

MELVILLE WESTON FULLER. By Willard L. King. New York: The Macmillan Co. Pp. x, 394. \$5.00.

MELVILLE W. FULLER was born in Maine in 1833. In 1856, he moved to Chicago and struggled for ten years there to build a law practice. He dabbled in politics in a minor way, serving a term in the state legislature. After the Civil War he settled down to serious and profitable practice, becoming one of Chicago's leading lawyers. He developed an acquaintance with Grover Cleveland, who in 1888 appointed him Chief Justice of the United States, a position he held until he died in 1910.

Fuller was the kind of nonentity of routine competence whom American life occasionally puts in high positions. The appointment he received went to Illinois because Cleveland thought it useful for the forthcoming elections to give the position to that state. While Fuller was a prominent Chicago lawyer, he was far from being the most prominent. William Goudy was as good a Democrat, as good or better a lawyer, just as conservative, and had a greater reputation.¹ John Peter Altgeld, four years later to become Governor of Illinois, might conceivably have been considered,² and certainly would have been better. Cleveland's own first choice was Judge Scholfield, of the Illinois Supreme Court, who declined. Since the Republicans controlled the Senate, Cleveland had to make an appointment which would be supported by Illinois' Republican Senator Shelby Cullom (who in fact did carry the Fuller appointment through to confirmation). Cullom made what was probably a perfectly accurate response to Cleveland's inquiry about Fuller when he said that Fuller was "one of the five best lawyers of Illinois who belong to his party."³

If one were to rank the Chief Justices from Marshall through Stone in terms either of accomplishments as a judge or impact on our own times, it is hard to imagine that anyone could avoid putting Fuller near the bottom of the list. Marshall, Taney, Waite, Taft, Hughes, and Stone were surely infinitely superior to him in legal attainments.

If the measure of distinction is influence on the life of our own times, Fuller's score is as close to zero as any man's could be who held his high office so long. Mr. King speaks of Fuller's "modesty" in assigning major cases to his brethren, rather than in keeping them himself, of his "unobtrusiveness." The fact is that Fuller was so unobtrusive that he has pretty well effaced himself altogether from history's rolls; of the 840 opinions of the Court he wrote, there is scarcely a one which is today of the slightest concern.

1. For a few words on Goudy, supporting the conclusion that he was "the acknowledged leader of both the Chicago and mid-western bar during the period when that region was having its greatest boom," see TWISS, *LAWYERS AND THE CONSTITUTION* 76-80 (1942).

2. At the Illinois Democratic legislative caucus to select a candidate for United States Senator in 1885, "Altgeld was fourth on the list, coming ahead of Governor John M. Palmer and Melville W. Fuller, who in a little while was appointed chief justice of the United States." BARNARD, *EAGLE FORGOTTEN* 70-71 (1938).

3. Frank, *Supreme Court Justice Appointments: II*, 1941 *Wis. L. Rev.* 343, 353.

The constitutional law casebooks, laden with opinions by his colleagues, ordinarily contain two opinions by Fuller. One is *Leisy v. Hardin*,⁴ which held invalid a state law prohibiting the bringing in of liquor in the original packages. The next year Congress passed the Wilson Act, in effect overruling Fuller's opinion, and the second Fuller opinion to survive is *In re Rahrer*,⁵ which upheld the constitutionality of that Act. I have always supposed that those two opinions were passed on in the casebooks to illustrate how badly a Court could be embarrassed when it crawled too far out on a limb, and how silly it could look when it crawled back.

One of the leading constitutional law casebooks has in addition, among its 300 cases, excerpts from three other Fuller opinions. One is a trifling bit of three paragraphs, saying that a legislature cannot be enjoined from passing a law, a point which was already well settled before Fuller took it up.⁶ The second presents a serious point concerning the power of states in respect to exports and imports; and the portion quoted consists to an appreciable extent in a quotation from Justice Bradley.⁷ The third, quoted in a short abstract, is Fuller's 1895 opinion invalidating the income tax, *Pollock v. Farmers' Loan & Trust*.⁸ This, says Mr. King, is "undoubtedly his greatest" opinion.⁹ If it is, it conveys a good idea about the rest of them.

But, says Mr. King, Fuller was the Court's great and unquestioned expert on matters of jurisdiction and procedure. This was not necessarily a good thing. The Dictionary of American Biography observes, "He was certainly not a reformer of legal procedure, even where reform seems today to have been imperative."¹⁰ My colleague, Professor J. W. Moore, when asked about Fuller's expertise in this field, said in astonishment, "Good Lord! I always thought that since Fuller was so muddle-headed in this field, he *must* have had a primary interest in substantive law."

Fuller was outstanding in the degree of attention he gave to matters of administrative detail and Court protocol. Mr. King's book is replete with instances of his supervising the Court Reporter very closely, picking him up on head-note points or other details. Mr. King quotes a note to the Reporter which we are led to believe was typical:

"In *Mendez v. Holt* (128 U.S. 514) the initials of the name of the English reporter Johnson, are given V.C.—3rd line from top of page 522. I think but am not sure that they are H.V.C. P.S. They are H.R.V." ¹¹

4. 135 U.S. 100 (1890).

5. 140 U.S. 545 (1891).

6. *McChord v. Louisville & N. R. Co.*, 183 U.S. 483 (1902), in DODD, *CASES ON CONSTITUTIONAL LAW* 213 (4th ed. 1949).

7. *Patapsco Guano Co. v. North Carolina Board*, 171 U.S. 345 (1898), in DODD, *op. cit. supra* note 6, at 746.

8. 158 U.S. 601 (1895), DODD, *supra* note 6, at 102.

