington as Chief Justice in 1795, but failed of confirmation by the Senate, and consequently never actually served as such.

[2] Oliver Ellsworth, Salmon P. Chase, Morrison R. Waite, Melville W. Fuller, William H. Taft, and Harlan F. Stone.

[2a] *Supra*, n. 1.

There is no record that he ever settled a case." Beginning with 1866, however, Fuller's practice began to expand notably. His reputation for winning cases brought him an increasing amount of both trial and appellate litigation, and his clients came to include railroad companies, banks, the City of Chicago, and others, both individual and corporate, so numerous that he had to turn business away.[2b] There was hardly a field of the law in which he was not experienced and successful. Although he suffered substantial losses in the great Chicago Fire of 1870, he rapidly recovered, and was never thereafter in want of any kind.

In politics, Fuller became a Benton—and later, a Cleveland—Democrat. All his life he had consistently and actively been an advocate of States' rights, sound money, tariff-for-revenue-only, economy in government, and individual civil rights. These principles now seem quite old-fashioned—but so are most of the virtues.

In regard to Fuller's appointment as Chief Justice by President Cleveland in 1888, the author sets at rest many half-truths and myths which have since sprung up. Fuller had already turned down successive offers of appointment as Chairman of the Civil Service Commission, Solicitor General, and Pacific Railway Commissioner, before Chief Justice Waite died. Since the important Seventh Circuit (Illinois, Indiana, and Wisconsin) was unrepresented on the Court, Cleveland decided that the new Chief Justice should, if possible, come from Illinois, and first offered the appointment to Chief Justice Scholfield, of the Illinois Supreme Court. Then followed a remarkable instance of the course of history being turned by a completely irrelevant and highly improbable circumstance: Scholfield had married a very fine woman with most of the frontier virtues, including an insistence on going barefoot in summertime. And Scholfield, though vowing that he "would give his good right arm to be Chief Justice of the United States," decided that under the circumstances he couldn't take his wife to Washington. His friends "sympathized," but concurred in his decision.

The President's nomination of Fuller followed. It was, of course, justified by the latter's integrity and ability as well as by geography. Justice Harlan later wrote Fuller that Cleveland had long and prayerfully considered the appointment, and added, "The Lord is very kind to Cleveland—He always tells him to do the thing he wants to do."

[2b] This was a quarter of a century before the advent of the large law firm.

Fuller's Court then consisted of Samuel F. Miller, Stephen J. Field, Joseph P. Bradley, John M. Harlan, Horace Gray, Samuel Blatchford, and Lucius Quintus Cincinnatus Lamar. Truly, in those days judicial giants walked the land. But they were also men of great diversity and individuality in their philosophies and thinking. Fuller was required to use all his outstanding traits of tact and resourcefulness in reconciling their differences. Justice Holmes, who sat under four Chief Justices[3] and knew several others, observed, "As a presiding officer, Fuller was the greatest Chief Justice I have ever known."

Fuller's first dissent occurred in what is probably the most romantic case ever to come before the Supreme Court.[4] It is certainly the only one involving an Associate Justice of the United States Supreme Court under indictment for murder. Additional characters and elements were a philandering California millionaire (who was, ironically, a United States Senator from Nevada!) and his handsome, dark-eyed, fortune-hunting mistress; the latter's mysterious "promoter," a wealthy, colored ex-"madame" from the "Gold Coast," via New Orleans; a $2,000,000 stake in community property turning on the authenticity of a peculiar holographic certificate of marriage upheld by the California Supreme Court, but denounced as a brazen and clumsy forgery by Justice Field in the Federal District Court; and a former Confederate cavalry colonel, who had also been a Chief Justice of California, afflicted with insanely violent and misdirected notions of honor and chivalry. How the movies have missed this gold-mine literally in their own back-yard is just one more inexplicable Hollywood mystery—perhaps producers have felt that the facts are too bizarre for a public not yet conditioned for anything more improbable than "Destination Moon."

The question to reach Fuller's bench was whether the Federal courts could release on *habeas corpus*, and protect from trial in the California Courts, a United States Marshal who had killed a man in defense of a Federal judge. The homicide had not even occurred while the judge was presiding in court, but while engaged in the quite prosaic, unofficial, and strictly non-Federal but essential function of eating breakfast in a railroad station.

Lamar's and Fuller's dissent was as courageous as it was sound. They believed that even if Marshall Neagle

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[3] Fuller, White, Taft, and Hughes.

[4] Cunningham v. Neagle (In re Neagle), 135 U. S. 1 (1890).

"had gone on trial upon this record, God and his country would have given him a good deliverance"; but in any event, they felt that the State of California had the jurisdiction and the right to try him, if she so decided. Subsequent Supreme Court opinions, as well as Congressional legislation, have recognized the validity of Fuller's position, and relegated *In re Neagle* to that penumbral limbo of cases not quite overruled, but never followed because "limited to their own, unique facts," and because of their "peculiar urgency."

