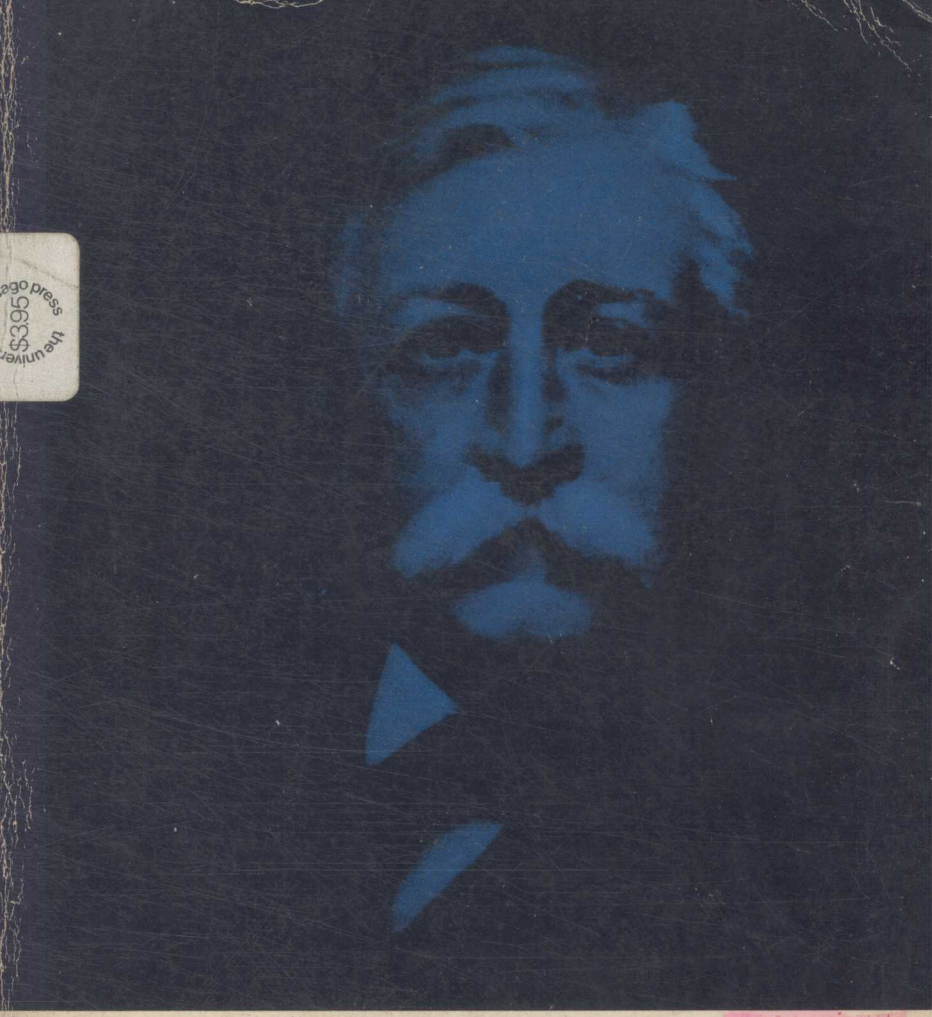

MELVILLE WESTON FULLER

CHIEF JUSTICE OF THE UNITED STATES 1888-1910

by WILLARD L. KING

WITH AN INTRODUCTION BY PHIL C. NEAL

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THE COURT AND THE CONSTITUTION