9. KING, 204.

10. 7 *DICTIONARY OF AMERICAN BIOGRAPHY* 61 (1931).

11. KING, 142.

He made it something of a rule not to attend dinners for any person who had not come to call on him formally, in part because he didn't like dinners, but in part because he felt that the dignity of office required it. Holmes, once inviting him to dinner in honor of a Japanese friend, concluded his note, "If you would honor us with your presence he would come to meet you rather than you to meet him, on the general principles of gravitation. You would add greatly to our pleasure, and I don't think that the dignity of your office would be impaired."¹²

Historical estimate must be that Fuller's name gained such luster as it has from the office he held, rather than that the office drew distinction from the man who held it. This is suggested, in an oblique way, by passages on Fuller's early life. King affects a touch of the mystery story writer's device of "If they could have but known then. . . ." In speaking of an ancestor, Daniel Cony, ". . . a great grandson [was to be] Chief Justice of the United States." Fuller [inevitably!] "once told his cousin Paulina that he would some day be Chief Justice of the United States." ". . . These women did not live to see their boy become Chief Justice of the United States." ". . . On eleven occasions the future Chief Justice of the United States was guilty of whispering in chapel." He was jilted by a girl in Maine, and "In later years the Chief Justice of the United States never failed to call on her in his annual visit to Augusta."

These wisps are from the book's first 35 pages. They are collected to underline a point: when an author has said that Melville W. Fuller was Chief Justice of the United States, he has said about him everything that is worth saying. Would any writer as able as Mr. King ever be compelled to refer to Marshall, or Taney, or Holmes in terms of the one accomplishment of obtaining an office?

2.

Mr. King, a Chicago lawyer, has been working on this volume for years, and writes of his subject with the affection of an old friend. He is very kind to Fuller, and puts different emphasis on his subject than that suggested in the first section of this review.

In one paragraph, Mr. King finds in one opinion evidence of Fuller's "pluck . . . grit . . . resourcefulness . . . influence . . . moderation . . . and adroitness."¹³ Elsewhere, he praises Fuller's appearance in some detail; his dignity; his "demeanor . . . almost majestic"; his humor, courage, and independence, his scholarship, gentleness, kindness, human sympathy, and, above all, his modesty.¹⁴

But King's affection for his subject does not cause him to lose objectivity. All the pleasant words just quoted can well be warranted, and if Mr. King

12. KING, 318.

13. KING, 169.

14. KING, 328-337, *passim*.

says so, they doubtless are. Fuller had courage, and he was modest. His appearance in the standard pictures always seem to me a little seedy; but I suppose it could be "majestic" if you don't mind unkempt hair and a straggly moustache.

Since Mr. King is an honest biographer, the word "able" does not appear on the list. He concedes that Fuller wrote almost no opinions in great cases, that his style was "not impressive," and was "labored," that some opinions were poorly organized, and that his fact statements were too long.¹⁵

But on one point, King stands up squarely for the capacities of his subject, and proves his point. Fuller must have been a superb manager of the conference, and an excellent administrator of the work of the Court. The King materials, with their current of notes among Justices, are unquestionably an outstanding contribution to the literature on the internal workings of the Court. The labor of collecting those papers must have been stupendous, and they were worth it. Mr. King's book deserves reading for those chapters alone, and he offers substantial evidence for his proposition that Fuller was the Court's outstanding presiding officer.

King's illustrations of Fuller's tact are numerous. The anecdotes should be saved for the book; how Fuller bridged an unpleasant moment between Harlan and Holmes; how he strove to get the senile Field off the Bench; how he restrained Holmes from using a word in a dissent which might annoy his brethren; and many more.

It is fair to conclude, as King does conclude, that Fuller's success "lay in his character rather than his intellect. . . . He was an extraordinary Chief Justice in his relations with his colleagues."¹⁶

3.

A biography of Fuller could be approached in at least two ways. The period 1890-1910 could be studied as a unit in legal history, or more broadly, American history, with a primary but not exclusive focus on Fuller; or the job could be tackled as a personal study, without much attention to the general drift of events. King chose primarily the latter technique, which has some advantages, but also some handicaps.

Fuller's Chief Justiceship was the period of constitutional development in which *laissez faire* finally came in full force to the Supreme Court. It was a period of a great number of overrulings of the less economically doctrinaire predecessor courts, and in turn is probably the most overruled Court of our history.

Fuller's were the years of the *Debs* case,¹⁷ officially inaugurating government by injunction; of the *Pollock* case,¹⁸ mentioned above; of the *E. C.*

15. *Ibid.*

16. KING, 336.

17. *In re Debs*, 158 U.S. 564 (1895).

18. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

Knight case,¹⁹ which so sharply contracted the Sherman Act, and the Commerce power; of *Smythe v. Ames*²⁰ and the beginning of rate review; of *Lochner v. New York*²¹ and *Adair v. United States*,²² putting the ten hour day and the yellow dog contract for the time being outside the reach of legislatures. These were the years in which, to adapt Holmes' phrase, Herbert Spencer's *Social Statics* were substituted for the Constitution.²³

These things are now all gone. They gave the Fuller Court the character it had. That character peers through only faintly in this book.

But it is not fair to criticize an author for choosing a different subject than would the reviewer. King chose to stick close to Fuller, and to leave social perspective alone. He faithfully recounts the events of a life time, and his researches, and especially the abundant manuscript quotations, will teach every reader much well worth knowing about the Supreme Court, 1888-1910. The book reads easily and enjoyably, and deserves rank as a valuable addition to judicial biography.

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19. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

20. 169 U.S. 466 (1898).

21. 198 U.S. 45 (1905).

22. 208 U.S. 161 (1908).

23. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

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