It is impossible to review here the many important and difficult cases to come before Fuller and his Court—e. g., *Leisy v. Hardin*,[5] *Northern Securities Co. v. U. S.*,[6] *Holden v. Hardy*,[7] *Muller v. Oregon*,[8] *The Insular Cases*,[9] and many others. The most valuable section of the book, however, deals with the *Income Tax Case*.[10] Millions of words (including scores of law review articles) have been written about the economic, political, and constitutional aspects of this *cause célèbre*. From now on however, nothing more can be written without the aid of this book. King has taken full advantage of access not only to the records of the Court, but also to many letters, notes, and data long hidden in the family "archives" of most of the Justices and other parties concerned. His analysis of the constitutional history involved, of the arguments of illustrious antagonists both in and out of court, and of the Court's own deliberations in conference and by written communication between the Justices, is handled ably, luminously, and dispassionately.

Fuller, and the majority of the Court aligned with him, have often been criticized for ultra-conservatism, "property-mindedness," "obstructing progress," and all the rest of it. It seems clear to this reviewer, however, that the language of the Constitution and the intention of its framers plainly invalidated the income tax there attacked as an unproportioned direct tax. The Court was then faced with the problem of whether to construe and apply the Constitution as written and intended by those who drafted it, or to construe it in accordance with current political,

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[5] 135 U. S. 100 (1890).
[6] 193 U. S. 197 (1904).
[7] 169 U. S. 366 (1898).
[8] 208 U. S. 412 (1908).
[9] DeLima v. Bidwell, 182 U. S. 1 (1901); Downes v. Bidwell, 182 U. S. 244 (1901); Fourteen Diamond Rings v. U. S., 183 U. S. 176 (1901); Dorr v. United States, 195 U. S. 138 (1904).
[10] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601 (1895).

popular, and legislative desires. This is a problem which has confronted our Supreme Court with increasing frequency: how shall our eighteenth-century Constitution be applied to twentieth-century atomic-age problems? It may be interpreted as understood and intended by its framers, subject to amendment by democratic action when the people so determine,[11] or it may be given such interpretation as would permit nearly any action currently desired. If the latter approach is to be adopted, then it becomes pertinent to ask, whose desires shall thus be given *carte blanche!* (1) those of the President appointing the Justices, (2) those of the majority of the Legislature or of executives in office and power at the moment or (3) those of the Justices themselves? This is the preeminent problem in constitutional jurisprudence facing the Court and the country today.

Fuller's Court, unlike those of Marshall and Hughes, carved few new roads into the wilderness of political science and social progress. And perhaps his Court's dissents—which Fuller disliked having, but which perforce he often wrote or concurred in — were more important than its majority opinions in forecasting and shaping the future course of the law of the land.

The United States Supreme Court is our great national arbiter. Such cases as *Marbury v. Madison*,[12] *McCulloch v. Maryland*,[13] *Gibbons v. Ogden*,[14] the *Dred Scott Case*,[15] *Munn v. Illinois*,[16] the *Federal Income Tax Cases*,[17] the *Schechter Poultry Case*[18]—to name only a few of the many that come at once to mind—have changed the direction of American history dramatically and definitely, not only as the result, but often in the teeth, of "movements," depressions, Presidents, and Congresses. Therefore, any book is necessarily important which depicts the leading figure on that tribunal over a span of twenty-two years, which sheds light on the personalities and philosophies of all the Justices during that period, and which gives intimate and heretofore undisclosed motives, reasons, and details regarding the alignment of the Court on the historic cases before it. To be sure, the adjudications of Fuller's Court were

[11] As was accomplished by the adoption of the XVIth Amendment, which authorizes federal income taxes.
[12] 1 Cranch. 137 (U. S. 1803).
[13] 4 Wheat. 316 (U. S. 1819).
[14] 9 Wheat. 1 (U. S. 1824).
[15] Scott v. Sandford, 19 How. 393 (U. S. 1857).
[16] 94 U. S. 113 (1877).
[17] *Supra*, n. 10.
[18] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

not as basically formative as those in the opening third of our nineteenth century. Fuller had not the vision, the ability, or the opportunity to be the architect of government that John Marshall was, nor does this modest work have the all-inclusive historic scope of Beveridge's classic four volumes.[19] This book will, however, take its place beside those of Swisher,[20] Delaplaine,[21] Monaghan,[22] Barry,[23] Fairman,[24] Duffy,[25] and Trimble[26] in the line of valuable biographies of our Supreme Court Justices. And it fills one of many yawning gaps in this series informatively, critically, honestly, and entertainingly.

—PAUL S. CLARKSON*

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[19] Albert J. Beveridge, *The Life of John Marshall*, 4 vols., Bost. & N. Y., Houghton Mifflin, 1916.

[20] Carl Brent Swisher, *Roger B. Taney*, N. Y., Macmillan, 1935; *Stephen J. Field, Craftsman of the Law*, Wash., Brookings Inst., 1930.

[21] Edward S. Delaplaine, *The Life of Thomas Johnson*, N. Y., F. H. Hitchcock, 1927.

[22] Frank Monaghan, *John Jay*, Indianapolis, Bobbs-Merrill, 1935.

[23] Richard Barry, *Mr. Rutledge of South Carolina*, N. Y., Duell, Sloan and Pearce (1942).

[24] Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862-1890*, Harvard Univ., 1939.

[25] Herbert S. Duffy, *William Howard Taft*, N. Y., Minton, Balch, 1930.

[26] Bruce R. Trimble, *Chief Justice Waite*, Princeton, Princeton University Press, 1938.

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