A SERIES EDITED BY

Philip B. Kurland

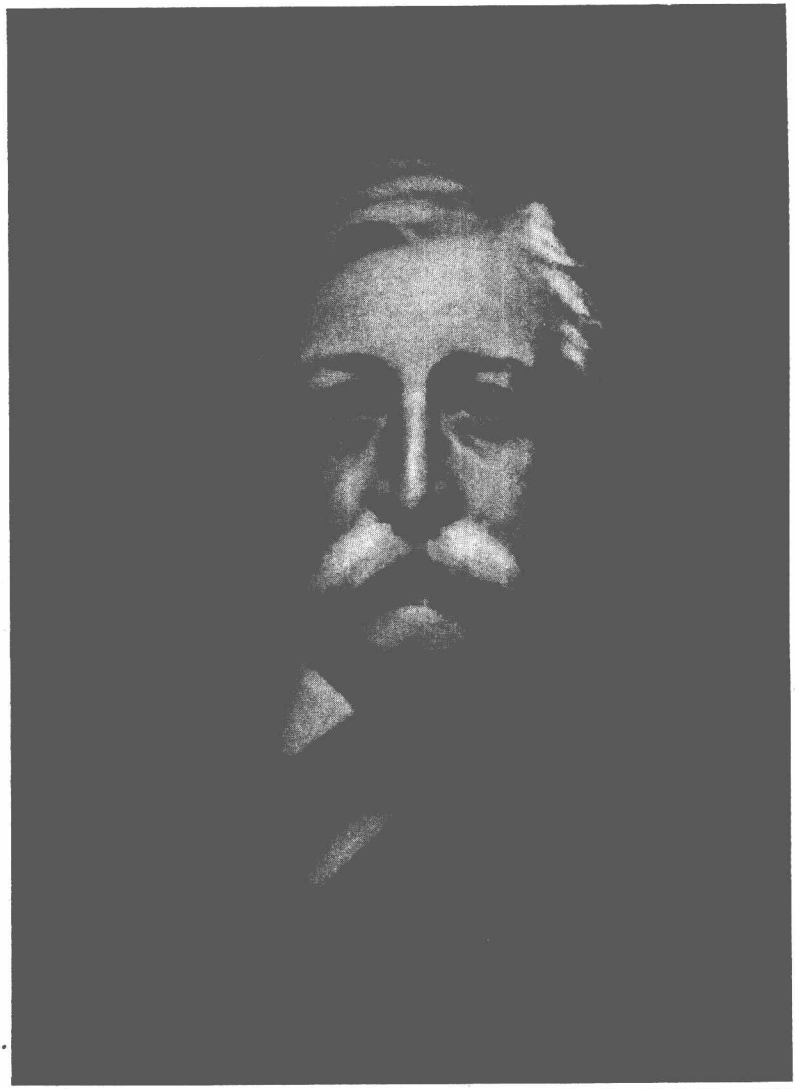

PHOTO BY CLARENCE BUCKINGHAM MITCHELL, FROM ROBERT HINCKLEY PORTRAIT, UNION LEAGUE CLUB, CHICAGO

MELVILLE WESTON FULLER

To my two Margarets

INTRODUCTION, 1967

If the law is respected in part because of its impersonality, it is interesting in part because of its personalities. This is especially true of the men who have sat on the Supreme Court of the United States. Their biographies are worth writing and reading, and not merely because as a group they have been men of attainments beyond the ordinary, but also because the history of the Supreme Court and its influence on the American scene is in a special way a history of men more than events or ideas. To a degree not true of law in general, the law shaped by the Supreme Court bears the indentifiable imprint of the experience, outlook, prejudices, and style of individuals who have been its members. The reading of opinions is only one of the trails that must be followed for a full appreciation of this history. As with statutes, the bare words of legal text are not the whole story. It is necessary, among other things, that we try to see the legal problems of another day as they appeared to those who judged them and to know something of the intellectual equipment with which they addressed their task.

Perspectives of this kind are not easily come by. Our judges have been less accustomed than other public figures to leave memoirs or other self-revelations, witting or unwitting, that might disclose the inner forces of judgment. Whether because of the weight of their official literary burdens, or a sense of the proprieties of judicial office, or the ingrained habit of lawyers to preserve the seal of confidentiality on their professional work, we have been left few extramural accounts of their labors by members of the Supreme Court. Still rarer are the materials for pursuing one of the most fascinating aspects of the history of the Court, the contests of the conference room and the interplay of judicial personalities. The Court itself has provided no record of tentative votes, memoranda and early drafts of opinions, or similar materials that might illuminate the process of decision. Such interior views of the Court's work must be built up from the fragmentary glimpses afforded in the personal papers of individual justices to the extent that they have

been preserved. The materials are less rich than one might expect. Not many justices have left for scholars the kind of collection of work papers which enabled Alexander Bickel to reconstruct the process of development of some of Mr. Justice Brandeis' positions.[1] There is some reason to believe that the Justices of a later day have acquired a greater sensitivity to the needs of historians and that such materials may hereafter be more abundant. But one has the impression that the earlier members of the Court were by and large content to let the United States Reports speak for them, an attitude that may tell something about their conception of the nature of law and the role of the Supreme Court.

For an adequate biography of the institution—which is to say, an understanding of one important slice of American history—we are forced to depend on the accretion of familiarity and of insights that individual biographies can bring us. Happily this is a process that is now well under way. The biography of Melville W. Fuller by Willard L. King, Esq., of the Chicago bar, first published in 1950, added an interesting and substantial piece to the mosaic, as did Mr. King's subsequent work on David Davis, the only other Illinois member of the Supreme Court until recent times.[2]

The rise of Fuller to the nation's highest judicial office is a story of the rewards of professional competence in ordinary affairs and also an illustration of the role of chance in the selection of American judges. As such, it holds interest for any lawyer, although the career is one not likely to be repeated in our day. But the special interest of Fuller's biography lies chiefly in its refracted views of the personalities that comprised the Court during his tenure and of the historical events that projected themselves into the Court's field of vision. Those who expect of biography an account of dramatic conflict, striking achievement, or powerful influence are unlikely to find in Fuller himself a satisfactory subject. An admirable but un-

[1] Alexander Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court At Work* (Cambridge: Harvard University Press, 1957).

