Melville Weston Fuller, Chief Justice of the United States, 1888-1910 (Willard L. King, 1950)

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Mr. King has written a useful book about his fellow Chicagoan Melville Fuller, Chief Justice between Waite and White. Most lawyers probably know less about this period of the Supreme Court of the United States than any other, due partly to the relatively few crucial cases decided and partly to the absence of genius from the Court. There was nothing like "the power to tax is the power to destroy" of Marshall. The basic constitutional questions had been settled by Marshall's Court or, at least, the basic policy had been determined. The Court under Chase and Waite had already placed a narrow construction on the Civil War amendments, particularly the Fourteenth, giving a maximum of latitude to the states, to the chagrin of the radical Republicans.

During Fuller's long tenure there was comparatively little public indignation at the Court's actions, although the Court was accused of favoring the vested interests in the Sugar Trust,¹ Debs,² and Income Tax³ cases, all decided in 1895. At least there was nothing like the uproar caused by the Dred Scott case⁴ or by the Court-packing of President Grant in an attempt to obtain a reversal of the first legal tender case.⁵ Perhaps the Chief Justice was partly responsible for the relative present obscurity of his Court. Despite the frequency of dissents, the Chief Justice was usually able to keep dissenting opinions temperate and prevent violent differences among the justices from making newspaper copy. Justices Miller and Holmes, who between them served under Taney, Chase, Waite, Fuller, White, Taft, and Hughes, a period of nearly eighty years, both said Fuller was the greatest presiding officer they had ever known. This kind of ability, however valuable, cannot compete with that of a Holmes in the struggle for legal immortality. "The 14th Amendment does not enact Herbert Spencer's Social Statics" is remembered long after administrative capacity is forgotten.

The twenty-two years of Fuller's service on the Court are by no

²In re Debs, 158 U.S. 564 (1895).
⁵Hepburn v. Griswold, 8 Wall. 603 (U.S. 1869).
means unimportant. The power of the Federal Government to regulate commerce was extended; suits between states were numerous; and toward the end of the period the Court began dealing with the social legislation of states. Justice Brewer said paternalism was odious to him, and what is odious to a judge is apt to be unconstitutional, as is illustrated by the Court's decision in Lochner v. New York, holding invalid a state law limiting to ten the hours of daily work in bakeries.

Chief Justice Fuller's most famous opinion is in Pollock v. Farmers Loan and Trust Co., holding a federal income tax to be a direct tax. Although Mr. King stoutly defends the opinion against contemporary criticism, he is objective enough to print the enlightening statistic showing that the five anti-tax judges were from wealthy states while the four pro-tax judges were from poor states.

The Insular cases presented the difficult problem of determining the status of the new territory acquired as a result of the Spanish War. The majority of the Court, intensely nationalistic, refused to hold that "the Constitution follows the flag," to use the expression of William Jennings Bryan. In view of the present struggle of conflicting ideologies, one may speculate on our moral loss in failing to adopt Fuller's views, as expressed in his dissent in the Downes case:

"That theory [the Court's] assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power."

Mr. King has written in the main about Fuller and only incidentally about the Court. The book begins with Fuller's birth in Maine during

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6198 U.S. 45 (1905).
7See note 3 supra.
Jackson’s administration, and quite a few of his ancestors are thrown in for good measure. The author must have done a prodigious amount of digging for Fuller material. The most interesting of the incidents related by Mr. King, however, concern the members of Fuller’s Court. To one toughened by years of reading briefs and appellate opinions, Mr. King’s style seems almost sprightly at times. The best example of this is the sex-and-blood-spiced story of the feud between Judge Terry and Justice Fields, who had been together on the California Supreme Court. Terry attacked Fields in a California railroad station. Neagle, a marshal assigned to protect Fields, shot and killed Terry. Naturally Mr. King includes details omitted by Justice Harlan in his opinion in the Terry contempt case⁰ and by Justice Miller in his later opinion in the Neagle habeas corpus case.¹¹

Mr. King makes one fairly well acquainted with Chief Justice Fuller’s fellow judges. Samuel Miller, the empiricist from Iowa, was the philosophical as well as political opposite of the dogmatic Fields. These two were the survivors of the Court from Lincoln’s day. For those who haven’t heard it before, the story of the efforts of the brethren to get Fields to retire after senility set in is quite interesting. With some exaggeration, Mr. King calls Bradley of New Jersey the Holmes of the early Fuller Court. Blatchford of New York was the work horse who rarely dissented. Justice Harlan, the former Union colonel from Kentucky, is best described by Holmes, who told Sir Frederick Pollock that Harlan’s mind was a powerful vise, the jaws of which couldn’t be got within two inches of each other. The scholar of the Court was Horace Gray of Massachusetts, whom Holmes succeeded. Gray’s brother, John Chipman, is familiar as the author of the standard work The Rule Against Perpetuities. Mr. King makes the Fuller period seem quite recent by anecdotes concerning Samuel Williston, who was Justice Gray’s secretary in 1888.

Chief Justice Fuller was no scholar but he was an intellectual. His judicial work was competent but not exceptional. Apparently he knew how to win friends and influence people, brilliant people like Bradley and Holmes as well as considerably less brilliant ones like McKenna. Without surrendering any of their intellectual independence, his brother judges desired Justice Fuller’s approbation. One gets no flashes of new insight into either people or events from Mr. King’s

⁰Ex parte Terry, 128 U.S. 289 (1888).
¹¹In re Neagle, 135 U.S. 1 (1890). The Court held that Neagle could not be tried for murder by the California court.
book; one does get to know better some men well worth knowing, and is apt to acquire a high regard and personal affection for Chief Justice Fuller.

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This is the first work devoted to describing in detail the practice and procedure in the Supreme Court of the United States to appear in over twenty years. As such it fills a genuine need, for in recent times the governing statutes, the Court's own rules, and the unwritten practices have been materially altered.

In this book the authors take you by the hand and conduct you on a detailed tour of the Olympian operations which are carried on and housed in the magnificent, gleaming, white marble palace in Washington where sits the Supreme Court of the United States. They bring, as it were, the Supreme Court to you, which is no mean accomplishment, for the Court, like Mahomet's mountain, requires us to come to it. Most lawyers may never have occasion to invoke the Supreme Court's jurisdiction; if they do, without benefit of previous experience or of skilled collaboration, the whole process usually appears to them to be somewhat mysterious and terrifying. With Supreme Court Practice as a guide, the mystery is dispelled and the terror abated. Awe remains, as it should in relations with this august tribunal. (No one should aspire to familiarity with the Supreme Court; not only is it in vain but a school child may tell what it breeds).

"The object of this book is to tell lawyers what they will need to know in order to handle a case in the United States Supreme Court" (p. 1). It achieves this objective well. It is not, nor is it intended to be, exhaustive in its treatment of Supreme Court jurisdiction and procedure; but its considerable detail and practical approach will probably prove adequate for most purposes. And, as the authors say, "If a difficult problem arises, the authorities cited will serve as leads to further research" (p. 1).