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Book Review (reviewing James W. Ely, *The Chief Justiceship of Melville W. Fuller, 1888-1910* (1995))

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ets of the jurisprudence of the German Constitutional Court, Professor Currie has laid a solid foundation for further exploration in the fertile field of comparative constitutional law.

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JAMES W. ELY, *The Chief Justiceship of Melville W. Fuller 1888-1910*. Columbia, S.C.: University of South Carolina Press, 1995. xii, 248 pp. \$49.95.

The twenty-two year period of the Fuller Court has often been regarded as a black hole of American Constitutional law whose twin low points are *Plessy v. Ferguson*¹ and *Lochner v. New York*.² Much of the blame for its sorry performance has been laid at the doorstep of Chief Justice Melville W. Fuller who has been described as “the fifth best lawyer from the City of Chicago,” a phrase meant to heap praise neither on the man nor the city. Its commitment to economic development, market institutions and limited government made it the target of the progressive criticisms that bore fruit in the New Deal reforms less than two generations later.

Today the new rise of conservative (broadly conceived) thinking has challenged this dismal portrait of the Fuller Court on philosophical and economic grounds. The conventional view of twenty years ago—that more government leads to a better and more justice society—no longer captures the political imagination of vast portions of the electorate, and the phrase “laissez-faire” once again is seen as a badge of honor and not some dismissive epithet. The shift in these broad political and philosophical undercurrents have also brought forth a parallel revisionism in the legal history. Ely’s fine book on Melville Fuller and the Supreme Court over which he presided usefully complements the current theoretical counterattack. His patient, balanced and careful study should do much to restore the Fuller Court to its fair measure of institutional and intellectual respectability.

The first surprise is the evident quality of the man himself. Ely details Fuller’s skillful handling of the often tense meetings among the Justices; his good judgement in deciding whether or when to accept Presidential, diplomatic or legal assignments; his excellent oratory on ceremonial occasions; and the energy and productivity of his own judicial labors. Here was a man whom Holmes thought was the best Chief Justice under whom he served. Whatever we may have thought about him, Fuller was no mediocrity. (pp. 53-54)

More to the point, Ely’s balanced and careful picture of the major doctrinal developments of the Fuller Court avoids the frequent sin of historical caricature. His discussion, for example, of the Fuller Court’s response to rate regulation of the railroads and public utilities effectively counters the view that the Court’s due process jurisprudence was an unwarranted and meddlesome interference with legislative prerogatives. He nicely chronicles the Court’s hostile response to the early regulatory overreaching of the Interstate Commerce Commission; he accurately reviews many of the major rate-of-return regulation decisions, culminating *Smyth*

1. 163 U.S. 537 (1896).

2. 198 U.S. 45 (1905).

v. *Ames*,³ and he neatly turns the shoe on the other foot by noting that the Fuller Court's respect for federalism often induced it to keep hands off state rate regulations of a distinctly confiscatory nature. (pp. 83-94)

The Fuller Court's commitment to federalism goes a long way to explain the Fuller's narrow (and correct) reading of the commerce clause in *E.C. Knight Co.*⁴ But that same concern did not require the Fuller Court to give an unnecessarily narrow construction to the Fourteenth Amendment's guarantees of individual rights against the state action. Yet throughout this period, Ely shows that the Fuller Court often gave the takings clause a narrow reading by sustaining, for example, Boston's height regulation on a dubious fire prevention rationale⁵ and provided scandalously little protection to owners of riparian rights.⁶ (pp. 104-105) More importantly its deference to the state exercise of the police power led to the disastrous support of separate-but-equal decision on *Plessy* and the forced separation of the races in *Berea College v. Kentucky*,⁷ where the state's power to issue corporate charters on condition was used to force private institutions to practice racial segregation against their will.

The clear lesson of this history is that the greatest sin of the conservative Fuller Court lay in its failure to take its jurisprudence of individual rights and limited government far enough. *Lochner* stood for a narrow conception of the police power: *Plessy* and *Berea College* stood for the far broader one. No court needs any ad hoc conceptions of fundamental rights or suspect classifications to guard against legislative abuse if it applies a beefed-up *Lochner* across the board. An abiding and consistent suspicion of state power could have spared this nation much of its subsequent racial turmoil. Ely shows perhaps too much sympathy for the Fuller Court's worst decisions and a bit too little praise for its best ones. Notwithstanding his own sound philosophical biases, he cannot quite bring himself to admit that Fuller Court should have pushed the strong and enduring principles of limited government to their logical and proper conclusion.

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STEPHEN C. HALPERN, *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act*. Baltimore: Johns Hopkins University Press, 1995. xiv, 391 pp. \$55.00 (cloth). \$18.95 (paper).

Stephen C. Halpern's scholarly monograph has two great virtues. It is sound in its treatment of complex legal questions, and it presents and develops an interesting thesis. Yet one wonders about the audience for the book. Readers who are not already knowledgeable about civil rights law will have to struggle with thick legalistic prose, while experts in the field will already be familiar with much of the story.

The book deals with the enforcement of Title VI of the 1964 Civil Rights Act, a provision that authorized the denial of federal funds to any program that

3. 169 U.S. 466 (1898).

4. 156 U.S. 1 (1895).

5. *Welch v. Swasey*, 214 U.S. 91 (1909).

6. *See, e.g., Scranton v. Wheeler*, 179 U.S. 141 (1900).

7. 211 U.S. 45 (1908).