[2] Willard L. King, *Lincoln's Manager, David Davis* (Cambridge: Harvard University Press, 1960).

exciting figure among the ranks of Supreme Court Justices, Fuller is an important object of attention mainly because, as the eighth Chief Justice, he presided over the Supreme Court for twenty-two terms, beginning in October, 1888, and ending with his death on the Fourth of July, 1910, a period of stewardship exceeded only by the tenures of Marshall and Taney.

It is dangerous to epitomize so lengthy an interval in the life of an institution, especialy by a figure of speech. But if one thinks of peaks and valleys, the Fuller period appears predominantly flat, perhaps even a trough, from the viewpoint of half a century later. The landscape is more interesting on closer view, however, which is one of the justifications for a biography such as this. Then, as now, the Court was from time to time at the center of great public issues and heated controversy, as in the Income Tax Case, the Debs Case, and the Insular Cases. Then, as now, the greater part of its work was in areas of the law that to the layman appear dry and technical. There is no reason to suppose that the Fuller Court's output was less significant, volume for volume, in the development of American law in its own time than that of the Court at other periods, or that the average competence of its members was lower. But the fact remains that the lasting imprint of the Fuller Court seems faint by today's light and in comparison with the work of the Court at both earlier and later periods.

It would be possible, indeed, to view the Court's record during these years as a chronicle of futile efforts and wrong turnings with respect to central problems. Its attempt to bar the way to a federal income tax was rejected by constitutional amendment. Its unrealistic view of federal powers produced a startling frustration of the Sherman Act in the Sugar Trust case, a position from which the Court was steadily forced to retreat. It failed signally in efforts to erect viable doctrines for fencing off the respective spheres of federal and state powers to regulate and tax interstate commerce. It embarked on a theory of judicial supervision of public utility rate regulation that led only to confusion and eventual repudiation. It dealt with the issues of the great Pullman strike in a way that hastened the crippling of the courts in the field of labor disputes. Its decision in *Lochner v. New York* brought the entire doctrine of judicial

review of statutes into disrepute, along with the concept of substantive due process and the idea of liberty of contract. It was responsible for the "separate but equal" doctrine of *Plessy v. Ferguson,* a decision that survived longer than some of its other work, but only to become one of the most infamous in the Court's history. It rejected crucial opportunities to redress blatant discrimination against the Negro in both the field of education and that of voting rights.

To account for such an impressive record of failures is among the reasons that make study of Chief Justice Fuller and his colleagues interesting. It would be a mistake to hold the Chief Justice primarily responsible for these unfortunate (as they now seem) directions taken by his Court. He spoke as one of nine; in some of the decisions cited above he did speak for the Court, while in most of the others he acquiesced. He was not visibly a dominant influence on the outlook of his Court. But neither was he dominated. If his Court's contributions were ephemeral to an unusual degree, it is reasonable to look for one important key in the stock of experience and ideas that the Chief Justice brought to the bench. Critics of the process of judicial selection have often deplored the frequency with which a political career has been the path to the Court. On the other hand, academic or philosophical concern with problems of public law has also been depreciated as preparation for judicial office. The case of Fuller, who had neither set of qualifications, is worth examining not only to try to distill his constitutional points of view but to see what other sources in his education and prior career might have been expected to give him an outlook adequate to the task of shaping a living Constitution.

It must also be remembered, however, that the Supreme Court of Fuller's period was in important respects a very different institution than it is today. The almost wholy obligatory jurisdiction of the Court, including large classes of private-law cases, brought the docket to its historic peak in the early years of Fuller's administration. None of his predecessors or successors has carried a burden of opinion-writing like that discharged by Fuller in the first decade and more of his service (see Appendix I). The Judiciary Act of 1892 began the process

of change, but it was many years before the Court acquired the control over its docket that has enabled it today to concentrate its attention on cases deemed to be of general importance. Accompanying that change, no doubt, has been an increased sensitivity on the part of the Court to the social and political implications of its work. It is a fair question whether the prerequisites for distinguished service on the Court and the criteria for judging accomplishment remain the same today as for Fuller's time.

It is unlikely that further scholarship will produce a portrait of Chief Justice Fuller markedly different from the result of Mr. King's gleanings, the product of long and scholarly investigation of the scattered source materials. Differences in estimates of his rank will persist. Mr. King's account refutes the harsh appraisal given us earlier by Umbreit,[3] for example, partly because Mr. King has taken a stronger interest in appreciating Fuller the man. Fuller emerges in these pages as, among other things, an attractive human being. Faithful to the record, Mr. King does not attempt to make of him a giant in the history of the Supreme Court. But we are fortunate indeed that the art of biography does not attract talent and labor such as Mr. King's only for the study of heroic figures. Our understanding of a major era of the Supreme Court is the richer for this work.

PHIL C. NEAL

[3] Kenneth Bernard Umbreit, *Our Eleven Chief Justices* (Harper, 1938), chap. 8.

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W. L. K.

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