

*The Chief Justiceship of Melville W. Fuller, 1888–1910*, by James W. Ely, Jr. Columbia, S.C.: University of South Carolina Press, 1995; 248 pp., illustrations, bibliography, table of cases, index; \$49.95, cloth.

Only John Marshall and Roger B. Taney have served longer as chief justice than Melville W. Fuller. Despite Fuller's long tenure, the reputation of the Fuller court has never been a particularly lustrous one. The consensus among historians has ranked the Fuller court among the worst, and Fuller himself fares no better, often being dismissed with derogatory remarks.

Against this backdrop, James W. Ely, Jr. has undertaken the valuable and challenging project of reassessing the court's work during Fuller's tenure and, in a number of areas, making the case that the traditional criticisms are unjustified or at least overstated. This is the first volume in a contemplated series, with each book in the series examining one or more chief justiceships. Herbert A. Johnson, the general editor of the series, in his preface to Ely's volume describes Ely's approach as "mildly revisionist" (p. x), but that is an unfairly bland description of a forceful book. Ely takes on Fuller's critics at every turn, and—if one accepts his conclusions—more than a mild revision of the prevailing view of Fuller's era is called for. Ely argues that "the jurisprudence of the Fuller years may be seen as pointing toward modern American society" (p. 214) and that the Fuller court "made an enduring contribution to

the constitutional system by establishing the Supreme Court as a key participant in American governance" (p. 215).

Ely provides a detailed and informative description of Fuller's roles as a congenial chief justice organizing the internal operations of the Supreme Court, a conciliator adept at melding the nine justices into a harmonious court, and a lobbyist effectively securing for the federal courts the much-needed procedural reforms contained in the Circuit Court of Appeals Act of 1891. At the same time, Ely concedes that "Fuller did not lead the Court by the force of his ideas, and he delivered few significant opinions" (p. 70). Even so, Ely generally finds something of merit in discussing each of Fuller's opinions, and in this respect even mild revisionism may go too far.

Ely canvasses the work of the court during Fuller's tenure in a manner that is thorough, balanced, and reliable. Often, he carefully marshals evidence to show that criticism of Fuller and his colleagues has been unreasonably harsh, and he endeavors to refute "the old image of the Supreme Court as a servant of business interests" (p. 69), to defend the court against the charge that it was "a partisan of the wealthy" (p. 123), and to establish "that the Fuller Court was no monolith dedicated to defining congressional power over commerce in narrow terms" (p. 140). One strength of the book is its broad coverage of the issues coming to the Supreme Court during Fuller's service as chief justice, coupled with a calm and informed analysis of the court's degree of success in handling the questions. However, the book fails to analyze rigorously and in depth the major controversial cases that remain of current interest. Thus, *United States v. E.C. Knight Co.*, *In re Debs*, *Pollock v. Farmer's Loan & Trust Co.*, and even *Plessy v. Ferguson* and *Lochner v. New York* are dealt with in only summary fashion.

Ely's effort to rehabilitate the reputation of Chief Justice Fuller and his associates is composed of three principal strands. The first two strands, offered to rebut the charge that the justices acted "as the single-minded champions of corporate interests," provide a more complete picture of the degree to which the decisions handed down by the court were based both on a principled "solicitude toward property rights and the growing national market" and on the desire "to preserve a large measure of autonomy for the states in handling social issues and criminal justice" (p. 213). However, the relatively cursory treatment that Ely gives to the most important cases seriously undercuts his ambitious effort to challenge the validity of the traditional criticisms of the Fuller era.

The third strand of Ely's argument is that, whatever we may think of such cases as *Lochner* and *Plessy*, the "justices shared

the economic and social views of the age and spoke for the dominant political alliance. . . . The Court tended to ratify majoritarian preferences and rarely challenged legislation clearly reflecting the wishes of the majority" (pp. 213-14). That may be an accurate description of what the court did under Chief Justice Fuller's leadership, but it does not amount to much of a defense of the court's work. The responsibility that Chief Justice Marshall claimed for the Supreme Court in *Marbury v. Madison* was that of going against the prevailing political winds in appropriate circumstances. While the Supreme Court has been more successful in carrying out this mission at some times than at others, even after considering Ely's defense of the chief justiceship of Melville W. Fuller, few will assert that the Fuller era represents a high watermark in our constitutional history.

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